THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

HOLDEN AT GULU

HCT-02-CV-MA-0068/2015

OLULA GEOFFREY & 31 OTHERS ::::::::::::::::::::::::APPLICANTS

VERSUS

ATTORNEY GENERAL::RESPONDENT

RULING OF HON. LADY JUSTICE MARGARET MUTONYI J.

This ruling is in respect of an application brought by way of Notice of Motion under S. 82 of the Civil Procedure Act, O.46 r (1) (2) 4 and 6 and Order 52 r(1)(2)(3) of the Civil Procedure Rules.

The applicants are seeking orders that this honourable be pleased to cause a review and set aside the judgment and orders granted by His Lordship John Eudes Keitirima, Judge of the High Court Gulu in Miscellaneous Application No. 19/2014 dated 30/4/2014 and that costs of the application be provided for.

The grounds upon which this Application is based are contained in the affidavit of Odwong Wod ayo and Acan Florence the 27th and 3rd Applicants respectively but briefly are that (a) there is a new and important matter of evidence discovered subsequent to the decree/order which could not be availed to court at the time the decree was passed.

(b) That there is an error or mistake apparent on the face of the record.

(C) If the order of the Judge is not reviewed and set aside urgently a lot of hardship, injustice and irreparable damage shall be occasioned to the Applicants.

(d) It is fair and just that this honourable court reviews the orders of the High Court Judge in the circumstances.

One Odwong Wod Ayo in his affidavit dated 4/6/2015 deponed in part as follows:

Paragraph 4 “That the trial Judge in his Judgment dismissed the application on the basis of that preliminary objection and this has caused me and my other co-Applicants a miscarriage of Justice.

Paragraph 3 “That I was informed by my advocates that the judgment of the court was wholly on the submissions on the preliminary important matter of evidence discovered subsequent to the decree/order which could not be availed at the time the decree was passed and on error or mistake apparent on the face of record respectively.

Paragraph 7: That if the Application is not heard I and my other co-Applicants shall suffer irreparable damage as the same will amount to locking me and my other applicants out of the case.

Paragraph 8: That I swear this affidavit in support of the Application for Review and an order of setting aside the Decree in objections raised by the respondent and one of which was on a point of law on defective affidavit with no annexture.

Paragraph 5: That the trial Judge acted in error when he dismissed the Application on the preliminary objections raised by the Respondent.

Paragraph 6: That I was advised by my lawyers which advice I verily believe to be true that it was necessary to go by way of review in the matter in that the supporting a affidavit at all because the annextures were serially marked and explained and this amounts to a new and civil Miscellaneous Application No.19/2014.

The affidavit of Acan Florence is more or less in similar terms.

4. In reply to the Notice of Motion and the affidavits in support, Christopher Alinaitwe of Ministry of Justice and Constitutional Affairs. Attorney General's Chambers Gulu Office deponed among others (4) that the Applicant's application for Review is misconceived, bad in law and an abuse of court process and the

respondent shall raise a preliminary objection to that effect at the earliest opportunity available.

Paragraph 5: That it is not true as deponed by the deponents that their application was dismissed by the learned Judge only on a point of law on defective Affidavit with no annexture.

Paragraph 6: That the learned Judge also considered other preliminary objections raised by the respondent before the applicant's application was dismissed with costs to the respondent.

Under Paragraph 8 he deponed that the applicant's affidavits were properly rejected for being incurably defective and that there is no new important matter of evidence discovered subsequent to the decree/order and there is no error or mistake apparent on the face of record.

5. The Applicants Counsel's law firm Odongo & Co. Advocates filed written submissions in support of the application. The Respondent did not file a Reply to the written submissions. I also discovered that there was confusion of the applications by counsel for the applicant filed written applications where he addressed to "**Your Lordship"** in reply to the preliminary points of law and yet the caption was miscellaneous application No.75/2015.

In the instant application apart from raising it in the affidavit in reply, the respondent did not point out the preliminary points of law he intended to raise. The above notwithstanding, Counsel for the Applicant in his written submissions stated " This is an application for review and setting aside the judgment and orders granted by His Lordship John Eudes Keitirima, the then Judge of the High Court in Gulu in MA No.019/2014 dated 30/4/2014 and costs of the Application. He went on to submit on page 3 that " According to the affidavit of Odwong Wod Ayo he averred that the whole affidavit was dismissed on a point of law that the affidavit was dismissed on a point of that the affidavit had no annextures and hence defective as per paragraph 3 of his affidavit in support. He stated in paragraph 6 of his affidavit that the affidavit they had filed in court had all the annextures serially marked, attached and explained **but it was ignored by the presiding Judge**. He further buttressed that this amounts to discovery of new and important matter of evidence and an error of mistake apparent on the record".

He went on to state that " He's our submission that since the Applicants had annexed all the documents referred to their affidavit, **the trial Judge made a mistake that is apparent on the record to dismiss the application on flimsy grounds.**

The discovery of the new evidence that the said affidavits had all the attachments clearly amplifies the need to review the Judgment and set aside the same"

He went on the submit that "The **Judge also referred to the notion of Legal severance but failed to apply the same as** required by law as per pages 13 and 14 of his judgment. This is a mistake of law that is apparent on the record.

The Supreme Court in the land mark case of **Col. Dr. Kiiza Besigye vs Museveni and Anor Election Petition No. 1 of 2001** developed the notion of severance of affidavits. Uganda being a common law Country, the Application of the doctrine of precedence is not strange to our legal Jurisprudence. Under the Principle of stare decisis, previous decisions of courts are to be followed and decisions of higher courts binds lower courts. **Your Lordship the trial Judge in refusing to follow the dicta of the Supreme Court in Col. Dr. Kizza Besigye Supra without any justification clearly offended the principle of law envisaged by the Superior Court of record.**

We therefore submit that this application should be allowed and the judgment and orders of the trial judge in MA.019/2014 be reviewed and set aside. This would ensure that justice is achieved" I rarely reproduce submissions in my rulings and judgments but put them under consideration. This case however presents a unique situation.

6. The issue for courts determination is whether this application is properly before court. In view of counsel's submissions and that facts of the case.

My brother Hon. Justice John Eudes Keitirima heard the application MA.019/2014 and delivered his judgment on 30/4/2015. He dismissed the application for judicial Review and application for a temporary injunction with costs of the Respondents.

This was after detailed/criminal analysis and evaluation of the preliminary objections raised by the Respondent where both Counsel vehemently submitted there on.

The application is brought under 0.46 of the Civil Procedure Rules. O.46 r (1) provides

" Any person considering himself or herself aggrieved by (a) 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/her knowledge or could not be produced by him or her at the time when the decree was passed or the order was made or on account of some mistake or error apparent on the face of the record of for any other sufficient reason desires to obtain a review of the decree passed or order make against him or her may apply for a review of judgment to the court which passed the decree or made the order"

From the above rule, for one to qualify to apply for a review one has to satisfy the following ingredients or one of them.

1. There must be discovery of new and important matter of evidence which was not within the knowledge of the Applicant or within his/her reach at the time of decree
2. There must be a mistake or a parent error on the face of the record. The error must be glaring.
3. Sufficient cause arising out of (1 and 2) above.

O.46 (2) of the CPR provides that

" An application for review of a decree or order of a court upon some ground other than the discovery of the new and important matter or evidence as referred to in rule 1 of this order or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree shall be made only to the Judge who passed the decree or made the order sought to be reviewed.

The Application for review in otherwise should be heard by the same judge who made the order unless the ground for review is based on discovery of new evidence and or important matter or clerical or mathematical error or mistake.

In the instant case, the applicants through their Counsel submitted there was new evidence and at the same time stated the evidence was on record. They claimed the documents that were supposed to be attached to the affidavits were on record but the Judge ignored them. There is therefore no proof of new discovery of new and important evidence as much. Their

grievance is that the judge ignored their evidence on record; which is an issue of failure to evaluate the evidence.

The applicants through their lawyer further criticized the judge for referring to the notion of legal severance but failed to apply the same as required by law as per pages 13 and 14 of his judgment. That this was a mistake of law that was apparent on the record.

With due respect to Counsel for the Applicants, the issues raised cannot be handled or resolved under review.

This court has no jurisdiction to re evaluate the judgment of my brother judge to see whether he ignored same evidence or record or that he made a mistake or failed to apply the law or follow a precedent.

It was held in the case of **F.X Mubuuke v UEB HCMA No.98/2005** unreported " ***That for a review to succeed on the basis of error on the face of the record, the error must be so manifest and clear that no court would permit such an error to remain o the record. A wrong application of the law or failure to apply the appropriate law is not an error on the face of the record"***

The learned counsel for the applicant has erroneously treated the exercise of the trial judge's discretion and interpretation of the law as an error or mistake.

I have had the opportunity to read through his judgment. He exhaustively evaluated the evidence before him and addressed all the preliminary objections raised by the respondents counsel and replied to by the Applicant's counsel. He considered all the case law cited by both counsel. In my opinion, the Applicants are just not agreeable with his decision. Even if I disagree with him of which I am not, I cannot overturn his decision and set it aside. I would be assuming the jurisdiction of an appellate court.

Counsel submitted that the trial judge made a mistake by dismissing the application on flimsy grounds.

The grounds for review by the same court are very clear. They have nothing to do with poor evaluation of evidence or erroneous interpretation of the law one cannot apply for review to the court which passed the decree or order simply because one is not satisfied with the decision. The grounds must be within the ambit of O.46 r(1) (2) of the CPRs to wit (a) the discovery of new evidence of important matter, (b) some apparent mistake or error on the face of the record (c) any other sufficient reason.

I am afraid, the Applicants failed completely to bring out evidence of the above ingredients/grounds for review to enable this court exercise the power of review.

I concur with the averments of the learned State Attorney from the Attorney General's chambers that the application is misconceived, bad in law and an abuse of court process.

The applicants should have appealed against the dismissal order of their application if the felt that the trial judge dismissed it on flimsy grounds and failed to evaluate the evidence on record.

It is not a question of using words like discovery of new and important evidence or error or mistake apparent on the record. The applicant must prove there is new evidence that was not within their knowledge or reach and the error or mistake must be pointed out clearly to the trial court or judge.

In the result, the application is dismissed with costs to the Respondent.

.....

Margaret Mutonyi

Resident Judge

19/5/2016

24/6/2016

Ruling delivered in the presence of the applicants.

The Respondnet absent

Agnes – Court clerk.

.....

Henry Twinomuhezi

Assistant Registrar

24/6/2016