The Republic of Uganda

In The High Court of Uganda Holden at Soroti

Miscellaneous Application No. 014 of 2020

(Arising from Civil Suit No. 041 of 2015)

Soroti Municipal Council :: Applicant

Versus

1. Akello Juliet
2. Akujo Betty :: Respondents

Before: Hon. Justice Dr Henry Peter Adonyo

Ruling

1. Brief facts

On or about 21st day of October 2015 Akello Juliet and Akujo Betty, hereafter referred to as the respondents sued Soroti Municipal Council, hereafter referred to as the applicant and others vide Civil Suit No.41 of 2015 seeking among others for declarations that they were the lawful owners of the suit land, permanent injunction, compensation for the land taken and costs.

The applicant filed its written statement of defence denying the allegations of the respondents contending that the suit land was its and that it had

already paid compensation to the family of the late Mzee Engwedu which also included the plaintiffs.

On various dates the matter was adjourned for various reasons until 2019 when the then trial judge after being moved by both parties entered a consent judgment which is a decision reached by a court upon the agreement of all parties involved in a suit.

Being aggrieved by the consent judgment, the applicant now seeks for a review off the said judgment by this application.

The respondents, however, states that since the original suit was concluded by consent of parties, then it should not be reviewed and have raised four preliminary objections.

2. Representation:

The applicant herein is represented by M/s Osilo & Co Advocates, of Kampala, while the respondents are represented by M/s Omongole & Co Advocates, also of Kampala.

3. Issues

a) Whether the preliminary objection is sustainable in law?

b) Whether the judgement and orders in Civil Suit No. 41 of 2015 should be reviewed?

4. Law applicable

a) The Constitution of the Republic of Uganda,1995 as Amended

b) The Civil Procedure Act Cap 71

c) The Civil procedure rules SI 71-1

d) Case law.

5. Resolution of issues

a. Whether the preliminary objection is sustainable in law?

The preliminary objection raised by the respondents is premised on a point of law. **The Oxford Law Dictionary at page 193** defines a preliminary point of law as a question of law ordered to be tried before the facts of the case are determined.

Order 6 rule 28 of The Civil Procedure Rules states that a point of law that is pleaded which when so raised is capable of disposing of the suit, may then by consent of the parties, or by order of the court on the application of either party, be set down for hearing and disposed of at any time before the hearing.

In the case of ***Yaya Farajalla vs. Obur Ronald and 3 Ors CA No.0081 of 2018*** court noted that a preliminary objection consists of points of law which has been pleaded, or which arises by clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit.

That a defendant wishing to rely on points of law as a preliminary issue is required to set out such points of law in the written statement of defence before the preliminary issue is regarded as properly raised. The preliminary points of law are as below.

b. The application is brought under a wrong law:

The respondents in their written submissions state that the application is brought under **Section 83 of the Civil Procedure Act** which provides for revision not review. The respondents pray that the application be dismissed on that ground.

Counsel for the applicant in reply to the first preliminary objection submitted that the mistake in quoting a wrong law is not key and does not to go to the root of the application thus rendering it incurably defective. That it is a mere technicality which must not deter court from administering justice by virtue of **Article 126 (2)(e) of the Constitution**. In arguing this point counsel for the applicant relied on the case of ***Comfoam Uganda Ltd vs. Megha Industries (U) Ltd HCMA 1084 of 2014.***

It is true that this application was brought under a wrong law, however, I would agree with counsel for the applicant that such an omission which does not go to the root of the matter which is in dispute can be ignored for **Article 126 (2) (e)** of the Constitution provides that substantive justice shall be realised without undue regard to technicalities. This was also the situation in the case of ***Comfoam Uganda Ltd vs. Megha Industries (U) Ltd HCMA 1084 of 2014*** where court pointed out that;

> ***"the citing of the wrong law is not fatal to an application as the essence of all disputes is that disputes must be heard and determined on merits other than dismissed on technicalities"***

Accordingly, the first preliminary objection be overruled.

c. <u>Inordinate delay.</u>

Second preliminary point of law raised was that there had been an inordinate delay by the applicant in filing this application. Counsel submitted that the default judgment in Civil Suit No.14 of 2015 was entered in favour of the respondent on 24th January, 2019, after the applicant failed to file a defence within time. That, thereafter, even execution commenced and a decree nisi

granted and subsequently a decree absolute was granted with bill of costs filed and taxed on 11th December, 2019. And according to counsel for the respondent such an application like the instant one ought not to be allowed by court where the applicant is guilty of unexplained and inordinate delay in seeking the indulgence of court.

In making this argument counsel for the respondents cited the case of ***Rosette Kizito vs Administrator General and Anor [1993] KALR 4*** in support of his submission.

The applicant in its reply submitted that it was not guilty of any inordinate delay in bringing the application basing on the fact the judge who had entered a summary judgement was still sitting at the High Court at Soroti, and that the applicant felt that justice would not be served considering the manner in which the consent judgement was entered.

Having had the chance to listen to both counsel in their submissions, I would state that the decision of court in the case of ***Rosette Kizito vs Administrator General and Anor [1993] KALR 4*** is applicable here for in that case where an application for extension of time to furnish security for costs was dismissed, the honourable Court observed that *" there was no sufficient explanation as to the delay of 18 months to file the application upon which Court could exercise its discretion in favour of the applicants"*

From the reasons given by the applicant, I would find that there was indeed inordinate delay in filing this application for I do not find sound the reason given by the applicant that it could not fight for its right in court for all that period because the same said judge who had passed the consent judgment was still sitting in Soroti and that was why it did exercise its right.

Such a reason is indeed very lame as it shows clear lack of appreciation of the rules of procedures which provides for processes to take when one is not satisfied with a judicial decision of a particular judicial officer.

At least I have found that not even an application was filed in the registry showing need for such a review in time. The applicant merely sat on its laps and awoke years later and then thought of making this application.

As the saying goes, equity aids the vigilant. The applicant was not vigilant. Given this laxity, this preliminary point of law is sustained and the reasons presented by the applicant are found to be not tenable in law.

d. Matters overtaken by events.

I note from the record of the After the consent judgment and garnishee process, the parties concluded the execution by consent and all matters were concluded. It would appear that it was through an afterthought that this application was made yet surely it had already been overtaken by events with the applicant's remedies all exhausted unless they allege that consent was obtained by fraud and thus would have apply to set it aside which is not the case here.

Whereas the applicant here seeks to rely on **Article 126 (2) (e)of the Constitution** and the holding in the case ***Kasirye & Byaruhanga and Co. Advocates vs. Uganda Development Bank, SCCA No.2 of 1997,*** The Supreme Court of Uganda proceeded to uphold the preliminary objection of a similar nature when it held that an application which seeks to invoke **Article 126 (2) (e) of the Constitution** must do so ***"subject to the law".***

The court went on notably to state that;

> ***"we have underlined the words 'subject to the law' which means that clause (2) is no license for ignoring existing law. A litigant who to seeks rely on the provisions of Article 126 (2) (e) must satisfy the Court that in the circumstances of the particular case before the Court it was not desirable to pay undue regard to a relevant technicality. Article 126 (2) (e) is not a magic wand in the hands of defaulting litigants."***

In this application, all remedies which the applicant court seek and get from court were exhausted. None was remaining and the applicant has not averred that the consent judgment, and subsequent consent executions were carried out arising from fraud. Therefore, I would find that this application was brought as an afterthought after an inordinate delay late and for that reason, this preliminary objection is sustained.

e. Attempt to illegally set aside consent judgement

The respondents submitted that by filing this application and it being allowed by this case, the consent entered by both parties on the 22nd day of October 2019 is to be legally set aside without the applicant pleading and proving the requirements for setting aside consent judgement. Counsel cited the case of ***Uganda Air Cargo Corporation V Moses Kirunda & 5 Ors MA No.385/2013 and Harani V Kasam (1952) EACA 131***

The applicants in their submissions in rejoinder submit that this matter involves serious and contentious issues relating to ownership of land and as such by entering judgment without hearing evidence or witnesses was

improper and the said judgment ought to be reviewed and the applicant has a right apply for review of the same.

I have carefully considered the submissions of both counsels on this preliminary objection, in the case of ***Harani V Kasam (1952) EACA 131*** in which it approved and adopted a passage from **Seton on Judgements and Orders 7th Edition, Volume 1 page 124** it was held that;

> ***"Prima facie any order made in the presence and with a consent of counsel is binding on all parties to the proceedings or action and cannot be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to policy of the court...or if the consent was given without sufficient material facts or in misapprehension or in ignorance of material facts or in general for a reason which would enable court to set aside an agreement"***

In consideration of the above and in reechoing the fact that a consent judgment was obtained in the presence of both counsels and no effort has been shown to show that such a consent was obtained through fraud or coercion, I would conclude that the argument of counsel for the respondent in respect of this preliminary point of law is persuasive and as such this preliminary objection too is sustained.

Arising from the preliminary points raised above in their entirety, of which I have mostly upheld, I am satisfied that they would dispose of this application as was pointed in the case of ***Yaya Farajalla VS Obur Ronald and 3 Ors CA No.0081 of 2018.***

That notwithstanding, I will procced to determine the application as presented for avoidance of any further doubt.

The application is brought by way of notice of motion supported with an affidavit of Otimong Moses for applicant and Akello Juliet for the respondent.

f. <u>Grounds upon which the application is based</u>

i. There is an error apparent on the face of the record which warrants review of the judgment of the court.

ii. The applicant was a defendant in civil suit NO.14/2015

iii. The applicant was aggrieved by the decision of the learned judge entering judgment in favour of the respondents without hearing the suit on merit or hearing any witness in the case

iv. The order was appealable but no appeal has been preferred against the order arising from the decree and judgment of the court

v. That entering the judgment without hearing the suit or any witnesses was an error on the face of the record which is good and sufficient ground for review of the judgment entered by this court.

vi. That if the judgment is nit reviewed, a mis courage of justice will be occasioned to the applicant

vii. That its fair and just that the judgment be reviewed as the same affects the interests of the applicant.

The applicant under paragraphs 6 and 7 of the affidavit in support of the application and by its written submissions submits that counsel for the respondent hurriedly moved court and had this application fixed without the applicant's or its counsel's knowledge and that court gave directives on filling submissions which directives were never communicated to the applicant

leaving the respondent alone to file its submissions which was even not served onto the applicant.

However, I note that court gave the applicant another chance to file its submissions and these are now on record and are considered alongside with those of the respondents.

Furthermore, by paragraph 7 of affidavit in support of the application, the applicant brings to attention of court that the learned trial judge's entering of the consent judgment without hearing the suit on merit was an apparent error on the face of the record which is good and sufficient ground for review of the judgment of the court.

In support of this contention Counsel for the applicant submitted that indeed there was an error on record after the consent judgment was made similarly and even cited **Section 82 of the Civil Procedure Act** and **Order 46 Rule 1 of the Civil Procedure Rules** and the case of **F.*X. Mubuuke v. UEB HCMA No. 98/2005*** *and* ***Ladak Abdalla Mohammed Hussein V. Isingoma Kakiiza SCCA No. 8 of 1995*** in support further of his submissions.

Counsel additionally cited **Article 28** and **44 of the Constitution** submitted which he says were violated after the entry of the consent judgement without a full trial which deprived the applicant of the constitutional right to be heard because it did not produce its witnesses or evidence to support its case leaving the dispute between the parties to be determined summarily without hearing either

Counsel also prayed that the costs of the application be provided for relying on **Section 27 of the Civil Procedure Act**.

Counsel for the respondent while citing **Section 82 of the Civil Procedure Act** and **Order 46 Rule 1 of the Civil Procedure Rules** submitted that the issue for court to determine is whether there is an error apparent on the face of the record to warrant review of the orders.

In making this submission, counsel cited the case of ***Kaloli Tabuta vs. Transroad MA No. 478 of 2019, National Bank of Kenya V Njau (1995-1998) 2 EA 249*** **and that** ***Kalokala Kaloli V Nduga Robert HCMA No.497 of 2014.***

Counsel concluded that there is no evident error apparent on the face of the record to warrant the grant of this application by the Honorable Court given that the judgement was entered summarily in favor of the respondent on valid grounds against the applicant on admission of both parties that the sellers without letters of administration had sold to the applicant.

Having listened to the submissions of both counsel, I would make finding and conclude as follows.

First and foremost, it is the general principle of law that the court after passing judgment becomes *functus officio* and cannot revisit its judgment or purport to exercise a judicial power over the same matter.

Furthermore, in civil suits, the parties can work out an agreement and have it finalized with a judgment to end litigation. The court's decision in that respect would final and it would put the issue to rest, ensuring that it cannot be further contested or relitigated in the future.

In some instances, the court will vacate, or remove, a consent judgment and revive the case. This is called vacating a consent judgment.

In the case of ***Wadri vs. Nuru (Civil Appeal No. 45 of 2014*** court stated that;

> ***"Once a validly-made final decision has been issued by the court, the court becomes powerless to change it other than to correct obvious technical or clerical errors, or unless specifically authorized to do so by statute or regulations. At some point judicial officers become functus officio and the jurisdiction to intervene comes to an end. The importance of finality of judicial decisions generally strongly militates against the existence of an inherent jurisdiction and power of court to set aside its own decisions made in finality of the matters before it. Such a power must be vested by statute or rules specifying the limited circumstances in which it is exercisable".***

However, there are exceptions to the general rules. **Section 82 Civil Procedure Act** and **Order 46 Civil Procedure Rules** allow the high court to sit in its judgments through a process called review.

The right to review is a creature of statute wherein **section 82 of the Civil Procedure Act** provides;

"Any person considering himself / herself aggrieved,

a) by the 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 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."

In the case of ***Margret Senkuule vs. Musa Nakirya HCRC No.7 of 2009***, it was held that the power to review is a creature of statute and courts have no inherent powers to review therefore special jurisdiction to review must be done according to the law, an application for review is to be placed before the court which passed the decree or made the order.

These same provisions are contained in ***Order 46 rule 1 and 2 of the Civil Procedure Rules*** which were cited by both counsel in their submissions.

An application for review of a decree or order of a court upon some ground other than the discovery of the new and important matter or evidence as referred to in rule (1) of this order or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree shall be made only to the Judge who passed the decree or made the order sought to be reviewed.

The first question to ask is whether the applicant is an aggrieved person as envisaged by the law above.

Under **Order 46 rules 1 and 8 of The Civil Procedure Rules**, a review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. That the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law is not a proper ground for review.

Misconstruing a statute or other provision of law cannot be ground for review but could be a proper ground for appeal since in that case the court will have

made a conscious decision on the matters in controversy and exercised his discretion in favour of the successful party in respect of a contested issue. If the court reached a wrong conclusion of law, in circumstances of that nature, it could be a good ground for appeal but not for review otherwise the court would be sitting in appeal on its own judgment which is not permissible in law.

In **Outa Levi Vs Uganda Transport Corporation [1975] HCB 353, it** was held the essence of review must be ordinary be to deal with straight forward issues which would not fundamentally and radically change of judgment intended to be reviewed, otherwise parties would lose direction as to the finality of a decision made by a particular court.

Any person considering himself aggrieved can apply for a review. **Section 82 Civil Procedure Rules** provides that any person considering himself/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 judgement 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.

The general principle is that any person aggrieved by a decree/order can bring this application.

In the cases of ***Busoga Growers cooperative Union vs. Nsamba & Sons Ltd HCMA No. 123 of 2000*** and ***Re Nakivubo Chemists V. Ltd [1979] HCB 12***, it was held that: "***an aggrieved person is a person who has suffered a legal grievance, which has wrongly deprived him of something.***"

Additionally, in ***Adonia vs Mutekanga [1970] EA 429*** it was held that a person is deemed to be legally aggrieved where he has suffered a legal

grievance in the sense that he had a direct interest in the subject matter and has been injuriously affected.

From the above, it can be stated that Soroti Municipal Council is the aggrieved party as it states that the order to the summary judgement issued by court on the 22nd January 2019 is against its interests and was issued without it producing witnesses.

The factors to consider to grant an application for review are spelt out in **Order 46 of the Civil Procedure Rules** and the same were reiterated in the case of ***Re Nakivubo Chemists (U) Ltd [1979] HCB 12***, the court found that their cases upon which review of judgment of order is allowed and these are

i. Discovery of new and important of evidence previously over looked by excusable misfortune
ii. Some mistake or error appearing on the face of the record
iii. For any other sufficient reason.

In the current application, the applicants under paragraph 7 of the affidavit in support state that there exists an apparent error on the face of the record. The position of the law is that for review to succeed on the basis of an error on the face of the record, the error must be so manifest and clear that no court would permit such an error to remain on the record. See ***F.X. Mubuuke v. UEB HCMA No.98 of 2005*** (unreported) and ***Muyode v. Industrial and Commercial Development Corporation and Anor. (2000) 1 EA 243 (CAC) 246***.

Having had the opportunity to look at both submissions of counsel, I would find and conclude that there is no error apparent on the face of the record as is envisaged under **Order 46 of the Civil Procedure Rules** and that this application is an attempt to illegally amend decisions already undertaken by

disguising it as one which is for review as not only are the issues complained in already been overtaken by events but is clearly an afterthought given the fact that even an inter party consented execution has long since already been carried out.

This being the case I would find that this application lacks merits as it has already been overtaken by events and as such it is dismissed with no orders as to costs.

Order

a. This application lacks merits as it has already been overtaken by events.

b. It is dismissed with no orders as to costs.

I so order.

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Hon Justice Dr Henry Peter Adonyo

Judge

7th June, 2022