

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL DIVISION

MISC APPLICATION NO. 262 OF 2012

(Arising from Misc. Application No. 63 of 2007)

(Arising out of HCCS No. 1044 of 2001)

1. BAGAMUHUNDA VICENT
2. JOHN KATONGOLE
3. EDWARD ROGERS KIWANUKA } **APPLICANTS**

VERSUS

UGANDA ELECTRICITY BOARD
(IN LIQUIDATION) **RESPONDENT**

BEFORE: HON. JUSTICE ELDAD MWANGUSYA

RULING

This is an application by a Notice of Motion brought under Order 46 Rule 1(b) of the CPR and Sections 83 and 98 of the Civil Procedure Rules for an order that the Order in Misc. Application No. 63 of 2007 arising out of HCCS No. 1044 of 2001 be reviewed as it erroneously quoted UEB Versus Peter Kiganda – Civil Appeal No. 46 of 2005 instead of HCCS No. 77 of 2003 Peter Kiganda Versus UEB and that the costs of the proceedings be provided for.

The application is supported by the affidavit of Patrick Nyabiryo and is premised on the following grounds:-

- i) The applicants hold a Consent Order vide Misc Application No. 63 of 2007 arising from the Decree in HCCS No. 1044 of 2001 which has not been fully satisfied as a result of the said error on the face of the record.
- ii) That instead of quoting HCCS No. 77 of 2003 Peter Kiganda Vs UEB the Order quoted in error CA No. 46 of 2005 UEB Vs Peter Kiganda hence the need to review the said Order to enable the decree in HCCS No. 1044 of 2001 be fully satisfied.
- iii) That it is in the interest of justice that the Consent Order in Misc Application No. 63 of 2007 be varied and/or reviewed

The affidavit of Patrick Nyabiryo from which the above grounds arise will be stated in full. It is only then that one may appreciate, if at all as to why it has taken the applicants more than five years to realize that there is an error that is apparent on the face of the record that calls for a review by this Court under S. 83 of the CPA and Order 46(1)(b) of the CPR. The affidavit of Patrick Nyabiryo is as under:-

I PATRICK NYABIRYO of c/o Mr. Kimanje Nsibambi Advocates, Plot 9, Agip House, P.O Box 72707, Kampala do solemnly swear and make oath as follows:-

1. That I am one of the judgment creditors and their representative in Misc Application No. 63 of 2007 that arose in HCCS 1044 of 2001 and swears this affidavit in that capacity.

2. That on the 6th day of July 2007 a Consent Order was entered between our lawyers and the judgment debtors/official receiver Uganda Electricity Board (now in liquidation) for the payments of our gratuities. A copy of the consent order is attached and marked “A”.
3. That the parties intended that the payment of gratuities were to be based on a formula which included interest at 1.5% per annum according to the formula that was agreed upon in the case of **Peter Kiganda Vs UEB (in liquidation) HCCS No. 77 of 2003**. A copy of the judgment in Peter Kiganda case and a correspondence from the Auditor General’s office are attached and marked “BI and BII” respectively.
4. That instead of quoting the above High Court judgment in **HCCS No. 77 of 2003, Peter Kiganda Vs UEB** the lawyers erroneously quoted the court of Appeal Case **No. 46 of 2005 UEB Vs Peter Kiganda** which only handled the issue of consolidated salary and not the factor of 1.5% handled in the High Court judgment quoted above. “C”.
5. That I am informed by my lawyers that due to the above error the factor of 1.5% was omitted in the payments of our gratuity and therefore the decree in HCCS No. 1044 of 2001 cannot be fully satisfied because the payments of gratuities were not guided by the judgment in Civil Appeal **No. 46 of 2005; UEB Vs Peter Kiganda** but the High Court judgment, vide; **Peter Kiganda Versus UEB HCCS No. 77 of 2003** where the factor of 1.5% was considered and this was in line with the terminal benefits circular attached and marked annexure ‘D’.
6. That the correct payment was supposed to be based on Consolidated Salary plus 1.5% being interest thereon multiplied by the number of years of service in arriving at the total gratuity payable to each applicant.

7. That I swear this affidavit in support of the application for the review of the Order in Misc. Application No. 63 of 2003.
8. That what is stated herein is true to the best of my knowledge save for those known to me through our lawyers.”

In reply to the above averments, the Respondent filed an affidavit of Mr. Bemanya Twebaze the Registrar General/Official Receiver who is in charge of the process of the liquidation of Uganda Electricity Board (“UEB”) and who in his position has had access to the records of UEB. His affidavit delves into a lot of details into the circumstances under which the impugned Consent Order was arrived at that may not be of relevance to this application. But of relevance of this application are paragraphs 14 to 22 which are reproduced hereunder:-

“14. Before the said application was called for hearing, I held negotiations with Mr. Peter Kimanje Nsibambi and agreed that in view of the contents of the said judgment of the Court of Appeal a Consent Order be recorded by the judge in the same terms appearing in Annexure “A” to the affidavit of Patrick Nyabiryo in support of the application for review.

15. The said order was accordingly approved by Mr. Nsibambi Kimanje as counsel for the applicants, myself and Mr. John F. Kanyemibwa counsel for the respondent.

16. On 6th July 2012 the said order was presented by counsel for the parties to Hon. Justice Remmy Kasule in my presence and the presence of the applicants and the same was duly signed and sealed as a Court Order.

17. My negotiations with Mr. Peter Kimanje Nsibambi for settlement of Misc. Application No. 63 of 2007 were guided by the contents of paragraph 6 of Patrick Nyabiryo's affidavit as mentioned in paragraph 13 hereof which cited the Court of Appeal Judgment in UEB Vs Peter Kiganda Civil Appeal No. 46 as the basis for the applicants' claim of gratuity computed in the applicants' consolidated salaries.

18. The judgment of the High Court in HCCS No. 77 of 2003 Peter Kiganda Vs UEB was not a basis of my discussions/negotiations between Mr. Kimanje Nsibambi and myself for settlement of Misc. Application No. 63 of 2007.

19. I therefore know that contrary to what is stated in paragraph 3 of Patrick Nyabiryo's affidavit in support of the application for review of the Consent Order in Misc Application No. 63 of 2007 it was never the intention of the parties that the settlement thereof be concluded in accordance with the judgment of the High Court in **HCCS No. 77 of 2003 Peter Kiganda Vs UEB.**

20. It is also not correct that the lawyers made the error alleged in paragraph 4 and 5 of Patrick Nyabiryo's affidavit in support of the application for review of the said order.

21. I know that the Consent Order in Misc Cause No. 63 of 2007 was jointly drawn by my office, M/s Kateera and Kagumire, Advocates as counsel for the respondent and M/s Nsibambi Kimanje Advocates as counsel for the applicants and that the citing of UEB Vs Peter Kiganda Civil Appeal No. 46 of 2005 in the said Consent Order arose out of the applicants' pleadings on

the Court record and the negotiations I held with the applicants' advocates Mr. Peter Nsibambi Kimanje.

22. I know that pursuant to the said Consent Order the Auditor General verified that the applicants were entitled to a sum of Shs 652.943.449= and by Deed of Indemnity dated 21st September, 2007 the applicants' Advocates M/s Kimanje Nsibambi acknowledged on the applicants' behalf that upon payment of the said sum the Consent Order would be discharged. A copy of the said Deed of Indemnity is hereto annexed and marked "UEB 6".

23. In the said Indemnity Deed the applicants counsel provided particulars of the bank account where the said sum was to be remitted by the respondent.

24. The respondent while believing that the applicants' claim was finally dealt with and concluded under the said Consent Order remitted the said sum to the applicants' lawyers.

25. I swear this affidavit to verify that there was no error in citing UEB Vs Peter Kiganda Civil Appeal 46 of 2005 in the Consent Order in Misc Application No. 63 of 2007.

26. I swear this affidavit in opposition to the application for review of the Consent Order in Misc Application No. 63 of 2007.

27.

The affidavit of Mr. Bemanya Twebaze clearly disputes the applicants' assertion that there was any error in the Consent Order entered by this Court. In fact Mr. Bemanya Twebaze asserts that what is stated in the Consent Order is what was

negotiated between him and Mr. Kimanje Nsibambi, counsel representing the applicants. I would have expected Mr. Kimanje Nsibambi to deny the assertion by Mr. Bemanye Twebaze that the clause in the impugned Consent order was deliberate and not erroneous and when Court is faced with a situation where the party asserts that a Consent Order is correct and the other party asserts that it is an error apparent on the face of the record I do not think that the provisions of Section 82 of the Civil Procedure Act would be applied.

Section 82 of the Civil Procedure Act provides as under:-

“82 Review

Any person considering himself aggrieved-

- (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 decreed or made the order, and the court may make such order on the decree or order as it thinks fit”.***

Order 46 Rule 1 under which the application is brought provides as under”.

“(1) Any person considering himself or herself aggrieved-

- (a) by a decree or order from which no appeal is hereby allowed, but from which no appeal has been preferred; or***
- (b) by a decree or order from which no appeal he hereby allowed and who from discovery of a new and important matter of***

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 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.” (underlining for emphasis).

So if from the testimony of both Mr. Patrick Nyabiryo and Mr. Bemanya Twebaze this Court is unable to establish as to whether the clause was deliberately put or was an error I do not see how by any stretch of imagination it can be said to be a ‘mistake or error apparent on the face of the record’. This is compounded by the fact that Mr. Patrick Nyabiryo’s affidavit in rejoinder does not resolve this contention but instead raises more controversy when he asserts “that both gratuities and persons were calculated and verified by the Auditor General basing on the formula which was not only provided in the UEB termination certificate but also adopted in the Peter Kiganda High Court judgment as per annexure “B1, B2, C & D” of the affidavit in support of this application. But what if as Mr. Bemanya Twebaze asserts what was consented to was done to exclude the element of the 1.5% interest and if it was an error which is so glaring and deprived their entitlement to the 1.5% interest why has it taken them more than five years from the time the Consent Order was entered to realise that an error which was so glaring was committed. To me it is this factor that lends credence to Mr. Bemanya Twebaze’s assertion that the clause was not erroneously included but was

deliberate. In any case the assertions of Mr. Bemanya and Mr. Nyabiryo have generated such controversy in this application and the resolution of the controversy does not lie in S. 83 of the Civil Procedure Act which to me is applicable in errors that are obvious and easily detectable and not those that take years to detect and after one party has met its obligations as Mr. Twebaze asserts.

In the circumstances this Court finds no merit in the application which is dismissed with costs to the Respondents.

Eldad Mwangusya

J U D G E

14.11.2012

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Kimanje Nsibambi for applicants

Michael Balimukuubo holding a brief for Pope Ahimbisibwe for the respondents

Clerk- Milton

Court:

Ruling read in open Chambers.

Keitirima Joh Eudes

DEPUTY REGISTRAR

14.11.2012