THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MASINDI

REVISION APPLICATION NO. 01 OF 2021

(Arising from Civil Appeal No. 0074 of 2014)

(All arising from Civil Suit No. 073 of 2008)

1. **MONICA BIRUNGI**
2. **KATUSABE GRACE** …… **APPLICANTS**
3. **BIRUNGI JANE**
4. **MUGISA NAKATO SARAH**

VERSUS

1. **KUSEMERERWA EVACE**
2. **AHEEBWA VINCENT**…… **RESPONDENTS**
3. **ASHIRAF S/O JANYONGO**

RULING

Before: Hon. Justice Byaruhanga Jesse Rugyema

[1] The applicant brought this application **under Section 83 and Section 98 of CPA, Order 52 rules 1, 2 & 3 of CPR**, seeking for orders that the judgment and orders of court in **Civil Appeal No. 74 of 2014** and **Civil Suit No. 073 of 2008** be reviewed and set aside and that court orders for a fresh trial of the dispute.

[2] The grounds of the application are set out in the affidavit in support of the application of **Mugisa Nakato Sarah, Monica Birungi and Abdu Kyamanywa** and briefly are;

a) *The trial of the case and appeal were tainted with material irregularity.*
b) *There was material evidence that was left out during trial to wit a certificate of title and will over the suit land; this led to mis-trial.*
c) *That no appeal has been preferred against the judgment of court.*

d) *That the Applicants are bound to suffer grave miscarriage of justice and irreparable damages if the application for review is not granted.*
e) *That it is only fair, just, equitable and in the interest of justice that this honorable court allows this application.*

[3] The 3rd Respondent (**Ashiraf s/o Janyongo)** opposed this application and filed an affidavit in reply stating, briefly that;

1. That **Civil Suit No. 73 of 2008** and **Civil Appeal No.74 of 2014** were decided on merit.
2. That the certificate of title alluded to in the affidavit was registered on the **22nd day of January 2009** after **civil suit No. 73 of 2008** had been filed and that it is the reason why it was not exhibited and/ or filed and therefore, the same cannot be sneaked in at this stage.
3. That the applicants are again trying to sneak in more evidence inform of annextures 3 (a), (b), (c) and (d) which were not part of the record both in the lower and the appellate court.
4. That documents which were not earlier pleaded and/or exhibited in the lower court cannot be smuggled on appeal.
5. That no application was made to High Court to have such documents brought on board and as such it cannot be a ground for retrial of a matter that has been in court for over 12(twelve) years.

Representation

[4] **Counsel Zemei Susan** of **Zemei, Aber Law Chamber, Masindi** appeared for the Applicants while **Counsel Irene Twesiime** of **Legal Aid Project of Uganda Law Society, Masindi** appeared for the Respondents. Both counsel filed written submissions which I have had the benefit of reading and considered in the determination of this application.

Counsel Submissions

[5] Counsel for the Applicant submitted that annexture "1" attached to the affidavit in rejoinder is a set of documents showing that before filing of the suit in the chief magistrate court at Hoima, the suit land was already under the operation of Titles Act and the application for conversion of the land to freehold title was lodged. That paragraph (iii) of the plaint disclosed the ongoing process of obtaining the subject certificate of title which was then made available to former counsel **Mwebaza** in **2009** and by that time none of the Applicants nor their witnesses had testified.

[6] That the evidence of the certificate of title was not only very relevant but also credible to the issues that ought to have been determined by the lower court as who owns the suit land. That the Applicant's former counsel did not adduce the certificate of title and the previous registration documents yet the same were made available to him before the commencement of the trial in the lower court. That mistake of counsel ought not to be visited on a client. Counsel relied on the case of **Ahmada B. Zirondomu Vs Mary Kyamutabi (1975) 1 HCB 337** and **National Insurance Corporation Vs Mugenyi & Co. Advocates (1987) HCB 28**.

[7] In reply counsel for the respondent submitted that the affidavit of the 4th Applicant stated that all documents which they intended to rely on were given to their former counsel before instituting **Civil Suit No. 073 of 2008** which were controverted and strongly rebutted by the affidavit of the 3rd Respondent. That once court has made a decision on any issue of law or fact, a losing party cannot seek for its reversal since the court cannot sit to hear an appeal against its own decision. Counsel referred to the case of **Uganda Taxi Operation & Drivers Association Vs Uganda Revenue Authority (SCCA No. 24 of 2019).**

Determination of the Application

[8] This is an application seeking for orders that the judgment and orders of court in **Civil Appeal No. 74 of 2014** and **Civil Suit No.**

073 of 2008 be reviewed and set aside and that court orders for a fresh trial of the dispute.

Section 82 of the Civil Procedure Act provides that;
Any person considering himself or herself aggrieved
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.*

Order 46 r.1(1) of the CPR provides that;
Any person considering himself or herself aggrieved
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 hereby allowed, and who from the discovery of the new and important matter or 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, desire 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.*

[9] It is trite that litigation must come to an end. In the case of ***Brown v Dean [1910] AC 373, [1909] 2 KB 573*** it was emphasized that in the interest of society as a whole, litigation must come to an end, and

"When a litigant has obtained judgment in a Court of justice...he is by law entitled not to be deprived of that judgment without very solid grounds."

[10] In general, it would undermine the whole system of justice and respect for the law if it were open to a party to be able to re-run a trial simply because relevant evidence had not been put before the court. An obligation rests on the parties to adduce any material evidence before the court, and if they fail to do so they cannot require a second hearing to put the matter right. It is apparent that in this application, the Applicants are seeking for review of **Civil Suit No. 73 of 2008** which the Applicants appealed and lost my understanding of **section 82 CPA** and **O.46 r. 1 C**PR, this is not permissible. A party cannot opt for appeal and then later at the same time opt for review.

[11] As regards admission of additional and new evidence, the principles and conditions to be followed on appeal were re-stated in the case of ***Hon. Bangirana Kawoya v. National Council for Higher Education Misc. Application. No. 8 of 2013*** where it held:

> **A summary of these authorities is that an appellate court may exercise its discretion to admit additional evidence only in exceptional circumstances, which include:**
>
> **i. Discovery of new and important matters of evidence which, after the exercise of due diligence, were not within the knowledge of, or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence;**
>
> **ii. It must be evidence relevant to the issues.**

Again, it is clear that this has to be raised in the appeal and not like in the instant application.

[12] In the instant application, the evidence the Applicants intend to rely on are the certificate of title which was obtained on

the **22nd January 2009** after the **Civil Suit No. 073 of 2008** had been instituted. In their pleadings the Plaintiffs/Applicants did not plead that they are registered proprietors of the suit land but rather pleaded that there is an ongoing process of obtaining a certificate of title. Still, they never furnished court with any document as exhibit showing that there was indeed an ongoing process of obtaining the certificate of title. Secondly the **Will** attached on the affidavit in support although mentioned in their pleadings, was never tendered in court as an exhibit.

[13] If the Applicants had the documentary evidence within their reach to wit; the certificate of title and the **Will** as they claim, and that the evidence was relevant to determine the true ownership of the suit land, it was their duty to adduce that evidence, and if the evidence was discovered or availed later, they had an option to file an application on appeal to have fresh evidence produced in court during the hearing of the appeal. The Applicant's failure to pursue this "new evidence" meant that or is proof that the evidence the Applicants intend to produce never existed and/or was not relevant evidence at the time **Civil Suit No. 073 of 2008** was being filed in court and therefore it is an afterthought upon losing **Civil Appeal No. 074 of 2014** to seek for production of such evidence in the present application.

[14] It is an invariable rule in all the courts that if evidence which either was in the possession of parties at the time of a trial, or by proper diligence might have been obtained, is either not produced, or has not been procured, and the case is decided adversely to the side to which the evidence was available, no opportunity for producing that evidence ought to be given by the granting of a new trial

[15] The affidavit in support of the application has annextures of copies of the documentary evidence sought to be adduced as additional evidence on a retrial. From the affidavit and the documents attached, I can safely deduce the import of both the oral and documentary evidence the Applicants seek to adduce. In essence the Applicants seek to prove that the land in dispute does not belong to the Respondents as decided by the trial court, but rather to the Applicants as registered proprietors and as per the **Will** of their late mother **Mwajuma**.

[16] By introducing that evidence, the applicants seek to prove that they are the true owners of the land in dispute which introduces a matter that is new altogether, which was never raised or does not emerge at all from the evidence already on record. If admitted, evidence to rebut it will also have to be admitted which will greatly alter the whole shape of the case and shall make the case which was decided on appeal entirely or, at the very least, substantially different from that decided at the re-trial.

[17] The Applicants argue that although the evidence was all along available to their advocate during the trial, for some unknown reason their advocate did not lead them to adduce it in court and therefore this was a mistake of their counsel which should not be visited on them. I find no basis upon which this court can find that former counsel for the Applicants deliberately decided to withhold the evidence but rather for reasons based on his honest and careful professional assessment of its relative impact on the overall strategy of obtaining from the trial court, a decision most

favourable to his client. There is no way the Applicants' former counsel would have led the Applicants on evidence pertaining the certificate of title when it was not pleaded in their pleadings. counsel very well knew that parties are bound by their pleadings and therefore, could not divert from them. I am therefore inclined to believe that this evidence was withheld from the trial court if at all it was available, because it was considered to be irrelevant at the time to the issues that were before the court for its determination.

[18] It is an invariable rule that if evidence which either was in the possession of parties at the time of a trial, or by proper diligence might have been obtained, is either not produced, or has not been procured, and the case is decided adversely to the side to which the evidence was available, no opportunity for producing that evidence ought to be given. In general, it would undermine the whole system of justice and respect for the law if it were open to a party to be able to re-run a trial simply because potentially persuasive or relevant evidence had not been put before the trial court. In this case no error apparent on the face of the Appellate record or new facts that were not available during trial of the suit have been disclosed. There is therefore no sufficient reason given for review of the matters at hand.

[19] For all the foregoing reasons, I do not find any merit in the application and it is hereby dismissed but with no orders as to costs since the Applicants are paternal aunties to the Respondents and their conflict need not be escalated by costs. As I conclusively

observed in **H.C.C.A No. 74 of 2014** out of which this application arises, the Applicants holds and own the land or estate in issue subject to the lawful interest of the Respondents.

Dated at Masindi this 31st day of August, 2022

Justice Byaruhanga Jesse Rugyema