

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
LAND DIVISION
MISCELLANEOUS APPLICATION NO. 631 OF 2011
ARISING FROM CIVIL SUIT NO. 1183 OF 1997

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| <ol style="list-style-type: none">1. MUGABO PETER BAGONZA2. JOHN SSIMBWA3. ELISA TUSUGIRE4. PATRICK OKILANGO5. J. K. SSEWANYANA6. LEMA NORAH KATABALWA7. M. NAKASIJJA8. EDITH BAINOMUGISGA9. S. OJAKOL10. BETTY KEMIREMBE | } | APPLICANTS/DEFENDANTS |
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VERSUS

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| <ol style="list-style-type: none">1. JAMES KIMALA2. NAMUKASA DEBORAH3. MUSISI ROBINSON.....RESPONDENTS/PLAINTIFFS4. ATTORNEY GENERAL5. UGANDA LAND COMMISSION | } | |
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BEFORE HON. LADY JUSTICE PERCY NIGHT TUHAISE

RULING

This was an application by notice of motion brought under sections 82 and 99 of the Civil Procedure Act, Order 46 rules 1(b), 2 & 8 and Order 52 rules 1 & 3 of the Civil Procedure Rules (CPR) for orders that:-

- a) The court ruling and orders of this court in HCCS No. 1183 of 1997 dated 31st March 2011 be reviewed and/or set aside.
- b) The consent judgment between James Kimala, C. J. M Kamoga, Attorney General and Uganda Land Commission be reviewed and/or set aside

- c) Alternatively, an order that the applicants be compensated by the respondents having purchased and heavily invested in the development of the suit property on the valid titles assured by the government of Uganda/office of titles.
- d) Costs of this application be provided for.

The application is supported by the affidavit of **Silver Ojakol** the 9th applicant. It is opposed by the respondents through affidavits in reply sworn by the 1st, 4th and 5th respondents. Counsel filed written submissions on the matter.

I have carefully perused the application and the affidavits on the record, including the submissions on the matter. The applicant prays this court to review/set aside a “ruling” of this court made on 31st March 2011, as well as a consent judgment of 31st August 2001, under Order 46 of the CPR.

Order 46 rule 1 of the CPR provides as follows:-

“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*
- b) by a **decree** or **order** from which no appeal is hereby allowed, and who from the discovery of new and important matter of evidence which, after the exercise of due diligence, was not within his or her knowledge or could not be procured 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 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 mine).*

On the “ruling” made by this court on 31st March 2011, the 9th applicant’s supporting affidavit and the 1st, 4th, and 5th respondents’ affidavits in reply hardly aver anything on it. Learned Counsel for the 1st, 2nd and 3rd respondents however submitted that the prayer to review the said “ruling” was incompetent and an abuse of court process as no decree or order was extracted to warrant a review of the court ruling. He submitted that it is the duty of a party who wishes to appeal against or apply for review of a decree or order to move the court to draw up and issue the formal decree or order. He cited **Godfrey Kitto V Robinah Namutebi Miuro Civil Appeal No. 24 of 2007** to support his position. Learned Counsel for the applicant in his submissions in rejoinder submitted that there was no enforceable order made in the ruling of 31/3/2011. He submitted that the directive was merely a directive sending the file to the Registrar for execution, and that it was upon the decree holder to apply to execute it against the right parties, and that a warrant was issued following the directives of 31/3/2011. He contended that the respondent Counsel’s objection on this point was misconceived.

The directive of 31/3/2011 was an expression of opinion, by way of guidance, on the way forward in the HCCS 1183 of 1997 in view of a Supreme Court decision which Counsel drew to the attention of this court. This matter was raised when the case came up for mention, and there was no hearing of anything on the merits. This court advised the parties to refer the file to the Registrar for execution. The record of proceedings on the matter was very clear. On 3rd February 2011 when this matter came up for mention, this court stated as follows:-

*“I will look at this file and give **guidance/opinion** on the matter on 21 Feb 2011.”*

On 21st February 2011 court was not ready to give the guidance and stated as follows:-

“On 03/02/11 I indicated I would give guidance/opinion on this matter as to whether the file should be sent to the Registrar for execution. The matter has instead been caused listed for mention. The guidance on this matter will be given on 31 March 2011 at 9 am.”

On 31st March 2011, court gave the guidance/opinion on the matter which guidance/opinion was sought by both Counsel. The written guidance/opinion however, which was titled “ruling” rather than “guidance,” was for ease of reference, particularly since Counsel indicated to court that they had come for a ruling. The record of proceedings all along clearly indicated it was guidance to the parties on the way forward. Counsel for the applicant agrees that it was a directive to the registrar for execution, and that there was no order issued by court. The question that arises is whether such guidance or opinion or directive is a subject for review under Order 46 of the CPR.

The law governing review as quoted above clearly refers only to decrees and orders. In **Bagumirabingi John & Ors V Hoima Town Council [2001 – 2005] HCB 116**, it was held that there can be no review where there is no decree. In the instant case, as Counsel for the applicant also agrees, there was no order issued by court, but only guidance or directive of 31st March 2011 where the file was referred to the Registrar for execution. This happens often in court where files can be referred for action by the Registrar, including transfers or re allocation of such files. In that respect, I find that there is no order or decree in place that can be reviewed in the instant case. In any case even if there had been a judgment or ruling from which to extract a decree or order, contrary to the submissions of learned Counsel for the applicant, case law is that it is the duty of a party who wishes to appeal against or apply for review of a decree or order to move the court to draw up and issue the formal decree or order. See **Jivanji & Another [1930] KLR 41**. In this case, even if there had been a decree or order to extract, the applicants would have failed in their duty to do so as indeed they did not extract any order or decree before they applied for review.

I may mention here that if the applicants want to challenge the execution proceedings, which in my opinion should originate from the consent judgment of 31st August 2001 rather than this court’s directive of 31st March 2011, they can clearly do so once they have been issued with notice to show cause why execution should not issue against them under Order 22 rule 19 of the CPR. Indeed the record indicates that the initial attempts to execute the consent judgment were

made on 12th May 2009 which was two years earlier than the directive of 31st March 2011. There is also correspondence on record showing similar attempts to execute, and they were all before 31st March 2011. The Civil Procedure Rules even provide for appearance of parties before court to show cause why execution should not issue against them. It defeats my understanding therefore to see attempts of both Counsel to peg the execution to the court directive/guidance of 31st March 2011 which was more or less administrative in nature.

On the applicant's prayer to review/set aside the consent judgment of 31st August 2001, all the 29 paragraphs of the 9th applicant's supporting affidavit, which reflected the grounds of the application, make averments on circumstances surrounding a consent judgment of 31st August 2001. In essence the affidavit is challenging the validity of the said consent judgment, briefly on grounds that there are new and important matters that have been discovered, and that there is an error apparent on the face of the record. The applicant's Counsel submitted at length on the said grounds. The respondents' affidavits in reply and the submissions of their Counsel on the matter also go at great length to show that the said consent judgment was valid.

The averments and submissions are literally delving into matters that were finally deliberated on by the Supreme Court as the final appellate court in this country. Even the consent judgment that the applicants pray this court to review or set aside was deliberated on by the Supreme Court. If I was to delve into its merits, as is apparent from the affidavit evidence, it would, in my opinion, tantamount to reviewing matters deliberated on by the Supreme Court. This court has neither the competence nor the powers to overturn let alone review matters deliberated on by the Supreme Court which is the final appellate court of this country. In fact, it is bound by the decisions of the said court under the doctrine of precedent. The consent judgment in view of the alleged developments raised by the applicants' Counsel can only be affected by having the Supreme Court review its judgment if there is legal possibility of doing that. I therefore decline to venture into that arena. The same position pertains to the applicants' alternative prayer for an order that the applicants be compensated by the respondents having purchased and heavily invested in the development of the suit property on the valid titles assured by the government of Uganda/office of titles.

For those reasons, this application is dismissed with costs.

Dated at Kampala this 1st day of November 2012.

Percy Night Tuhaise.

JUDGE.