

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**MISCELLANEOUS APPLICATION NO 310/2015**  
**ARISING FROM CIVIL SUIT NO 078/2012**

- 1. FAITH BIRUNGI BABUMBA**
- 2. EVELYN GRACE BABUMBA**
- 3. AGATHA TIBITENDWA BABUMBA**
- 4. DR. FRED BABUMBA.....APPLICANTS**

**VERSUS**

**JAMES SSALI BABUMBA (Administrator of the estate of the late Dr. Eria Muwanga Babumba.....RESPONDENT**

**BEFORE HON LADY JUSTICE PERCY NIGHT TUHAISE**

**RULING**

This is an application by Notice of Motion brought under Order 46 rule 2 and Order 52 rules 1 & 3 of the Civil Procedure Rules (CPR) for orders that the applicants be heard on an application for review of the orders/judgement delivered by Hon Lady Justice Percy Night Tuhaise on the 1<sup>st</sup> day of September 2015; and that costs of the application be provided for.

The grounds of the application are generally that:-

1. The applicant obtained judgement against the respondents vide Civil Suit No. 078/2012, delivered on the 1<sup>st</sup> day of September 2015 for orders that the letters of administration vide Administration Cause No 495/1987 be revoked and costs of the suit awarded to the plaintiffs among other things.
2. The applicants contend that there is an error apparent on the face of the record as the said judgement does not bar the respondent/defendant from being reappointed as administrator of the above estate.

3. That if the respondent is allowed to be re appointed as administrator of the estate of Dr. Eria Muwanga Babumba it will defeat justice handed down by this honourable court and thereafter render it nugatory.
4. That it is in the interests of justice the application ought to be allowed.

The application was supported by the affidavit of **Agatha Tibitendwa Babumba** the applicant. It was opposed by the respondent through his attorney **Anne Babumba** who swore an affidavit in rejoinder to which the applicant swore an affidavit in rejoinder.

The 1<sup>st</sup> applicant states in her affidavits that she is a beneficiary to the estate of the late Dr. Eria Babumba, who, together with the other applicants, instituted Civil Suit 078/2012 against the respondent and judgement was given in the applicants' favour; that she verily believes that the said judgement has an error on the face of the record since it does not specifically bar the respondent from being reappointed as one of the joint administrators of the estate; that the respondent and his agent, a one Anne Babumba, who holds powers of attorney have continuously frustrated the process of reappointing new administrators as was directed by the Judge; that the judgement has clerical errors as it contains mistaken identities or reference to the parties in the civil suit; and that the will alluded to particular precedence/order of how administrators to the estate ought to be chosen which was not reflected in the judgement.

The respondent responded through Ann Babumba's affidavit in reply that the application is incompetent and bad in law in so far as it does not comply with the laid down legal procedures; that it is an abuse of court process; that there is no error apparent on the court record as required by the law for the court to review its judgement in so far as there was no orders barring the respondent being re appointed as administrator since the same was not pleaded during trial; that it is therefore an afterthought driven by the applicants' emotions and not on law; that the issues raised by the applicants are false, far – fetched, and do not meet the conditions for this court to review since the same can be handled on appeal; that the applicants can appeal the decision and that since the respondent has started the process of appeal, the applicants have a right to cross appeal; that the application is frivolous, vexatious and brought in bad faith in so far as the application does not merit a review in so far as the applicants have a chance to cross appeal; that the application does not disclose any of the circumstances under which this court can review its decision in so far as there is no error apparent on the face of the record in the judgement or at all;

that Ann Babumba is not an agent of the respondent but the Advisor (Lubuga) of the late Dr. Eria Babumba's family under Kiganda customs and practices and was duly appointed in the will of late Dr. Eria Babumba; and that the late Babumba's will alluded to heirs and not administrators in a sense that any child of the late Babumba would be appointed as the administrator of his estate.

The 1<sup>st</sup> applicant stated in her affidavit in rejoinder that that the application is tenable before court and complies with the legal procedures and is properly before court; that there is sufficient cause for review; that the application merits review as an alternative remedy to appeal as it discloses sufficient cause for review; that the affidavit in reply is improperly before court, an abuse of the court process as the deponent had no capacity to depone to the same; that the will alluded to a particular precedence or order of how administrators to the estate of the late Dr. Eria Babumba ought to be chosen which was not reflected in the judgement; and that it is in the interests of justice and equity that the court allows the application for review.

The law on review is contained in Order 46 rule 1 of the CPR which provides as follows:-

*(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 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 cause, desires to obtain review of the decree passed or order made against him or her, may apply for a review of judgement to the court which passed the decree or made the order.”*

The same provisions are reflected in section 82 of the Civil Procedure Act cap 71.

I will first address the averments in the 1<sup>st</sup> applicant's affidavit in rejoinder that the affidavit in reply is improperly before court, an abuse of the court process as the deponent had no capacity to depone to the same. The record contains a certified true copy of a Power of Attorney signed by James Ssali Babumba (defendant/respondent) dated 1<sup>st</sup> March 2010 appointing Ann Magero

Babumba (deponent of the affidavit in reply) and a George Mwesigwa Babumba to be the defendant/respondent's attorneys, to, among other things, to bring or defend actions or other proceedings affecting the estate of the late Dr. Eria Muwanga Babumba. In that respect, I find that Ann Babumba's affidavit in reply is properly before court, and that Ann Babumba has capacity to depone the same as one of the defendant/respondent's appointed attorney.

The second question to address is whether the applicants are aggrieved persons for purposes of filing this application for review. An aggrieved person is a person who has suffered legal grievance as a result of a judgement and this includes a person who is not a party to the proceedings. However the grievance must be a legal one. See **Muhamed Alibhai V Bukenya SCCA No 56/1986**. In **Ladak Abdulla Muhamed Hussein V Griffiths Isingoma Kakiiza & Others Civil Appeal No 08/1995**, unreported, it was held that a person suffers legal grievance if the judgement is against him/her or affects his/her interests.

In the instant application, the 1<sup>st</sup> applicant states that she is a beneficiary of the estate of the late Dr. Eria Babumba who together with other applicants instituted Civil Suit No. 78/2012 against the defendant/respondent for revocation of letters of administration issued to him, and judgement was delivered in their favour. Ground 2 of their application is that the judgement in Civil Suit No. 78/2012 does not bar the respondent from being re appointed as administrator of the estate of the late Dr. Eria Muwanga Babumba. The applicants have indicated in this application that they are not happy with the judgement's not barring the defendant/respondent from re appointment as administrator of the estate of Dr. Eria Muwanga Babumba. From that perspective, without going into the merits of why this was not done as this will be done at a later stage in this ruling, the applicants can be considered to be aggrieved persons. This is in view of their contention that as beneficiaries and parties to Civil Suit No. 78/2012 the judgement is against him/her or affects his/her interests.

The third question to address is whether there is an error apparent on the face of the record to justify a review of the judgement. The applicants' contention is that there is an error apparent on the face of the record as the said judgement does not bar the respondent/defendant from being reappointed as administrator of the above estate.

It was held by the Supreme Court in **Edson Kanyabwera V Pastor Tumwebaze civil Appeal No. 6/2004** that in order for an error to be a ground of review, it must be one apparent on the face of the record, that is,

*“...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 the record. The ‘error’ may be one of fact, and includes also error of law.”*

It is correct that the judgement from which this application arises does not bar the respondent/defendant from being reappointed as administrator of the above estate. The court’s order sought to be reviewed stated that, *“at least two administrators consented to by all the beneficiaries to be appointed within three months from the date of this judgement. The consent should be promptly filed in this court upon which the Registrar will issue a court order appointing the administrators.”*

The said order was issued in answer to the plaintiffs prayer for *“an order to appoint a new administrator in accordance with the will or consented to by the beneficiaries.”* I have failed to see anything in the said order suggesting any error apparent on the face of the record, of fact, or of law. The plaintiffs were granted the order the way it was pleaded. There was no prayer to ban the defendant/respondent from offering himself before the beneficiaries, most of whom were plaintiffs in the main suit. It was never an issue for determination before this court. Had it been pleaded or raised before this court, it would certainly have been addressed within the perspective of the adduced evidence and applicable laws. Secondly, the applicants have not cited any law which bars a person whose letters of administration have been revoked from co administering the estate with others if it is by the beneficiaries’ consent.

The applicant’s counsel’s submissions appear to suggest that the permanent injunction issued against the defendant/respondent not to waste the estate extended to bar the respondent from being appointed by the beneficiaries a co administrator of the estate. With the greatest respect, the permanent injunction barring the defendant/respondent from wasting the estate is different and distinct from the beneficiaries consenting to re appointing the defendant to co administer the estate with others.

If the plaintiffs/beneficiaries choose to reject the defendant from being administrator in their late father's estate, it is within their powers to do so. This court gave them the powers to consent to subsequent administrators of their late father's estate as they had prayed. The power is with all the beneficiaries as opposed to only the five applicants in this matter. In the same connection, I do not agree with the applicants' counsel's submissions that if the respondent is allowed to be re appointed as administrator of the estate of Dr. Eria Muwanga Babumba, it will defeat justice handed down by this honourable court and thereafter render it nugatory. This court handed justice to the beneficiaries by addressing their prayers, that is, among others, revoking the defendant/respondent's letters of administration to the estate of the late Dr. Eria Babumba, and allowing all of them to participate in the selection of at least two administrators to administer the estate. It is in the beneficiaries' powers to choose not to return the administrator whose letters of administration were revoked by this court. It appears, as pointed out by the respondent's counsel, to have been an afterthought on the part of the applicants to raise the matter of barring the defendant from being re appointed to co administer the estate with other beneficiaries. The parties in this suit were 14 (fourteen) in number, but only five of them have raised this matter in this application.

The 1<sup>st</sup> applicant also averred in paragraph 6 of her supporting affidavit that the judgement has clerical errors as it contains mistaken identities or reference to the parties in the civil suit. This matter was not a ground in the application. The respondent's counsel however submitted that plaintiff no. 12 was omitted from the court's summarized list of plaintiffs on page 3, last paragraph of the judgement, as one of the plaintiffs and children of the late Dr. Eria Muwanga Babumba. Counsel also submits that court on page 5, first paragraph line no. 8 states that the 6<sup>th</sup> and 12<sup>th</sup> plaintiffs are not children of the deceased. He submits that this was never an issue, and that it was erroneous for court to summarize the same as a disagreed fact.

Will all respect to learned counsel, it ought to be appreciated that this court reported *ad verbatim* the joint scheduling memorandum of both parties, signed by both counsel (William Kasozi and Vincent Mugerwa), and filed on the court record even before I took over the hearing of the case. In the said joint scheduling memorandum, the 12<sup>th</sup> plaintiff is omitted as a child of the deceased, and it is reflected as a disagreed fact no. 8 that the 6<sup>th</sup> and 12<sup>th</sup> child are not children of the deceased. Counsel never at any one time moved court to correct it. It is in bad faith therefore for

the applicant and her counsel, who never participated in the trial, to submit that it was the error of court. However if it was an error on the part of both counsel when they were executing the joint scheduling memorandum, then the same error can be corrected under the slip rule embodied in section 99 of the Civil Procedure Act without having to review the judgement once it has been properly brought before this court's attention.

It is stated in paragraph 8 of the respondent's attorney's affidavit in reply that he has started the process of appeal against the judgement in Civil Suit No 078/2012. The affidavit contains two annexures **A** and **B** which are copies of letters from M/S Mugerwa & Partners (the defendant/respondent's former counsel) and M/S Muhimbura & Co Advocates (the defendant/respondent's current counsel), both addressed to the Registrar of this court requesting for a record of proceedings. The respondent's attorney's affidavit of service states that there is a notice of appeal annexed to the affidavit but there is no such notice of appeal. In the given circumstances where there is no copy of the Notice of Appeal, I do not find it safe to rely on letters requesting for copies of proceedings to conclude that an appeal process has started. I will therefore not address the argument that an appeal process has commenced.

All in all this application is dismissed with costs to the respondent.

**Dated at Kampala** this 28<sup>th</sup> day of June 2016.

Percy Night Tuhaise

**Judge.**