

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
MISCELLANEOUS CIVIL APPLICATION No. 0011 OF 2016
(Arising out of Arua High Court Civil Appeal No. 0029 of 2011 and Arua Chief
Magistrate’s Court Civil Suit No. 0005 of 2002)

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| 1. IGGA ANYI GODFREY | } | |
| 2. ANDIA CISARIA | } | |
| 3. JUITA KOLIRA | } | |
| 4. TETCI ALISI | } | |
| 5. EDA DOMNIC ALISI | } | |
| 6. MOLOMA PHILLIP | } | |
| 7. CEZIRA IKU | } | |
| 8. MARGARET EDEA | } | APPLICANTS |
| 9. ISSA LUCY TANGA | } | |
| 10. ISURIRI WILLIAM | } | |
| 11. DRAPAKO ALI | } | |
| 12. IPE VALENTINE | } | |
| 13. JURUGO TOM | } | |
| 14. ISSA RAYMOND | } | |
| 15. OLUKO CHANDIGA | } | |

VERSUS

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| 1. THE REGISTERED TRUSTEES OF | } | |
| PENTECOSTAL ASSEMBLIES OF GOD | } | |
| 2. MOYO TOWN COUNCIL | } | RESPONDENTS |

Before: Hon Justice Stephen Mubiru.

RULING

This is an application for review of a decision of this court. It is made by way of notice of motion under the provisions of section 82 and 98 of *The Civil Procedure Act*, and Order 46 rules 1 and 8 of *The Civil Procedure Rules*. The background to it is that judgment was entered in favour of the applicants by the trial magistrate. The respondent appealed the decision to this court which on 2nd October 2015 delivered its judgment setting aside the judgment of the trial court and directed a retrial before another magistrate of competent jurisdiction. It however in the meantime issued a

permanent injunction restraining the appellants from entering on and carrying out any activities on the land in dispute.

It is contended by counsel for the applicants Mr. Samuel Ondoma that the issuance of a permanent injunction alongside the order of a retrial is a mistake apparent on the face of the record since it substantially affects the matter to be retried in that it fetters the ability of the trial court to make a decision that is inconsistent with the order, yet the trial court cannot set aside the permanent injunction, being an order issued by a superior court. The order therefore is likely to affect the fairness of the retrial. Counsel for the first respondent, Mr. Madira Jimmy opposed the application on grounds that there is no ambiguity in the order and therefore it does not constitute a mistake apparent on the face of the record. The injunction must be interpreted as restraining the applicants from alienating the land in dispute pending the retrial. In the alternative, if the order is reviewed, the first respondent should not be condemned in costs since the error was committed by court. Counsel for the second respondent, the learned State Attorney Ms. Mudoola Diana too opposed the application and advanced the argument that the injunction was meant to preserve the status quo pending the retrial. In any case, the affidavit in support is defective since it contains matters deposed on basis of information without disclosing the source of the information. She too prayed in the alternative that if the order is reviewed, the first respondent should not be condemned in costs since the error was committed by court.

I note that the order sought to be reviewed was made by my brother Judge, Hon. Justice Vincent Okwanga. In *Outa Levi v. Uganda Transport Corporation [1975] H.C.B 353*, it was held that an application for review of a decree or order ought to be made to the judge who made it, except where that judge is no longer member of the bench in which case review could be by another judge. However, that is not the only situation in which an order may be reviewed by a Judge other than the one who made the order. This being an application for review placed before a Judge who did not deliver the decision sought to be reviewed, the jurisdiction to grant the orders sought is derived from Order 46 rule 2 of *The Civil Procedure Rules* which provides as follows;

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.

In paragraphs 5 to 7 of the affidavit in support of the notice of motion seeking review of the order of this court, it is clear that the basis of the application is that the applicants have found an error apparent on the face of the record. For that reason, this is not among such applications as Order 46 r 1 restricts to only the Judge who made the order sought to be reviewed. This court has jurisdiction to review the order. The question that follows is what an error apparent on the face record means. The case of *Nyamogo and Nyamogo Advocates v. Kago* [2001] 2 EA 173 defined it thus:

An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. 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 be made out. 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. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal.

Under Order 46 rules 1 and 8 of *The Civil Procedure Rules*, a review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. That the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law is not a proper ground for review. Misconstruing a statute or other provision of law cannot be ground for review but could be a proper ground for appeal since in that case the court will have made a conscious decision on the matters in controversy and exercised his discretion in favour of the successful party in respect of a contested issue. If the court reached a wrong conclusion of law, in circumstances of that nature,

it could be a good ground for appeal but not for review otherwise the court would be sitting in appeal on its own judgment which is not permissible in law.

The error complained of in these proceedings is the grant of a permanent injunction alongside an order of retrial. A retrial is a trial of a suit *de novo*. On hearing an appeal, this court has the power to order a trial court to conduct the entire trial afresh or aspects of it. To ascertain the scope of the retrial therefore, there is need determine if a particular finding given by the judge on appeal is a final decision or not on any of the merits of the case, and if the judge on appeal, has remitted the suit for determination of all the points at issue, or, has determined some points in controversy, and remanded the suit for determination of the remaining points. In the instant case, the Judge on appeal remitted to the court below the entire suit for a fresh decision of the case according to law. All points in issue in the trial were remanded to the court below for a trial *de novo*. The learned Judge on appeal did not make any final decision on any of the points in controversy between the parties or the merits of the case.

The injunction made alongside the order of retrial therefore stands as an anomaly. It cannot be construed as a temporary injunction as argued by counsel for the first respondent in that for such an order to issue, there ought to have been a case pending before this court in its appellate jurisdiction, the respondents need to have shown a *prima facie* case, addressed the balance of convenience and also irreparable injury. None of these considerations are evident on the court record in the evaluation of evidence leading to the court's pronouncement of the order. Such orders are designed to preserve the *status quo* pending final determination of the suit then pending before the court. In any case, the order does not indicate that it is to remain in force for a specified period. It is on the face of it to remain in force in perpetuity or until it is overturned by a higher court. On the other hand, a permanent injunction is an order in finality made consequent to a determination of the merits of the case. It is in a way finally determinative of the rights of the parties in light of the controversy between them. The order therefore is inconsistent with an order of retrial in which all the matters in controversy between the parties are to be subjected to a trial *de novo*.

With a permanent injunction in place, relief was granted in favour of respondents which pre-empted the issue of the respondents' right to remain on the land, which is the essence of the retrial. The issue was unintentionally determined by the appellate court thereby fettering the trial court's ability to make a finding and pronouncement in that regard that is contrary to the injunction. This could not have been the intention of this court in issuing the injunction.

Once a direction is issued by a competent court, it has to be obeyed and implemented without any reservation. If an order passed by a court of law to not complied with or is ignored, this weakens the rule of Law. If a party against whom such order is made has a grievance, the only remedy available to such a party is to challenge the order by taking appropriate proceedings known to law. Such an order cannot be made ineffective by not complying with the directions on a specious plea that no such directions could have been issued by the court. Such argument would result in chaos and confusion and would seriously affect and impair the administration of justice.

In a similar vein, the court below cannot ignore the directions given by this Court while remitting the matter on the ground that the said directions are without jurisdiction or for that matter, a nullity. A court to which the case is remitted has to comply with the order and acting contrary to the order of retrial is contrary to law, for the order of retrial has to be followed in its true spirit. Since the court below cannot disobey the said order, I am therefore persuaded by the argument of counsel for the applicants that the order fetters the trial court's ability to arrive at a fair decision and for that matter it presents an error apparent on the face of the record.

Consequently, the order of a permanent injunction that was issued by this court on 2nd October 2015 is hereby set aside. The costs of this application shall abide the results of the re-trial.

Dated at Arua this 10th day of March 2017.

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Stephen Mubiru
Judge