THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

LAND DIVISION

MISCELLANEOUS APPLICATION NO 1250 OF 2019

ARISING FROM CIVIL SUIT NO. 415 OF 2017

KAMPALA DISABLED TRADERS

BUSINESS ASSOCIATION CO. LTD :::::::::::::::::::::: APPLICANT

VERSUS

1. **KAMPALA DISTRICT UNION OF PEOPLE WITH DISABILITIES CO. LTD**
2. **KAMPALA CAPITAL CITY AUTHORITY ::: RESPONDENTS**

BEFORE: HON. JUSTICE DR. FLAVIAN ZEIJA

RULING

The applicant herein brought the instant application under Section 33 of the Judicature Act Cap 13, Section 82 and 98 Civil Procedure Act Cap 71 and Order. 46 r 1(b) and Order 51 r. 6 Civil Procedure Rules SI 71-1 seeking this court to review it's judgment and decree in CS-415-2017; to set aside the said judgment and decree and for the applicant to be joined as a party to the main suit. In the alternative and without prejudice to the foregoing that the name KAMPALA DISTRICT UNION OF PEOPLE WITH DISABILITIES LTD in the judgment be substituted with the name KAMPALA DISABLED TRADERS BUSINESS ASSOCIATION LTD. Additionally, that the 2nd

respondent issues a sublease in the name of the applicant and costs be provided for.

The application is supported by the affidavit of the applicant's trustee a one ACAN JOYCE OKENY and sets out the grounds of the application. Both the respondents filed affidavits in reply opposing the application which are on record. Written submissions of both parties are also on record. The applicant was represented by M/s S.K.Kiiza & Co. Advocates, the 1st respondent was represented by M/s Shonubi, Musoke & Co. Advocates and the 2nd respondent was represented by the directorate of legal affairs.

In a bid to exhaustively determine this application I find it imperative to appreciate the background of this matter. The 1st respondent sued the 2nd respondent vide CS-0451-2015 seeking a declaration that it was entitled to have the sublease on property comprised in Leasehold Register Volume 3854 Folio 20 Plot 7A at Namirembe Road *(suit land)* renewed by the 2nd respondent and an order directing the 2nd respondent to extend the sublease to a full term of 49 years. The matter was heard and judgment was entered in favor of the 1st respondent. Aggrieved by that decision the 2nd respondent appealed to the Court of Appeal. Before the appeal was concluded the applicant herein brought the instant application seeking to review the judgment in the main suit on the grounds stated hereinabove. At the commencement of the hearing of the application counsel for the respondents raised a preliminary objection to the effect that given the pendency of the appeal, the applicants are, by the operation of Section 82 CPA and Order 46 rule 1 CPR precluded from bringing the instant application for review. Further that the parties to the appeal

had already entered into a partial consent in the Court of Appeal and the only outstanding issue left was on damages. In response Counsel for the applicant submitted that the instant application is filed by a party, who though was not party to CS-415-2017, is an aggrieved party and as such was empowered by Section 82 CPA and Order 46 rule 1(2) CPR to apply for a review even when the decision sought to be reviewed has been appealed against. The trial judge overruled the objection and held, rightfully so, that there was nothing to show that there is a ground of appeal common to the applicant and the appellant for this application to fall within the exception under Order 46 rule 1(2). The application was set for determination and both parties were directed to file written submission which are on record.

The applicant's case as can be gathered from the affidavit in support of the application and the submissions on record, is that in the year 1989 people with disabilities formed an association known as Kampala Disabled Business Association and the same was registered as a business name and carried on business till 2007. Through the same business name, Kampala Disabled Business Association lobbied Kampala City Council for allocation of land in the City Center to enable them put up an income generating project for the people with disabilities. The council allocated land at Plot 11 Lumum Street which was later reallocated to another person. On the 14th November 2007, upon advise from it's lawyers, the disabled persons incorporated an entity known as Kampala Disabled Traders Business Association Company Ltd a company limited by guarantee.

The disabled persons petitioned the president in 2005 over the reallocation of Plot 11 Lumum Street and after a series of

communication, the Permanent Secretary of the Ministry of Local Government wrote to the Acting Town Clerk Kampala City Council indicating that the name Kampala Disabled Traders Business Association be put in the land title. The letter was forwarded to Kampala City Council which in response held an ordinary council meeting on the 13th September 2007 and under minute C.8/59/2007 resolved to sublease 0.15 hectares of land in respect of Plot 7A Namirembe Road (suit land) to the Kampala District Union of Persons with Disabilities (1st respondent). The applicant contends that this was a great error since by the time the council sat and made a resolution to allocate the suit land the 1st respondent had not been incorporated as it was only incorporated on the 2nd May 2008. Further that the 1st respondent has never been in physical occupation of the suit land and it tried to forcefully take possession of the same by a hoarding permit which was eventually revoked by the 2nd respondent. That upon expiry of its sublease the 1st respondent applied for its renewal which the 2nd respondent declined due to the physical possession of the suit land by the applicant. It is then that the 1st respondent filed CS-415-2017 compelling the 2nd respondent to renew the sublease to a full term of 49 years. Judgment was entered in the 1st respondent's favor which the applicant now seek to review.

The respondents on the other hand allege that the president's letter that the applicant relies on was generally in reference to people with disabilities and the property to be allocated was Plot 11 Lumum Street and not the suit land. In their submissions Counsel for the 1st respondent stated that the current application was incompetent

before this court as the decision the applicant seeks to review has already been determined by the court of appeal. That the remedy left for the applicant is to either apply to be joined as parties on the remaining ground of damages in the court of appeal or apply to review the consent judgment that has already been entered. Counsel citing the case of **Muwema, Mugerwa & Co. Advocates Vs. Shell Uganda Limited & 10 Ors CA-018-2011** submitted that this court has no jurisdiction to determine on the rights pertaining the suit land since the court of appeal has pronounced itself on the issues of the proprietorship of the same in CA-245-2017. Counsel further submitted that Order 46(2) CPR allows an application for review by a party who is not party to an appeal even when an appeal has been preferred where the ground of appeal is not common to that of review. That in the instant case the applicant seeks to review the judgment on ground that they are the "true" owners of the suit property yet on appeal the 2nd respondent sought to challenge the finding of the court regarding the ownership of the suit property which court had held to be owned by the 1st respondent. Counsel stated that these issues are similar and hence the matter should not be subject of review. Further counsel for the 1st respondent submitted that the applicant is not an aggrieved person as defined under the law and as such has no locus to bring the application. Counsel stated that under paragraph 11 of the applicant's affidavit in support, the deponent, Achan Joyce Okeny, states that the suit land was allocated to Kampala Disabled Business Association. That this was not the applicant. Further that it was not true that the applicant was in possession of the suit land as the same is in possession of various persons who include members

of the applicant and not the applicant itself and being in possession does not amount to an interest. Counsel citing the case of **Kampala Bukenya Vs Edith Nakandi & Umar Katongole MA-0775-2017** submitted that the applicant was fully aware of CS-415-2015 and can not claim to be an aggrieved party since the said Acen Joyce*(deponent)* attended the court proceedings through the hearing to the pronouncement of court and the applicant did not bother to apply to be added as parties. Counsel further submitted that there is no error apparent on the face of the record to warrant the review of this court's judgment. Counsel stated that the letters that the applicant refers to and the grant of the land made refers to Plot 11 Lumum Street and not the suit land. That for one to understand how the suit land was awarded to the 1st respondent it would require serious examination and evidence to be adduced. Counsel prayed for the application to be dismissed with costs.

Counsel for the 2nd respondents conceded with the submissions of the 1st respondent and added that the applicant's assertions that the court labored under a mistake that the 1st respondent legally existed at the time the 2nd respondent's predecessor held a council meeting to sublease the suit land is an argument that would require a long court process of litigation. Furthermore, that the existence or non-existence of the 1st respondent was not a matter for consideration but the court having established and agreed by both parties that a sublease agreement had existed between the 1st and 2nd respondents and the same had expired, the issue before court undisputedly was whether the 1st respondent was entitled to have its sublease renewed and extended and that was the issue upon which judgment was

made. Counsel submitted that the applicant has failed to show that there was an error apparent on the face of the record and the applicant failed to adduce any proof in form of a certificate of title, lease agreement or any other permission that it is in exclusive possession and use of the suit land.

I noted that from the submissions and affidavits of the respondents they advanced the same objection they did in the court in CS-0415-2015 that is whether this application is properly before this court. Counsel for the respondents reiterated their earlier objection to the effect that since there is already a consent agreement in the Court of Appeal this court ceased to have jurisdiction to revise the decision in the main suit. I find that this objection was properly addressed and determined by the trial judge in the main suit and the well advanced reasoning in the ruling is no record.

Order 46 rule 1(2) provides;

"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 appeal is common to the applicant and the appellant, or when, being respondent, he or she can present to the appellant court the case on which he or she applies for the review".

As already noted by the trial judge, by virtue of the above order, the applicant herein who was never a party in the main suit could properly bring the instant application regardless of the appeal in the court of appeal. The order provides for an exception that is where the ground of appeal is common to the applicant and the appellant. The

ground of appeal in the court of appeal were premised on the fact that the trial judge erred to order the 2nd respondent to renew the 1st respondent's sub lease. However, the applicant's grievance seems to be on how the 1st respondent acquired the lease in the first place to warrant the said renewal. These are two different issues are as such cannot be said to be common grounds to each other. In the circumstances therefore this application for review is properly before this court. That is settled.

The grounds for an application for review like the instant one have been outlined in numerous leading authorities to include;

1. *That there is a mistake manifest or error apparent on the face of the record.*
2. *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.*
3. *That any other sufficient reason exists.*

See: FX Mubuuke Vs UEB High court Misc. Application No. 98 of 2005.

In the instant application, the applicant relied mainly on ground one, that is; *"a mistake or an error apparent on the face of the record."*

Counsel for the applicant submitted that this Court rendered its judgment while laboring under a mistake that the 1st respondent legally existed at the time the 2nd respondent's predecessor held a council meeting to sublease the suit land whereas not. I found this

to be gist of the application. The applicant contends that at the time the town council sat and allocated the suit land to the 1st respondent, it was not in existence. That at times the suit land was allocated to the applicant since 1986 and it has been in occupation, through its members ever since. Counsel stated that in the absence of exclusive possession there was no lease hence the 1st respondent, who has not been in possession of the suit land, was given a mere paper.

The 1st respondent on the other hand submitted that it had applied for and was lawfully granted a lease by the 2nd respondent and subsequently renewed it after litigating in the main suit. As regards to being in possession counsel for the 1st respondent submitted that while the lease was still subsisting there was a suit that was filed against the respondents and other parties. An injunction was issued staying the status quo of the property during the subsistence of the suit till its determination in 2015. The 2nd respondent then declined to renew the lease on ground that there was a matter in court and an injunction stopping the renewal. It was through a series of these events that the 1st respondent was not able to take possession of the suit land.

Considering the arguments of the parties and the pleadings I find that what the applicant is seeking as an aggrieved party is for this court to look into decision which it allegedly passed under false representation. From the arguments of counsel for the 1st respondent, it is not disputed that the company was formed in 2007. As a matter of fact the appellant never seemed to address this issue. What we have before this court is evidence that the applicant company was incorporated on 14th November 2007 while the 1st

respondent was incorporated on the 2nd May 2008. The question that begs an answer is how the council sat in 13th September 2007 and passed a resolution to allocate the suit land to a company that was nonexistent? The applicant has produced before this court a wealth of evidence to prove its case. On record is a clear communication from ... stating that the suit land should be allocated to the applicant company. This was not done. While the issue of how the 1st respondent acquired the suit land was never previously addressed as alleged by the respondents the plausible answer is because it was never an issue at the time. What court was dealing with was whether the 2nd defendant was liable to renew the 1st respondent's lease. In essence court was acting on the assumption that the 1st respondent was the legal owner of the suit land. There's overwhelming evidence that the applicant who is still in occupation of the suit land was allocated the suit land. I noted that the same members who were in the applicant's company are the same members who were previously in the association. This court gave directions to both parties to provide information about their membership which the 1st respondent did not adhere to. What can be discerned from the record is that there is self-evident error glaring on the record that this court shut it's eyes from. The history of the allocation of the land as evidenced by documentary evidence shows that the association was the first allocatee of the land. It is a stakeholder in the land that was subsequently allocated to the 1st respondent.

An error apparent on the face of the record was defined in numerous leading cases including **Batuk K. Vyas Vs Surat Municipality AIR (1953) Bom 133 as thus:**

"No error can be said to be apparent on the face of the record if it is not manifest or self evident and requires an examination or argument to establish it....."

The error referred to in this instant is one that stares one right in the face and not one that has to be established through a long process of reasoning or on points where there may conceivably be two opinions. The fact that the 1st respondent was allocated the suit land before it's existence is such an error. It is therefore pertinent that court determines the question of ownership before the 2nd respondent can renew the lease. This calls for the issue of proprietorship to be subjected to a thorough legal process. This may be done in form of a suit.

The instant case therefore is a proper subject for proceedings for review.

Before I take leave of the matter I noted that there has been previous arbitration between the respondents, the applicants and other parties in regard of the suit land. Somehow these arbitrations have never bore any fruits. This is quite unfortunate.

In the circumstances therefore this application is allowed with the following orders:

(a) The judgement in Civil suit No 415 of 2017 is hereby set aside and the suit be heard afresh

(b) The applicant should be joined as a party to the suit for the issue of ownership to be effectively determined

(c) costs to the application should be in the cause.

Date at Kampala this 15th day of December 2020

Flavian Zeija

Principal Judge