THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT LIRA

MISCELLANEOUS APPLICATION NO. 031 OF 2020

(Arising from Land Appeal No. 009 of 2016)

(Arising from Apac Magistrate Court Grade 1 Court No. 005 of 2012)

1. OKELLO TERENCE
2. TOGA BENSON
3. ELANK BOSCO ::APPELLANTS

VERSUS

AGEC PETER ::RESPONDENT

BEFORE: HON. JUSTICE ALEX MACKAY AJIJI

RULING

Background

The background of this application is that the Applicants instituted a land claim No. 05 of 2011 for a declaration that they are the lawful owners of the land located at Awang cell measuring 200 acres a plot measuring 15 meters with commercial building at Apac town along Market Street against the Respondent. The trial magistrate found the matter in favour of the Respondent. The Applicants were dissatisfied with that decision and appealed against it before this court. Hence, this Application for review of the Appellate decision.

This Application was brought by way of Notice of Motion under section 82 of the Civil Procedure Act Cap 71, Order 46 Rules 1,2,and 8 of the Civil Procedure Rules for orders that;

i. Orders in the Decree of this Honorable Court in Land Appeal No.009 of 2016 be reviewed.

ii. Orders in the Decree of this Honorable Court in Land Appeal No.009 of 2016 be set aside

iii. The Taxation proceeding in Land Appeal No.009 of 2016 be stayed

iv. Costs of this Application be provided for.

The Application is supported by the affidavits sworn by the Applicants. However, all of their affidavits being similar in content, I will only consider one to represent others.

Okello Terrance in his affidavit in support to the Application briefly averred as follows;

i. That on the 19th day of February, 2020 when the judgment was read and delivered in open court, judgment was passed in his favour together with the other two Applicants in Land Appeal No.009 of 2016 and court ordered that he remains in occupation of the suit land and also cost of the suit and Appeal was awarded to them

ii. That the copy of the Court judgment had clerical errors with several crossings specifically on issues of cost and yet at the time of delivering the judgment, court awarded cost of the suit and the appeal to us

iii. That when his lawyers M/S Egaru & Co. Advocates was served with a copy of the decree in Land Appeal No.009 of 2016, he was shocked to discover that the orders in the said decree were not the orders that court pronounced at the time of judgment especially the orders that the lease shall continue to run until its expiration and orders of costs awarded to us the Appellants.

iv. That the decree in Land Appeal No.009 of 2016 has errors/mistakes specifically on the party who was awarded cost of the suit and the appeal. He contended that the said decree of court has to be reviewed.

v. That in the said judgment, the 1st Applicant and other Applicants were awarded costs of the suit and that of the Appeal but the same was erroneously crossed out to indicate the Respondents whereas the original transcribed recording of court at the time when the judgment in Land Appeal No.009 of 2016 was being delivered/read states that the 1st Applicant together with other Applicants were awarded costs of the suit and of the Appeal.

vi. That there was grave errors in the judgment and the decree inland Appeal No.009 of 2016 which the Applicant herein intends to have it addressed by the Honourable Court and that this can only be done if this Honourable Court be pleased to grant an order for Review, set aside the judgment and decree in land Appeal No. 009 of 2016 and make corrections in the areas cited above in the interest of justice.

vii. That the Respondent through his Lawyer M/S Okae, Basalirwa Kakerewe & Co. Advocates have already filed a Bill of cost in respect of Land Appeal No.009 of 2016 and the same has already been fixed for 14th October, 2020 to taxation well aware that the orders in the Decree of the Honourable Court in Land Appeal No. 009 of 2016 was obtained in error.

viii. That this Application is brought without undue delay and further that it would meet the ends of justice if the intended taxation proceedings/hearings in land Appeal No.009 of 2016 already fixed for the 14th of October, 2020 is stayed/ halted pending the hearings and determination of this Application for review.

ix. That it is in the interest of justice that this Application be granted and if the same is not granted, then the Applicants will suffer irreparable injuries from the clerical errors in the judgment and decree of this Honourable Court in Land Appeal No.009 of 2016.

x. That whatever I have deponed here is true and correct to the best of his knowledge and belief save for information obtained from his advocates.

In the affidavit in reply the Respondent averred briefly as follows;

i. That the Application and its affidavit in support are frivolous, vexatious, incompetent, bad in law, incurably defective, devoid of merit and shall at the earliest opportunity raise a point of law and pray that this court be pleased to dismiss the same with costs as the same violates the provisions of the Civil Procedure Rules.

ii. That the Respondent shall raise a preliminary objection to the effect that the purported transcribed version is not certified by court, a requirement under the provisions of the Evidence Act and therefore cannot be relied upon by this court.

iii. That the Respondent admits the contents therein to the extent that all the Applicants were Appellants in Land Appeal No.009 of 2016 which was dismissed on its entirety with costs

iv. That the contents therein are false and intended to intentionally mislead court. That the copy of judgment correctly shows that the Appeal was correctly dismissed with costs upon re-evaluation of the evidence on court record by this court and the said order of court was extracted in accordance with the court orders in the judgment.

v. That the judgment was passed in this matter on February 2020 in his favor and the Applicants who were in court simply sat back until October, 2020 when the Respondents served them with the bill of costs to be taxed, that's when the Applicants woke up 8 months after to bring this Application which is an abuse of court process.

vi. That the original judgment and court orders shows that costs were awarded to the Respondent in accordance with the findings upon re-evaluation of evidence on court record.

vii. That this Application is brought in bad faith and as an abuse of court process. He averred that the Applicants waited until they were served with taxation notices 8 months after.

viii. That when the Applicants were served with a letter from the Respondents counsel to have the pre-taxation hearings, the Applicants ignored it.

Legal Representation

1. The Applicants were represented by M/s Egaru & Co. Advocates whereas Okae, Basalirwa, Kakerewe & Co. Advocates represented the Respondents.

2. This Application proceeded by way of written submissions and those of the Applicants are on the court record. The Respondent did not however file his submissions.

Court's Determination

Submissions by counsel for the Applicants

Counsel for the Applicant in his submission raised only one **issue** for this court's resolution which is that;

Issue No. 1: Whether there are grounds for court to grant an order of review.

Counsel submitted that an order of review is a creature of statute which must be provided for expressly. He contended that in considering review, the court exercises its discretion judicially. He referred court to the case of **Abdul Jafa Devij V. Ali RMS Devij [1958] EZ 558.**

Co cited **section 82 of the Civil Procedure Rules and Order 46 Rule 1 of the Civil Procedure Rules S.1 71-1** which empowers courts to review and revise the judgments where there is a mistake apparent on the face of record. He argued that it is the duty of court which has passed the judgment to correct any grave or errors committed by it to prevent miscarriage of justice.

Counsel submitted that this application is premised on the ground of an error apparent on the face of record. He cited the case **Re- Nakuvubo Chemist (U) Ltd (1979) HCB 12**, where it was held that there are three cases in which a review of judgment or orders is allowed and these are that; there is a mistake apparent on the face of record and any other sufficient reason.

Counsel contended that court passed its judgment on the 19th day of February, 2020 however it had a lot of error and mistakes apparent on the face of record. He argued that according to the copy of the judgment on the court record, a lot of clerical errors with several crossings specifically on who was awarded costs of the suit, yet during open court when the judgment was delivered, costs of the suit and of the Appeal were awarded to the Appellants

Counsel submitted that the crossings in the judgment were erroneously done to indicate that the Respondent was awarded costs whereas not since the original transcribed court recording when the judgment was being delivered in open court, it states that the Applicants were awarded costs of the suit of the Appeal.

Counsel submitted that the copy of the decree that was extracted by the Respondent counsel that was served on to the Applicants had orders that were not pronounced by court at the time the judgment was being delivered especially the orders that the lease shall continue to run until its expiration was omitted and that the orders of costs was awarded to the Applicants. He contended that the decree bore totally different orders from that that was pronounced by court granting costs to the Respondent which was not in courts pronouncement and as such this was an error which

needs to be reviewed by the honorable court because the judgment reads totally different orders from the decree that was extracted by the Respondent counsel which is to the detriment of the Appellant which if not corrected will cause an injustice and grave injury to the Applicants

Counsel submitted that the learned judge in his judgment took cognizance of the fact that the 1stApplicant had a valid lease title over the suit land, and in nowhere was fraud imputed on it which only meant that the 1st Applicant was the lawful owner of the suit land as a certificate of title is conclusive evidence of ownership under section 59 of the RTA. He argued that it was erroneous for the learned judge to decide that the 1st Applicant's lease shall continue to run until its expiry yet the 1st Applicant as a lessee had options to either renew or extend his lease term upon its expiration.

Following the above submissions, counsel prayed that the decisions that were made in Land Appeal No.0009 of 2016 be reviewed due to the errors that are on the face of record.

Sufficient reason to warrant the review

Regarding the above condition, counsel for the Applicants submitted that the Respondent filed a bill of costs in respect of Land Appeal No. 009 of 2016 which was fixed for hearing well aware that the orders in the decree were obtained in error. He submitted that the Respondents were not awarded costs but rather the Applicants and as such, a reason for this honorable court to review its decision and correct these grave errors in the judgment and set aside the judgment and decree in Land Appeal No. 009 of 2016 and make corrections in the judgment in regards to among others who was awarded costs of the suit and that since the 1st Applicant had a valid lease which was never challenged, then the 1st Applicant should be

declared the rightful owner of the suit land and with the option of renewing the said lease upon expiration.

Counsel submitted that since court found that the 1st Applicant had a valid lease, it was an error on the face of record to decide that upon expiration of his lease, the suit land should revert back to the Respondent without the said lease being challenged by the Respondent.

Counsel further argued that following page 10 and 11 of the judgment of court, the judge confirmed that the 1st Applicant got a lease way back in 1993 in his names on the suit land meaning 200 acres for a period of 49 years and the copy of the same was tendered as PEX.2. Counsel contended that the court went ahead to state that the grounds of Appeal that the applicants are the lawful owners of the suit land must fail and clearly this was an error of law on the face of record since possession of a land title is conclusive evidence of ownership except if challenged for fraud but this was not done by the Respondents as already noted above. Counsel submitted that it is therefore just and in the interest of justice that this application for review of Land Appeal No.009 of 2016 is allowed for the reasons given.

He added that another error that is apparent on the court record is when the court observed that the evidence adduced during the trial, it is more probable than not that the private property of the Respondent and that it was therefore erroneous for the court below to have decided in favor of the Respondent but went ahead to disallow the appeal. Counsel contended that since court found that it was erroneous for the court below to have decided in the Respondents favor, then the Applicants appeal should have been allowed hence justifying the need for this review in favor of the Applicants

Analysis of Court.

Issue No. 1: Whether there are grounds for court to grant an order of review.

Section 82 of the Civil Procedure Act provides that;

> *"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 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."* **Also see Order 46 of the CPR.**

In **Mohamed Allibhai V. W.E Bukenya Mukasa & Departed Asians Property Custodian Board Supreme Court Civil Appeal No.56 of 1996**, Odoki, JSC, explained that;

"A person considers himself aggrieved if he has suffered a legal grievance. A person suffers a legal grievance if the judgment given is against him or affects his interest."

And in **Ladak Abdallah Mohmmed Hussein V. Isingoma Kakiiza S.C.C.A No. 8 of 1995**, it was held that "any person means a person who has suffered a legal grievance which has wrongly deprived him of something....."

In the instant case, the Applicants instituted a land claim No. 05 of 2011 for a declaration that they are the lawful owners of the land located at Awang cell measuring 200 acres a plot measuring 15 meters with commercial building at Apac town along Market Street and the Respondent instituted a defence to that effect.

The learned trial magistrate found the suit in favor of the Respondent and made the following orders;

"It is hereby decreed and ordered that

i. ***The Defendant (AGEC PETER) is the rightful owner of the suit land measuring 300 acres located at Owang Cell, Atik Parish Apac sub-county, Apac District.***

ii. ***The 1st and 2nd Plaintiffs and their sons are ordered to remove their illegal structures/buildings on the suit land or the same be demolished therefrom***

iii. ***A permanent injunction does issue against the plaintiffs, restraining them and their children from further building cultivating on the suit land.***

iv. ***That costs of the suit is awarded to the Defendant.....***"

The Applicants were dissatisfied with the above decree and appealed against it under Land Appeal No. 009 of 2016. However, the decision of the Appellate Court is challenged under this Application for being un clear. Counsel for the Applicants submitted that the copy of the Appeal judgment has errors and mistakes on the face of record.

In that Appeal judgment, after evaluation of the evidence of the trial court, an appellate court stated as below;

"Therefore Respondent has to discharge this burden. Therefore, the Respondent has proved a degree of exclusivity that is capable of evidencing ownership.

However there exists an issue on the same suit land to do with the lease after that was given to Okello Terrence, as evidenced by his testimony. That by 1987 after leaving school, he began a small business in Apac town and they still had no problem, he then came up with an idea to lease this suit land. They sat down and agreed that he continues with the process. He went on up to the District Land Committee and the general community and thereafter, 3 people signed the document on behalf of the

community. There were Owo John, Ogwang Alonsio and Opio William. Thereafter he got a lease in 1997 in his name, the photocopy of this lease hold title was tendered in court as P.EXH.2. The land is located in Owang Cell Atik Parish, Apac sub-county, Apac District, the lease offer talks of 200 acres, it was signed by commissioner of lands and survey. However he further stated that the original stayed with the Respondent. Given the evidence of P.Exh.2, I see that indeed the 1st Appellant actually was granted a lease offer on the 15th/09/1993 on the suit land for a period of 49 years at Shs. 10,000/= per annum. Therefore, this ground fails however the subsisting lease that was given to the 1st Appellant shall continue to run until its expiration."

Considering the balance of probabilities, the conduct of the parties tends to tilt the weight of the evidence in favor of the Respondent*. If the evidence is such that the tribunal can say "we think it more probable than not," the burden is discharged, but if the probabilities are equal it is not" ..... when left in doubt, the party with the burden of showing that something took place will not have satisfied the court it did.* ***In the instant case, the Appellant failed to attain the required level of proof****.* ***Based on the evidence adduced during the trial, it is more probable, than not that the private property is of the Respondent****. It was therefore erroneous for the court below to have decided in the Respondent's favour.* ***In the final result, the appeal is disallowed. The judgment of the lower court is upheld. However, the 1st Appellant's lease shall continue to run until its expiration.*** *The costs of the suit and of appeal are awarded to the Respondent."*

Following the above finding of the appellate court, it is obvious that there is an error on the face of the court record because the 1st Appellant's lease could not continue to run in the presence of the trial court's orders.

In the circumstance, as guided by the way the Appellate court evaluated the 1st ground of appeal, it established that the Respondent was found to be the lawful customary owner of the suit land but there being an existing lease, the Appellate court faulted the trial magistrate for failure to consider that part of evidence. Hence, the trial court failed to evaluate the evidence on the court record and the 1st ground of appeal succeeded.

The 2nd ground of appeal also succeeded since the Appellate court found that any slight reference to the proceedings at the locus were not fatal since the trial magistrate based his decision on the evidence that was given in court other than the evidence at locus.

Sufficient reason to warrant the review

The Applicants submitted that following the error on the court record, the Respondent drafted a bill of costs containing costs of the appeal and that of the trial court yet the Applicant understood the decision of the Appellate Court to have been made in their favour.

The above is a sufficient reason to warrant review of Civil Appeal No. 009 of 2016.

Accordingly, Civil Appeal No. 009 of 2016 is reviewed in the following terms;

i. The orders and decree under Civil Suit No. 005 of 2011 are set aside.
ii. The 1st Applicant's lease shall subsist until its expiration.
iii. The Taxation proceeding in Land Appeal No.009 of 2016 are stayed
iv. Costs of the Appeal and those of the court below are awarded to the Applicants

I so order

Dated and delivered at Lira on 17th of January 2024

.....

ALEX MACKAY AJIJI

JUDGE