THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBARARA

HCT-05-CV-CR-0009-2020

(Arising from HCT-05-CV-CS-0009-2011)

RUKUNDO CALEB :: APPLICANT

VERSUS

1. BAKAMWANGA ALICE

2. MUBURIZI EMMANUEL

3. MUGISHA BENON :: RESPONDENT

BEFORE: HON LADY JUSTICE JOYCE KAVUMA

RULING

Introduction.

[1] The Applicant brought this application by Notice of Motion under **Section 82 and 98 of the CPA, Section 33 of the Judicature Act, Order 46 rules 1 and 2, Order 52 rule 1 & 3 of the CPR** for orders that:

1. *The order in HCT-05-CV-CS-0009-2011 be reviewed and be set aside.*
2. *The costs of this Application be borne by the Respondents.*

The grounds in support of this motion were stated in the motion and are briefly that;

(a) There is an error apparent on the face of record in so far as the order that the proposed scheme of distribution in the proposal filed by the Plaintiffs on 17th May 2019 was the one to be followed as the distribution formula is inconsistent with the holding and declaration that was a valid will left by the late

Bakamwanga and the order that the 1st Plaintiff and Defendant be appointed to apply for grant of letters of administration with a will annexed and in so far as implementing the said proposed formula would amount to violating the provisions of the will that contains commands of the testator and which ought to be followed.

(b)It is fair, reasonable and in the interest of justice that the application be allowed.

The application was supported by the affidavit of the applicant and opposed by the affidavit sworn by Mugisha Benon the 3rd Respondent. The Applicant filed an affidavit in rejoinder. I have taken cognizance of the content in all the affidavits in coming to this ruling.

Representation.

[2]The Applicant was represented by *M/s Ngaruye Ruhindi, Spencer & Co. Advocates* while the Respondents were represented by *M/s Guma & Company Advocates.*

Both counsel filed written submissions which I have equally considered in this ruling.

Analysis and decision of court.

[3]Order 46 Rule 1 of the Civil Procedure Rules in so far as it applies to the instant application provides that:

"1. 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

(b) by a decree or order from which no appeal is hereby allowed,... 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."

[4]For a court to substantively consider an application for review, the Court needs to first address ascertain whether the application before it is a proper application review. The current application arises from the Applicant's contention to the effect that this court's decision dated **17th June 2019** was riddled with an error apparent on the face of its record.

For an application of this nature to succeed under the aforementioned **Order 46(1)** of the CPR, it must fulfil any or all the conditions specified in that provision. In the instant application, the Applicant had to show that the impugned decision of this court demonstrates some mistake or error apparent or manifest on the face of the record; or, alternatively, for any sufficient reason that may have caused a miscarriage of justice.

The grounds of this application were largely limited to the area of mistake or error apparent on the face of the record. Nothing was raised to demonstrate a miscarriage of justice or any other sufficient cause.

[5]In the case of **Independent Medico Legal Unit vs The Attorney General of The Republic of Kenya (Application no. 2 of 2012) (EACJ)**, the East African Court of Justice took time to restate the law on "*apparent error on the face of the record*" their Lordships held that:

> *"First and foremost, the term "error apparent on the face of the record" is not/hardly a term of art: one whose meaning has been definitively settled, once and for all. Rather, it is a nebulous legal concept the fluidity of whose content must be interrogated in every case – using the rich jurisprudence that has grown up around it. Second, implicit in that term, is the notion that review of a judgment has a limited purpose. It must not be allowed to be an*
> *appeal in disguise. The purpose of review is not to provide a back door method by which unsuccessful litigants can seek to re-argue their cause. On these two principles hang all the law of "apparent error".*

The court went further and laid down the following principles which I believe are worth producing in the instant ruling;

(a) The court in determining the expression "error apparent on the record" should do so sparingly and with great caution.

(b) The error apparent must be self-evident; not one that has to be detected by a process of reasoning.

(c) No error can be said to be apparent where one has to travel beyond the record to see the correctness of the judgment.

(d) It must be an error which strikes one on mere looking at the record, and would not require any long-drawn process of reasoning on points where there may conceivably be two opinions.

(e) A clear case of "error apparent on the face of the record" is made out where, without elaborate argument, one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions entertained about it.

Drawing from the words of their Lordships in **Independent Medico (supra)**, from the foregoing, the error complained of by an Applicant must be manifest and self-evident not requiring an elaborate discussion of evidence or argument to establish. (**See also Edison Kanyabwera vs Pastori Tumwebaze SCCA no. 6 of 2004)**

[6] In **Nyamogo & Nyamogo Advocates vs Kago [2001] 2 EA 173**, it was held that:

"There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long-drawn process of reasoning or on points where there may conceivably be two opinions can

hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal."

[7]Review as a remedy may be granted by a court whenever that court considers that it is necessary to correct an apparent error or omission on the part of the court. The alleged error must be one that is self-evident and should not require an elaborate argument to be established. It is generally not sufficient as a ground for revies that another Judge could have taken a different view of the matter. That the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law is not a proper ground for review. In **Farm Inputs Care Centre Limited vs Klien Karoo Seeds Marketing (pty) Ltd HCMA no. 086 of 2021**, this court observed that misconstruing a statute or other provision of law cannot be ground for review but could be a proper ground for appeal since in that case the court will have made a conscious decision on the matters in controversy and exercised its discretion in favour of the successful party in respect of a contested issue.

[8]The Applicant deposed under **paragraph 3** of his affidavit in support of this application that:

"Implementing the judgment has become difficult in so far as there is a holding that the late Bakamwanga left a valid will and that the Applicant and 1st Respondent were appointed to apply for

letters of administration with a will annexed and these decisions are inconsistent with an order in the same judgment that the proposed scheme for distribution in the proposal filed by the Plaintiffs on 17th May 2019 be the distribution formula and accordingly there is an error apparent on the face of the record which ought to be corrected to make the judgment implementable as one cannot have a grant with a will annexed and distribute the estate using a formula that is diametrically opposed to the commands of the testator."

I have had the benefit of equally reading the submissions of counsel for the Applicant in support of the above averment by the Applicant and I find that what the Applicant is seeking is for this court to sit as an appellate court of its own decision an aspect not anticipated in review.

My learned brother Judge in arriving at the decision to subject the distribution of the estate of the late Bakamwanga to a scheme of distribution provided reasons for doing so. Among the reasons why he did so, he pointed the following out at page 5 of the judgment;

"1. The appointed Executors did not take up their responsibility to apply for Grant of Probate and subsequently distribute the estate.

2. The defendant has since built on the family land close to the family home which is not provided for in the will.

3. The cows stated to have been fifteen at the time of the testator's demise have since dwindled to about five at locus and no viable explanation was offered by the defendant.

4. The banana plantation stated to have been distributed to Y. Rugyendo, Muburizi and the defendant has since withered and there was no evidence to show that it was indeed distributed."

The learned Judge went further and stated at page 7 of his decision that:

"It also emerged at the locus visit that the parties were amenable to a distribution of the estate without taking into account the dictates of the will. Court guided that the parties may consider a fresh start by equitably distributing the estate but taking into account the fact that the defendant is the customary heir and the fact that the widow has to maintain her matrimonial home with land to cultivate."

The above findings of my brother Judge were based on both law and his observations at locus. For this court to sit and alter the findings of my learned brother Judge in **HCT-05-CV-CS-0009-2011** would be sitting as an appellate court in this court's own decision.

It would further require me to ascertain whether the judgment or decision **HCT-05-CV-CS-0009-2011** is correct or wrong and formulate my opinion which is a preserve of an appellate court. The Applicant is simply challenging the decision of this court on its merits in a process of reasoning and scrutiny of the law and facts which does not fall under the purview of an application for review. He wants a complete reversal

of the decision yet an application for review is a simple one. It cannot be allowed to be an appeal in disguise.

Therefore, for the reasons given herein above, this application fails and it is dismissed with costs to the Respondents.

I so order.

Dated, delivered and signed at Mbarara this 15th day of December 2022.

Joyce Kavuma
Judge