THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

MISC. APPLICATION NO. 105 OF 2023

(ARISING FROM CIVIL SUIT NO. 0030 OF 2019)

1. **ALLAN KAHUMUZA NYAKAANA**

(Admin. of the Estate of the late Laban MukiidiAbookiNyakaana)

2. **GRACE NYAKAANA**
3. **DAVID NYAKAANA**
4. **JENNIFER NYAKAANA**
5. **OBRA MUGISA NYAKAANA :::::::::::::::::::::::: APPLICANTS**

VERSUS

1. **ANNE MARY NYAKATO**

(Admin. of the Estate of the late Laban Mukiidi Abooki Nyakaana)

2. **FRANK RUSA NYAKAANA**
3. **ERNEST NYAKAANA :::::::::::::::::::::::::::::: RESPONDENTS**

BEFORE: HON. JUSTICE VINCENT WAGONA

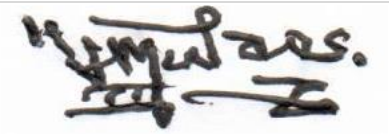
RULING

This ruling follows an application under Section 98 of the Civil Procedure Act, Order 9 rules 17 & 23, Order 52 rule 1 & 3 of the Civil Procedure Rules seeking orders that:

1. **The orders of this honorable court dated 25th September 2023 dismissing Civil Suit No. 030 of 2019 be reviewed and set aside.**
2. **That Civil Suit No. 030 of 2019 be re-instated**
3. **That the costs of taking out the application be provided for.**

The application is supported by the affidavit of Mr. Allan Kahumuza Nyakaana, the first applicant who deposed as follows:

1. That the applicants filed Civil Suit No. 030 of 2019 seeking revocation of the letters of administration granted over the estate of the late Mukiidi Abooki Nyakaana.
2. That before the suit was heard and concluded the applicants instituted an application for citation order which was granted on 5th September 2019 compelling the Respondents to bring letters of Administration of the said estate. That the order was served upon the Respondent who disobeyed the same.
3. That on 24th February 2020, the applicants filed Misc. Application No. 23 of 2020 for contempt of orders of court against the Respondents. That on the 25th day of September 2023 when the Civil Suit No. 030 of 2019 was dismissed there was a pending application No. 23 of 2020 before Justice Vincent Mugabo whose ruling was delivered on 23rd October 2023.
4. That the main suit could not be heard before the determination of Misc. Application No. 23 of 2020 which was pending before the judge. That by court dismissing this suit while there was a pending application is an error apparent on the face of the record which qualifies this application for review.



The application was opposed by the respondents where the 3rd Respondent deponed an affidavit and stated as follows:

1. That the applicants filed Civil Suit No. 030 of 2019 where summons for directions were not taken out and there was no action to commence hearing of the suit.
2. That a citation order was issued in Administration Cause No. 060 of 2019 and the 2nd and 3rd Respondents were not parties to the same. That the pending Misc. Application No. 30 of 2019 could not prevent the applicants from prosecuting Civil Suit No. 30 of 2019.
3. That the dismissal of Civil Suit No. 30 of 2019 was justified and there is no error or mistake apparent on the face of the record. That the applicant's continued litigation has delayed the distribution of the estate of the late Laban Mukidi Abooki Nyakaana to the prejudice of all the beneficiaries who are all adults.
4. That the application for review is incompetent, unfounded and thus ought to be rejected with costs.

Issues:

The following issues were framed for determination of this application thus;

1. **Whether the applicant has sufficient grounds for review.**
2. **Whether there is sufficient cause shown by the applicants to warrant re-instatement of Civil Suit No. 30 of 2019.**

Representation and hearing:

Mr. Mugabi Geofrey Kireru of M/s Acellam Collins & Co. Advocates appeared for the applicants while ***Mr. Bwiruka Richard*** of M/s Kaahwa, Kafuuzi, Bwiruka & Co. Advocates appeared for the Respondents. Both counsel filed written submissions which I have duly considered herein.

Resolution:

Issue No. 1*: Whether the applicant has sufficient grounds for review.*

Section 82 of the Civil Procedure Act Cap. 71 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 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 and 2 of the Civil Procedure Rules S.I 71 also provides that:

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.

Section 82 and Order 46 rule 1 limits the locus standi for purposes of review to a person aggrieved by a decision of Court. In ***Re Nakivubo Chemists (U) Ltd [1979] HCB 12*** court guided that an aggrieved party for purpose of review is one who has suffered a legal grievance. Justice Karokora JSC (as he then was) in ***Muhammed Bukenya Allibai Vs. W.E Bukenya & Anor, SCCA No. 56 of 1996*** defined an aggrieved party as a party who has been deprived of his property or whose right has been affected by the impugned judgment.

The grounds for review are provided for under Order 46 of the Civil Procedure Rules which are: (a) discovery of new and important evidence which could not be produced during trial; (b) That there is some mistake or error apparent on the face of the record; (c) any sufficient cause.

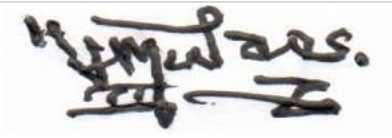
The applicant contends that there is a mistake apparent on the face of the record which needs to be reviewed and corrected. In **Levi Outa v Uganda Transport Company [1995] HCB 340,** Court noted thus ***"the expression 'mistake or error apparent on the face of the record' refers to an evident error which does not require extraneous matter to show its incorrectness. It is an error so manifest and clear that no court would permit such an error to remain on the***

record. It may be an error of law, but law must be definite and capable of ascertainment."

In **Mr. Satis Kumar v Chief Secretary, RA No. 51 of 2013**, court thus: ***"The term 'mistake or error apparent' by its very connotation signifies an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation either of facts or the legal position. If the error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be an error apparent on the face of the record for purposes of Order 47 Rule 1 CPC or Section 22(3)(f) of the Act. To put it differently an order or decision or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the Court/Tribunal on a point of law or fact."***

A mistake or error apparent on the face of the record must be glaring on the face of the court record. It should not require an extensive evaluation of the law and the evidence in order to find and see it. It should not be about the legality or validity of the judgment or decision of court in relation to the laws applicable on the merits. Its resolution should not result in the court sitting as an appellate court to examine the legality and correctness of its own decision, which is a preserve of the appellate court. (See: ***Bamugaya Deo v Peter Tinkasimire&Anor, HCM No. 90 of 2018***).

Learned counsel for the applicant contended that court dismissed Civil Suit No. 30 of 2019 when there was a pending application No. 23 of 202o before Hon. Justice Vincent Emmy Mugabo; that this was an error apparent on the face of the record which needs to be cured by review. In response Mr. Bwiruka for the



Respondent contended that there was no error apparent on the face of the record since the applicants had not taken any efforts to have the suit progressed. That the suit was dismissed under order 9 rule 17 of the Civil Procedure Rules thus the relief for the applicant fell under Order 9 rule 18 by filing a fresh suit. That whereas there was a pending application before justice Mugabo, this did not stop the applicants from attending court when the suit was called for hearing and as such court rightly dismissed the same.

The error apparent on the face of the record has to be found in the record of Civil Suit No. 30 of 2019. In the present case, I have failed to see any error or mistake apparent on the face of the record of Civil Suit No. 30 of 2019. What the applicant alleges is that the dismissal was made when Misc. Application No. 23 of 2020 for contempt was pending and thus was erroneous does not at law constitute an error apparent on the face of the record. It requires this court to examine the legality of its decision vis-à-vis the facts on record against Misc. Application No. 23 of 2020 and its effect on the legality of the decision dismissing Civil Suit No. 030 of 2019. Further, the law provides for an elaborate procedure to an aggrieved party in the event a suit is dismissed under Order 9 rule 17 of the CPR. The remedy is to apply to have the same set aside under Order 9 rule 18 of the CPR. I therefore agree with Mr. Bwiruka for the Respondents that review does not arise in the circumstances of this case. I thus resolve this issue in the negative.

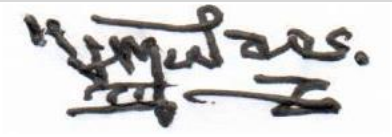
Issue No. 2: ***Whether there is sufficient cause shown by the applicants to warrant re-instatement of civil suit no. 30 of 2019.***

The test for reinstatement under Order 9 rule 18 is proof of sufficient cause that prevented the plaintiff from entering appearance when the suit was called for hearing. In ***Hadondi Daniel vs Yolam Egondi, Court of Appeal Civil Appeal No 67 of 2003*** the term sufficient cause was described thus: ***"…Sufficient cause must relate to the inability or failure to take necessary steps within the prescribed time."***

In ***The Registered Trustees of the Archdiocese of Dar es Salaam v The Chairman Bunju Village Government & Others quoted in Gideon Mosa Onchwati vs Kenya Oil Co. Ltd & Another [2017] eKLR*** it was stated that: "*It is difficult to attempt to define the meaning of the words 'sufficient cause'. It is generally accepted however, that the words should receive a liberal construction in order to advance substantial justice, when no negligence, or inaction or want of bona fides, is imputed to the appellant."*

Further to the above, the Supreme Court in ***Kansiime K. Andrew v Himalaya 5 Traders Ltd & 5 others, Supreme Court Civil Application No. 60 of 2021***, adopted the dicta in ***Supreme Court of India in Parimal versus Veena alias Bhart lz01-1-l 3 SCC 34S*** where it was observed thus: ***"….. In this context sufficient cause means a party had not acted in a negligent manner or there was want of bona-fide on its part in view of the facts and the circumstances of each case..."***

Therefore, sufficient cause connote any legally justifiable excuse presented by a party that prevented him or her from doing an act mandated by the law in a given period of time as long as such excuse or conduct was not negligent or a party has not taken steps to take the act without undue delay and the omission

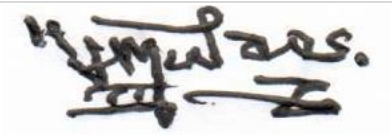


was an innocent one. (See: ***Alisen Foundation Group of Companies Ltd v Bazara Julius, HCMA No. 0054 of 2023***).

The case law appears to leave the meaning of "sufficient cause" to judicial discretion and determination based on the facts, surrounding circumstances and the merits of each particular case and to ensure the ends of justice. The conduct of the parties, for example, whether or not, a party has been grossly negligent, careless, reckless or palpably indifferent in prosecuting the case, would be a consideration. A delay that is beyond the full control of the party or due to occurrence of facts that could not be contemplated by the party, should favour an extension of time in appropriate cases. (See ***Kyegegwa District Local Government v Aharikundira Margaret, HCMA No. 25 of 2022).***

In ***Tiberio Okeny & Anor V The Attorney General and 2 5 ors CA 51 of 2001 Twinomujuni JA (RIP)*** gave the broad contours within which the discretion is to be exercised where he observed thus:

> **"(a)** ***First and foremost, the application must show sufficient reason related to the liability or failure to take some particular step within the prescribed time. The general requirement notwithstanding each case must be decided on facts.***
>
> ***(b) The administration of justice normally requires that substance of all disputes should be investigated and decided on the merits and that error and lapses should not necessarily debar a litigant from pursuit of his rights.***



(c) Whilst mistakes of counsel sometimes may amount to sufficient reason this is only if they amount to an error of judgment but not inordinate delay or negligence to observe or ascertain plain requirements of the law.

(d) Unless the Appellant was guilty dilatory conduct in the instructions of his lawyer, errors or omission on the part of counsel should not be visited on the litigant. Where an Applicant instructed a lawyer in time, his rights should not be blocked on the grounds of his lawyer's negligence or omission to comply with the requirements of the law …"

The Hon. Justice Twinomujuni further held that ***"it is only after "sufficient reason"*** has been advanced that a court considers, before exercising its discretion whether or not to grant extension, the question of prejudice, or the possibility of success and such other factors …".

The sufficient cause advanced for the applicants is that the applicants were pursing an application for contempt before His Lordship Justice Vincent Mugabo whose ruling was delivered on 23rd October 2023 when the main suit had been long dismissed on 25th September 2023. Mr. Bwiruka on the hand insisted that the pending application for contempt did not in any way prevent them from prosecuting the suit.

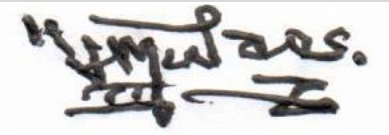
In the present application, the main suit in this case was dismissed under Order 9 rule 17 for none attendance of the parties when the suit was called for hearing. Rule 18 of the same order permits court to re-admit the suit if the plaintiff

satisfies court that there is sufficient cause to account for his or her none attendance when the suit was called for hearing. Rule 18 provides thus;

> ***Where a suit is dismissed under rule 16 or 17 of this Order, the plaintiff may, subject to the law of limitation, bring a fresh suit or he or she may apply for an order to set the dismissal aside; and if he or she satisfies the court that there was sufficient cause for his or her not paying the court fee and charges, if any, required within the time fixed before the issue of the summons or for his or her nonappearance, as the case may be, the court shall make an order setting aside the dismissal and shall appoint a day for proceeding with the suit***

The applicants indicated that the reasons they did not appear when the suit was called for hearing was because they were still following up on the application for contempt. Whereas this could be true, the applicants did not make any effort to communicate to court about the pending proceedings for contempt when the suit was called for hearing. Further, the pending application did not bar the applicants from progressing Civil Suit No. 30 of 2020. However that being the case, I am alive to the position that audience of court cannot be sought unless parties have purged themselves of contempt. This was emphasized in ***Comform Uganda Limited v Megha Industries (U) Ltd***, ***HCMA No.1084 OF 2014,*** where ***Justice FlaviaSenogaAnglin (as he then was)*** Observed thus;

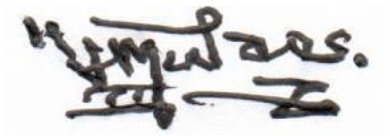
> ***"This court therefore finds that, the Applicants cannot have courts discretion exercised in their favor before they have purged themselves of contempt…To hold otherwise would be encouraging impunity by litigants who find court orders unpleasant and decide to disobey them."***



In this case there were pending contempt proceedings which were not brought to the attention of court while dismissing Civil Suit No. 30 of 2019. The Respondents could not be granted audience unless they had purged themselves of the contempt. I find it fair that the main suit is reinstated and heard on the merits. I have not found any prejudice that the Respondents shall suffer in the event this application is allowed. This application therefore succeeds with the following orders:

1. **That the order dismissing civil suit no. 030 of 2019 is hereby set aside.**
2. **That Civil Suit No. 030 of 2019 is hereby reinstated and shall be heard on the merits interparty.**
3. **Both parties are directed to generate and file a joint scheduling memorandum and witness statements within two weeks from the date of delivery of this ruling.**
4. **The case is fixed for mention on 19.04.2024.**
5. **The costs of this application are awarded to the respondents.**

I so order.



Vincent Wagona

High Court Judge

Fort-portal

DATE: 22/03/2024