THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT GULU

MISCELLANEOUS APPLICATION NO. 07 OF 2020

(ARISING FROM CIVIL APPEAL NO. 009 OF 2026 ITSELF ARISING FROM PADER MAGISTRATES GRADE 1 CIVIL SUIT NO. 11 OF 2013)

ACAYO SANTINA FRANCA.....APPLICANT

VERSUS

OBITA NICKSON.....RESPONDENT

BEFORE: HON. MR. JUSTICE GEORGE OKELLO

RULING

Introduction

This is an application seeking for orders of review and setting aside of Judgment and Orders awarding costs to the Respondent, given by His Lordship Hon. Justice Vincent Tonny Okwanga, dated 23rd November, 2018, in Civil Appeal No. 009 of 2016, wherein the Respondent (Obita Nickson) was the appellant and the applicant (Acayo Santina Franca) was the Respondent. For clarity, I shall refer to the parties by their names. The appeal before his Lordship sprang from the decision given in civil suit no. 11 of 2013 by a Magistrate Grade 1 of Pader Magistrates Court. There, Acayo Santina Franca had sued Obita Nickson seeking declaration that

she is the owner of land situate within Ogwaleng Ward, Luna Parish, Pader Town Council, Pader District, measuring approximately 15x30 metres. Judgment was given in favour of Acayo Santina Franca, which declared her as the lawful owner of the suit land, and a permanent injunction issued restraining Obita Nickson and his agents, relatives and successors from trespassing thereon, demolition orders at the expense of Obita Nickson, plus general damages of shs. 5,000,000, and costs of the suit. This prompted an appeal by Obita Nickson. The appeal was heard by his Lordship who declared the Judgment of the trial court a nullity and of no legal effect, because the Judgment had been written by the first trial Magistrate who did not sign and did not date it but simply typed his name and title thereunder. The very typed Judgment was later purportedly delivered by a successor Magistrate, in favour of Acayo Santina Franca (the plaintiff then) on 4th March, 2016, at a time when the first trial Magistrate who had written it had long retired from the judicial service. The successor Magistrate Grade 1 had issued a Decree/ Order on the date of the Judgment which Acayo Santina Franca sought to execute against Obita Nickson. However, His Lordship set aside the decree, on account of illegality. The Learned Judge concluded that, the entire trial was a mistrial and neither party could validly appeal the outcome of a mistrial. His Lordship ordered for a retrial before another Magistrate of competent jurisdiction, specifically a Magistrate who never handled the very file before. The impugned Judgment was accordingly set aside, and expunged

from the court record for illegality. In conclusion, his Lordship awarded costs of the Appeal to Obita Nickson, the appellant, hence this application by Acayo Santina Franca for review of the order of costs.

Grounds of the Application and the opposition

In her Notice of Motion brought under section 82 of the Civil Procedure Act (CPA) (wrongly cited as s.83, which court has ignored under article 126 (2) e) of the Constitution, 1995), section 98 of the CPA, and Order 46 rule (1), Order 52 rules 1 and 3 of the Civil Procedure Rules (CPR), the Applicant seeks for review and setting aside of order of costs, stay of execution of the costs; and that in place of the Order of His Lordship, each party is made to bear its own costs, in the interest of justice.

The Applicant concedes that the nullified Judgment was written by the first trial court but delivered by a successor Magistrate Grade 1. The Applicant avers that the appeal lodged against the impugned Judgment was never decided on merit by His Lordship, as it emerged that the same was unsigned and undated by the trial Magistrate. It is averred that His Lordship committed an error apparent on the face of the record, in ordering the applicant to pay costs of the Appeal to the Respondent. The Applicant avers that she has never been a judicial officer, she did not write the impugned Judgment and had no control over its being written, and there was no legal basis for ordering the Applicant to pay costs of the Appeal

since the Applicant did not herself commit any illegality. The Applicant concluded that there is thus sufficient cause for review and vacating of the order of costs, and in the interest of justice and equity.

The averments were amplified in the supporting affidavit deposed by the Applicant, dated 22nd January, 2020.

Reply

The Respondent opposed the application, contending that the same is bad in law, lacks sufficient grounds, an afterthought, and ought to be dismissed. He contends that the application was lodged after delay of over a year after, the Judgment of the High Court was delivered on 23rd November, 2018, yet the application was filed in this court on 24th January, 2020.

Representation and submissions

Mr. Brian Watmon represents the Applicant, while Mr. Doughlas Odyek appeared for the Respondent. Both learned counsel addressed court by way of written submissions, which court has duly considered.

Court analysis and determination

In his submission, learned counsel for the Respondent opposed the application, contending the same is not proper before court. He argued that the application should have been placed before Hon. Justice Vincent Tonny Okwanga who heard civil appeal no. 009 of 2016. Learned counsel cited Outa Levi Vs. Uganda Transport Corporation Ltd [1975] HCB 353 to support his arguments. Relying on the said authority, counsel submitted that, application for review ought to be brought before the Judge who made the impugned order/ decision, except where such a Judge is no longer a member of the bench. He argued that, the Learned Judge who made the Order sought to be reviewed is still part of the bench.

I wish to deal with this preliminary point first, as it is an objection which goes to root of the matter, touching on the issue of whether or not this court is the proper Judge to hear the application for review. I note that the Applicant who lodged her submission much later than the Respondent, did not respond to the Respondent's objection.

The answer to the objection is provided for in Order 46 rules 2 and 4 of the CPR. I proceed to quote rule 2 first. It reads,

"An application for review of a decree or order of a court, upon some other ground other than the discovery of the new and important matter or

evidence as is referred to in rule 1 of this Order, or the existence of a clerical or arithmetical mistake or error apparent on the face of the record, shall be made only to the Judge who passed the decree or made the order sought to be reviewed."

The above provision means that a review application on the ground of discovery of the new and important matter or evidence or the existence of a clerical or arithmetical mistake or error apparent on the face of the record, can be heard by any other Judge, not being the Judge who passed the Decree or made the Order sought to be reviewed.

In the present case, the Application is premised on the allegation that there is an error apparent on the face of the record. This is therefore clearly within the remit of this court to deal with.

O.46 rule 4 is also relevant for resolving the objection. Under rule 4, where the Judge who passed the decree or made the order sought to be reviewed continues to be attached to the court at the time when the application for a review is presented, and the Judge is not precluded by absence or other cause for a period of six months next after the application, from considering the decree or order to which the application refers, the Judge shall hear the application, and no other Judge shall hear it.

The contention by learned counsel for the Respondent that the Application should have been made before Hon. Justice Vincent Tonny Okwanga, the then resident Judge of the court is, with respect, misconceived. I understand that objection is taken, in view of the wording of Order 46 rule 2 CPR which I have underlined. That would be the case, if the ground of the application was some other ground, not being the discovery of the new and important matter or evidence, or the existence of a clerical or arithmetical mistake or error apparent on the face of the record. Here the ground pleaded is *"error apparent on the face of the record"*, thus review application can be made before any Judge, other than Hon. Justice Vincent Tonny Okwanga. The objection is therefore, with respect, not well taken and is accordingly over-ruled.

Learned counsel for the Respondent also argued that Hon. Justice Vincent Tonny Okwanga is still a member of the bench. I understand learned counsel's contextual argument, because his written submission was lodged in this court on 17th August 2020, at the time I am not quite certain the Learned Judge was still a Resident Judge of Gulu High Court circuit. This Court takes judicial notice that at the time this application was lodged in court, the Learned Judge was no longer resident Judge at the circuit of court. The application was not therefore placed before the learned Judge for hearing and determination. What is clear however is that the law is clear that there is no time limit for filing a review application and the period

within it ought to be disposed of. In the instant case therefore rule 4 of O.46 comes into play, given that (and this court takes judicial notice of the fact) His Lordship has since retired from the Bench on 24th September, 2022 or thereabouts. The Application is therefore properly before me for determination. The second objection which is closely related to the first, is accordingly overruled.

Turning to the merit of the application, learned counsel for the Respondent argued that there is absolutely no error apparent on the face of the record by his Lordship awarding costs of the annulled Judgment of the trial court. Counsel argued, award of costs is discretionary, and that if this court exercises review powers, it would be assuming powers of an appellate court, and would be erroneous. Learned counsel drew a distinction between review and appeal. He argued that, the fact that Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law, cannot be ground for review. He asserted that misconstruing a provision of the law cannot be ground for review but could be a proper ground for appeal, since in that case, court would have made a conscious decision on matters in controversy and exercised its discretion in favour of the successful party in respect of a contested issue. Counsel cited Lalwak Alex Vs. Opio Mark, Misc. Civil Application No. 0058 of 2016, in which Nyamogo & Nyamogo Advocates Vs. Kago [2001] 2 EA 173 was followed.

For the Applicant, it was maintained that the award of costs against the applicant, after the Judgment was nullified because of default on the part of the trial Magistrate in not signing and dating the Judgment, which was not the applicant's own making, constitute an error apparent on the face of the record.

In resolving the matter, this court notes that Review power is a creature of statute. Section 82 of the CPA provides for grounds for review. As is relevant here, a person considering himself or herself aggrieved by a decree or order from which an appeal is allowed by the CPA but from which an appeal has not been preferred, may apply for review of a 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 provision of section 82 CPA is more amplified in O.46 of the CPR. I have already considered the grounds, and as stated, the main ground is an alleged error apparent on the face of the record.

The Learned Authors of Mulla, the Code of Civil Procedure Act V of 1908, 16th Ed. have ably dealt with the subject of review. Since our CPR is modelled along the line of the Indian Code of Civil Procedure, the learned authors have variously been cited with approval by our courts on matters

of interpretation of our Rules. I will therefore pay deference to relevant aspects of their literary works, in addressing the matter.

Review is not an appeal in disguise, however the fact that a matter is appealable is no basis for not exercising review power, in appropriate case coming within the purview of the law on Review. The CPA and the CPA are clear that a person considering himself or herself aggrieved, that is, a person who has suffered legal grievance, contending that the decree or order of court affects his/her right to something, can seek Review of the decree or order. This right accrues where the decree or order is appealable under the CPA, and equally applies to cases where a decree or order is not appealable under the CPA. See: Mohamed Alibhai Vs. W.E Bukenya Mukasa and Departed Asian Property Custodian Board, SCCA No. 56 of 1996, [1996] 111 KALR 92.

I do consider that justice is a virtue which transcends all barriers, and the rules or procedures or technicalities of law cannot stand in the way of administration of justice. Law has to bend before justice. Thus, if the court finds that an alleged error pointed out in the review application was under mistake and the earlier judgment would have been passed but for erroneous assumption which in fact did not exist and its perpetration had resulted in miscarriage of justice, nothing would preclude the court from rectifying the error. The mere fact that the different views on the same

subject are possible, is no ground to review the earlier judgment passed by a bench of the same strength.

In respect of an error apparent on the face of the record, the learned authors of Mulla (*supra*) opine that the error contemplated under the rule must be such which is apparent on the face of the record and not an error which has to be searched. It must be an error of inadvertence. An error should not require any long-drawn process of reasoning on points where there may conceivably be two points. An error is said to be apparent on the face of the record when it is obvious and self-evident, and does not require an elaborate argument to be established. Thus, if the court applies its mind to a particular fact or law and then comes to a conclusion after conscious reasoning, it can never be contended, even if the conclusion was wrong, that the error is one apparent on the face of the record. See page 4121.

Drawing a distinction between an erroneous decision and an error apparent on the face of the record, the learned authors of mulla observe that while an erroneous decision can be corrected by higher forum, an error apparent on the face of the record can be corrected by review.

In conclusion on the principles, it should be recalled that the power of review can only be exercised for the correction of a patent error of law or

fact which stares one in the face without any elaborate argument being required for establishing it.

I approach this matter with a lot of caution, given that, I should not be seen as sitting in an appeal against the very decision of this court. In the Judgment of my brother Judge, the Learned Judge noted that none of the parties was aware of the illegality surrounding the Judgment and none addressed court on it.

I quote the Learned Judge, *"when the appeal came up before me for hearing on 18/01/2018, this Hon. Court, while exercising its due diligence with extra hindsight, which were apparently not utilized by all counsel involved in the processing and the handling of this appeal, noted with consternation that both the original and handwritten judgment of the trial Magistrate and the typed copy enclosed were not actually signed by the said trial Magistrate..., his said name and the official title having been printed in capital letters thereunder notwithstanding." (Emphasis is added.)*

The Learned Judge, having apparently done his own independent due diligence/ inquiries continued, *" by taking judicial notice about the facts, appointment, retirement of all the judicial officers serving and posted within this circuit of this Hon. Court, I was very much aware and keenly alive to the fact that, as of 18/01/2018 when this appeal first came before me for*

hearing, the said trial Magistrate Grade 1...had long retired officially from the service as a judicial officer, specifically as a Magistrate Grade 1 and therefore was no longer seized with jurisdiction to handle all matters pertaining the original civil suit no. 011 of 2013."

After making several other observations, the learned Judge concluded that, by not signing and dating the Judgment, the purported Judgment is null and void. His Lordship set aside the Judgment and expunged it from the records for illegality. Court then ordered for a retrial in these words, *"in the interest of justice, this Hon. Court shall order and direct that a retrial before another Magistrate, of competent jurisdiction, who has never handled this file in his or her official capacity as a judicial officer is hereby ordered."* At the end of the above order, the learned Judge stated, ***"The costs of this appeal is awarded to the Appellant."***

This court notes that His Lordship did not consider any grounds of the appeal and was alive to it. Although the Court stated that it would be considering the merits of the appeal, it did not do so. At the end of its analysis of the circumstances surrounding the writing and the delivery of the annulled Judgment, Court made the Orders quoted above. Court did not hear the parties on the appeal and on the 'illegalities' surrounding the Judgment of the court below.

Having perused the Judgment as a whole, I am convinced that awarding costs of an appeal to the appellant when the appeal was not heard at all, but was simply disposed of on the ground of the Judgment having been declared illegal (for want of signature and date) constitute a mistake apparent on the face of the record. This apparent error required no long-drawn reasoning to be established. It did not call for a search to see. I was not able to fish out the error but the same struck me on the face after reading the Judgment of court. I think it was an error of inadvertence. It was a self-evident error of law, in light of the facts before the court and in light of how the court had dealt with the matter.

Suffice to state that there has been a trend in this country that where a fault in a particular proceeding lies squarely with the court, no party should be penalized in costs. The correct thing to do in such a case is that each party bears its own costs. See: Mohammed Mohammed Vs. Roko Construction Ltd, Civil Appeal No. 01 of 2013, where the Supreme Court held that the Coram of the court of appeal that delivered the final Judgment in the appeal had a 'stranger'/ member who never participated in the hearing of the appeal, participate in writing the Judgment of the Court, the Judgment could not stand, it being illegal. The Supreme Court set aside the orders of the Court of Appeal, ordered for return of the matter to the Court of Appeal for the Court to constitute *"a suitable different Coram to hear and decide the appeal in accordance with the established*

procedures." In other words, the Supreme Court held there was need for a retrial of the appeal, and ordered a *denovo* hearing. This is exactly what Hon. Justice Vincent Tonny Okwanga ordered in the appeal before him.

On costs, which is pertinent here, the Supreme Court in the just quoted case stated thus, ***"In the circumstances of this Appeal where the Court of Appeal is to blame, we order that each party should bear their own costs."*** (Underlining is for emphasis.)

The same approach was taken by the Supreme Court in the case of **Komakech Geoffrey & M/s Victoria Advocates Vs. Rose Akol Okullo, Electoral Commission and Among Annet Anita, Civil Appeal No. 21 of 2021**, where after holding that the Court of Appeal was not duly constituted when only two members of the Court had heard the matter regarding why the appellants (lawyers) should not personally bear costs of the High Court election petition, and costs of an application for striking out the appeal of their client (Annet Anita Among). There, the Supreme Court held (*inter alia*) that the application for striking out the appeal had been decided by the Court of Appeal without Coram, and thus the order that costs be personally borne by the Appellants would also be set aside. The Supreme Court also ordered that the Motion (seeking to strike out the election appeal) be heard afresh by the Court of Appeal before a proper Coram. On the issue of costs before the Supreme Court (which is most

relevant here) it held, ***"We make no order as to costs because the appeal arises partly from Court of Appeal error*** *to which the Appellants contributed by failing to object to the hearing of the Motion (by Court of Appeal) for lack of Coram." (Emphasis is added.)*

The above decisions of the highest Court in this Country therefore show the consistent approach of court on costs, where neither party is to blame for any illegality in the decision of a court. The approach is that, in such cases, each party bears its own costs.

For the foregoing reasons, and on the special circumstances of this application, I find that there is an error of law apparent on the record. I accordingly exercise my discretion and review it. Accordingly, the application succeeds. The Decree/ Order of Court given in the Judgment in Civil Appeal No.009 of 2016, dated 23rd November, 2018, with regard to costs is accordingly reviewed. Instead of the Respondent in that Appeal (the present Applicant) paying costs of Civil Appeal No. 009 of 2016 to the Appellant (the present Respondent), I substitute it with an Order that each party bears its own costs of civil appeal no. 009 of 2016.

Given my orders above, I find it unnecessary to deal with the prayer that this court issues a stay of execution of the order of costs, given that there is no order of costs to be executed, since each party is to bear its own costs

of the said appeal. For the avoidance of doubt, I wish to state that my order of review of the order of costs does not affect the Order in respect of a retrial of civil suit no. 11 of 2013, in the terms ordered by Hon. Justice Vincent Tonny Okwanga.

As regards to the costs of this review application, given the fact that the parties are yet to have their case retried by a Magistrate Court, at the end of which costs may still be dealt with, and given that neither party is to blame for the error of law just reviewed, I order that each party bears its own costs of this review application. It is so ordered.

Delivered, dated and signed in chambers this 24th October, 2022.

24.10.2022

George Okello
JUDGE HIGH COURT

Ruling read in chambers in the presence of;

12:45pm

Attendance

Ms. Grace Avola, Court Clerk.

Louis Odongo, Counsel for the Applicant.

The Applicant is present in Court.

Mr. Ojara Byron, holding brief for Counsel Sabiti Omara, for the Respondent.

The Respondent is in Court.

Mr. Odongo: The matter is for Ruling, and we are ready to receive.

Mr. Ojara: We are also ready to receive the Ruling.

Court: Ruling delivered in Chambers.

George Okello

JUDGE HIGH COURT

24th October 2022