THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT GULU

MISCELLANEOUS APPLICATION NO. 08 OF 2023

ARISING FROM MISC. APPLICATION NO. 123 OF 2021
ARISING FROM MISC. APPLICATION NO. 99 OF 2021
(ARISING FROM CIVIL SUIT NO. 09 OF 2021)

WATWERO ENTERPRISES LIMITED.....APPLICANT

VERSUS

1. **BOARD OF GOVERNORS OF LUKOME SECONDARY SCHOOL**
2. **ATTORNEY GENERAL.....RESPONDENTS**

BEFORE: HON. MR. JUSTICE GEORGE OKELLO

RULING

This is an application for review of the Orders of this Court (Ajiji Alex Mackay) given in Miscellaneous Application No. 123 of 2021, dated 20 October, 2022. The Application before me is dated 14 June, 2023 but was placed for endorsement by the Deputy Registrar on 15th February, 2024 and fixed for hearing on 12 March, 2024.

Ajiji, J., was faced with an appeal against the decision of the then Deputy Registrar (hereafter, D.R) of this Court, Ntalo Nasulu Hussein, given in Misc. Application No. 99 of 2021. The Applicant had moved the D.R to

strike out joint Written Statement of Defence (WSD) of the present Respondents lodged in the head suit (Civil Suit No. 09 of 2021), and that ex parte judgment be entered against both Respondents by the D.R. The Application before the learned D.R was purported to have been brought under Order 8 rule 19, Order 11A rules 5 (5) (b), 6 (3) and 7 (1); as well as Order 52 rules 1 and 3 of the Civil Procedure Rules (hereafter CPR). The reason advanced before the learned Deputy Registrar was that; the Respondents had failed to serve their WSD on the Applicant in time. The D.R heard the Application (M.A No. 99 of 2021) and dismissed it on 05 October, 2021, with no order as to costs, holding that, it was brought under the wrong law (Order 9 rule 10 CPR) and that in any case, the WSD was on court record. The learned D.R ordered the WSD to be served on the Applicant (Plaintiff) there and then in court. The present Respondents had contended before the Deputy Registrar that, when they filed their WSD, they could not trace the Applicant for service as its location at the stated address within Kati-Kati Trading Centre (along Gulu- Atiak Road) was not found, and that the telephone number of its Managing Director, Nyeko Wilfred, indicated on the Plaint, could not go through.

I will not comment on whether the learned D.R had the requisite jurisdiction to hear the application seeking to strike out a WSD on the ground of non-service as it was never canvassed before my brother Judge, and would in any case be far-fetched and would have no place in this

review proceedings. I will also not comment on the applicability of the legal provisions invoked before the D.R save for the observation in the passing that, by and large, most of the provisions were wrongly invoked by the Applicant.

The Appeal to this court against the decision of the learned D. R, which was heard and determined by my brother Judge, sought to assail the decision of the learned D.R on several grounds of alleged errors of law. The main ground of the attack was that, the learned D.R erred in law and fact when he dismissed the Application on the basis that it had been brought under a wrong law specifically, Order 9 rule 10 of the CPR, purporting that, an ex parte Judgment be entered when actually a WSD was on court record and timeously lodged. As noted, other grounds were raised in the Motion before Ajiji, J., but I note that, they were erroneously canvassed because, the learned D.R did not base his decision on other impugned grounds. I have thus decided not to reproduce those extraneous grounds herein.

This court (Ajiji, J.) agreed with the learned D.R. and noted that, the applicant had even filed a reply to the WSD, and parties proceeded to lodge scheduling memorandum. Court reasoned, the fact that the Applicant had not been served with WSD, did not prejudice the Applicant (as Plaintiff) since he even replied to it. Thus, the Applicant's pursuit of the application

was designed to evade the determination of the suit on merit by opting for quick way of securing an ex parte judgment. Court held the conduct of the Applicant to be unbecoming, noting, such techniques not only waste court's time but erodes the quality of legal professionalism. Court concluded that, the Applicant's refusal to acknowledge service of the WSD when directed by the D.R, sums up the Applicant's conduct. Court dismissed the Appeal against the decision of the learned D.R, with costs.

It is perhaps necessary to state the factual matrix on which the dispute in the head suit is predicated. Although not attached to the present Motion, the Plaint and the WSD, which I have perused, show that, the Applicant was contracted by the 1st Defendant/ 1st Respondent in the year 2012 to construct four new class room blocks, one multipurpose science block and five stance latrines (hereafter, 'facilities') at a consideration of Ugx 312, 655,300. It was a World Bank funded project. It is apparent that disagreements arose between the parties at some point in the contract implementation, resulting in the non-payment of some amounts which would have been due to the Applicant, hence the suit. The Respondents allege defects in the projects as the reasons for non-payment of the amounts demanded by the Applicant, and avers that the Applicant breached the contract.

Thus in the present Application, the Applicant claims that this court (Ajiji, J.) made errors in dismissing the appeal against the decision and order of the learned D.R. I have, however, seen no specific error pleaded, but in his oral address, the M.D of the Applicant argued that, an error was committed when this court failed to rule on an objection that the Applicant had made regarding the Respondents' affidavit in reply. It was a reply to the Motion in which the decision of the D.R was being challenged. The objection was thus that, the Respondents' affidavit was not served on the Applicant. So, the Applicant argued, this court failed to rule on the objection and court should have struck out the said affidavit. According to the Applicant, this was the first error apparent on the face of the record. The Applicant alleges, the second error was committed when this court (Ajiji, J.) did not order for service of the Respondent's affidavit in reply on the Applicant.

In his response, Mr. Amuru Shaffi, the learned Senior State Attorney who appeared for both Respondents, opposed the application for review. He argued that this court conclusively dealt with the gist of the complaint against the decision of the D.R, and resolved all points raised. The learned State counsel prayed that the Application be dismissed with costs.

Determination

The pivotal issues are whether there is a ground for review of the order of this court dated 20 October, 2022? And remedies available to the parties.

The instant Application for review is anchored on Sections 82 and 98 of the Civil Procedure Act (CPA), and Order 46 rules 1, 2, 4 and 8 of the Civil Procedure Rules (CPR). The Applicant also seeks for costs of the Application.

Simply stated, review according to Blacks Law Dictionary, 9th Ed. page 1434 means consideration, inspection, or reexamination of a subject or thing. Review thus connotes a judicial reexamination of the case in order to rectify or correct grave and palpable errors committed by court in order to prevent a gross miscarriage of justice. See: ***John Imaniraguha Vs. Uganda Revenue Authority, Misc. Application No. 2770 of 2023***.

Section 82 of the CPA which has been invoked by the Applicant confers an unfettered right to apply for review. This was the view of the Court of Appeal of Kenya expressed in the case of ***Kimita & another Vs. Wakibiru [1967-1985] 1 E.A 229***, while interpreting the equivalent of the provision of our section 82 of the CPA. Thus a person applying for review under section 82 CPA and Order 46 CPR must be a person who is aggrieved by a decree or order of the High Court. The Order reviewable is that of a Judge and that of a Registrar, Deputy or Assistant Registrar of the High Court. The order or decree sought to be reviewed may thus be that from which an appeal is allowed by the CPA but where the person aggrieved has opted

not to exercise the right of appeal. It may also be a decree or order from which an appeal is not allowed by the CPA, for example, consent decree/order, which is not appealable under section 67 (2) of the CPA. I should observe that, under the provision of Order 46 rule 1 (1) of the CPR, an applicant for review must satisfy one of the three conditions, namely, discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his or her knowledge; mistake or error apparent on the face of the record; or any other sufficient reason which must be analogous to the first two conditions above.

I wish to also state that it is only the High Court which enjoys review powers under section 82 of the CPA and Order 46 of the CPR, pursuant to rules 4 and 5. The Judge thus also enjoys the powers to review the order of a Registrar High Court of whatever designation. The Registrar does not have powers to review its orders as the power is exclusively reposed in the Judge. The special auxiliary powers of the Registrar High Court have been prescribed in Order 50 of the CPR and is circumscribed. Those powers do not extend to review of its orders. This matter was extensively discussed by the Supreme Court of Uganda in the oft cited case of ***Attorney General and Uganda Land Commission Vs. James Mark Kamoga and James Kemala, Civil Appeal No. 8 of 2004 (SCU).***

For the purposes of section 82 of the CPA and Order 46 rule 1 (1) of the CPR, an "aggrieved person" means a person who has suffered a legal grievance. This was the interpretation taken in ***Re Nakivubo Chemist (1979) HCB 12***. Further still, in the persuasive decision of ***Ex Parte Side Bothan (1880) 14 Ch. D 458 at page 465***, Lord Justice James had this to say on the matter;

"the words 'person aggrieved' do not really mean a man who is disappointed by a benefit which he might have received if no other order had been made: a person aggrieved must be a man (and of course a woman) who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongly deprived him of something or wrongly affected his title." (Additions are mine to be gender sensitive).

The views of James L.J was followed in ***Re Nakivubo Chemist (1979) HCB 12*** *(supra)*. See also the case of ***Mohammad Alibhai Vs. W.E Bukenya Mukasa & Others, SCCA No. 56 of 1996***; where the Supreme Court of Uganda (per Odoki, JSC, as he then was) held that, a person considers himself aggrieved when he has suffered a legal grievance.

The grounds for review canvassed by the Applicant, as noted, is an alleged error apparent on the face of the record. I have noted that, the Applicant

slotted additional ground of illegality, as a stand-alone ground in her motion. The Applicant thus averred that this court *"sanctioned an illegality brought to his attention"*. However, the details of the alleged illegality are not given. I am thus tempted to think that the Applicant is basing on the same arguments fronted to support the alleged apparent errors, to support the illegality averment. In other words, the Applicant impugns the failure of this court (Ajiji, J.) to strike out the Respondents' affidavit in reply. She also attacks the failure of this court to rule on the issue of non-service of the affidavit in reply. And lastly, the alleged failure of court to order for service of the Respondents' affidavit in reply on the Applicant.

Having principally based her claim on the alleged errors, I seek to explain the term *'error apparent on the face of the record'*. I should first of all state that, an error apparent on the face of the record is one of the three known grounds for review as noted, under Order 46 of the CPR. The learned editors of Mulla on the Code of Civil Procedure Act V of 1908 16th Ed., are quite authoritative on the matter. They have interpreted the provisions of the Indian Code of Civil Procedure on which the Ugandan CPR is substantially modelled. They opine that, an error apparent on the face of the record must not be that which has to be searched. It must be an error of inadvertence. It should not require any long-drawn process of reasoning on matters where there may conceivably be two points. The error must be obvious and self-evident, and should 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. Thus, an error apparent on the face of the record is one which is based on clear ignorance or disregard of the provisions of the law. It is a patent error and not a mere wrong decision. Conclusions arrived at on appreciation of the evidence cannot, therefore, be classified as 'error apparent on the face of the record'.

Courts in East Africa have recognized that it is not, however, possible to define the term *'error apparent on the face of the record'* precisely or exhaustively as there is an element of indefiniteness inherent in its nature. Thus, error apparent on the face of the record must be left to be determined judicially and on the facts of each case. See: ***Nyamogo & Nyamogo & Co. Advocates Vs. Kago [2001] 2 EA 173***.

Therefore, 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 have been made out. However, as noted, 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. Therefore,

a wrong view is no basis for review although it may be a ground for an appeal.

In the instant case, having perused the record, the Applicant has totally failed to point out any errors in the orders of this court. Rather, the purported claim that, by this court failing to rule on the objections an error apparent on the face of the record was made and, therefore, a matter for review, with respect, is a serious misunderstanding and misapplication of the law of review of orders/ decrees of this court. In my opinion, what this court (Ajiji, J.,) considered in its rendition, was an appraisal of the decision of the learned D.R, with which he agreed. This court did not purport to consider the Respondents' impugned Affidavit in reply. This is evident because court was silent on it and nowhere adverted to it. I think the affidavit in reply to Applicant's Motion in the Appeal (against the decision of the D.R) was not necessary for the appeal determination. This court only restricted itself to the record that had been taken before the D.R and considered submissions of the parties to the appeal, and rendered its decision. The Applicant cannot, in the circumstances, be heard to lament that, this court did not reject the Respondent's replying affidavit when court never relied on it in the first place. I think the views of the learned Senior State Attorney, to the effect that, the Applicant has a penchant for saddling court with numerous frivolous applications instead of focusing on, and pursuing the head suit for determination on merit, is sound. I

should add that, short circuiting the process of court, as the Applicant sought by his Motion before the learned D.R, and in the appeal before Ajiji, J., more over without clear legal basis, should not be countenanced by a court of justice. In the present action, nowhere does the Applicant purport to move this court to review any error in its order. Thus a purported challenge to the process leading to the order of this court, in the circumstances, would be a matter for appeal, if at all, and not for review. Thus, the claim that, simply because this court did not rule on the issue of non-service of a replying affidavit on the Applicant, then an error apparent on the face of the record was committed, does not in the least sway me as a clear matter for review. An application for review should not be a disguised appeal, even if matters that are appealable can be reviewed. The power of review must be exercised with great circumspection lest court ends up sitting in appeal against itself.

All in all, I find that the Applicant has not proved the grounds pleaded and this application ought to fail which I accordingly dismiss with costs.

Delivered, dated and signed in court this 19th March, 2024.

19/03/2024

George Okello
JUDGE

Ruling read in Open Court

19th March, 2024

Attendance

Ms. Prossy Akello, holding brief for Mr. Amuru Shaffi, Counsel for the Attorney General and the 1st Respondent.

Mr. Nyeko Wilfred, Managing Director of the Applicant, in court.

No representatives of the Respondents in court.

Mr. Ochan Stephen, Court clerk

19/03/2024

George Okello

JUDGE