

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
(LAND DIVISION)**

**MISCELLANEOUS APPLICATION NO. 901 OF 2017  
(ARISING FROM CIVIL SUIT NO. 218 OF 2017)**

**AL-SHAFI INVESTMENT GROUP LLC ::::::::::::::: APPLICANT  
VERSUS**

- 1. AHMED DARWISH DAGHER**
- 2. DARWISH AL MARAR :::::::::::::::RESPONDENTS**

**BEFORE: HON. MR. JUSTICE BASHAIJA K. ANDREW**

**R U L I N G:**

The Applicant herein brought this application under Order 46 rr.1, 2, 3 and 8 CPR seeking orders that;

**(a) *The decision of court dismissing the HCCS No. 218 of 2017 be reviewed owing to an error apparent on the face of the record.***

**(b) *The cost of the application be provided for.***

The grounds of the application are that;

- 1. *The decision of the court in the above matter contains an error of fact apparent on the face of record.***
- 2. *The said error does not require extraneous matter to show its correctness.***
- 3. *The said error is so manifest and clear that no court ought to permit it to remain on the record.***

The application is supported by the affidavit sworn by Mr. Herbert Kiggundu Mugerwa an Advocate with *M/s. Kabayiza Kavuma Mugerwa & Ali Advocates*. In the main, he states that in the judgment of this court in *HCCS No. 218 of 2017*, there is an error apparent on the face of record. That this error is in the finding of this court, at different points in the judgment, to the

effect that no evidence was adduced to prove that the defendant had been convicted in Abu Dhabi of the offence of issuing a false cheque.

Further, that this finding constitutes an error apparent on the face of record as submissions of the plaintiff in the said matter which were filed on 5/5/2017 show that judgment in respect of the criminal case in Abu Dhabi was attached in evidence.

Also, that the perusal of the criminal court judgment in Abu Dhabi would have shown this court that the defendant had been convicted of the offence of issuing a false cheque. That this error does not require any extraneous matter to show its incorrectness, and that no court ought to permit it to remain on the record.

The Respondents opposed the application and filed an affidavit in reply sworn by Mr. Peter Kabatsi SC. He stated that no error of fact is apparent on the face of record. That throughout the judgment, this court referred to a final judgment of the Abu Dhabi criminal court being absent from the pleadings and submissions, finally determining the Respondent's fate in the criminal case which as a matter of fact is/was not available.

That what was available, and what was attached to the pleadings was the judgment of the Abu Dhabi court of first instance which, there is no dispute, was subsequently stayed pending its review by a higher court in that country. That owing to the above, there is no error apparent on the face of record or an apparent misapprehension of the decision of this court.

Mr. Siraj Ali, represented the Applicant and made submissions in support of the Applicant's case. Mr. Bruce Musinguzi together with Ms. Nansukusa and Mr. Ismail Kibirige represented the Respondents and also made submissions in support of the Respondents' case. The respective submissions are on court record. I will not reproduce them in detail as I have taken them into account in arriving at a decision in this ruling.

50 **Opinion:**

Section 83 of the civil Procedure Act Cap 71 which governs applications for review of court orders/judgment provides as follows;

**“82. Review.**

***Any person considering himself or herself aggrieved—***

55 ***(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.”***

60 The provisions above are replicated in Order 46 of the Civil Procedure Rules which amplifies on the law by providing for the considerations when granting an application for review. It provides as follows;

**“1. Application for review of judgment.**

***(1) Any person considering himself or herself aggrieved—***

65 ***(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***

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**apply for a review of judgment to the court which passed the decree or made the order.** (underlined for emphasis).

75 The considerations were restated in *Re-Nakivubo Chemist (u) Ltd (1979) HCB 12*, where Manyindo J, as he then was, held that the three cases in which a review of a judgment or orders is allowed are those of;

(a) *Discovery of new and important matters of evidence previously overlooked by excusable misfortune.*

80 (b) *Some mistake apparent on the face of record.*

(c) *For any other sufficient reasons, but the expression “sufficient” should be read as meaning sufficiently analogous to (a) and (b) above.*

Of the three above, the instant application is brought under the aspect of “error apparent on the face of record”. This phrase is expounded upon in *Mulla The Code of Civil Procedure (18<sup>th</sup>*

85 *Ed.) Vol. 1 at page 1147*, as follows;

***“Where a statement appears in the judgment of a court that a particular thing happened or did not happen before it, it ought not ordinarily to be permitted to be challenged by a party unless both parties to the litigation agree that the statement is wrong, or the court itself admits that the statement is erroneous. In such***  
90 ***circumstances, the remedy available is review.”***

The learned authors (supra) further elucidated, at page 1146,(supra) that there is a clear distinction between an erroneous decision and an error apparent on the face of record. The first can be corrected by a higher forum; the latter can only be corrected by the exercise of the review jurisdiction. Only a manifest error would be a ground for review.

95 Also in the case of *Attorney General & O’rs vs. Boniface Byanyima HCMA No. 1789 of 2000*,  
the court citing *Levi Outa vs. Uganda Transport Company [1995] HCB 340*, held that the  
expression “mistake or error apparent on the face of 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  
100 be definite and capable of ascertainment.

As the above articulated principles apply to facts of the instant application, the Applicant which  
is the party aggrieved by the decision of this court, contends that this court rendered its judgment  
while laboring under a mistake that no criminal judgment of the Abu Dhabi Court exists finally  
pronouncing on the fate of the Respondent. Counsel for the Applicant submitted that in fact such  
105 judgment, in the Arabic language and its English translation, does exist and it was attached to the  
submissions of counsel for the plaintiff and to the pleadings in the main suit.

This court has had occasion to revisit the particular submissions and pleadings referred to,  
particularly the attachments thereto. At pages 76-78 of the plaintiff’s reply to the defendant’s  
point of law, it is indeed true and correct that the judgment of the criminal court of Abu Dhabi  
110 does exist and it was attached thereto as evidence. The reading of its English translation easily  
reveals that it finally and conclusively pronounced on the fate of the Respondent herein. At the  
page 78 of the paginated version of the judgment, the court after reviewing the evidence in  
accordance with the penal laws of that country concluded/held as follows;

115 ***“Based upon the above mentioned, the accused person committed an offence of  
issuance of a cheque without sufficient funds so he is convicted as per Article 212 of  
the penal procedures code and shall be punished in accordance with Article 401/1 of  
the Federal penal code.”***

Still at 78 the court stated;

***“Therefore,***

120 ***The court judges in presentia;***

***1. To imprison the accused person for a period of three years for the charge filed against him.***

***2. To oblige the accused person to pay the plaintiff an amount of AED 20100 as provisional compensation damages.”***

125 Clearly, the judgment of the criminal court in Abu Dhabi had the effect of determining the fate of the Applicant herein. I have not come across any contrary evidence of an appeal having been proffered against the conviction and sentence pronounced by the said court; or that the orders were set aside. The Respondent only had the order for compensation arising out of the criminal judgment stayed pending the pronouncement on the same by the civil court in Abu Dhabi in civil  
130 proceedings. The Court of Appeal of Abu Dhabi invariably made its findings in the civil case, which this court considered at some length in *HCCS No. 218 of 2017*.

Therefore, within the context the law pertaining to review of court orders and judgments, the finding by this court that there was no judgment of a criminal court in Abu Dhabi finally pronouncing on the fate of the Respondent was, and is an error apparent on the face of record in  
135 the judgment. The criminal court judgment indeed exists. It was attached to the submissions of counsel for the plaintiff. This error apparent on the face of record needs no extraneous matter to explain its incorrectness. It is quite glaring. It should not be permitted to remain on the record. The judgment of this court in *HCCS No. 218 of 2017* is accordingly reviewed in that regard.

The effect of the above finding is that the judgment of the Abu Dhabi Court of Appeal in the  
140 matter sustains a claim founded on a breach of law in force in Uganda. On that account, being a  
foreign judgment, it shall not be conclusive pursuant to Section 9(f) CPA which provides that;

***“9. When foreign judgment not conclusive.***

***A foreign judgment shall be conclusive as to any matter directly adjudicated, upon by it  
145 between the same parties or between parties under whom they or any of them claim,  
litigating under the same title, except—***

***(f) where it sustains a claim founded on a breach of any law in force in Uganda.”***

[Underlined for emphasis].

The reasons are quite straight forward. The Respondent issued to the Applicant a cheque drawn  
upon the Abu Dhabi Islamic Bank payable on presentation. The issue that it was postdated could  
150 not be, and would not ordinarily be discernible on the face of the cheques as far as banking  
business is concerned. In the due course the cheque was presented for payment at the said bank  
and it was dishonored due to insufficient funds in the account. The Respondent was found guilty  
of the offence of issuing a false cheque under that country’s penal laws. He was convicted and  
sentenced as shown above.

155 The Respondent filed a civil case and all through the Abu Dhabi court system up to the Court of  
Appeal, his consistent case was that he issued the cheque without intending it to be cashed, but  
only as a security deposit cheque. The Abu Dhabi Court of Appeal agreed with his claim.

Under the Uganda legal regime, specifically the Bills of Exchange Act, Section 72(1) a cheque  
defined as

160 ***“...a bill of exchange drawn on a banker payable on demand.”***

Section 2 (supra) defines a bill of exchange as follows;

165 ***(1) A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person or to bearer.***

***(2) An instrument which does not comply with these conditions, or which orders any act to be done in addition to the payment of money, is not a bill of exchange.”***

The implication of the law cited above is that by its very nature, a cheque is unconditional. Under no circumstances can it be legally issued on any condition, including one that it should serve as a security or as a deposit. Otherwise such would be illegal. This position was reinforced by the case of ***Sembule Investments Ltd vs. Uganda Baati Ltd HCMA No. 664 of 2009 [2011] UGCOMMC*** wherein it was held that;

175 ***“As I observed in Dembe Trading Enterprises vs. Bidco (U) Ltd, JJA HCMA No. 28/2008, the practice among businessmen and women in Uganda of issuing cheques as security with the instructions that they should not be banked or negotiated should be strongly discouraged because it goes against the very nature of such negotiable instruments. One cannot have a trade custom or practice that purports to turn the law completely on top of its head... I think that businessmen and women have come to take this alleged custom/practice, which is in fact a blatant illegality, as valid because they have not a clue about the legal implications and the gravity of issuing and accepting cheques. They therefore carelessly issue cheques in spite of the provisions of S.385(1) (b) of the Penal Code Act which makes it an offence to issue a cheque well knowing that one does not have the funds to meet the payment ordered in their account. But***



185 ***ignorance of the law is not a defence. The drawer of a cheque is presumed to know the***  
***implications of his/her action and should be held liable for it...*** [underlining mine].

The claim by the Respondent that he issued a cheque to serve as a security or deposit but never intended that it should not be cashed, is not a lawful defence to a suit instituted against him on a bounced cheque. Such a claim violates provisions of Section 2(1) and Section 72 (1) of the Bills  
190 of Exchange Act (supra) and Section 385(1)(b) PCA (supra).

It is in no doubt that the Respondent issued a cheque in question when he was acutely alive to the fact that he did not have sufficient funds in his account to pay the amount on the cheque. The criminal court in Abu Dhabi found so. In fact the said court found the defendant guilty of issuing a cheque as security or deposit as it contravened the penal laws in that country. Similarly in  
195 Uganda issuing a false cheque is criminal, and issuing postdated cheque on condition that it will only serve security or deposit is unlawful.

Having come to that conclusion, Section 9 (f)CPA (supra) specifically precludes this court from recognizing and holding as conclusive the foreign judgment of the Abu Dhabi Court of Appeal as it sustains a claim that is founded on a breach of law in Uganda, in particular; Section 385(1)  
200 (b) PCA(supra). On that account, the judgment of this court in *HCCS No. 218 of 2017* is reviewed and set aside. The suit is set down for hearing on merit.

**BASHAIJA K. ANDREW**  
**JUDGE**  
**13/07/2017**

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