THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MASAKA

MISC. APPLICATION NO. 062 OF 2020

ARISING FROM MISC. CAUSE NO. 19 OF 2019

NGABIRE BENA :: APPLICANT

VERSUS

MALONGO SUBCOUNTY LOCAL GOVERNMENT ::::::::::::::::::::::: RESPONDENTS

Before; Hon Justice Victoria Nakintu Nkwanga Katamba

RULING

This application was brought under Order 46 Rules 1, 2 and 8 of the Civil Procedure Rules SI 71-1, and Section 98 of the Civil Procedure Act Cap 71 seeking orders that; this Court reviews its decision in Misc. Cause No. 19 of 2018 on grounds of sufficient cause and an error apparent on the face of the record, and costs of the application be provided for.

The grounds of the application as contained in the Applicant`s affidavit are briefly that; Misc. Cause No. 019 of 2018 was dismissed for lack of sufficient evidence which was due to negligence of counsel which should not have been visited on the Applicant. The Applicant gave documents to prove that she was ultra viresly dismissed from office to her Advocate who never adduced them into evidence. Mistake or negligence of counsel should not be visited on the Applicant. There is also an error apparent on the face of the record as the Court failed to properly evaluate the evidence on record hence reaching a wrong decision.

In its affidavit in Reply sworn by Lugemwa John, the Respondent opposed the application and stated Misc. Cause No. 19 of 2018 was dismissed because the Applicant failed to prove her claims and allegations against the Respondent. At the time she filed the application, all

the documents she mentioned were in her possession and she is therefore estopped from blaming the failure to adduce evidence in Court on her advocate. The Applicant is trying to introduce fresh evidence that was not tendered in evidence and this cannot be relied on during review as it would occasion a miscarriage of justice. The Applicant stopped holding a political office in Malongo Sub-County Local Government when she moved to Katovu Town Council and as such is not entitled to sitting allowance from the Respondent. The Applicant neither has sufficient cause, nor has she disclosed any error apparent on the face of record.

In rejoinder, the Applicant stated that she brought all the evidence to her lawyer who then told her that the evidence would be adduced and showed to court later at the hearing which she believed since the lawyer was knowledgeable with the law. Review is granted on grounds of just cause and error apparent on the face of record, and these are mistake of counsel which should not be put to the litigant, and error in evaluation of evidence. The Applicant is an elected Councilor of Malongo Parish in Malongo Sub-county and not elected in Katovu Town Council as alleged by the Respondent.

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

Counsel for the Applicant cited the case of ***Ojara Otto Julius v Okwenga Benson MCA No. 23 of 2017*** defining sufficient cause as to relate to failure to take a particular step in time, and, ***Rousos v Gulam Husein Habib SCCA No. 9 of 1993*** where the Supreme Court decided that mistake of counsel though negligent may be accepted as a just/sufficient cause and should not be visited on the litigant. Counsel for the Applicant attached evidence to the submissions which was a mistake as evidence does not come from the bar and the evidence should have been attached to the affidavit. Such ignorance of procedure of law, mistake and fault of the advocate of failing to attach the Applicant`s evidence to her affidavit should not be visited on the Applicant. Court should find it as a sufficient reason to review the judgment and set it aside.

Counsel for the Applicant submitted on the second ground of error apparent on the face of record that the court in Misc. Cause No.19 of 2018 evaluated the ingredient of irrationality twice and failed to evaluate the ground of procedural irregularity hence reaching a wrong decision. This is a wrong and bad precedent to remain on the record and thus should be reviewed to allow evidence to be evaluated properly as it is so clear and manifest and does not need extraneous factors to prove this error.

In response, Counsel for the Respondent submitted that ***Section 82 of Civil Procedure Act*** allows a person aggrieved by a decree or order of the court to apply for review and no such decree has ever been extracted in the instant case. The application is therefore premised on the judgment and not a decree and should be struck off the record because of its incompetence.

Counsel further submitted on the ground of sufficient cause all the documents relied on by the Applicant were mentioned in her affidavit and as such were in her possession at the time of filing Misc. Cause No. 19 of 2018. She therefore had the opportunity to adduce that evidence then but she did not as is evidenced from her affidavit in support of the instant application. She is therefore estopped from blaming her failure to adduce the evidence on her advocate. Counsel cited the case of ***Bishop Jacinto Kibuuka v The Uganda Catholic Lawyers Society & 2 others MA 696 of 2018*** for the definition of sufficient cause and submitted that there was want of bonafide on the Applicant`s part and she did not act diligently to ensure that her evidence was received on court record. The Applicant has not demonstrated that there is sufficient reason that prevented her from adducing evidence in her possession in Court when Misc Cause No. 19 of 2018 was called up for hearing.

On whether there is an error apparent on the face of the record, Counsel for the Respondent cited the case of ***Edson Kanyabwera v Pastori Tumwebaze SCCA No. 06 of 2004*** on the definition of an error apparent on the face of the record. Counsel then submitted that the fact that the error complained of by the applicant is that court failed to properly evaluate the evidence on record is not apparent on the face of the record but rather requires an elaborate

argument to establish and therefore does not meet the test of an error apparent on the face of the record as a ground for review.

Counsel further submitted that this application has been overtaken by events since the split of Malongo Sub-county and formation of Katovu Town Council where the Applicant has since become a Councilor and as a result no longer holds any political office in Malongo Sub-County Local Government. She is therefore not entitled to sitting allowances from the Respondent. Counsel prayed for the instant application to be dismissed with costs.

Determination of the Application;

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 that:-

"Any person considering him/her self-aggrieved by a decree or order from which an appeal is allowed but from which no appeal has been preferred or 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 order was 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 apply for a review of the judgment to the court which passed the decree or made the order."

I have carefully perused the pleadings, parties' submissions and the evidence on record and I make my decision and observation as follows;

Counsel for the Respondent challenged the competence of this application on the ground that there is no decree for Misc. Cause No.19 of 2018 which is the subject of this application.

Black's Law Dictionary revised 4th Edition page at 1247 defines an 'Order' to mean, ***"Every direction of a court or judge made or entered in writing, and not included in a judgment."***

I have perused the record and observed that the Ruling of the trial Judge was delivered on the 28th day of November 2019 in the presence of the Applicant and the Respondent's Counsel, the Orders of the Trial Judge are stated in her Ruling. I find that although no order has been extracted, the final orders of the court were given with the effect of finalizing the matter between the parties. Counsel for the Respondent's argument that no order or decree has been extracted therefore bears no merit.

This application for review is based on the grounds that there is sufficient cause for the grant of the application, and; that there is an error apparent on the record.

Whether the Applicant has proved that there is Sufficient Cause for the grant of the application;

Black's Law Dictionary 8th Edition at Page 231 defines "sufficient cause" to be analogous to "good cause" or "just cause", which simply means "legally sufficient reason." Sufficient cause is often the burden placed on a litigant by court rules or order to show why a request should be granted or action or inaction excused.

In the cases of: ***Mugo v Wanjiri [1970] EA 481 at page 483. Njagi v Munyiri [1975]EA 179 at page 180*** *and* ***Rosette Kizito v Administrator General and Others [Supreme Court Civil Application No. 9/86*** *reported in* ***Kampala Law Report Volume 5 of 1993 at page 4]***

it was held that sufficient reason must relate to the inability or failure to take the particular step in time.

In the instant application, the Applicant`s ground for sufficient cause is premised on the failure to attach evidence to her pleadings in the application that's subject of this application for review. The Applicant indicates that she provided her advocate with the necessary evidence, but the advocate never attached the evidence to her pleadings nor adduced the same in court during the hearing. The Applicant cites mistake of counsel and prays that the mistake should not be visited on herself but rather found to be sufficient cause for granting the order for review.

It is trite law that the mistakes, faults, lapses or dilatory conduct of Counsel should not be visited on the litigant **(see the Supreme Court decisions in *Andrew Bamanya v. Shamsherali Zaver, S.C. Civil Appln. No. 70 of 2001*; *Ggoloba Godfrey v. Harriet Kizito S.C. Civil Appeal No.7 of 2006*; and *Zam Nalumansi v. Sulaiman Bale, S.C. Civil Application No. 2 of 1999*).**

I have perused the record and Misc. Cause No. 19 of 2018 proceeded by way of written submissions. The Applicant attached to her application for judicial review letters of administration and a letter from justice centers. No other document was attached or even mentioned in the affidavit. In her Ruling, the trial Judge observed that the evidence of suspension and minutes as to censorship of the Applicant were not brought into evidence to support the Applicant`s claim. She stated in her Ruling that, ***"it is clear that there is no copy of the minutes of the 4th of September 2018 to prove that a meeting actually took place or confirm who exactly attended and took that decision…considering the burden of proof which lies on the Applicant to prove her case to the standard required by law, I have therefore arrived at a different opinion from that of Counsel for the Applicant; I agree with the Respondent and to me, the evidence adduced does not clearly indicate that there was any illegality by the Respondent or that any Council meeting was held on that date.*** "

Section 101 of the Evidence Act requires a party seeking to rely on an allegation, to prove that allegation. The Applicant had a duty of adducing the evidence supporting her claim in court but this was never done. She states that she brought the documents to the attention of her Counsel who never attached them to her affidavit.

I have perused the record and observed that some of the evidence mentioned by the Applicant is attached to the submissions of Counsel in Misc. Cause No. 19 of 2018. This proves that indeed Counsel for the Applicant had the evidence in his possession as stated by the Applicant. This evidence could have been submitted by supplementary affidavit instead of attaching it to the submissions. It goes to show that the Advocate had been given the evidence to support the applicant's application but such evidence was not adduced in court which supports the Applicant's allegation.

Affidavits should contain evidence as to facts known to and alleged by the deponent, and such facts should be accompanied by proof of the same. The Applicant alleged to have been suspended but evidence of such suspension was never adduced in evidence and the trial Judge took this under consideration in reaching her final decision to dismiss the application for judicial review. Attaching evidence to submissions instead of the Applicant's affidavit was not merely a mistake but also negligent of the advocate.

In ***Joel Kato & Anor v Nuulu Nalwoga (Misc. Application No 04 Of 2012) [2012] UGSC 2 (26 June 2012);*** the Supreme Court held

"***I do not think it is right to blame the applicants, lay people as they are, for the delay in securing the record of proceedings from the Court of Appeal. These are matters which squarely fall within the province of professional lawyers who possess the necessary training and experience to handle them. That is why I believe the applicants found it necessary to engage new lawyers to deal with them***."

In the instant application, the Applicant states that she relied on the advocate who was more knowledgeable in the law. The Applicant's advocate attached evidence to submissions which proves the Applicant's assertion that she gave the evidence to her advocate. The advocate could have filed a supplementary affidavit and this was well within their knowledge. Failure to do so was therefore negligent and it was also to the detriment of the Applicant.

I therefore find that the advocate's negligence should not be visited on the litigant and for that reason, the Applicant has proved that there is sufficient cause for the grant of this application.

Whether there is an error apparent on the face of the record;

The Applicant also relies on an error apparent on the face of the record as another ground to warrant the grant of this application.

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)

Counsel for the Applicant submitted that the court in Misc. Cause No.19 of 2018 evaluated the ingredient of irrationality twice and failed to evaluate the ground of procedural irregularity hence reaching a wrong decision.

The error raised by the Applicant requires re-evaluation of the evidence on record. It is not a mere error that does not require examination of the record and consideration of arguments.

I therefore agree with Counsel for the Respondent that the error raised by the Applicant requires an elaborate argument to establish and therefore does not meet the test of an error apparent on the face of the record as a ground for review.

In the final result, I find merit in the applicant in as far as there is sufficient cause relating to failure to adduce evidence which was due to negligence of counsel and not the Applicant.

The ruling and orders of this trial Court in Misc. Cause No. 19 of 2018 are hereby set aside and the matter shall be re-heard *denovo,* taking into consideration the evidence of the Applicant.

I so order.

Dated at Masaka this 20th day of April, 2021.

Victoria Nakintu Nkwanga Katamba

Judge