THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MASAKA

MISC. APPLICATION NO. 137 OF 2020

(Arising from Civil Suit No. 40 of 2011)

1. NAMATOVU VICTOR
2. SSENTONGO MIKE :: APPLICANTS

VERSUS

1. NAKANJAKO TEOPISTA
2. CONSTANCE NANTONGO
3. KATO JOSEPH :: RESPONDENTS

Before; Hon Lady Justice Victoria Nakintu Nkwanga Katamba

RULING

This application is brought under Order 46, Order 52 Rules 1 and 2 of the CPR, Sections 98 and 82 Civil Procedure Act and Section 33 of the Judicature Act Cap 13 seeking orders that;

a) The judgment and orders delivered by His Lordship Justice John Eudes Keitirima the trial Judge at the High Court of Masaka in Civil Suit No. 40 of 2011 as against the Applicants/4th and 5th defendants be reviewed and set aside;
b) An order for review doth issue against this Honorable Court`s judgment and decree made on the 26th day of June 2020 to have the 4th and 5th Defendants (applicants herein) struck off;
c) Costs of this application be provided for;

The grounds upon which this application is brought are contained in the affidavits of the Applicants and they are briefly that;

1. The applicants are aggrieved by the decision/judgment in Civil Suit No. 40 of 2011 in which the trial judge made an error when he erroneously added the applicants as defendants in place of the late Kamulegeya Joseph Junior who was the 4th defendant, in the absence of letters of administration;

2. The decision was entered in error as against the applicants and such error is apparent on the face of the record;
3. The said error doesn't require extraneous matter to show its correctness and there is sufficient cause for this court to review its orders and ruling in Civil Suit No. 40 of 2011

In their affidavits in reply, the Respondents opposed the application and stated that the application is incompetent since there is already a preferred appeal

In rejoinder, the Applicants contended that the Respondents affidavits in reply are incompetent for being bad in law, evasive and frivolous and the Applicants will pray to have them expunged with costs.

Both Parties filed written submissions and they are on court record.

The Applicants raised a preliminary objection that the Respondents` affidavits in reply were filed out of time (after 15 days from the date of service) without first seeking leave of court. Counsel cited the case of Patrick Senyobwa & Rose Nakito Vs Lucy Nakito MA Appn. No. 1103 of 2018 in which an affidavit in reply was struck out for having been filed out of time. The Respondents were served on the 1st day of December 2020 and filed their respective affidavits on the 10th day of February 2021. The Applicants prayed for this court to be struck off the record with costs for having been filed out of time without leave of court. It is also the Applicants objection that the affidavits in reply do not in any way disclose an answer to the application and they are hence evasive and offend Order 6 Rules 8 and 10 of the Civil Procedure Rules.

Counsel for the Applicants further submitted on the grounds of the application that in the absence of an application for substitution of the Applicants as Parties in Civil Suit No. 40 of 2011 as required under Order 24 of the Civil Procedure Rules and in the absence of letters of administration on record to prove that the Applicants were administrators to the estate of the late Kamulegeya Joseph as indicated on the judgment, the Applicants were erroneously substituted as parties to the said judgment. Counsel prayed that the judgment is

reviewed and set aside as against the 4th and 5th Defendants/Applicants herein, with costs to the Applicants.

In response, Counsel for the Respondents argued that the Applicants have preferred an appeal which has not been withdrawn and this application is therefore incompetent and should therefore be dismissed with costs. Counsel further admitted that the affidavits in reply were filed out of time and prayed for this court to exercise its discretion under Section 98 of the Civil Procedure Act to enlarge time and admit the affidavits in reply on ground that it is in the best interest of justice. It is also the Respondents` submission that the grounds of the application show that this is not an appropriate matter for review as the application challenges the way court analyzed the evidence on record to reach its judgment. Counsel prayed for the application to be found incompetent and be dismissed with costs.

Determination of the Application;

Preliminary points;

Counsel for the Applicants raised a preliminary objection challenging the competence of the Respondents affidavits in reply and prayed for the affidavits to be struck off the record for having been filed out of time without leave of court. Counsel for the Respondents admitted that the affidavits in reply were indeed filed out of time without leave of court and prayed for the court to exercise its powers under ***Section 98 of the Civil Procedure Act*** and admit the affidavits in the interest of justice.

I have carefully perused the record and also addressed my mind to the arguments of both Counsel for the Parties. The law requires such pleadings as affidavits in reply to be filed within 15 days from the date of service. In the instant case the Respondents affidavits in reply were filed out of time two months after service of the application. Neither the Respondents nor their Counsel gave reason for such incompetence and non-compliance with the law and set timelines. Since the affidavits in reply in this case were filed out of time and without leave of court, and no reason was given for such incompetence, I have no option but to agree with the Applicants` submission that the affidavits in reply are

incompetent and improperly before Court. Consequently, I strike out the Respondents` affidavits in reply.

Counsel for the Applicants also challenged the affidavits in reply for being evasive and offending ***Order 6 Rules 8 and 10 Civil Procedure Rules*** thereby being bad and untenable in law.

I have carefully perused the Respondents` affidavits in reply and not only are they simply duplicated, but they also do not specifically answer to the Applicants` allegations and grounds of the Application. It is a principle of the system of pleading that denial should be specific (***Order 6 Rule 8),*** and further that parties should not deny evasively (***Order 6 Rule 10).*** In the instant case, the Respondents in their affidavits in reply raised a general ground of opposition of the application instead of responding to the Applicants` allegations specifically and stating clearly the circumstances under which they oppose the applications. Further, in addition to the conclusion above, I find the affidavits in reply improper and incompetent for being evasive.

I will now proceed to determine the merits of the application.

The Respondents opposed this application challenging the same to be incompetent since the Applicants have already preferred an appeal arising from the same judgment sought to be reviewed.

Section 82 of the Civil Procedure Act establishes this Court`s jurisdiction to review its own decrees or orders. It provides that:-

"*Any person considering him/her self-aggrieved by a decree or order from which an appeal is allowed by this Act but from which no appeal has been preferred or by a decree or order from which no appeal is allowed by this Act, may appeal for review of the 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."*

Section 82 Civil Procedure Act has been enlarged by ***Order 46 Rule 1 of the Civil Procedure Rules*** which provides under Rule 1(2) that:-

"A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party, except where the ground of the appeal is common to the applicant and the appellant, or when, being respondent, he or she can present to the appellate court the case on which he or she applies for the review"

It is the Applicants submission that the instant application is brought under Rule 1(2) reiterated above.

The Respondent adduced a copy of a Notice of Appeal filed in this court on the 3rd July 2020, which is being preferred by the Defendants. The Defendants as stated on the said Notice of Appeal are; Nansubuga Julie, Nalule Mary Immaculate, Peter Godfrey Sentongo and the Administrators of the estate of the late Kamyulegeya J.

From perusing the record of Civil Suit No. 40 of 2011, I have established that indeed the Applicants` names are included on the judgment and decree of the said suit as defendants and administrators of the estate of the late Kamulegeya J. The Applicants adduced a copy of the Letters of Administration for the Estate of the late Kamulegeya Joseph to prove that they are not the Administrators of his estate. It is clear that they are not Parties to the intended appeal since they are not administrators of the estate of the late Kamulegeya. This application is therefore competent in that regard and in accordance with Order 46 Rule 1(2) under which it is brought.

It is not explained as to why they were indicated on the Judgment and Decree as some of the Administrators of the estate of the late Kamulegeya Joseph.

I have also carefully perused the record and established that indeed there is no application from which the Applicants were be substituted onto the suit to justify why they appear on the judgment and decree of the same.

An error apparent on the face of the record was defined in ***Batuk K. Vyas vs Surart Borough Municipality &Ors (1953) Bom 133*** that:

"***No error can be said to be apparent on the face of the record if it is not manifest or self-evident and requires an examination or argument to establish it…" (*****Emphasis mine)**

The case of ***Nyamogo & Nyamogo Advocates v. Kago [2001] 2 EA 173*** defined an error apparent on the face record, to mean:

"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" (Emphasis mine)

The error complained of in the instant application relates to the Applicants` names being indicated on the judgment and decree in civil suit No. 40 of 2011 as Defendants and Administrators of the estate of the late Kamulegeya Joseph whereas they are not.

Having observed that there is no justification as to why the Applicants appear on the judgment and Decree of Civil Suit No. 40 of 2011, they not being administrators of the estate of the late Kamulegeya Joseph, I find that it was erroneous for their names to be reflected on the said judgment and decree.

The Applicants have therefore sufficiently proved that there is an error apparent on the record of the judgment and decree in Civil Suit No. 40 of 2011. The judgment of this court in Civil Suit No. 40 of 2011 is hereby reviewed and set aside as against the Applicants in as far as they were indicated on the judgment and decree as Defendants/Administrators of the estate of the late Kamulegeya Joseph whereas not.

In the result, this application is hereby allowed with costs to the Applicants.

I so order.

Dated at Masaka this 24th day of May, 2021

Victoria Nakintu Nkwanga Katamba

Judge