

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT FORT PORTAL
MISCELLANEOUS APPLICATION NO. 002 OF 2016
(Arising from Civil Appeal No. 37 of 2016)
(Arising from Civil Suit No. 21 of 2002)

KASORO ANNET
KASORO ESTHER.....APPLICANTS
VERSUS

BONABANA BULANDINA.....RESPONDENT

BEFORE: LORDSHIP HON. JUSTICE OYUKO. ANTHONY OJOK, JUDGE

Judgment

This is an appeal from the Judgment and Orders of His Worship Karemani Karemera, Magistrate Grade I, Fort Portal, determined on the 14th July, 2015.

Brief background

The plaintiff in this suit Bulandina Bonabana brought this suit against 3 defendants namely, 1st, 2nd and 3rd defendants. The first defendant is the mother of the 2nd and 3rd defendants. The plaintiff is the aunt of 2nd and 3rd defendants and a sister in law of the first defendant.

The plaintiff seeks orders of Court that; he be declared the lawful owner of the suit property which is a piece of land located at Maguru in Fort Portal Municipality, Kabarole District; orders of Permanent Injunction; General Damages and costs of this suit.

The brief facts are that on the 8/8/1976 the plaintiff entered an agreement with the Municipal Council for a piece of land which she was given by her late uncle Kabwimukya in 1942. That later the plaintiff went to live with her husband. That the 1st defendant's late husband built a matrimonial house on part of the land which the plaintiff had given him and therefore trespassed on her piece of land, demolishing her latrine and constructed a house thereon.

Three issues arose for determination in the lower Court;

- (a) Whether or not the suit land was given to the plaintiff alone by Paul Kabwimukya or to her and the late Charles Kasoro husband of the 1st defendant?
- (b) Whether the defendants have trespassed on the suit land?
- (c) What remedies are available to either party?

After listening to the evidence of both sides, visiting the locus-in-quo and hearing from the witnesses, the learned trial Magistrate came to the finding that this land belonged to the late Kasoro Charles and cannot be reclaimed by the plaintiff who allegedly gave this land to him, he thus dismissed with costs, hence this review.

It was until the respondent served a bill of costs to the Applicants and started the process of execution that it awakened/alerted the applicants hence this review in 2016 and the grounds are;

1. That the decision, decree and orders in **HCT-01-CV-CS-037/2016** be reviewed and set aside and the appeal be dismissed.
2. That the Judgment and order in the suit no. **FPT-00-CV-CS-112/2002** be restored.
3. Costs of the application.

This application is supported by affidavit in support of Kasoro Annet one of the applicants. Counsel for the respondent filed his affidavit in reply and vehemently opposed the application on grounds listed in the reply and prays that this court be pleased to dismiss the application with costs.

Counsel Joseph Muhumuza Kaahwa appeared for the applicants while Counsel Kizito Deo represented the Respondent and all the parties were present. By agreement, both parties made oral submissions.

Ground 1;

That the decision, decree and orders in HCT-01-CV-CA-37/2006 be reviewed and set aside and the appeal be dismissed.

Counsel for the applicant submitted that the duty of the first appellate court is to scrutinise, re-evaluate and re-appraise evidence on appeal with the duty to reach at its own conclusion or confirm the decision appealed against and in doing so it can uphold the Judgment or set it aside or modify it accordingly. He went ahead and submitted that in the instant application, the court did not exercise its power as the first appellate court in accordance with **Section 80 (1)a & b** of the Civil Procedure Act as well the provision under the Judicature Act.

According to counsel, by failure to perform its duty and power, it constituted an error in law and such a decision is subject to review.

By allowing the submission of the appellant and not agreeing with it and going ahead to dismiss the appeal without exercising its power to re-evaluate, re-appraise the lower court's decision was an error apparent on the face of the record. Court had all the powers to either take or not take the submission but on its own, go ahead and re-evaluate, re-appraise and scrutinise the records other than just dismiss it. He cited numerous authorities such as **Banco Araba Esponol Vs Bank of Uganda SCCA 8/98, Edson Kanyabweru Vs Pastori Tumwebaze SCCA No. 6/2004 and A.G & ULC Vs James Marting Kamoga & James Kamuli** to support his submission.

In reply Counsel Kizito Deo vehemently opposed the application saying it was bad in law, abuse of court process and should be struck out with costs. He submitted that the applicants remedy if any is not before this court, the court exercised its jurisdiction and invites court to look at the affidavit in reply specifically paragraphs 8,9,10 & 11 and maintained that the conditions for review are well laid down under **Section 82 (a) & b** of the Civil Procedure Act and **Order 46 Rule 1 & 8** Civil Procedure Rules.

According to counsel, there is nothing in the affidavit in support that warrants a review or justifying Court to review this case. According to him by the appellate court not performing its duty to re-evaluate, re-appraise or scrutinise the records to either confirm or modify or set aside would have been a ground of appeal not review. It was an afterthought on the part of counsel of the applicant after knowing that time was not on their side to apply for review, therefore this court should be obliged to dismiss this application with costs.

Counsel Kizito also relied on a number of authorities to support his submission.

Having attentively and carefully internalised the submission, authorities and the background of the case, I do respond to ground I as follows;

It is on record that both counsel agreed that there is no time frame under which a review can be brought to court whereas it is true with appeals. This implies that either party can still make an application for review at any time or at any stage whereas I am also mindful that counsel normally take advantage of having realised that time of appeal is against them to hide under **Section 82** of the Civil Procedure Act and Order 46 Rules 1 & 8 of the Civil Procedure Rules this does not in any way actually take away the powers of this court to objectively look at the law, the submissions and the background of each case.

According to lawyers club Indian forum an error apparent on the face of the records implies;

(a) Court has failed to exercise a jurisdiction which it has resulting in failure of justice (emphasis in mind).

(b) The court has assumed a jurisdiction which it does not have.

(c) Jurisdiction though available is being exercised in a manner that tantamount to overstepping the limits of jurisdiction.

Black's Law Dictionary defines apparent to mean that;

“That which is obvious, evident, or manifest; what appears, or has been made manifest. In respect to facts involved in an appeal or writ of error, that which is stated in the record.”

And error to mean;

“A mistaken judgment or incorrect belief as to the existence or effect of matters of fact, or a false or mistaken conception or application of the law. Such a mistaken or false conception or application of the law to the facts of a cause as will furnish ground for a review of the proceedings upon a writ of error; a mistake of law, or false or irregular application of it,

such as vitiates the proceedings and warrants the reversal of the judgment Error is also used as an elliptical expression for "writ of error;" as in saying that error lies; that a judgment may be reversed on error."

Section 82 of the Civil Procedure Act provides 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."

Then **Order 46** of the Civil Procedure Rules provides that:-

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.

2. To whom applications for review may be made.

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 is 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.

3. Application where rejected or where granted.

(1) Where it appears to the court that there is not sufficient ground for a review, it shall dismiss the application.

(2) Where the Court is of opinion that the application for review should be granted, it shall grant it; except that no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his or her knowledge, or could not be adduced by him or her when the decree or order was passed or made without strict proof of the allegation.”

Section 96 of the Civil Procedure Act provides for Enlargement of time and states that;

“Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge that period, even though the period originally fixed or granted may have expired.”

Ground 1 therefore fails.

Ground 2;

That the Judgment and order in the suit no. **FPT-00-CV-CS-112/2002** be restored.

Since Ground 1 has failed then Ground 2 automatically also fails.

In the instant case Counsel for the Applicants was present when judgement was being delivered in the first Appellate Court and is well aware of the option to further appeal in case of dissatisfaction. Counsel should have guided his clients to opt for further appeal within 30 days and not to come 5 years later seeking for review to delay justice. Be as it may the Applicants could have applied for extension of time and still lodge their appeal. Much as the Appellate Court could have acted without jurisdiction this was not an error on the face of the record but rather a ground for appeal. Litigation cannot however, go on forever thus has to come to an end. This application is dismissed with costs.

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OYUKO. ANTHONY OJOK

JUDGE

22/06/16