

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
HOLDEN AT MBALE**

**HCT – 04 – CV-MA-207-2015
(ARISING FROM HCCA NO. 0066/2012)
(ARISING FROM CIVIL SUIT NO. 151/1996)**

- 1. ROBINAH MATANDA**
- 2. SUZAN MATANDA**
- 3. SARAH MATANDA**
- 4. BETTY KAKAYI**
- 5. ESTHER NAMBUYA**
- 6. JUNIOR MATANDA**
- 7. NIGHT KAKAI MATANDA**
- 8. MICHAEL WASIKE**
- 9. PAUL WAFULA**
- 10. DERICK WALYAULA**
- 11. MABELI NAKHAIMA**
- 12. FLAVIA MUTONYI MATANDA** :::::::::::

APPLICANTS

VERSUS

- 1. P.R. PATEL**
- 2. JOHN NALEMU** :::::::::::

RESPONDENTS

BEFORE: THE HON. MR. JUSTICE HERY I. KAWESA

RULING

The applicants being aggrieved as beneficial owners of the estate of the **J.W. Matanda** filed the application seeking a review and setting aside of the orders in appeal.

The grounds of the application are contained in the Notice of Motion as supported by the affidavit of **Robinah Matanda**.

The grounds *inter alia* are that:

- a) Applicants are children and beneficiaries of the estate of the late **J.W. Matanda**, who was not a respondent in CA 0060/2012.
- b) That the Judgement has an effect on the applicants who were not parties to the proceedings.

- c) The late **J.W. Matanda** was irregularly added on the appeal and was not given an opportunity to be heard.
- d) The purported purchase of the suit property by 1st Respondent **R. Patel** from the defunct UCB was tainted with illegalities.
- e) The application is intended to protect the estate of the late **J.W. Matanda**.
- f) That it's just and equitable that the Judgment and decree in Civil appeal N0. 066 of 2012 be reviewed and set aside.

I have carefully followed the submissions by both applicants' counsel, and Respondents' counsel.

I will determine this application under the following issues:

- 1. Whether the applicants had capacity to bring this application.
- 2. Whether the application raises any ground under O. 46 Rule 1 of the Civil Procedure Rules for which a review of Judgment can be granted.
- 3. Remedies.

This court determines the issues as below:

1. Whether applicants have capacity to bring the application.

According to section 82 of the Civil Procedure Act;

“Any person considering himself / herself aggrieved,

- a) by the 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 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.”*

These same provisions are contained in O. 46 R 1 and 2 of the Civil Procedure Rules.

The first question for investigation therefore is whether applicants are aggrieved persons as envisaged by the law above.

In submissions, counsel for applicants alleges that the applicants have proved by affidavit that they are aggrieved by virtue of being children of the late **J.W Matanda** the registered proprietor of the suit land. He submitted that their rights were affected by the Judgment in the said appeal yet they were not parties to the appeal.

In Response the Respondent shows that the suit property is not part of the estate of the said **Matanda**.

I notice from the pleadings that the application is filed by 12 named persons who allegedly according to the affidavit in support of the motion authorised **Robinah Matanda** to depone contents of her affidavit on their behalf. According to the affidavit under paragraph 2;

“ a copy of the authority is attached and marked A.”

I however have perused the entire record and did not find any authority *“attached and marked A”*. This affidavit is therefore false as regards this assertion.

It means that same applicants 1- **Robinah Matanda** , the rest of the applicants did not swear any affidavits in support of the motion , and to that extent has no evidence in support of the grounds!

Secondly in paragraph 3 the deponent **Robinah Matanda** states that “ I am one of the children and beneficiaries of the estate of the late **J. W. Matanda**” and in paragraph 4 that *“the late **J.W. Matanda** was the registered proprietor of the suit property comprised in plot 11 Republic Street Mable as per Certificate annexed as ‘B’.”*

From the above averments it is proposed to court that **J. W. Matanda** is deceased. However, there is no evidence in proof of this fact in the pleadings. Apart from a reference to **Matanda** as “the late”. There is no ‘Certificate of death’ or “letter from the Registrar of Birth and Death, or letters of Administrator or Probate , or any other independent evidence availed to court in proof of this fact. There is similarly no evidence on record that applicants1-12 are children/

Beneficiaries of the said estate, save the averment by **Robinah Matanda** which is not supported by independent evidence.

From the above facts, there is a serious problem in terms of the locus to bring this application. The general principle is that any person aggrieved by a decree/order can bring this application. But in **Re Nakivubo Chemists V. Ltd (1979) HCB 12**, it was held that:

“An aggrieved person is a person who has suffered a legal grievance, which has wrongly deprived him of something.”

And **Ladok Abdalla Mohammed Hussen V. Isingoma Kakiiza SCCA No. 8/1995** (unreported) further held that a third party cannot in general apply for review of an order or a decree in which he or she was not a party.

This position was however clarified in **Mohamed Albhai v. W.E. Bukenya Mukasa and Departed Asians Property Custodian Board- SCCA No. 56 of 1996** (unreported), that where a third party can prove that he or she is an aggrieved person and has suffered a legal grievance, he or she can apply for review.

In this case the applicants had the legal burden to prove that their aggrieved persons; who have suffered a legal grievance.

When I read the pleading I find that applicants tried to base their application on a title held by **J. Matanda** annexed to the motion, which they claimed relates to the estate of their late father, in which they have interest by virtue being his children and hence beneficiaries of his estate.

I have however found that there is no proof of the fact of death, there is no proof of the estate properties to which the said property is listed, there is no list of beneficiaries to which applicants are named as such. At best these factors are hearsay evidence as they are not proved by evidence. It is unsafe to conclude therefore that the applicants are aggrieved persons in terms as alleged. The arguments by counsel in his submissions on this point were not borne out of evidence on record and it misleading for counsel to assert that;

“The person from whom the applicant’s derive their beneficial interest was dead at the material time and therefore could not be party to the suit....”

Without him providing proof by way of evidence in court. The statement at best amounts to evidence at the bar from counsel which is unacceptable. The rest of his arguments on this point therefore fall on the wayside.

I find that applicants filed to prove that their aggrieved persons, who could bring this application as such. They had no capacity to sue.

2. Whether the application raises any ground for which a review can be allowed as per Order 46 rule 1 of the Civil Procedure Rules

The grounds under which court can grant the application for review are laid out under O.46 r. 1 of the Civil Procedure Rules. They are;

- (i) Discovery of new important matter.
- (ii) Error on the face of the record.
- (iii) Sufficient cause.

In his submission applicant’s counsel argued that the record reveals that there is an error/mistake/illegality on the fact of the record. This was because **Matanda** was erroneously added as party to the suit yet he had died in 2014. He also argued that the purported sale under which the 1st Respondent claims rights was a nullity as it violated Section 48 of the Civil Procedure Act.

Counsel for Respondent opposed this assertion and referred court to case law in support of his arguments.

The position of the law is that for review to succeed on the basis of an error on the face of the record, the error must be so manifest and clear that no court would permit such an error to remain on the record. See *F.X. Mubuuke v. UEB HCMA No.98/2005* (unreported). Also *Muyode v. Industrial and Commercial Development Corporation and Anor. (2000) 1 EA 243 (CAC) 246*.

The matters which counsel for the applicant has made reference to in my view are not errors. The fact that **Matanda** was added as a party was a matter argued in submissions, and court made its decision on it having listened to arguments. If counsel finds the conclusions by court erroneous, his remedy is not review- but appeal.

The same goes for the complaint that Section 48 of the Civil Procedure Act, was not complied with. This finding was also reached by court exercising its jurisdiction of adjudication. If the decision according to counsel for appellant offended Section 48, then again the right course to take is appeal and not review. None of the scenarios cited by counsel therefore pass the test of “*Error on the face of the record.*”

I also agree with counsel for Respondent’s concern that the applicant in this application appears to be moving this court to review earlier decisions which gave rise to the decision in HCCA .0066/2012 that is Land Suit No. 445/2012, and Civil Suit No.151/1996.

That is a wrong procedure to take and cannot be sanctioned by this court. The attempt to use “*the alleged death of J.W. Matanda*” as a prox, to pull him out of the litigations in which he participated as found by the decisions being complained about, cannot be sanctioned by this court.

Respondent counsel says applicants and Respondent 2 **Nalemu**, have appeared in the Court of Appeal to pursue the same matters being argued by applicants’ counsel, and have withdrawn the appeal. This has not been rebutted by counsel/applicant in reply. I therefore do not find any justifiable grounds for which this court can base itself to order for review of its judgment. This issue terminates in the negative.

3. Remedies

The applicants’ remedy lies in appeal, if they feel aggrieved by the judgment.

In conclusion there is no merit in any of the grounds raised in this application. It fails and is dismissed with costs. I so order.

Henry I. Kawesa

JUDGE

12.07.2017