

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT FORT PORTAL**  
**MISCELLANEOUS CAUSE NO. 0002 OF 2018**  
**Arising from High Court Revision Cause No. 1 of 2017**  
5 **Arising from Judgment of LC1 Court Rwehingo Village, Nyakatonzi Parish,**  
**Munkunyu Sub-County**

**NYAKIYUMBU GROWERS COOPERATIVE SOCIETY** **APPLICANT**

10 **VERSUS**

**THEMBO K. SALONGO** **RESPONDENTS**

**BEFORE HON. JUSTICE DAVID S.L. MAKUMBI**

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Applicant represented by Guma & Co. Advocates

Respondent represented by Sibendire, Tayebwa & Co. Advocates

**LAW AND REMEDIES SOUGHT:**

20 This application is brought under the provisions of Sections 82 and 98 of the Civil Procedure Act and Orders 46 and 52 of the Civil Procedure Rules seeking orders as follows.

- 1) The ruling in High Court Revision Cause No 1 of 2017 and the execution vide Kasese Chief Magistrate Miscellaneous Application KAS MA No. 1  
25 No. 1 of 2017 be reviewed and set aside.
- 2) The costs of this application be provided for.

## **BACKGROUND:**

30 The grounds of this application as laid out by the applicant and supported by the affidavit of one Muhindo Christopher Makupe were in summary as follows.

Execution orders were granted against the applicant arising from the **Kasese Chief Magistrate Court Miscellaneous Application No. 1 of 2017**.

### **Applicant's Case:**

35 The applicant being dissatisfied with the decision of the Chief Magistrate applied for Revision in the High Court vide **Fort Portal High Court Revision Cause No. 1 of 2017**. In both cases the applicant lost to the same respondent as in this case.

The applicant contends that in both cases the matters were heard in the names  
40 of Tembo K Salongo who had passed on years before the matters in the Chief Magistrate and High Courts. To that extent the applicant argued that no suit in law could commence in the names of a deceased person except through a legal representative. The applicant went on to contend that the proceedings before the Chief Magistrate Court and the High Court were a nullity and ought to be  
45 set aside.

The application was supported by the affidavit of Muhindo Christopher Makupe, a Chief Advisor to the Executive Committee of the applicant society who deponed that the discovery of the death of the respondent was new  
50 evidence previously unknown to the applicant at the time of the decision of the High Court.

The applicant further relied upon and annexed a copy of a death certificate from Kasese District Local Government to prove that the respondent Tembo K. Salongo had passed away on 17<sup>th</sup> September 2009.

### **Respondent's Case:**

55 In response to the application, the respondent submitted that it was trite law that one of the grounds upon which an application can be based is discovery of new evidence which the applicant was not aware of at the time of determination of the matter in issue.

Before delving into the substantive grounds of the review the respondent drew  
60 attention specifically to Section 82 of the Civil Procedure Act by way of preliminary objection. The respondent emphasized that by virtue of the

Section cited the applicant could only proceed with this application provided no appeal had been preferred from the decision of the High Court in the Revision Cause.

65 The respondent contended that the applicant had filed a Notice of Appeal on 2<sup>nd</sup> January 2018 and it was served on the respondents on 4<sup>th</sup> January 2018. The respondent annexed a copy of the said Notice of Appeal to his submissions.

70 The respondent then pointed out that the applicant had never responded to the affidavit where the evidence of the appeal was brought out.

The respondent then went on to address the substantive grounds of the application and argued that this application did not meet the test of new evidence that was not within the knowledge of the applicant at the time of determination for which review is now sought.

75 In relation to this the respondent drew attention to the Revision Cause No. 1 of 2017 before this same court between the same parties as in the present application. The respondent contended that both the application in that cause and the affidavit in support of the application for the revision plainly indicated that the applicant was aware that the respondent Tembo K. Salongo was dead.  
80 This was evident in Paragraph 22 of the respondent's affidavit in reply to the application.

The respondent concluded that on the basis of the above the applicant was aware about the death of Tembo K. Salongo at the time the application for revision was filed in the High Court.

85 The respondent also pointed out that this court could not review the order of the Chief Magistrate Court because a court can only review its own decision.

### **ANALYSIS:**

In this application there are two basic issues apparent for the determination of this court.

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- 1) Whether an appeal was pending at the time this application was lodged.
  - 2) Whether the death of the respondent was new information to the applicant within the meaning of Order 46 Rule 1 of the Civil Procedure Rules.

95 The law at the heart of this application is laid out in Section 82 of the Civil Procedure Act and then in even more detail in Order 46 Rule 1 of the Civil Procedure Rules.

Section 82 provides that,

*“Any person considering himself or herself aggrieved –*

100 *(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,*

105 *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 Rule 1 of the Civil Procedure Rules essentially reproduces Section 82 above except that after Section 82(b) the paragraph continues,

110 *“... and who from discovery of new and important matter of evidence which after 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 ...”*

### **Issue 1:**

115 In the instant application the first contention of the respondent was to the effect that an appeal had been filed with respect to the decision in **Fort Portal High Court Revision Cause No. 1 of 2017** and that as such this application ought to fail as did not meet the requirement for no appeal to be pending.

120 The evidence of a Notice of Appeal relied upon by the respondent as proof of appeal cannot be deemed to be an appeal. As the phrase “Notice of Appeal” suggests, it is merely a notification of the intention to appeal and cannot be deemed to be evidence of appeal. Rule 83(1) of The Judicature (Court of Appeal Rules) Directions states,

125 *“Subject to rule 113 of these Rules, an appeal shall be instituted in the court by lodging in the registry, within sixty days after the date when the Notice of Appeal was lodged –*

*(a) a Memorandum of Appeal, in six copies, or as the Registrar shall direct;*

(b) the Record of Appeal, in six copies, or as the Registrar shall direct;

130 (c) the prescribed fee; and

(d) security for the costs of the appeal.”

It is therefore not correct to suggest that an appeal was in fact pending when no such evidence has been led in line with the Court of Appeal Rules above.

## Issue 2:

135 As concerns whether the applicant met the required standard of discovery of new and important evidence in keeping with Order 46 Rule 1 of the Civil Procedure Rules and which evidence was not within its knowledge even after exercise of due diligence this court observes as follows.

140 The applicant primarily contended that the proceedings before both the Chief Magistrate Court and then the Revision before the High Court were a nullity in as much as they were commenced in the names of a deceased person. This was denied by the respondent who in turn contended that the applicant was at all material times aware of the demise of Tembo K. Salongo who was named as the respondent.

145 Upon analysis of the pleadings of both the applicant and respondent, this court noted primarily from the respondent’s pleadings that there was ample proof that the applicant proceeded before both the High Court and Chief Magistrate Courts in full knowledge that the respondent was deceased. However, in as much as this court agrees with the respondent in this matter that a court can  
150 only review its own decision, this court shall restrict itself to the Revision Cause before the High Court in 2017.

According to the applicant’s own Notice of Motion for **Fort Portal High Court Revision Cause No. 1 of 2017**, the applicant clearly stated at Paragraph 6 the ground that,

155 *“The Trial Magistrate acted with material irregularity and injustice when he failed to sustain the applicant’s objection on the fact that the respondent died in 2009 ...”*

Furthermore, in the affidavit in support of the application deposed by Muhindo Christopher Makupe in capacity of executive member of the  
160 applicant society, the same statement as was in the Notice of Motion was reproduced at Paragraph 10.

It is important to note that by so pleading as indicated above in the Revision Cause and the Court subsequently relying on the pleadings to reach a decision for which the applicant now seeks review, the applicant became bound by the doctrine of estoppel by record. This doctrine while not specifically pleaded by  
165 the respondent lends itself to this situation because there is a binding judicial decision arising from the disputed Revision Cause and which decision was predicated in part on the applicant's own pleadings.

Estoppel by record is based in part on the principle "*Interest rei publicae ut sit  
170 finns litum*" – Public interest demands finality in law suits.

This matter started in 2005 with the judgment of the LC1 court which then led to proceedings before the Chief Magistrate Court of Kasese in 2017 and then Revision before the High Court in the same year. It is disingenuous on the part of the applicant to now turn around and essentially deny its own pleadings  
175 moreover after this court relied on the same pleadings to reach its decision in the Revision Cause.

It was also clear from the affidavit in reply to the application for Revision deponed by Kabunzungwire Joseph that he deponed the said affidavit in capacity of Administrator to the estate of the deceased respondent. This  
180 evidence was never challenged by the applicant during the Revision Cause. It does not therefore make sense for the applicant to make an issue of the demise of the respondent before this court at this point in time.

It is this court's considered view that the applicant became irrevocably bound by its own pleadings the moment they were relied upon by this court to reach  
185 a decision in the Revision cause. The applicant cannot therefore be seen distance itself from its own pleadings by acting as if the death of the respondent was not a known fact in the Revision Cause before this court.

Parties in suits cannot be expected to continuously raise grounds for litigation indefinitely. It is in this same spirit that Order 46 Rule 7 of the Civil Procedure  
190 Rules bars applications to review orders made on applications for review or orders made on review. Litigation must come to an end at some point in time.

**RESOLUTION:**

In light of the analysis above, this court accordingly finds that with regard to Issue 1 concerning a preliminary objection about a pending appeal, there was  
195 no pending appeal within the meaning of Rule 83(1) of the Judicature (Court of

Appeal Rules) Directions. The respondent's objection in that regard is therefore overruled.

200 As concerns the second issue concerning whether the death of the respondent was new and important information that had not been available to the applicant at the time of the Revision Cause before this court, I find that the applicant was at all material times aware that the respondent had died and had even acquiesced to the presentation of evidence by the Administrator to the estate of the respondent in the matter. It is therefore evident that for all  
205 intents and purposes whereas the Revision Cause proceeded in the names of the deceased it was impliedly the estate of the deceased actively participating as a respondent in the said cause.

To that extent this application therefore fails for lack of sufficient grounds.

**ORDER:**

210 This application is hereby dismissed in accordance with Order 46 Rule 3(1) of the Civil Procedure Rules with costs to the respondent.

**David S.L. Makumbi**

**AG. JUDGE**

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**13<sup>th</sup> November 2023**