THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA-MAKINDYE
(FAMILY DIVISION)
MISC. APPLICATION NO. 134 OF 2018

(Arising from Misc. Applications No. 101/2013 & 102/2013 consolidated with No. 58/2013)
(And also Arising from Administration Cause No. 918 of 2012)

ALEX NSUBUGA ……. APPLICANT

VERSUS

ZIMULA EDWARD ….……..…….……. RESPONDENT

BEFORE: HON. LADY JUSTICE KETRAH KITARIISIBWA KATUNGUKA
RULING

Introduction

This Application is brought by Alex Nsubuga under **Order 46 rules 1, 2 and 8, Order 52 rules 1, 2, and 3 of the Civil Procedure Rules S.I. 71-1, Sections 82 and 98 of the Civil Procedure Act Cap 71, Sections 14 and 33 of the Judicature Act Cap 13 and Article 139(1) of the 1995 Constitution of Uganda as amended**, by way of Notice of Motion, seeking orders that;

a) Part of the orders of Hon. Justice Alexandra Nkonge Rugadya in HCFD Misc. Application No. 101/2013 and 102/2013 consolidated with No. 58/2013 delivered on the 12th day of May 2014 be reviewed and set aside to wit:

   i) Misc. Application No. 124/2013 for review of HCCS No. 85 of 2005 was not consolidated with FD Misc. Application No. 101/2013 and 102/2013 consolidated with No. 58/2013 delivered on the 12th of May 2014 and this was an error apparent and or mistake on the face of the record by this Honourable Court.

ii) The trial judge made an order to rule that she was functus officio and neither she nor any other judge of equal jurisdiction has jurisdiction to vary, add and alter the terms of such position or judgment and this was an error and or mistake.

iii) The validity of the Will of Mika Mulyankota was and is not a settled matter in HCCS No. 85 of 2005 as alleged in the ruling.

iv) The applicant filed an application for and was allowed to be one of the trustees which was an error and or mistake on the face of the record.

v) This Honourable court is not competent to hear Misc. Application No. 56/2014, No. 157/2013 and 124/2013 as introduced which was an error and or mistake on the face of the record.

vi) Misc. Application No 577/2013 and not No.157/2013, wherein the applicant wanted to be added as a party(defendant) vide HCCS No. 268/2013 which was referred to as Misc. Application No.268/2013 in the ruling

vii) The Letters of Administration granted to the Applicant that was annulled be reinstated.

b) Misc. Application No. 124/2013 for review of HCCS No. 85 of 2005 be reinstated and heard on its merits since it was not fixed, served and sealed by this Honourable Court and this was an error and or mistake on the face of the record.

c) The costs of this application be provided for by the respondent.

2. The grounds for this application are set out in the affidavit of the Applicant, Alex Nsubuga, and are briefly that (inter alia); the applicant is an attorney of the lineal descendants of the late Mika Mulyankota and a beneficiary of his estate; the applicant is aggrieved by the decisions and orders made on the 12th day of May 2014 in Misc. Applications 101/2013 and 102/2013 consolidated with 58/2013,

the applicant being a party in Misc. Applications No. 101/2013 and 102/2013 and 124/2013 respectively and yet the same were not consolidated; the trial judge has jurisdiction to vary, alter and add to the terms of the judgments of another judge on review as provided by law; the holding by Hon. Justice Alexandra Nkonge Rugadya that Misc. Application 124/2013 was res judicata and that she was functus officio respectively was overturned by Civil Reference No. 27/2012 and the same Misc. Application 124/2013 was dismissed without being sealed by the Registrar so as to be put properly before the judge and served to the respondent which was an error and or mistake on the face of the record; the applicant is aggrieved by the orders of this honourable court and will suffer irreparable damages as a beneficiary if the orders of the trial judge are not reviewed; and so it is in the interest of justice that the said orders be reviewed.

3. The Respondents never filed a response in spite of having been served on 7/8/2018 and so the matter proceeded exparte.

4. Representation

The Applicant is represented by Counsel Mugisa Ronald of M/S Barungi Baingana & Co. Advocates; while the Respondent is represented by M/S Odokel Opolot & Co. Advocates. Counsel for the applicant filed written submissions.

5. The case

5.1. The gist of the application is that the Applicant is a lineal descendant of the late Mika Mulyankota who died on 23rd March 1961. The respondent obtained Letters of Administration to the estate of the deceased following the court order in CS 85/2005 which found inter alia that the Will of the deceased had created a trust estate. The applicant then filed Misc. Application 124/2013 seeking review of the judgment in CS 85/2005 on grounds inter alia that he was aggrieved yet not a party to the said suit and thus could not

appeal. The applicant had also filed AC 918/2012 and thus obtained Letters of Administration which were recalled on the application of the respondent in MA 58/2013. This resulted in the filing of Misc Application 101/2013(seeking to suspend the citation) and 102/2013 for an interim order to issue in MA 58/2013. The three applications were consolidated and Hon. Justice Alexandra Nkonge Rugadya in her ruling ordered, inter alia, that Misc. Application 124/2013 be dismissed since it was related to the matters in the consolidated application and yet Misc Application 124/2013 had not been consolidated and neither had it been brought properly before court. The judge also pronounced herself functus officio and found that issues of the validity of Will were res judicata premised on court's decision in CS 85/2005. The applicant now seeks review of the said ruling in Misc. Application 101/2013 and 102/2013 consolidated with 58/2013 among other prayers; to have the orders given in Misc. Application 101/2013 and 102/2013 consolidated with 58/2013 reviewed and Misc. Application 124/2013 reinstated and heard on its merits since it was not fixed, served and sealed by this Honourable Court; and that the Letters of Administration which were annulled be reinstated.

The issue for determination is; ***whether this Application should be granted.***

6. Resolution.

6.1. The position of the law.

Review is a creature of statute provided for under section 82 of the Civil Procedure Act, to the effect 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 rule 1 (1)(b) of the Civil Procedure Rules provides that **any person considering himself or herself aggrieved by a decree or order from which no appeal is hereby allowed** … 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.

Counsel for the applicant cited the cases of Abdul Jaffar Devji vs Ali RMS Deviji(1958) EA, Kalokola Kaloli vs Nduga Robert MA No. 497 of 2014 and **FX Mubwike vs UEB HCMA No.098 of 2005** and argued that this is a proper case for review.

Court's analysis of the issue as to whether *there are sufficient grounds for a review.*

The grounds for review were enunciated in the case of ***FX Mubwike Vs UEB High Court Misc. Application No.98 of 2005***(also cited by counsel for the Applicant) 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.

iii.That any other sufficient reason exists.

I shall focus on grounds 1 and 3 since counsel for the applicant seems to rely on those two.

I shall address the 1st ground first then ground 2 and 3 shall be addressed together since they are similar, then ground 5; followed by ground 7 and then grounds 4 and 6 shall be handled together; then I shall address the issues raised by counsel in his submissions in that order.

An error apparent on the face of the record was defined as one which is manifest or self evident and does not require an examination or argument to establish it (see **Batuk K. Vyas v Surat Municipality AIR (1953) Bom 133**.

Examples of situations that may be described as **mistake or manifest mistake or error apparent on the face of the record** were listed in the case of **Kalokola Kaloli Vs Nduga Robert Misc. Application No. 497 OF 2014** (also cited by counsel for the applicant)to include; -where a suit proceeds ex-parte when there is no affidavit of service on record; (see the case of ***Edison Kanyabwere Vs Pastori Tumwebaze SCCA 6/2004),*** or where the court enters a default judgment when there is no affidavit of service or where a summary judgment is entered under Order 36 when there is a pending application for leave to appear and defend on record.

A perceived misdirection or error in judgement by a judicial officer on a matter of law cannot be said to be an error on the face of the record (see the case of **Kalokola Kaloli Vs Nduga Robert (supra).** If one needs to 'enter the head" of the trial judge to investigate the error then this error is not apparent on the record.

In the Supreme Court case of ***Edison Kanyabwere Vs Pastori Tumwebaze SCCA No 4 of 2004,*** court stated that an error may be a ground of review and must be apparent on the face of the record i.e. an evident error which doesn't 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 of fact or law.

Ground 1.

That Misc. Application No. 124/2013 for review of HCCS No. 85 of 2005 was not consolidated with FD Misc. Application No. 101/2013 and 102/2013 consolidated with No. 58/2013 delivered on the 12th of May 2014;

In the Supreme Court case of case of **Attorney General and Another v James Mark Kamoga and Another (Civil Appeal No.8 of 2004) [2008] UGSC 4**, though dealing with a consent judgment, J. Mulenga observed that an aggrieved party is a party wrongly deprived of a legal interest and that such a party is aggrieved within the meaning of Order 46 rule 1.

The question is whether the applicant is aggrieved. M.A 124/2013 was filed for orders that the decision of the High Court made in CS No. 85 of 2005 that the suit land comprised in Busiro Block 380 plot 1 and Kyadondo Block 13 belongs to the trust created by late Mika Mulyankota and the attendant orders thereof be reviewed and set aside; that the deceased died intestate in respect of the suit land; that the deceased's suit land be managed under provisions of the Succession Act; that the suit land is not trust land and that costs of the application be provided for. It's the applicant's case that the orders were prejudicial to him and so ought to be reviewed.

A look at the ruling shows that when the trial judge was considering the issue of whether or not there was a valid will she stated on page 13 and I quote;

"The issue has been settled in an earlier court. It was one of those over which evidence was adduced and conclusions made in HCCS No. 85/2005…. court in that case also noted that none of the witnesses who testified in the case….denied the land at Makandwa was butaka land. No evidence was adduced in that suit to

dispute the genuineness of the register which was presented from the office of the Administrator General. The will and trust created under it were entered in that register. Court on that basis recognised both the will and the trust…...I did not have the benefit of viewing the register relied on by court. However the observations above in my well-considered view led to a reasonable determination by the court of the wishes of the deceased and an enforceable inference binding on the devisees, these now being the trustees of the estate. Besides the rules of equity would, in the circumstances of this case enjoin this court to look to the substance of the registered wishes of the deceased. Also bearing in mind that those wishes registered decades ago, have been relied on and acted upon…...the judgment under that suit together with all the facts and documents necessary for ascertaining the issue of the validity of the will of Mike Nsimbe Mulyankota came in that suit, were properly on court record…...That matter was therefore satisfactorily put to rest . . .' (emphasis supplied) page 14.

At page 15 the judge states; **'I also came across a letter to the office of the Administrator general, dated 3rd February 2012 from the applicant's counsel ref.MZ/GEN/2012 ...in which it was acknowledged that the deceased left a will naming executors but they did not take up the executorship since 1961 for date(sic) and the executors and trustees and administrators have since died save for one trustee…...The law applicable now is the succession Act, unlike the succession law applicable at the time of writing the will. The applicant possesses an introduction letter from the LC1 and certificate of death as well as the will already on file in your office . . .the implication of the letter is three fold; The applicant acknowledges the existence of the will… he even goes further and presents it to the Administrator General, relying on it in the attempt to process his application for a Certificate of No Objection;**

In MA 55 the applicant sought court and was allowed, to register interest in the estate as an intended co-trustee, thus seeking to rely on the very will he is now challenging and which will he referred to in order to access the grant;..On record the applicant proceeded to apply for letters of administration with will annexed . . . It would appear from the above scenario therefore that the will was acceptable and valid as long as it enabled the applicant access to the grant but lost validity as soon as the letters were granted . . . This court has issues with that. In answer to the first issue therefore, the validity of the will is a settled matter which in the opinion of this court can only be reversed by an appellate court . . .'(page 16)

At page 8 paragraph 3 the Honourable trial judge stated and I quote; ***'The applicant herein contests the Will of Mika Mulyankota on several grounds including the following; The purported will by the(sic) Mulyankota and under which Edward Zimula sought to rely on as beneficiary was not a will; it was signed by the Katikkiro, who was not the testator; that it had no witnesses, it was only a report; that the deceased died in 1961 and that the applicable law at that time was the Possession of Land Law 1908 and the Land Succession Law of 1912 which provided restrictions to the testator . . .'***

At paragraph 6 '***The applicant also challenged the very existence of the trust . . . the trust was invalid as was the will because both contravened the requirements of section 2(c) of the Land Possession Law . . .'***

The judge before framing issues had this to say at page 11 and 12 last and first paragraphs respectively, ***'My observations from the evidence on record and the conclusions from these issues will go a long way in helping this court to dispose of the matters in MA 101/2013, No. 102/2013 and No.58/2013 and possibly render other applications pending or planned before this court unnecessary;'***(underlined

for emphasis*)* then she went ahead to frame issues and the 1st issue was*; **'Whether or not there was a valid will and trust'(***emphasis supplied).

At page 12 paragraph 6 she stated ***'In determining these issues I have laboured to provide an in-depth genesis of the matters relating to this estate for five main reasons all structured towards finding an effective way of managing this case. First is to endeavour to give a clear picture of the main issues of contention between all parties, in the checkered history of this estate; secondly to identify all the outstanding matters which may necessitate consolidation of the several remaining applications…..and to facilitate justice to each party, with minimum litigation, acrimony and expense and maximum expediency and convenience; finally to give a ruling on the three applications that were heard before the Nakawa High court'***
At the end of the analysis she ordered that MA 124/2013 together with MA 25/2014 and MA No. 26/2014 ***'proposed for hearing before this court are also rendered unnecessary, in light of order No.2'***

Decision of court on ground 1

Consolidation of suits is provided for under O.11 r.1 of the Civil Procedure Rules to wit; 'Where two or more suits are pending in the same court in which the same or similar questions of law of fact are involved, the court may either upon the application of one of the parties or of its own motion at its discretion order a consolidation of those suits. MA124/2013 was filed seeking review of the decision and orders made in HCCS NO.85/2005. Other applications were filed to challenge and or claim there was a will and the management of the suit estate. Court in the ***MA 101/2013, No. 102/2013 and No.58/2013*** went into detail as shown above to show that the issues of the will were **satisfactorily handled** in HCCS No. 85/2005(emphasis supplied). ***MA 101/2013, No. 102/2013 and No.58/2013; 'was to dispose of the issues in those, consolidate matters and possibly* render other applications pending or planned before this court unnecessary;'**(supra)

I am of the considered opinion that the ' . . .*other applications pending or planned before this court* . . .' refer to those analogous to the consolidated matters including MA124/2013 in addition to court's holding that a matter(s) is(are) res judicata rendering court functus officio; but not before analysing the applicant's fair weather way of dealing with the will and the trust. The applicant in this application denies that there is a letter where he acknowledges the will and the trust. I have chosen to take judicial notice of the ruling and decided to believe there is such letter otherwise court would not have dreamt of a reference number, date and contents. I am also convinced that going for review of HCCS No. 85/2005 by holding that court erred and dismissed MA 124/2013 without consolidating it when it actually did and analysed the gist at length, would in my considered view be going technical at the expense of both substantive matters and wastage of court's time and definitely would be an abuse of court process since declarations were made to show that the matter of the will was satisfactorily handled. I am therefore of the considered opinion that MA124/2013 was consolidated.

MA 124/2013 therefore was consolidated and I find no error on the face of record warranting review.

Ground 2

That the trial judge made an order to rule that she was functus officio and neither she nor any other judge of equal jurisdiction has jurisdiction to vary, add and alter the terms of such position or judgment and this was an error and or mistake; and that

Ground 3

The validity of the Will of Mika Mulyankota was and is not a settled matter in HCCS No. 85 of 2005 as alleged in the ruling.

The above statements emanate from the fact that the issue of the existence of the Will and a trust were stated to have been put to rest in CS 85/2005 and that that position can only be challenged at a higher court not the High court under the res judicata and the functus officio principles;(see *In Re H.C. Kaggwa, Misc. Appl. No. 42 of 1952).*

Section 7 of the Civil Procedure Act bars court from handling matters which have been heard and finally disposed of unless it is by an appellate court. The court ruled what it did because that is both factual and legal. I do not find any error to warrant review.

That this Honourable court is not competent to hear Misc. Application No. 56/2014, No. 157/2013 and 124/2013 as introduced which was an error and or mistake on the face of the record.

Having addressed MA **124/2013** the rest of the applications including **Misc. Application No. 56/2014, No. 157/2013, MA 577/2013 and HCCS 268/2013** rendered unnecessary were in my view by implication consolidated if they were all challenging the will and trust concerning the estate of the late Mulyankota and how it was to be managed as confirmed under HCCS 85/2005, because that matter was considered and a decision reached by court that they were res judicata and so the High court is functus officio. I do not find this to be an error because court has both inherent and residual powers under section 98 of the Civil Procedure Act and section 33 of the Judicature Act to make orders where it deems it necessary, for proper adjudication of cases and to avoid multiplicity of cases and avoid unnecessary litigation. There is no reason why court should be stuck in the rut of the same issues.

The Letters of Administration granted to the Applicant that was annulled be reinstated.

Having found that the decision of the court in M.A 101 &102/2013 consolidated with 58/2013 and other applications including No. 124/2013, 56/2014, No.157/2013, MA 577/2013 and HCCS 268/2013 which by virtue of that decision by implication were also consolidated and resolved in respect of the Will and the Trust concerning the suit estate, to wit; that the position is as held in HCCS No.85/2005 and also having found that the process applied to attempt to get Letters of Administration was analysed and found to have been irregular, the finding of court and order that Letters of Administration granted to the applicant be annulled is not an error.

Grounds 4 and 6

That it was an error on the face of the record when court ordered that MA 577/2013 and not 157/2013 was an application by the applicant to be added as a defendant vide HCCS 268/2013 (which was also referred to as MA 268/2013) as stated in the ruling at page 28; and that the applicant filed an application for and was allowed to be one of the trustees which was an error and or mistake on the face of the record.

According to the applicant's affidavit evidence in paragraph 24 (g) and annextures 'P' and 'Q', MA 557/2013 was brought so as to join the applicants and 3 others as defendants in CS 268/2013 wherein the respondent sought recovery of the land at Makandwa from Patrick Lwanga so as to be availed compensation from UNRA; The record shows that AC 918/2012 was an application by the applicant for Letters of Administration as a beneficiary and not as a trustee; the applicant filed MA 55/2014 as a beneficiary and not a trustee;

The above statements in the ruling are typing errors and may be corrected under section 99 of the Civil Procedure Act; they are clerical errors that warrant review. In

the **East African Court of Justice (Appellate Division)** decision **of Independent Medico Legal Unit v. The Attorney General of the Republic of Kenya {Application No. 2 of 2012; Arising from Appeal No. 1 of 2011**, the court noted that a similar doctrine for review of court judgments which is well established and which is widely practiced is the 'slip rule', by which courts are empowered to correct inadvertent mistakes of computation, of arithmetical calculations, clerical errors of e.g. spellings, proper names, addresses and others of similar genre, which invariably slip into courts judgments by the, 'slip of the pen'.

Arguments by counsel

a)Counsel for the Applicant argued issues concerning the validity of the Will and the trust.

I shall not address this because this is the reason expounded above under section 7 of the Civil Procedure Act. The decision of court was that the issue of the will and the trust were laid to rest in HCCS 85/2005 and they could not be opened through FD Misc. Application No. 101/2013 and 102/2013 consolidated with No. 58/2013 then before her. I do not find the decision of the judge an error or mistake on the face of the record.

b) The holding by Hon. J. Rugadya that MA 124/2013 was res judicata and functus officio was overturned by Constitutional Civil Reference No 27/2012.

I have studied the ruling in Constitutional Civil Reference No 27/2012 and found that court dismissed the application which sought Constitutional interpretation because the process of reference was irregular and the constitutional Court did not deal with the merits of MA No.604/2011.

Conclusion

1.In conclusion, Court finds no error on the face of record in the dismissal of MA 124/2013 warranting review of the ruling in M.A 101/2013 and 102/2013 consolidated with 58/2013;

2.There are clerical errors that warrant review;

3. Since the application proceeded exparte and no reply was filed the applicant shall bear the costs of this application.

On the above premises the application majorly fails. I therefore make the following consequential orders;

1. There is no error on the face of the record concerning dismissal of Misc. Application No. 124/2013 for review of HCCS No. 85 of 2005. MA 124/2013 was disposed of and there is nothing to review concerning it;
2. Misc. Application No. 56/2014, No.157/2013, MA 577/2013 and HCCS 268/2013 were disposed of by the orders made in M.A 101/2013 and 102/2013 consolidated with 58/2013.
3. The letters of administration annulled were validly annulled.
4. The ruling shall be corrected to show that;
   a) The applicant filed MA 55/2014 as a beneficiary and not a trustee;
   b) MA **577**/2013 and not 157/2013 was an application by the applicant to be added as a defendant in HCCS 268/2013 and not in MA 268/2013)
   c) AC 918/2012 was an application by the applicant for Letters of Administration as a beneficiary and not as a trustee;
5. The application is dismissed with costs to be borne by the applicant.

Ketrah Kitariisibwa Katunguka

Judge

Dated at Kampala this 29th day of March 2019