

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
(LAND DIVISION)**

**REVIEW CAUSE NO. 849 OF 2012  
(Arising out of Civil Suit No. 227 of 2009)**

**HENRY BAZIRA SEWANNYANA  
FLORENCE JUDITH NNAKALANZI ..... APPLICANTS  
VERSUS  
FLORENCE NAKIWALA ..... RESPONDENT**

**RULING**

**BEFORE HONOURABLE LADY JUSTICE EVA K. LUSWATA**

This application is brought under **Section 82 and 98 of the Civil Procedure Act Cap 71, Order 46 rule 1 and Order 52 rules 1 &3 of the Civil Procedure Rules SI 71-1** for orders that the judgment and orders granted in Civil Suit No. 227 of 2009 be reviewed by this honorable court, the caveat lodged by Florence Nakiwala under Instrument No. BUK 60602 on the 28<sup>th</sup> day of April 2006 be vacated, the orders granted under Revision Cause No. 12 of 2012 on the basis of Civil Suit No. 227 of 2009 be set aside and costs of the application. The applicant was represented by Christopher Jingo while Gilbert Baguma represented the respondents.

The grounds of the application are;

1. That the applicants have discovered new and important evidence previously over looked by excusable misfortune.
2. That the respondent has no interest in the suit property whatsoever as a beneficiary.
3. That the mistake of counsel should not be visited on the client.
4. That it is just and equitable that this honorable court grants this application for review of orders and judgment in Civil Suit No. 227 of 2009 and orders under Revision Cause No. 12 of 2012 be set aside.

The application is supported by the affidavit of Henry Bazira Ssewanyana (the 1<sup>st</sup> applicant). The respondent opposed the application through her affidavit in reply dated 1/5/13. In his affidavit, the 1<sup>st</sup> applicant stated that he lawfully purchased land known as Bulemezi Block 35 Plot 30, Katikamu (hereinafter called the suit land) from the late Margret Julian Suubi in May 1987 and transferred the same into his name before her death in April 1988. The same was later transferred by the 1<sup>st</sup> applicant to the 2<sup>nd</sup> applicant's in 2012. That the suit land ceased to be part of the property of the estate of the late Margret Julian Suubi (respondent's mother) and the respondent has no letters of Administration in the estate of the late Margret Julian Suubi. The 1<sup>st</sup> applicant also stated that there is no law firm approved in the name of Robert Mukanza & Co. Advocates in Uganda and therefore any pleadings drafted and filed by them are irregular. He also argued that counsel who represented them in the main suit negligently failed to adduce evidence before this court concerning his proprietorship of the suit land hence mistakes of his lawyer should not be visited on him.

In reply Florence Nakiwala (the respondent) swore an affidavit in reply opposing the application. She contended firstly that the 1<sup>st</sup> applicant has no locus standi to institute these proceedings because he admits to have transferred the suit land to the 2<sup>nd</sup> applicant and yet the said 2<sup>nd</sup> applicant is not aggrieved with the orders made in Civil Suit No. 227 of 2009 sought to be reviewed. Secondly, that the second prayer is contrary to the law as caveats are vacated not on the basis of affidavit evidence but upon a full hearing. Thirdly, that the 3<sup>rd</sup> order sought is an indirect request for this court to sit on appeal against its orders issued in Revision Cause No. 12 of 2012 which was implemented by consent. She further contended that there is nothing new that the applicants have discovered that is of evidential value and the claims are *resjudicata* having been tried by this very court in HCCS No.227 and Revision Cause No. 12 of 2012. That the respondent has never sued the 1<sup>st</sup> applicant but to the contrary, it is the 1<sup>st</sup> applicant who sued the respondent in HCCS No. 227 of 2009. She in addition contended that the respondent has never engaged any law firm styled as Robert Mukanza & Co. Advocates to represent her.

On 25/11/13 when the application came up for hearing, counsel for the applicants sought and was allowed to withdraw the second and third prayers in the application by admitting that there was no caveat on the suit land. He also conceded that the orders in Revision Cause No. 12 of

2012 could not legally and realistically be set aside. I directed that the parties file written submissions but, only the respondent complied with my order.

Jurisdiction of a court to review its orders/judgments is founded on Section 82 CPA which provides that:-

*“Any person considering him/her self 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 appeal for review of the 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.”*

**Section 82 CPA** has been enlarged by **Order 46 rule 1 of the CPR** which provides that:-

*“Any person considering him/her self aggrieved by a decree or order from which an appeal is allowed but from which no appeal has been preferred or 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 order was 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 the judgment to the court which passed the decree or made the order.”*

Both the above provisions specifically allow any party who feels aggrieved by a decree or order to seek its review. Therefore, the 1st applicant was acting within his right and the law to present this application as a person aggrieved by the decision in C/S No.227 of 2009.

The court in **Re Nakivubo Chemists (U) Ltd [1979] HCB 12** while interpreting Order 46 held that an applicant in order to succeed in a claim for review has to show firstly, that there is discovery of a new and important matter of evidence previously overlooked by excusable misfortune. Secondly, that there is discovery of some error or mistake apparent on the face of the record; and thirdly, that review ought to be made by court for any other sufficient reason.

In the case of **Yusuf vs. Nokorach [1971] EA 104**, it was held that any other sufficient reason ought to be read as meaning sufficiently of a kind analogous to the first two grounds.

However, before I embark on the merits of this application, I need to give some attention to important objections raised by the respondent. Firstly, it was argued that the affidavit which is undated, offends the provisions of Section 5 of the Commissioner of Oaths Act since it did not state in the *jurator* attestation when the affidavit was made or sworn. The wording of Section 5 appears to make the provision that an affidavit must be dated mandatory. However, it is now settled by our courts that this is a mere technicality which is not fatal to the affidavit on the whole. Many Justices of the High Court (see for example: **Interconsumer Products Ltd Vs Nice and Soft Investments (2003) Ltd M/A 256/04 H.CT**) have routinely followed the finding in **Tarlok Singh Vs Road Master Cycles (U) Ltd Civil Appeal No.46/2010** where it was held *inter-alia* that

*“It is trite that the defect in the jurat or any irregularity in form of affidavit could not be allowed to vitiate an affidavit in view of Article 126 (e) of the 1995. Constitution which stipulates that substantive justice can be administered without undue regard to technicalities ..... the errors or omissions regarding the date and the commissioner cannot vitiate an application.”*

I am likewise bound to follow that liberal view and will therefore consider the applicant’s evidence, in spite of the shortcoming of his affidavit.

Secondly it was contended for the respondent that the nature of the review sought under 0.46 r. CPR required that the application be put before Justice Murangira who passed judgment and not a new Judge. In my view, the main ground for review here is that of discovery of new and important evidence. According to 0.46 R.2 CPR this is the type that can be placed before a new Judge. Therefore I again disagree with the respondent on this objection and it is overruled.

The above notwithstanding, I also note that the 1<sup>st</sup> applicant failed to bring into evidence of this application either the judgment or decree from which this application seeks a review. Annexure “C” to the 1<sup>st</sup> applicant’s affidavit is an unsigned judgment, which bears hand written corrections indicating that it is only a draft. No decree was presented as extracted from that judgment. Our courts have previously held that the decree appealed from must be extracted and attached to the appeal otherwise the whole appeal is rendered incompetent. (See for example **Board of Governors & Headmaster Gulu S.S. Vrs P. E. Odond CA 2 of 1990** and **Yoweri Katorobo**

**CA 2 of 1995.** The same rule should apply to an application for a review of a judgment and that alone would make this application for review incompetent. However, even if I were to hold otherwise, I find no merit in the substantive arguments presented for the 1<sup>st</sup> applicant for the following reasons.

I have already discussed the provisions of law allowing review and will not repeat them here. However, it is important to note that **Order 46 CPR** provides for review but also widens the jurisdiction of the court to do so on grounds of discovery of new and important matter or evidence which after exercise of due diligence was not in the knowledge of an aggrieved party or could not be produced by that party at the time the decree was passed. The said provision also permits one to apply for review of a judgment on account of some mistake or error apparent on the face of the record or for any other sufficient reason. This honorable court has already pronounced itself on the proper interpretation of the above provision in **Yefeesi Tegiike Vs. Jamada Wakafutuli HCMA No. 1 of 1996 [1996] V KALR 102.**

The applicant relied on three grounds to pursue review. Firstly that he discovered new and important evidence previously overlooked by excusable misfortune, secondly that the respondent has no interest in the suit property as a beneficiary and thirdly that mistake of counsel should not be visited on him. However in my view, the applicant failed in his affidavit to explain the new matter discovered. He argued that the respondent had no interest in the suit property because she did not have letters of administration in respect of the estate of the late Margaret Julian Suubi and even then, he purchased the land from Suubi before her death meaning that the suit land did not form part of her estate. He also argued that his advocate omitted to adduce evidence regarding his ownership of the suit land.

It may well be that the new matter 'discovered' is that the respondent was represented by a firm which is not licensed to practice law in Uganda or that she did not have letters of administration to the estate of the late Margret Julian Suubi. This in my view would be information that would be available or reasonable available to the applicant before or during prosecution of his claim. Even if it were not so, I note that in the decree sought to be reviewed, the respondent was the defendant in that case. One does not need letters of administration to be a defendant in a matter involving matters of a deceased's estate. Moreover, it is not in dispute that the respondent is a daughter of the late Margret Suubi and it has now been settled that a beneficiary can sue (or for

that matter be sued) to protect their interest in an estate even where no grant of letters of administration has been made. **See; Israel Kabwa vs. Martin Banoba Musiga SCCA No. 52 of 1995.**

With regard to the alleged omission by the 1<sup>st</sup> applicant's counsel to adduce evidence of the applicant's proprietorship of the suit land, I do agree with counsel for the respondent. Allowing that ground as 'new matter left out as excusable omission' would be erroneous. Firstly, that type of evidence would ostensibly or reasonably be in the knowledge of or within reach of any litigant before or during the process of prosecution of their claim. I also opine that the mistake of counsel (to take a certain step) is not a 'mistake' envisaged under 0.46 r. 1 CPR. Under that rule, the mistake or error must be one that is 'apparent on the face of the record'. According to the court in **Edison Kamyabwera Vs Pastor Tumwebaze SCCA 6/04 (unreported)** it must be an 'evident error', so manifested and clear that no court would permit it to remain on the record. I believe such an error would not include the mistake or omission of one's advocate to take a necessary step or present certain evidence vital to the success of the claim.

Again, matters of the applicant's ownership of the suit land were conversed or should have been conversed in HCCS. No.227/2009 and cannot be repeated here as they are matters already *res judicata* as far as this court is concerned.

It is also strange that it is the applicant who raises the fact that a nonexistent law firm represented the respondent in the suit. My perusal of the record shows that the applicant who was the plaintiff in C/S 227/2009 is represented by M/s Robert Mukanza & Co., Advocates, and the very firm he was complaining about. That being the case, it is him and not the respondent who used a firm that was, or is practising law in contravention of the Advocates Act and Rules, if at all. That would therefore pose serious questions as to the authenticity of the pleadings in the main suit, which is the basis of this application. I therefore also disregard that objection.

So on the whole, I find that this application is lacking in merit and it is thereby dismissed with costs to the respondent.

Before I take leave of this application, I need to point out that counsel who represented the applicant did so in a very careless and clumsy manner. They presented an undated affidavit for filing and attached to it, were incomplete documents that offered no evidential value to the

application. They also omitted to file written submissions, which may probably have, to some extent, redeemed their poor representation of the applicant on the whole.

**EVA K. LUSWATA**  
**JUDGE**  
**30/4/14**