THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

MISCELLANEOUS APPLICATION NO. 583 OF 2021

(Arising out of Civil Suit No. 452 of 2016)

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1. **GIBWA SEBOWA**
2. **ABDALLA SEBOWA .....APPLICANT**

VERSUS

10 1. **DR. MEDADA EBYARIMPA**
2. **HARUNA KAMULEGEYA SENTONGO.....RESPONDENTS**

Before: Lady Justice Alexandra Nkonge Rugadya

15 **RULING:**

Introduction:

This application seeks orders that that the judgment in ***Civil suit No. 452 of 2016*** dated 30th October, 2020 having been issued in error on the face of the record, be reviewed and set aside; and for costs to be provided for.

20 The application is supported by the affidavit of the 1st applicant, Mrs Gibwa Sebowa, the registered proprietor of the land comprised in ***Kyadondo Block 167 plot 370,*** land at Manyangwa (suit land), jointly owned with Abdalla Sebowa, the 2nd applicant.

She claims that on 17th July, 2010 she together with the 2nd applicant, had entered into a memorandum of understanding (MOU) with Mr. Haruna Kamulegeya Sentongo, the 2nd respondent and Ms Namaganda
25 Annet, giving both of them powers to negotiate and recover some of that land.

The applicants on 23rd July, 2010 executed a power of attorney in their favour to help them perform their obligations under the MOU.

That the applicants were never aware of the ongoing hearing of the suit until 14th July, 2020 during the *Covid 19* country wide lock down period when they were served with the 1st respondent's submissions at
30 her home.

They instructed ***M/S Richard Nsubuga & Co. Advocates*** to represent them in the matter, upon learning that they had been added as third parties in the suit which had been instituted by the 1st respondent against the 2nd respondent to recover the suit land.

They claimed not to have been served with the court documents in time to enable them file a defence. The hearing of the suit had thereafter proceeded *exparte* against them and that they were able to know about the judgment on the 29th March, 2021, when they were served with a copy.

Their claim in this application is that the decision had been made in error when this court came to its conclusion that the applicants had ratified the sale of the land to the 1st respondent, a transaction which they were never aware of in the first place, and therefore not liable in any way.

That the power of attorney was never intended for sale of the land but for settling issues concerning squatters; and the 1st respondent had not been one of the squatters.

The applicants claimed that while it is true that they gave the 2 acres to their attorneys, these were never intended for settlement of the transaction between the respondents since the land had been sold off by the 2nd respondent to one Hassan Magezi who had gone ahead to develop it.

That it was in the interest of justice that the judgment be set aside and the applicants be accorded a fair hearing.

Reply by the 1st respondent:

In rebuttal, the 1st respondent Dr. Ebyarimpa Medad however argued that the suit had been filed for recovery of the land he had bought from the 2nd respondent; and in the alternative for refund of the purchase money.

That the 2nd respondent filed a defence admitting the claim, but later became evasive, blaming the applicants for his failure to make the transfer. The 2nd respondent took out a third party notice but all efforts to serve him proved futile since his former lawyers claimed not to have any further instructions from him.

That when the matter had been fixed for hearing, the 1st respondent had gone with the process server to the applicant's house. They only found the 2nd applicant whom they served but who however declined to append his signature on the court papers, but promised to appear in court on the date set for the hearing. On the hearing date, the applicants did not turn up. His lawyers subsequently applied for substituted service which was granted and effected.

Since around that time the entire country was under lock down and the matter could not proceed for hearing. Fresh summons were issued and advertised but the applicants and the 2nd respondents failed to turn up, and the matter proceeded in their absence.

It was the 1st respondent's that the applicants were availed the chance and time to be heard when they were served and were now acting in collusion with the 2nd respondent, with an intention to frustrate the

course of justice. He rejected their argument that the judgment had been made in error. Accordingly that the application had not been made in good faith and ought to be dismissed with costs.

Representation:

The applicants were represented by ***M/S R. Nsubuga & Co. Advocates.*** The 1st respondent was represented by ***M/S Mpeirwe & Co. Advocates.*** The 2nd respondent did not file a reply.

Consideration of the issues:

The issue to be addressed by court is whether or not the service to the applicants had been effective; and whether or not therefore they had any legal grievance to merit a review.

The applicants were added by court upon application by the 2nd respondent, who claimed in his defence that the 1st respondent had sued the wrong party. He however did not follow up the case.

Needless to add, a plaintiff has the right to sue any party that he/she wishes and although the 1st respondent filed the suit against the 2nd respondent, it was the latter's decision to add the applicants as third parties in this case. When the 2nd respondent became evasive the duty to effectively serve the third party notice still remained outstanding.

The desired and intended result of serving summons is to make such party aware of the suit brought against him/her, so that he/she has the opportunity to respond to it by either defending the suit or admitting liability and submitting to judgment.

Although substituted service would be deemed good service, if it is shown that it did not lead to the defendant becoming aware of the summons it would not amount to effective service. (***Geoffrey Gatete and Anor vs William kyobe SCCANO. 7 OF 2005).***

In the present case, as established from the pleadings, the applicants admit that they received the final submissions by the 1st respondent. In addition to the substituted service, personal service had been effected to the 2nd applicant, who had however declined to acknowledge receipt thereof, but promised to attend court, assertions which the applicants however denied.

It is significant to note that on 14th July, 2020, the date on which the applicants first became aware of the case against them, the first step they took was on 8th January, 2021 when they instructed ***M/S R. Nsubuga and Co. Advocates*** to take over their defence.

Their counsel on that same date filed an application for leave to appear and defend. This application which was never heard, was filed at the time when Rwakakooko J, the presiding judge had already taken over the file.

On 9th July, 2020 the proceedings had been conducted and as directed, by that court, submissions were filed by the plaintiffs and service duly effected to the applicants as indeed admitted by them. Judgment was delivered on 20th October, 2020.

The *exparte* proceedings were not challenged when the applicants first got to learn about the suit. Instead their counsel who as court noted took over the matter in January, 2021 filed ***MA No. 34 of 2021*** seeking to file the defence out of time, about seven months after substituted service had been effected and three months after the judgment had already been delivered.

This implies that the application ***MA No. 34 of 2021*** (for leave to appear and defend out of time) which was filed after the judgment had already been delivered, had been overtaken by events.

Accordingly, the letter dated 10th February, 2021 requesting to have their application fixed for hearing came a little too late after the judgment was passed, to redeem the situation.

If therefore as claimed under the affidavit in support of the application that the applicants only became aware of the suit on 14th July, 2020, it is not clear to court then why they had to wait till January, 2021 before instructing their lawyer to take up some form of action.

Having slept on their rights they cannot therefore now claim that they were completely blind to whatever developments had been taking place in court. For those reasons, I want to believe that the service had duly been effected to the applicants, and had achieved the desired results.

Now for the merits of this application.

Issue No. 2: Whether the application merits a review:

The applicants' contention is that they detected an error on the face of the record by court, which would merit a review of the judgment.

Review is a creature of statute. Thus ***section 82*** of the ***Civil Procedure Act Cap. 71*** stipulates 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.***

Furthermore, ***Order 46 Rule 1 of the Civil Procedure Rules S.I.71-1*** enumerates three grounds under which a review may be granted to any person considering himself or herself aggrieved by a decision of court, that is:

> ***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

c) 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.

In general terms, the expression *"person aggrieved"* was considered to mean a person who has been injuriously affected in his rights or has suffered a legal grievance. ***James L.J*** in the case of ***Ex parte Side Botham in re Side Botham (1880) 14 Ch. D 458 at 465*** held that:

> ***"A person aggrieved must be a man who has suffered a legal grievance, ... against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully affected his title."***

It includes a person who has a genuine grievance because an order has been made which prejudicially affects his interests. (***See: Lord Denning in the Privy Council case of Attorney General of Gambia vs. N'jie [1961] AC P 617*** at ***page 634***).

A review application is made to the court which passed the decree or made the order. ***(See also FX Mubuuke vs UEB High Court MA No. 98 of 2005).***

In the case of ***Ariban Tuleshwar vs Ariban Pishak Sharma [1979] 4 SCCA 389,*** it was held that the power of review is exercisable where some mistake or error apparent on the record on the face of the record is found; and any analogous ground.

Going by the authorities above, the right to move the court is not restricted to parties to the suit or proceedings leading to the order or decree but includes any person who has a direct interest in the matter and who satisfies court that he or she has been injuriously affected.

An applicant will not fall within the category of an aggrieved party for purposes of review on basis of error on the record, where a decision was based on the merits.

That would fall within the provinces of a court of appeal. The review powers ought not to be confused with those of an appellate court enabling such court to correct all manner of errors committed by a lower court.

In ***Kanyabwera vs. Tumwebaze [2005] 2 E.A. 87***, the court relied on the ***AIR Commentaries: The Code of Civil Procedure by Mohar and Chitaley Vol. 5, (1998)*** and held as follows;

> ***"In order that error may be a ground for review, it must be one apparent on the face of the record, i.e. an evident error which does not 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 record.***

In other words, an error is apparent on the face of record when it is obvious and self-evident and does not require an elaborate argument to be established. ***See: Mulla on the Code of Civil procedure Act 1908 3rd edition at page 1673.***

The applicants in this case contended that an error apparent on the record was made by this court when it gave an interpretation to the words written on the instrument of the revocation of the powers of attorney, different from that which they had intended.

Court in its decision had agreed that the wrongful actions of the defendant (2nd respondent) were ratified by the applicants, the registered proprietor of the suit land on whose behalf he was acting.

The purported ratification ***(Annexture E')*** had been made in the terms below, inscribed on the bottom of the revocation instrument (full text):

> *In settling this matter with both parties we resolved to give them 2 acres in their work done. So am to provide them with pass photo (sic!) to effect their transfers.*
>
> *Signed:*
>
> *12.2.13*

Court also went on to state as follows:

> *'....I am satisfied that the plaintiff having paid a total deposit of Ugx 31,000,000/= acquired an equitable interest in the suit land and the defendant was tied to specific performance of the terms of the contract to its fullest. For the defendant to give up the same grounds of frustration by the third parties who are also the registered proprietors of the suit land was a fundamental breach.....*
>
> *The defendant knew that he was selling to the plaintiff land of which he had no authority over to sell. Although in law this gives rise to a distinctive and separate cause of action of fraud, in the instant case the plaintiff opted to sue for breach of contract and has amply demonstrated that indeed there was a breach of the contract of sale of land by the defendant.*

With all due respect to the applicants' arguments above, a distinction must be made between a mere erroneous decision and an error apparent on the face of the record.

An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record.

Evidently from the record the sale agreement ***(Annexture P2)*** dated 25th July, 2011 was entered between the respondents, erroneously based on powers of attorney dated 23rd July, 2010.

The revocation instrument is dated 7th January, 2013 and bears the purported ratification by the applicants, some two years after the sale between the respondents had already been concluded and which, as court acknowledged made the agreement null and void.

The core question therefore becomes: was the alleged ratification intended to validate an otherwise void agreement or ratify any such acts or transaction made previous to the revocation? The court in this case

gave what it perceived as the correct interpretation of the handwritten words on the instrument of revocation.

Mere error or wrong view is certainly no ground for a review, but rather a subject for a higher court, upon appeal.

I could also add, by way of observation that one acre was sold on 8th February, 2013 by the 2nd respondent to one Hassan Magezi for the land comprised in ***plot 3565, of block 167.*** This was after the revocation had been made and two acres already given to the 1st respondent and one Namaganda.

But more significantly, HCsome two years earlier in 2011, the 1st respondent had already bought an acre from the 2nd respondent. It is a principle observed in equity that where there are two competing equities one that is earlier in time is stronger in law.

Put differently, where equities are equal and neither claimant has a legal estate, the first in time will prevail over the one which comes later. ***(Ref: Mugogo fred vs kasagalya fred nd anor . HCCA NO. 0088 OF 2011).***

The suggestion also made therefore by the applicants in *paragraph 19* of the supporting affidavit that the land which they had given to the 2nd respondent and one Namaganda had been sold to one Hassan Magezi could not have been further from the truth since the 1st respondent had purchased his acre two years before Magezi bought his.

As indeed as pointed out by the 1st respondent counsel, the applicants could not dictate to the 2nd respondent to whom to sell the land after the validation. On that basis, the applicants had no legal grievance against the 1st respondent whose transaction had been validated, but in my view, could only maintain an action against the 2nd respondent in respect of any land sold by him beyond what had authorized under the revocation instrument.

In the premises, the application fails, with costs to the 1st respondent.

Alexandra Nkonge Rugadya

Judge

Delivered by email 26/8/2021

16th July, 2021