

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**(FAMILY DIVISION)**

**MISCELLANEOUS APPLICATION No. 213 OF 2018**

5 **(ARISING FROM CIVIL SUIT NO 203 OF 2012)**

**1. NALEBE EPHRANCE KIYINGI=====APPLICANT**

**Vs**

**1. SSOLOME BBOSA**

**2. BBOSA GEOFREY**

10 **3. LYAZI MEDARD =====RESPONDENTS**

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**Before: Hon. Lady Justice Olive Kazaarwe Mukwaya**

## **RULING**

### **Background**

15 The applicant, Ms. Nalebe Ephrance Kiyangi brought this motion under Section 82 of the Civil Procedure Act and Order 46 Rules 1 and 8 of the Civil Procedure Rules seeking review of the judgment and orders in Civil Suit No.203 of 2012. It was also her prayer that execution of the judgment and orders in that suit be stayed by this court.

### **Grounds for the Application**

20 1. There is a discovery of new and important evidence which could not have been produced by the applicant at the time when the judgment was passed on the 4<sup>th</sup> of April 2017. This was the inventory dated 10<sup>th</sup> November 2011, which, though on court file, was never considered.

2. There is some mistake or error apparent on the face of the record and the judgment should be corrected to include the correct figure of the share given by the court to the respondents; Ms. Ssolome Bbossa, Mr. Bbossa Geoffrey and Mr. Lyazi Medard. They were due 1% of the estate which was equivalent to 0.495 acres and not 2.8 acres, as stated in the judgment.
3. The mathematical mistakes or errors within the judgment are likely to occasion a miscarriage of justice to the applicant.
4. The respondents are threatening to execute the judgment and orders in Civil Suit No. 203 of 2012 even before the hearing of an application for review which seeks to correct the mistakes therein to the applicant's detriment.
5. It is in the interest of justice that the judgment and orders in Civil Suit No. 203 of 2012 dated 14<sup>th</sup> April 2017 be reviewed and execution stayed.

#### Judgment and Orders in Civil Suit No. 203/2012

The respondents are beneficiaries of the estate of the late Samwiri Lyazi who was a customary heir to the late Daudi Kiyangi. They instituted Civil Suit No. 203 of 2012 against the applicant for among other things, an order that they were entitled to a share in the estate of the late Daudi Kiyangi as his grandchildren.

The trial Judge, Hon. Lady Justice Alexandra Nkonge, decided in favour of the respondents. She found that the family of the late Samuel Lyazi Bbosa was entitled to benefit from the 2.8 acres reserved for the heir of the late Daudi Kiyangi's estate. The learned trial judge further found that the property was to be administered by the Ms. Ssolome Bbossa, as part of her husband, Samuel Lyazi Bbosa's estate.

In her orders following the judgment, the learned trial judge laid out the specific distribution schedule of the land among all the beneficiaries.

This application is seeking review of that distribution on the grounds outlined above.

Counsel for both the applicant and the respondents filed written submissions in support and opposition of the application.

## The Law

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 of the Civil Procedure Rules provides;

“1. Application for review of judgment:-

(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.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party, except where the ground of the appeal is common to the applicant and the appellant, or when, being respondent, he or she can present to the appellate Court the case on which he or she applies for the review.

The grounds for review were enunciated in the case of FX Mubuuke Vs UEB High Court Misc. Application No.98 of 2005 to be;

- i. That there is a mistake or manifest mistake or error apparent on the face of the record.
- ii. That there is discovery of new and important evidence which after exercise of due diligence was not within the applicant's knowledge or could not be produced by him or her at the time when the decree was passed or the order made.
- 5 iii. That any other sufficient reason exists.

Further in the case of Edison Kanyabwera versus Pastori Tumwebaze, Supreme Court Civil Appeal No. 6 Of 2004 as cited by Counsel for the respondents the court found that;

10 *"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 a fact and includes also error of law."*

### **Issues**

1. Whether the applicant has sufficient grounds for review?
- 15 2. Whether execution of the judgement and orders arising from civil suit No. 203 of 2012 can be stayed?

### **Issue 1**

It was counsel for the applicant's submission that there is an inventory, dated 10<sup>th</sup> November 2011 which constituted new and important evidence. This evidence could not have been  
20 produced by the applicant at the time when the judgment was passed on the 4<sup>th</sup> of April 2017. The applicant's case was that the inventory was never considered during the judgment.

Counsel further argued that the correct figure of the share given by the court to the respondents which is 1% of the estate of the total estate should be 0.495 acres but not 2.80 acres as stated in the judgment. This error should therefore be corrected by this review.

- 25 In rebuttal, Counsel for the respondents submitted that the issue of the said purported inventory is not new evidence. He added that the applicant mentioned the inventory in paragraph 8 of her Written Statement of Defence. Counsel submitted that the inventory was not attached to the

Written Statement of Defence neither was it produced in court as evidence. He further added that Civil Suit 203 of 2012 was filed by the respondents while the applicant was already in possession of the inventory which was dated 10<sup>th</sup> November 2011 therefore the applicant had the information before the suit was even filed.

- 5 The respondent's counsel also submitted that there is no error on the face of the record to warrant a review since the Judge rightly awarded the 2.8 acres to the family of the late Samuel Bbosa Lyazi. This was based on the doctrine of estoppel wherein the applicant was bound to the specific performance of the said resolutions in the fulfillment of her obligation as administratrix.

10 This arose from P. Exb. 5 (b) the first family resolutions in which the 2.8 acres was the share awarded to their father's family, Samuel Lyazi Bbosa. He also pointed out that the titles reflect hectares and not acres.

### Resolution of Issue 1

#### The Inventory

15 At Page 8 of the Judgment the trial judge in determining the issue of the entitlement of the plaintiffs/ respondents as beneficiaries to the estate of the Late Daudi Kiyingi stated thus:

'Thus, for each of these claimants, the contention was, since the deceased Samuel Lyazi Bossa was a son of the deceased, they were each entitled to a share under the estate of Daudi Kiyingi, *a big portion of which the defendant, administratrix under the estate had refused to hand over.*'(emphasis mine)

20 Further ahead in the Judgment, the learned judge stated;

*'The defendant as it were, from her own testimony disowned the petition for letters which was filed by her (or by another person on her behalf) on the basis that it had been edited. Yet she did not attempt to deny her signature on it. That also left her grant shrouded in suspicion being that this was the same document that she relied on to obtain the said grant(PEXH.10); one that had*  
25 *also empowered her to dispose part of the estate.'*

It is apparent from the foregoing that the learned judge was alive to the petition for the letters of administration filed by the applicant and the grant which was issued thereafter vide

Administration cause 1480 of 2005. However, from the learned Judge's observations, the applicant distanced herself from the petition and the grant on grounds that the documents had been edited. The inventory which the applicant now wishes this court to consider as new evidence was a requirement of the said disputed petition and subsequent grant. Its validity and relevance was premised on the existence of an undisputed grant issued to the applicant. If the applicant disputed the grant, she could not expect this court to recognise an inventory arising from the said disputed grant. This is especially so since her original petition is not attached to the inventory.

This court further agrees with Counsel for the respondent that the inventory was not new evidence. A perusal of the applicant's Written Statement of Defence filed in January 2013 makes reference to said distribution/inventory, as attached and marked 'D'. However, there is no such attachment. The inventory seeking to be relied on by the applicant is a photocopy. It has the letter 'A', written on it and not 'D' as this court would have expected, if in fact it had been attached to the applicant's pleadings.

There is nothing to show that the inventory was tendered into evidence at the time of hearing and that the learned Judge over looked it. On page 23, the learned Judge found that *'for a period stretching over eleven years after obtaining the grant, the defendant had not accomplished her role as a trustee and in contravention of Section 278 of the Succession Act failed to exhibit an inventory and provide an account over the estate'*

For reasons best known to the applicant, she kept the inventory to herself during her defence hearing. This court finds that she could not rely on the same document as sufficient grounds for review of the orders of the trial court.

#### A mistake or error on the record

The applicant contended that the 1% of the estate awarded to the respondents of the total estate would be 0.495 acres but not 2.80 acres as stated in the judgment.

The trial judge considered the share of 0.50 acres given to the plaintiffs/ respondents by the defendant/ applicant. In drawing her final conclusions however, the learned Judge relied on an

existing family resolution; P Exb.5 (b) which defendant/ applicant had endorsed alongside her siblings.

In that resolution, the plaintiffs/ respondents had been given 2.8 acres, being 1% of the estate land. The acreage had, according to page 24 of the judgment, been arrived at following a survey of the estate land. Invoking the doctrine of estoppel, the trial judge found that since other elements of the family resolution had been implemented by the defendant/ applicant, she could not decline to implement the 2.8 acres award to the plaintiffs/ respondents; see pages 21- 23 of the judgment. The orders made by the trial court, followed this finding. None of the parties to this application referred to this family resolution as being in dispute at all.

- 10 There were therefore no mathematical errors, miscalculations or mistakes that this court could identify, apparent on the face of the record, in light of the foregoing.

This court finds no grounds to review the judgment or orders of the Hon. Lady Justice Alexandra Nkonge in Civil Suit No. 203/ 2012.

## **Issue 2**

- 15 Order 43 r. 4 (3) of the Civil Procedure Rules provides for the conditions under which court may grant an application for stay of execution.

1. The applicant must satisfy court that substantial loss will occur unless execution is stayed;
2. The applicant must show that the application has been made without unreasonable delay and
3. The applicant is willing to provide security for performance of the decree should the decision become binding at a later stage.

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- Further, in Stanbic Bank v Atyaba Agencies SCCA No. 31 of 2004, court noted that where a Notice of Appeal or an application or indeed an appeal is pending before a superior court, it is right and proper that an interim order for stay of execution be granted in the interests of justice and to prevent the proceedings and any order there from of the appellate court being rendered nugatory.
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The applicant has not proved any of the foregoing conditions. There is no pending appeal to a superior court. This application was lodged on the 7<sup>th</sup> May 2018; one year after the trial court delivered its judgment on the 4<sup>th</sup> April 2017. According to the respondents 75% of the court orders have already been executed. The applicant is no longer administratrix, and a number of transfers of land have been made. There was inordinate delay of one whole year on the part of the applicant in bringing this application and she has failed to show what kind of damage she would suffer if stay of execution is not granted.

The application for stay of execution is redundant at this stage and is accordingly denied.

### **Order**

I hereby find as follows:

1. The applicant has failed to show sufficient grounds for review of the Judgment and Orders of the Court in Civil Suit No.203 of 2012.
2. The application for stay of execution is denied.

The application is dismissed with costs.

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**Olive Kazaarwe Mukwaya**

**JUDGE**

**Dated at Kampala this 20<sup>th</sup> day of May 2019**