THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

MISCELLANEOUS APPLICATION NO.49 OF 2019

(ARISING FROM CIVIL SUIT NO. 655 OF 2002)

ISAAC WANZIGE MAGOOLA---------- APPLICANT

VERSUS

ATTORNEY GENERAL---------- RESPONDENT

BEFORE HON. JUSTICE MUSA SSEKAANA

RULING

The Applicant brought this application by way of Notice of Motion against the respondent under Section 82 AND 98 of the Civil Procedure Act and Order 46 r 1,2 & 8 of the Civil Procedure Rules, for orders that;

a) Errors apparent on the face of the record including but not limited to computation of the applicant's accrued emoluments in the judgment of the trial Judge in the main suit be reviewed and rectified.
b) Costs of the application be provided for.

The grounds in support of this application are set out in the Notice of motion affidavit of Isaac Wanzige Magoola which briefly states;

1. That there is an error apparent on nthe face of the record in as far as the learned trial judge acknowledged that the applicant was a public servant whose last position of service was that of First Secretary in foreign service at the Ugandan diplomatic Mission at Pretoria-South Africa, whose last salary was USD 1360 and yet the Learned Trial judge erroneously computed the Applicant's gratuity using salary scale of a Senior Intelligence Officer in

Domestic Service, contrary to the practice, policy and principles of the Public Service Standing Orders (L-d) and pension regulation.

2. There is an error apparent on the face of the record is as far as the learned trial Judge ignored, failed or neglected to apply the practice, policy, principles and provisions of Public Service and went ahead to manufacture a speculative formula of determining the alary the applicant earned from 1992 to 1999 without any evidence whatsoever, occasioning a miscarriage of justice.

3. That there is an error apparent on the face of the record in as far as the learned trial Judge computed gratuity at speculated salaries paid before coming into force of the Security Organisations Act, 2000 which explicitly stated that it would not operate retrospectively and all computations would use current salaries thus selectively applying law, policy and practice for the different computations occasioning loss and injustice to the applicant.

4. There is an error apparent on the face of the record for the learned trial judge to cite a mandatory entitlement of ex gratia payment on retirement then reverse the logic and find that because the applicant was unlawfully and unfairly terminated he is not entitled to restitution to his original position of an innocent person who should not have suffered the process he was subjected to.

5. There was an error apparent on the face of the record in as far as the learned trial judge found the applicant termination unfair and unlawful yet failed to award the statutory compensatory awards including severance allowance, damages for unlawful termination and ex gratia payment and only restricted his award to salary in lieu of notice hence occasioning a miscarriage of justice.

6. There was an error apparent on the face of the record in as far as the learned Trial judge acknowledged that the applicant was suspended from April 2000 until 1st July 2002, a period of 27th months yet he computed his salary arrears at half pay for only 26 months.

7. There is an error on the face of the record in as far as the Learned trial Judge observed the law allowed for an investigative suspension to last more than four weeks and yet he upheld the said suspension lasting 27 months as lawful thereby causing a miscarriage of justice.

8. There is an error apparent on the face of the record in as far as the learned trial judge in considering the suspension of the applicant and his salary arrears and emoluments erroneously considered evidence already deemed false, forged or given under torture by this Honourable Court vide HC Criminal Case No. 1048 of 2000 HC Criminal Misc. Appl No. 104 of 2000 and HCCS 293 of 2005 thereby arriving at wrong conclusions.

9. There is an error apparent on the face of the record in as far as the learned Trial Judge observed that during the period of unlawful indefinite suspension the applicant's entire salary was withheld, yet he computed his salary arrears for the said period at half pay causing a miscarriage of justice.

10. That there is an error apparent on the face of the record in as far as the learned Trial Judge acknowledged that the last office held by the Applicant within External Security organisation was that of Director Finance and Administration earning a salary of 2,201,300/= yet he went ahead and erroneously computed all his accrued emoluments at a rank and scale of Senior Intelligence Officer, a rank he never held at the time of his unlawful termination.

11. There is an error apparent on the face of the record in as far as the Learned Trial Judge held that the applicant's termination was unlawful meaning he could be reinstated or lawfully retired yet he erroneously declined to award his ex gratia payments which is a statutory entitlements for all lawful retirees.

12. There is an error apparent on the face of the record for the learned trial judge to compute repatriation allowance for the applicant and his family return to their village at the rate of a Senior Intelligence Officer when it had already

been acknowledged that the applicant was way above that position at the time of termination.

13. There is an error apparent on the face of the record for the Learned trial judge to apply section 39(2) and (3) of the Employment Act, 2006 regarding the Applicant's repatriation to Paliisa and decline to apply it on his repatriation to Uganda from Pretoria in South Africa on the basis that he had been unlawfully recalled yet his repatriation to Pallisa also resulted from unlawful termination as the learned trial judge found.

14. There is an error apparent on the face of the record in as far as the Learned trial Judge upon holding that the applicant was irregularly recalled and proper procedures were not followed declined to order a refund of Ushs 1,400,000/= for two air tickets, the cost of shipment and items abandoned of 41,703,200/= on a mere technicality other than rendering substantive justice to the applicant.

15. There is an error apparent on the face of the record in as far as the learned trial judge upon holding that the applicant as a public servant was unlawfully terminated declined to award the applicant general damages for prospective earnings and other statutory entitlements.

16. There is an error apparent on the face of the record is as far as the Learned trial judge upon holding that the applicant was entitled to general damages and awarding the said damages at an interest of 12% per annum from the date of judgment reduced the same award to 10% in the summary awards under the interest head without any basis.

In opposition to this Application the Respondent through *Ms Nabasa Charity* a State Attorney filed an affidavit in reply briefly stating that;

1. The application is misconceived and a total abuse of court process and frivolous and bad in law prays that it be dismissed with costs.

2. That on 4th September 2014 Court delivered its judgment in civil suit No 655 of 2002 in favour of the applicant.

3. That it is not true that the judgment contains multiple errors, irregularities and illegalities in respect of computation of the applicant's emoluments.

4. That there is no error apparent on the face of the record and the applicant has not shown sufficient reason for review.

5. That there has been inordinate delay in filing this application and the respondent will be prejudiced by the same.

In the interest of time the respective counsel were directed to make written submissions and it appears none of the parties filed submissions. The applicant was represented by *Ms Ngajju Leticia* holding brief for *Mr Deo Mukwaya Musoke* whereas the respondents were represented *Ms Adongo Imelda*.

Whether this is a proper case to review the Judgment?

The affidavit in support of the application was argumentative and this is contrary to rules governing affidavits and the same ought to have been struck out. However, for completeness this court shall proceed to determine the matter in the interest of justice.

Determination

The law on review is set out in Section 82 of the Civil Procedure Act and Order 46 rule of the Civil Procedure Rules. The applicant has premised his application on ***" Error apparent on the face of the record"***

Review means re-consideration of order or decree by a court which passed the order or decree.

If there is an error due to human failing, it cannot be permitted to perpetuate and to defeat justice. Such Mistakes or errors must be corrected to prevent miscarriage

of justice. The rectification of a judgment stems from the fundamental principle that justice is above all. It is exercised to remove an error and not to disturb finality.

Reviewing a judgment/ruling based on mistake or error apparent on the face of the record can only be done if it is self-evident and does not require an examination or argument to establish it.

An error which has to be established by a long drawn out process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. ***See Civil Procedure and Practice in Uganda by M & SN Ssekaana page 453***

In the present case the applicant faults the trial Judge on over 15 grounds. A close examination of the judgment, the court dealt with these grounds together and made findings about the same.

I find no error of law apparent on the face of record as contended by applicant's counsel or the applicant. The Judge properly analysed the facts and applied the law to the facts.

The applicant seems to contend that the Judge made errors in his judgment that would have been according to him *per incuriam*.

The power of review should not be confused with appellate powers which enable an appellate court to correct all errors committed by a subordinate court. The applicant tried to dissect the entire ruling in order to find some grounds that can be used to justify the application for review.

What the applicant terms as errors apparent on the face of the record are only disagreement with the judgment and reasoning and are not errors apparent on the face of the record.

Greater care, seriousness and restraint are needed in review applications. In the case of ***MK Financiers Limited vs Shah & Co Ltd Misc. App No. 1056*** Justice Flavia Senoga Anglin held that;

"If the applicant was not satisfied with court's decision, he ought to have appealed instead of applying for review. Since it has been established that an erroneous view of evidence or of law and erroneous conclusion of the law is not ground for review, though it may be good ground of appeal." Misconstruing of a statute or other provisions of law cannot be a ground for review.

The proper way to correct a judge's alleged misapprehension of the procedure or substantive law or alleged erroneous exercise of discretion is to appeal the decision, unless the error be apparent on the face of record and therefore requires no elaborate argument to expose"

The errors in the judgment/decisions ought to be appealed to a higher court since they are not apparent on the face of the record. They are not manifest and clear to any court but rather are an apprehension of the law and evidence. ***See Edison Kanyabwera v Pastori Tumwebaze SCCA No. 2004***

It is neither fair to the court which decided the matter nor to the huge backlog of cases waiting in the queue for disposal to file review applications indiscriminately and fight over again the same battle which has been fought and lost. Public time and resources is wasted in such matters and the practice, therefore, should be deprecated.

This court is surprised that the applicant's counsel could file such an application is clearly out of time since the court determined the case on 4th September 2014 after a period of over 4 years.

In addition, the applicant's counsel has set out grounds of appeal which in his view are errors apparent on the face of the record. This court cannot sit in its own matter as an appellate court as the applicant wishes this court to do.

The applicant did not have any justification for filing this application and the same was merely an abuse of court process.

Abuse of Court Process was defined in Black's Law dictionary (6th Ed) as

"***A malicious abuse of the legal process occurs when the party employs it for some unlawful object, not the purpose which it is intended by the law to effect, in other words a perversion of it***."

Parties and their respective counsel should take the necessary steps to safeguard the integrity of the judiciary and to obviate actions likely to abuse its process. See ***Caneland Ltd & Others vs Delphis Bank Ltd Civil Application No. 344 of 1999 (Kenya Court of Appeal)***

Similarly, in the case of; **Benkay Nigeria Limited vs Cadbury Nigeria Limited No. 29 of 2006** (*Supreme Court of Nigeria*), their Lordships held:

"*In Seraki vs Kotoye (1992) 9 NWLR (pt 264) 156 at 188, this court on abuse of court process held….the employment of judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. This will arise in instituting a multiplicity of actions on the same subject matter against the same opponent on the same issue.*

The Court further observed that;

"*….to constitute abuse of court process, the multiplicity of suits must have been instituted by one person against his opponent on the same set of facts*"

The respondent's counsel has contended that the application is frivolous and vexatious and should be dismissed with costs.

A pleading is deemed frivolous when it is without substance or unarguable. ***See. Nsereko v Lubega [1982] HCB 51.***

While a pleading or action is vexatious when it lacks –*bonafides* or is hopeless or oppressive and tends to cause the opposite party unnecessary anxiety, trouble and expense.

Court will dismiss any action or strike out any pleading if it is frivolous and vexatious in the sense that the pleadings disclose no reasonable cause of action or answer, or

are so plainly frivolous that to put them forward would be an abuse of the process of the court as they are not likely to lead to any practical result. ***See Zachary Olum & another v AG Constitutional Petition No 6 of 1999.***

This court is in agreement with the respondent's counsel that this application is frivolous and vexatious and ought to be dismissed with costs.

This application fails and the same is dismissed with costs to the respondents

It is so ordered.

SSEKAANA MUSA
JUDGE
16th/08/2019