THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL DIVISION

MISC. APPLICATION NO. 636 OF 2020

(ARISING FROM Civil Suit No. 363 of 2014)

MONICA KOMUJUNI:: APPLICANT

VERSUS

HASS SCIENTIFIC & MEDICAL

SUPPLIES

LTD.:::RESPONDENT

BEFORE: HON. JUSTICE EMMANUEL BAGUMA

RULING

Introduction.

This is an application by way of Notice of Motion brought under **Sections 82 & 89 of the CPA, Sections 33 & 34 of the Judicature Act cap 13 and Section 4 of the Judicature (Amendment) Act 2002** seeking orders that;

1. The judgment and decree of Her Lordship: **Hon. Lady Justice Lydia Mugambe** vide **C.S No. 363 of 2014**, **Hass Scientific & Medical Supplies Ltd V Monica Komujuni** dated **20th June 2020**, be reviewed and/ or set aside.
2. Costs of and incidental to this application be provided for.

The grounds in support of this application are stated in the Notice of Motion and affidavit in support deponed by **Monica Komujuni** but briefly are that;

1. The applicant was not properly advised by her former advocate who abandoned her defence rendering the decree in **C.S No. 363 of 2014** liable to be set aside**.**
2. The applicant received new evidence showing that she was one of the directors of Hass Scientific & Medical Supplies Ltd, at the time the company donated the machine to Naguru hospital.
3. All efforts to obtain the documents to support the applicant's directorship were restricted by the plaintiff company since the applicant was no longer their director at the time the suit was filed.
4. The applicant was able to retrieve a record from URA which shows that she was one of the Directors and that she always paid taxes in that capacity. (**See Annexure A to the affidavit in support).**
5. As a director of the company, the applicant had full mandate to act for and on behalf of the company.
6. The respondent lacked merit in filing the suit against the applicant because the value of the subject matter of the suit was way above the share capital of the respondent/plaintiff company, whose share capital is UGX 500,000/=.
7. For the respondent to deal in imports of the machine which is subject of **C.S No. 363 of 2014**, the respondent/plaintiff company needed a member's resolution to transact in capital above their registered share capital.
8. The trial judge condemned the applicant to pay the value of USD 42,000 for the XS 1000i sysmex machine, which value was not justified and proved at the trial but was rather estimated.
9. The applicant was aggrieved by the judgment of court which was very unfair to subject her to pay the value of the machine as though it was sold at the cost of UGX 160,000,000/= yet she did not receive any valuable consideration for the donation.
10. The respondent shouldn't have been awarded the sum of UGX 96,000,000/= because the machine was donated and the applicant never received any money

for it, thereby rendering the judgment and decree in **C.S No. 363 of 2014,** liable to be set aside.

11. It is in the interest of substantive justice that the decree in **C.S No. 363 of 2014**, be set aside and/or reviewed.

The grounds opposing the application are laid out in the affidavit in reply deponed by **Ms Mary Muthoni Gakuo** the Country Manager of the respondent's company who stated that;

1. The applicant was duly represented by Kasana, Mpungu & Co. Advocates initially, who filed a WSD on her behalf and participated in the lodgment of a joint scheduling memorandum on **4th September 2015**, and later was represented by Kibeedi & Co. Advocates pursuant to their Notice of change of advocates filed on **14th December 2016** who prosecuted her matter effectively to conclusion.
2. The respondent's claim against the applicant personally in **C.S No. 363 of 2014** deduced from **paragraph 3** of the plaint was based on misappropriation and conversion by donation and claim founded on payment of a personal loan.
3. The applicant personally misappropriated and converted by donation of a sysmex machine worth **USD 42,000** to China-Uganda friendship hospital, Naguru illegally, unlawfully and without authorization and she was personally liable to pay back her loan taken from the respondent company.
4. The applicant was the respondent's branch office country manager and there is no respondent's company shareholders or Board of Directors Resolution appointing her as a director of the respondent company.
5. Annexure A to the applicant's affidavit in support is not the respondent's company shareholders or Board of Directors Resolution appointing the applicant as director.

6. The applicant furnished at trial of **C.S No. 363 of 2014** the plaintiff's trial bundle which entailed the applicant's appointments, resignation and acceptance of resignation letter that all clearly spelt out her position in the respondent company as country manager and not a director.
7. The applicant in whatever position held as country manager or employee or director could never have had the mandate to donate any equipment or products of the respondent without authorization of the Head office situate in Nairobi, Kenya.
8. The applicant neither furnished proof of her alleged full mandate to donate the medical equipment in the course of the trial in **C.S No. 363 of 2014** nor currently in the instant application.
9. The respondent continues to suffer great inconvenience, grave injustice arising from refusal to honor the judgment by the applicant through uncalled for court process.

Representation.

The applicant was represented by Mr. Emmanuel Turwomwe while the respondent was represented by Mr. Enoth Mugabi.

At the hearing of the matter, both counsel for the applicant and respondent agreed on three issues for this court's determination;

Issues.

1. **Whether there is discovery of new and important matters of evidence previously overlooked?**
2. **Whether there is a mistake or error on the face of the record?**
3. **What remedies are awardable to the parties?**

Issue No. 1: Whether there is discovery of new and important matters of evidence previously overlooked?

Submissions by counsel for the applicant on issue No. 1.

Counsel for the applicant submitted that the applicant was adjudged in error because some key facts and material evidence was not properly brought to the attention of court.

Counsel argued that the applicant presented an invoice from Sysmex attached to her affidavit in rejoinder marked **AR2** showing that the net value of the XS1000 machine was **14,300 Euros** and not **USD 42,000**.That this evidence was not in reach of the applicant thus not considered by the trial judge in determining the value of the machine.

Counsel stated that the respondent came up with a proforma invoice for the XS 1000 machine which was not adduced at the hearing and it depicted a value determined by the respondent who determined their own value but not the true value of the machine.

Counsel further added that at the time the XS machine was delivered and installed at Naguru hospital, the applicant had long left the respondent company and that they had the exclusive discretion and convenience to stop the donation.

That their decision to file a suit against the applicant was an afterthought intended to abuse the due process of court and obtain unwarranted orders against the applicant.

Submissions by counsel for the respondent on issue No. 1.

Counsel for the respondent submitted that the applicant demonstrated that she had authority to donate the sysmex 1000xi machine through emails dated **19th September 2012**, **18th October 2012** and **9th January 2013** collectively tendered as **DE1** and the witness statement marked as **DW1** where the applicant confirmed that she was the

owner of Microhaem Scientific and Medical Supplies Ltd where she is both a shareholder and director but not the respondent/plaintiff company.

Counsel stated that the applicant testified at **page 14 line 1-21** of the certified proceedings that her company was the sole distributor of Sysmex products and that the XS 1000i machine supplied to Naguru hospital is owned by her company-Microhaem Scientific and Medical Supplies.

Counsel added that the applicant testified at **page 16 lines 1-20** of the certified proceedings that Hass had paid **USD 42,000** for the machine but have never recovered that money and that the applicant's company Microhaem Scientific owns the machine now since 2013.

Counsel argued that among the agreed facts in the joint scheduling memorandum was the fact that the machine XS 1000i sysmex worth **USD 42,000** was donated to China-Uganda friendship hospital Naguru.

Counsel further submitted that the contention in this case was whether or not the donation was undertaken with authority and not one for the value of the XS 1000i thus there is no discovery of new and important evidence previously overlooked by the trial judge.

Law applicable.

Section 82 of the Civil Procedure Act provides that;

"Any person considering himself or herself 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 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."

Order 46 r. 1 of the Civil Procedure Rules provides that;

(1) Any person considering himself or herself aggrieved;

(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 apply for a review of judgment to the Court which passed the decree or made the order."

In the case of **Ladd V Marshall [1954] 1 WLR** it was held that;

"In order to justify the reception of fresh evidence, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive: thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible."

Also in the case of **The Attorney General of the Republic of Uganda V. The East African law society & another EACJ Appeal No. 1 of 2013** court held that;

"***We need to be clear in our minds as to the process for admitting this new evidence.The Court needs to satisfy itself of whether the evidence sought to be adduced is relevant and helpful i.e. whether, if it is admitted, it will add value to the prosecution of the case."***

Analysis of court on issue No. 1.

Upon the scrutiny of **C.S No. 363 of 2014**, the contention was whether or not the donation was undertaken with authority and not whether the machine cost **14,300 Euros** as opposed to **USD 42,000** as proposed by the applicant in this application for review.

In my opinion, this is a disguised appeal coming in form of review which court should discourage.

The alleged new evidence is about the value of the XS 1000i machine which in my view does not amount to discovery of any new evidence in respect of the authority/mandate since it was not even the contention before the trial court hence it is not credible.

In the instant case, I doubt whether the alleged new evidence would have an effect on the judgment in **C.S No. 363 of 2014** hence review cannot be established.

On that basis, issue No. 1 is answered in the negative.

Issue No. 2: Whether there is a mistake or error on the face of the record?

Submissions by counsel for the applicant on issue No. 2.

Counsel for the applicant submitted that the applicant in **paragraph 2** of her affidavit in support and **paragraphs 5, 6 and 7** of the affidavit in rejoinder contended that she was not accorded a fair hearing firstly because her advocates did not adequately represent her and secondly that the trial judge did not accord her a fair hearing. Counsel added that the applicant's advocates did not inform her whenever the case came up for hearing.

Counsel argued that from the record of proceedings, **C.S No. 363 of 2014** was dismissed for want of prosecution on **23rd February 2016** at page 3 of the record but there is no formal application for its reinstatement yet the record shows that the suit came up for hearing on **14th December 2016**.

Counsel further stated that this error by court resulted in the judgment and several orders against the applicant which orders unless set aside, will occasion a grave injustice on the applicant.

Submissions by counsel for the respondent on issue No. 2.

Counsel for the respondent submitted that the certified proceedings **pages 12-15** show that the applicant provided a witness statement, testified and was represented by an advocate.

Counsel submitted that notwithstanding an application **(M.A No. 77 of 2016)** for reinstatement of the matter, it is no ground for review of the merits found by court and it has no effect of vitiating the findings of the merits by court.

Law applicable.

In the case of **Edison Kanyabwera V Pastori Tumwebaze, SCCA No. 6 0f 2004** court found that;

"In order that an error may be a ground for review, it must be one apparent on the face of the record, i.e. an evident error which does not require any extraneous matter to show its incorrectness. It must be an error so manifest and clear that no Court would permit such an error to remain on record. The error may be one of fact but it is not limited to matters of fact and includes also errors of law."

In the case of **Independent Medico Legal Unit V. The Attorney General of the Republic of Kenya (Application No. 2 of 2012) EACJ** the phrase 'error on the face of the record' was explained in the following terms;

- The 'error apparent' must be self-evident; not one that has to be detected by a process of reasoning.
- No error can be an error apparent where one has to 'travel beyond the record' to see the correctness of the judgment.

- It must be an error which strikes one by mere looking at the record, and would not require any long drawn process of reasoning on points where there may conceivably be two opinions.
- A clear case of error apparent on the face of the record is made out where, without elaborate argument, one could point to the error and say, here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions entertained about it.
- In summary, it must be a patent, manifest and self-evident error which does not require elaborate discussion of evidence or argument to establish.

Analysis of court on issue No. 2.

From the evidence on record, the applicant was duly represented by Kasana, Mpungu & Co. Advocates and later represented by Kibeedi & Co. Advocates pursuant to their Notice of change of advocates filed on **14th December 2016**.

I have also noted that the applicant's submissions are based on arguments and explanations which don't clearly point out the error apparent on the face of the record. The applicant's arguments require one to go beyond the record to analyze the correctness of the judgment.

I find that the judgment of the court had no 'errors apparent on the face of the record' to justify interfering with it.

On that note, Issue No. 2 is answered in the negative.

Issue No. 3: What remedies are awardable to the parties?

Counsel for the applicant prayed for setting aside the judgment and decree of this court and the costs of this application.

On the other hand, counsel for the respondent prayed for dismissal of the application with costs.

Analysis of court on issue No. 3.

In light of the foregoing, this court finds no reason to review the judgment in civil suit **No. 363 of 2014.**

Conclusion.

This application for review is hereby dismissed with the following orders;

1. The judgment and decree of this court vide **C.S No. 363 of 2014** is hereby upheld.
2. Costs of the application are awarded to the respondent.

I so order.

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Emmanuel Baguma

Judge.

27/05/2021