THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MUBENDE

MISCELLANEOUS APPLICATION NO. 001 OF 2021

ARISING FROM MISCELLANEOUS APPLICATION NO. 063 OF 2019

ARISING FROM CIVIL SUIT NO. 81 OF 2018

1. **SEMANDA GODFREY**
2. **KWITONDA AARON ::: APPLICANTS**

Versus

1. **LAKE WAMALA FARM LTD**
2. **ABID ALAM**
3. **MANZUR ALAM ::RESPONDENTS**

BEFORE: THE HON. JUSTICE DR. FLAVIAN ZEIJA

RULING

This is an application for review brought by way of Notice of Motion under sections 82 CPA, section 33 of the Judicature Act, Order 46 rules 1(b) CPRs S.I 71-1

It is seeking for review and setting aside of;

a) Orders arising from court's ruling in Miscellaneous Application No. 63 of 2019 which;

i. Declared that the certificate of title for Plot 219 Block 427 was obtained by the predecessors in title through fraud and as such there was no land available for leasing and transferring to a one Dr. Odong Jacob.

ii: *And further declared that land comprised in Block 427 Plot 219 which was being claimed by Dr. Odong Jacob as a Plaintiff in Civil Suit No. 81 of 2018 sits /encroaches/overlaps over the land belonging to the 1st Respondent (1st Defendant in Civil Suit No. 81 of 2018)*

b) Costs of this application be provided for

The grounds on which this application is premised are contained in the application and buttressed in the 1st and 2nd Applicants' affidavits in support of the application. Briefly that;

1. *Around the year 2007, the 2nd Applicant acquired unregistered interests from several people who were occupying land that was subsequently registered as Block 427 Plot 207*

2. *The 2nd Applicant applied and Mubende District Land Board granted him the said land comprised in Block 427 Plot 207 land at Bukoba Kika in 2012.*

3. *The 2nd Applicant then subdivided the same land into Plots 215, 216, 217, 218 and 219.*

4. *The 2nd Applicant sold Plot 216 to Mr. Balongo Sam, then sold Plots 215, 217, 218 & 219 to the 1st Applicant and a one Ojambo David.*

5. *The 1st Applicant and Mr. Ojambo later sold and transferred Plot 219 to a one Odong Jacob and retained Plots 215, 217 and 218.*

6. *The 1st Applicant and Ojambo David as registered owners of Plot 215, 217 and 218 then permitted the 2nd Applicant to continue occupying and utilizing Plot 215 for his farming activities to wit; cattle and goat rearing, cultivation of bananas and seasonal crops like maize and beans among others like tree farming.*

7. *Mr. Balongo Sam also permitted the 2nd Applicant to continue in occupation and utilization of Plot 216.*

8. *Dr. Odong Jacob took possession of his Plot 219 and utilized it uninterrupted until around June 2017 when the Respondents started claiming interests thereon which prompted Dr. Odong Jacob to file Civil Suit No. 81 of 2018 against the Respondents for trespass.*

9. *Dr. Odong Jacob later filed Miscellaneous Application No. 63 of 2019 which sought for leave to add the 1st Applicant and Ojambo David as defendants in in Civil Suit No. 81 of 2018.*

10. *While considering the said Miscellaneous Application No. 63 of 2019, the trial judge declared that the certificate of title for Block 427 Plot 219 was obtained through fraud by Dr. Odong's predecessors in title.*

11. *By implication, the trial judge ruled that the 2nd Applicant obtained the original Block 427 Plot 207 by fraud and as such, all the subdivisions arising therefrom i.e Plot Nos. 215, 216, 217, 218 and 219 were obtained by fraud.*

12. *The trial judge further declared that Plot 219 which the 1st Applicant and Ojambo David transferred to Dr Odong Jacob sits/encroaches/overlaps over the 1st Respondent's land.*

13. *The said declarations by the trial judge were irregular in so far as they were made in an application to add the 1st Applicant and Mr. Ojambo David as parties to Civil Suit No. 81 of 2018, a thing he ought not to have done.*

14. *Fraud is a very serious issue which requires to be strictly pleaded /particularized by a party relying on it as its cause of action.*

15. *The foregoing facts demonstrate a serious error apparent on the face of the record which necessitates a review of the same so as to set aside the erroneous orders/ findings that affect interests of third parties.*

16. *It is in the interest of justice that court reviews the said ruling and its orders /declarations.*

In opposition to the grounds in support of the application, Sami Alam who is a director in the 1st Respondent Company deponed that;

1. *During the hearing and/or scheduling of H.C.C.S No. 81 of 2018 the court ordered for a boundary opening and/or survey for the suit land.*

2. *Upon presentation to court of the above boundary opening survey report by the Commissioner Surveys & Mapping, the Plaintiffs in HCCS No. 81 of 2018 on account of the discoveries and findings in the said report filed HCMA No. 63 of 2019 filed HCMA No. 63 of 2019 for leave to amend the Plaint, consolidation of suits and addition of parties to the said suit.*

3. *At the time HCMA No. 63 was instituted, the Applicants had instituted HCCS No. 40 of 2019 seeking for among other orders; a declaration that the Applicants herein are the rightful owners of land comprised in Block 427 Plot 219.*

4. *The court while considering HCMA No. 63 of 2019 took time to review the pleadings of HCCS No. 40 of 2019 since this suit had prominently featured in the pleadings of the parties in HCMA No. 63 of 2019.*

5. *The said decision of court in HCMA No. 63 of 2019 has never been appealed and /or reversed by any court and the Applicants cannot be aggrieved by the said decision since the court never made the declarations that the Applicants purport to state in the motion.*

6. *The Applicants are not registered proprietors of Plot 219 which is registered in the names of Odongo Jacob who is a party to HCCS No. 81 of 2018 and as such cannot be aggrieved by an order of court that affects the said land.*

7. *The Respondents were not the only parties to the suit and for the Applicants herein to sue the Respondents without suing the other parties is suspicious and questionable.*

8. *The instant application is misconceived, lacks merit, an abuse of court process, does not meet the test of law, it is belated and a ploy by the Applicants only intended to delay the 1st Respondent's activities on the land.*

The 2nd & 3rd Respondents did not swear an affidavit in opposition to the application despite court having given schedules for filing of the same. However, Counsel for the Respondents during submissions informed court that the 3rd Respondent is a non-existent person having passed on last year. Counsel for the Applicants made no rejoinder to this assertion. As it stands therefore, this application proceeded against the 1st & 2nd Respondents only.

Representation

At the hearing of this application, the Applicants were represented by Maven Advocates. The Respondents were represented by Counsel Betunda Yusuf of Plot 97, Bukoto Street, Upper Kololo- Kampala.

The Law

Applications for review and set aside are governed by the provisions of section 82 of the Civil Procedure Act, Cap 71 and Order 46 rules 1 and 2 of the Civil Procedure rules. For ease of reference, I will reproduce the said provisions hereunder.

Section 82 of the Civil Procedure Act as far as is relevant to this case provides;

> **82. Review**
> *Any person considering himself or herself 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 decree or made the order, and the court may make such order on the decree or order as it thinks fit.*

Order 46 rules 1 and 2 provide;

> **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, 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 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.*

Consideration of court

This application is hinged on the assertion that the orders of court in Miscellaneous Application No. 63 of 2019 were erroneous and demonstrated serious errors on the face of the record which by extension affect the Applicants' third-party interests in land wherefrom the suit land Block 427 Plot 219 was cut.

Upon examination of the impugned HCMA No. 63 of 2019 attached as annexture B to the affidavit in support of the application, it is clear to me that it was an application by Chamber Summons brought by Dr. Odongo Jacob (the Applicant therein) under section 98 of the Civil Procedure Act Cap 71, Order 6 Rules 19 & 31 and Order 1 Rule 10(2), 13 of the Civil Procedure Rules S.I No. 71-1, seeking for leave to amend the plaint and join Semanda Godfrey and Ojambo David as defendants in Civil Suit No. 81 of 2018. The said Semanda Godfrey and Ojambo David are the predecessors in title of Dr. Odong Jacob in respect to Block 427 Plot 219, the same land that the Respondents were claiming as theirs in Civil Suit No. 81 of 2018. Kwitonda Aaron (2nd Applicant herein) is the original proprietor of the suit land from whom the said Semanda Godfrey and Ojambo David derived title for the said Block 427 Plot 219 and subsequently transferred it to Dr. Odong Jacob.

By way of background, on 25th October 2018, Dr. Odong Jacob filed Civil Suit No. 81 of 2018 at the High Court in Mubende against Lake Wamala Farm Limited, Abid Alam and Manzur Alam **(also Respondents in this application)** for inter alia; trespass on the Plaintiff's land comprised in Block 427 Plot 219 measuring approximately 122.9090 Hectares having faced stiff resistance from the Respondents who claimed ownership of the same land as part of their Plot 6 Block 291 Singo.

Before scheduling in HCCS No. 81 of 2018 was concluded, the parties therein agreed to have the boundaries of the suit land opened by a Government Surveyor working hand in hand with the parties' independent surveyors. The parties further agreed that the outcome of the said survey report would bind the parties. ***(See; Court proceedings in HCCS No. 81 of 2018 dated 11th April 2019 and 13th March 2019 respectively)***. The said survey was done and a survey report dated 25th March 2019 was filed on court record on 10th April 2019. The findings of the survey report were interalia; that all the subdivisions resulting from Block 427 Plot 207 Singo fall exactly in Plot 6 Block 291 Singo thus encroaching and overlapping on Plot 6 Block 291 Singo which belongs to the Defendants (Respondents herein). The record shows that it is on 16th April 2019 after the survey report had been filed that Dr. Adongo Jacob the Plaintiff in Civil Suit No. 81 of 2018 filed HCMA No. 63 of 2019 seeking to add the Applicants herein to the suit since they are Dr. Odongo Jacob's predecessors in title from whom he would be entitled to seek indemnity under the land sale agreement for any loss caused by third party claims.

It is from the survey report that the learned trial judge made findings and concluded that the suit land comprised in Singo Block 427 Plot 219 being claimed by Dr. Odongo Jacob sits /encroaches /overlaps over the 1st Defendant's land comprised in Singo Block 291 Plot 6. Secondly, that the certificate of title for Block 427 Plot 219 was obtained by the predecessors in title through fraud. The said predecessors in title include the 2nd Applicant herein who was the original proprietor of land comprised in Block 427 Plot 207 land at Bukoba Kika. It is the 2nd Applicant who then subdivided the said land into several Plots including Plot Nos. 215, 216, 217, 218 and 219. He transferred Plot 216 to Mr. Balongo Sam and Plot Nos. 215, 217, 218 & 219 to the 1st Applicant and a one Ojambo David. It is the 1st Applicant and Ojambo David who then transferred Plot 219 to Dr Odongo Jacob. The implication of the ruling in MA No. 063 of 2019 therefore, is that the entire chain of the transactions cited was marred by fraud

and thus a nullity. Incidentally, it is in the same ruling in MA No. 063 of 2019 that Civil Suit No. 81 of 2019 was dismissed with costs.

It therefore follows that the dispute in HCCS No. 81 of 2018 was only in respect to Dr. Odongo Jacob's claim over Plot 219. The basis of the Applicants grievance therefore lies in the orders of court in Miscellaneous Application No. 063 of 2019 which Orders had the effect of tainting their respective titles yet they were not party to the said MA No. 063 of 2019 and neither were they party to Civil Suit No.81 of 2018 from which the application arose.

Who is an aggrieved party?

An aggrieved party has been defined in ***Muhammed Bukenya Allibai versus W E Bukenya and Anor; SCCA No. 56 of 1996***, *by Karokora (JSC) as he then was to mean;*

> *"Any party who has been deprived of his property"*

The Hon. Justice of the Supreme Court relied on an earlier decision of ***Re-Nakivubo Chemists (U) Ltd, in the matter of the Companies Act (1979) HCB 12 and Kawdu versus Bever Ginning Co. Ltd, Akot and Others 1929 AIR Nag par 185*** which further noted that where Court considers a matter for review of an order passed affecting a third party, it must be a person who has suffered a legal grievance and this principle applies, depending on the peculiar circumstances of each case. It is on the basis of this principle that I find that the Applicants are aggrieved parties within the meaning of the law in as far as the impugned Orders of court in MA No. 063 of 2019 had the effect of depriving them of title in property without according them a chance to be heard.

It was contended for the Applicants that fraud cannot be proved by affidavit evidence. I am however, of the considered view that it was never meant to be a rule of general application that fraud cannot be

proved by affidavit evidence. It is possible for an Applicant to plead and prove fraud through affidavit evidence. Going by the provision of Order 19 Rule 2 of the CPR, such evidence can be tested through cross examination and strict proof. As such, depending on the nature of the case, the facts and circumstances of a particular case, it is possible to prove fraud through affidavit evidence. The mere fact that the evidence in an application was brought by way of affidavit cannot be a ground to defeat the application. It suffices if such affidavit evidence can be tested by cross examination. ***See; Kagoro v Samalien Properties Limited and 4 others (H.C. Miscellaneous Application 90 of 2020)***

This application is however, one of a kind where the orders of the learned trial judge even though relying on the agreement of both parties to be bound by the findings of the survey report, made Orders that stretched to third parties who were neither party to Miscellaneous Application No. 063 of 2019 nor Civil Suit No. 81 of 2018. In my view, the survey report should have formed part of the evidence on record by which court should have holistically determined Civil Suit No. 81 of 2018 after hearing all parties on merit.

In the case of ***Fredrick Kabugo Sebugulu Vs The Administrator General CACA No. 69 of 2010***, the Court of Appeal of Uganda citied with approval the Supreme Court case of ***AlHaji Yahya Balyejusa Vs Development Finance Company Limited Civil Appeal No. 34 of 2000*** in which it was held that it was a cardinal principle that as far as possible litigation on land matter should be resolved on merit. Making Orders that have the effect of depriving third parties of interest in land without according them a hearing should as much as possible be discouraged.

The law on amendment of pleadings is now well settled. Order 6 Rule 19 of the Civil Procedure Rules which provides as follows;

19. Amendment of pleadings.

"The court may, <u>at any stage of the proceedings</u>, allow either party to alter or amend his or her pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary <u>for the purpose of determining the real questions in controversy between the parties.</u>"

The truest test for allowing or disallowing amendments of pleadings has always been whether the intended amendment would be prejudicial to the other party's case. However, a great string of authorities postulate that even where there is a likely prejudice, an amendment will often be favored over the prejudice as long as the prejudice can sufficiently be compensated for in terms of costs. It therefore, goes without saying that the burden heavily lies on the party opposing the amendment to demonstrate to court's satisfaction that the amendment will occasion such an injustice that it cannot be sufficiently compensated for by costs or that the amendment seeks to prejudice the rights of the opposite party which rights are existing as at the date of the proposed amendment eg; by depriving him of the defense of limitation. See; ***Mohan Musisi Kiwanuka vs. Asha Chand SCCA No. 14 of 2002*** and ***Eastern Bakery v. Castellino, C.A. C.A. No. 30/1958[1958] E.A 461*** both cited with approval by the Supreme Court in ***Mulowooza & Brothers Ltd vs. N Shah & Co. Ltd Civil Appeal No. 26 of 2010.***

In Miscellaneous Application No. 063 of 2019, adding the Applicants was pertinent in order to determine all questions in controversy between the parties. The right to be heard is sacrosanct and should sparingly be denied only in rare and deserving circumstances. I have been constrained to extend the scope of this application to finding that the Applicants should have been added as parties to Civil Suit No. 81 of 2018.

In the circumstances, this application succeeds with the following orders;

a) The ruling in MA No. 063 of 2019 is set aside.
b) Let the Applicants be added as parties to the Civil Suit No. 81 of 2018 so that court can determine all questions in controversy and for the benefit of avoiding future multiplicities of proceedings.
c) Costs shall abide the outcome of the main suit.

Dated at Kampala this 15th day of August 2022.

Flavian Zeija (PhD)
PRINCIPAL JUDGE