THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(LAND DIVISION)

MISCELLANEOUS APPLICATION NO. 1034 OF 2020

(Arising out Civil Appeal No. 117 of 2016)

(Arising from Makindye Chief Magistrate Court, Civil Suit No. 82 of 2014)

FARIDAH OMAR .....APPLICANT

VERSUS

1. **SHEILA AGONZIBWA**
2. **KATIMBO TRAVIS.....RESPONDENTS**

Before: Lady Justice Alexandra Nkonge Rugadya

RULING:

The applicant filed this application against the respondents, under the provisions of ***sections 82 and 98, of the Civil Procedure Act, Cap. 71 and section 33 of the Judicature Act; Order 46 and 52 rr1 and 2 of the Civil Procedure Rules.***

It seeks orders for a review of the decree of this court in ***Civil Appeal No. 117 of 2016.*** This court allowed the appeal on the ground that the learned trial magistrate had relied on persons who were not witnesses in the court; and for the costs of this application to be provided for.

Background:

The brief background of the appeal is that the respondent, the owner of land situated at Buggu Zone LC 1 Busabala Parish Makindye Ssabagabo, instituted ***Civil Suit No.82/2014*** against the

appellants jointly and severally for trespass; an order of eviction, general damages, *mesne* profits; interest, as well as costs of the suit.

The plaintiff/respondent claimed that the defendant/appellants had illegally entered her land with the intention of depriving her of the same.

The defendants/appellants on the other hand contended that they rightfully purchased the suit land from the lawful owner and that they were not trespassers on the suit land.

The trial court found that the plaintiff/respondent had an interest in the suit land and that the appellants were indeed trespassers upon the suit land.

Dissatisfied with the judgment and orders of the trial court, the appellants filed an appeal in this court, raising six (6) grounds of discontent:

1. ***That the learned trial magistrate erred in law and in fact when he failed to properly evaluate the evidence on record thereby coming to a wrong conclusion that the appellants were trespassers thus causing a miscarriage of justice as well as an injustice to the appellants;***

2. ***That the learned trial magistrate erred in law and fact when he made a finding of trespass to land without first establishing the issue of possession and ownership of the suit land;***

3. ***That the learned trial magistrate erred in law and fact for failure to conduct a locus visit in accordance with the law;***

4. ***That the learned trial magistrate erred in law and fact when he allowed the case to proceed exparte thereby denying the appellants an opportunity to be heard on merit.***

5. ***That the learned trial magistrate erred in law and fact in issuing the order evicting the defendants from the suit land.***

6. ***That the learned trial magistrate erred in law and fact in awarding general damages of Ugx. 5,000,000/= (Five Million Shillings Only), interest, as well as costs to the respondent.***

Grounds of the application:

The grounds of this application are set out in the affidavit of Ms Faridah Omar, the applicant herein.

Briefly, that she filed ***Civil Suit No.82 of 2014*** against the 1st respondent for trespass which was heard by the learned Grade 1 Magistrate Makindye, His Worship George W Watyekere who heard all the witnesses, later visited the *locus* and finally decided in favor of the applicant.

That this court in its decision allowed the appeal on grounds that the trial magistrate relied on evidence of persons who were not witnesses at the *locus*.

The applicant further averred that judge made error on face of record as no one other than the witnesses who presented to court was relied on upon the visit and that the record of proceedings at *locus* does not indicate any person that was relied upon by the trial magistrate and this amounted to an error.

The 1st respondent, Ms Agonzibwa Sheila in her reply however opposed the application, contending that it lacks merit; does not demonstrate any grounds to merit a review or setting aside the orders of this court since there is no error on the face of the record; that it was preferred in bad faith and that it is just and equitable for this application to be dismissed with costs.

The applicant did not file any affidavit in rejoinder.

Representation:

The applicant was represented by ***M/S AB David Advocates,*** while the 1st respondent was represented by ***M/S Kafeero and Co. Advocates.***

In the rejoinder, the applicant objected to the late filing of the submissions in reply, contrary to ***order 17 rule 4 of the Civil Procedure Rules.*** It provides that where any party to a suit fails to produce or perform any act necessary to further progress of the suit for which time has allowed, the court may notwithstanding that default proceed to determine the suit immediately.

Indeed the reply which was to be filed in court in 8th October, 2020 was only filed on 26th October, 2020. I would accordingly disregard the same and proceed with this application.

The position of law:

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, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully affected his title."

It does not include a mere busy body who is interfering in things, which do not concern him, but they do include 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***).

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 has been injuriously affected.

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 SCC 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.

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. But secondly where the record is missing critical information, leaving a lot of room for speculation. Where it is a question of The expression *"person aggrieved"* was thus 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, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully affected his title."***

The words *"a person aggrieved"* do not include a mere busy body who is interfering in things, which do not concern him, but they do include 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***).

Going by the authorities above, the right to move the court is therefore 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 has been injuriously affected.

That would be the province of a court of appeal. The review powers ought not to be confused with appellate powers which may enable an appellate court to correct all manners of errors committed by the subordinate 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. The error may be one of fact, but it is not limited to matters of fact and includes error***

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***

An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. A real distinction therefore exists between a mere erroneous decision and an error apparent on the face of the record.

Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out.

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.

Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal.

Specifically in respect of *ground 3* of the appeal, the learned trial magistrate had been faulted by the appellant (respondent in this application), for his failure to conduct a *locus* visit in accordance with the law.

The basis of the objection as spelt out under the affidavit in support is that this court made an error apparent on the face of the record as no evidence other than that of the witnesses who were presented to court was relied on at the *locus,* to support the this court's decision under the appeal; that the record of proceedings does not indicate any person that the trial court relied on, so as to justify the decision to refer for a retrial.

On *page 3* of the trial court's judgment, this is what that court had to say:

> ***At the close of the plaintiff's case the court visited the locus in quo and all the witnesses court interfaced with at the locus that included the local leaders and the neighbours to the suit land confirmed the fact that the suit land belongs to the plaintiff having purchased it from Solome Nakakawa the former owner. (emphasis added).***

Court concluded that whereas it could not be denied that the *locus* visit had been conducted by the trial court, the judgment did not give any indication as to whether or not the witnesses who were in court were the same as those whom court had interfaced with during the visit at *locus*.

That the record of proceedings at *locus* had not been availed to guide in making the conclusions that the trial court did. It thus created doubt on the correctness of the procedure adopted, the nature of evidence collected at the *locus* and consequently the accuracy of the conclusions that court eventually arrived at.

This court could not therefore rule out the possibility first, that the trial court had consulted the neighbours and local leaders, some of whom may not have appeared in court; and secondly, that the magistrate had erroneously based his decision on such evidence.

In ***John Siwa Bonin v. John Arapkissa (HCCS No. 0058) of 2007***, the authority of De-***Souza v. Uganda (1967) EA 78***, was re-echoed, where court observed that *the purpose of visiting locus in quo is to check on evidence given by the witnesses in court, not to fill in gaps to bolster the party's case.*

The court at trial is not to take on new evidence from parties who were never called in court as witnesses and such failure to conduct the *locus in quo* properly rendered the evidence to have been procured in error. (***Paineto Omwero v. Saulo S/o Zabuloni HCCS No. 31 of 2010).***

This court as a result faulted the trial court's failure to conduct the *locus quo* proceedings in a proper manner. Court's reliance on evidence of witnesses at *locus,* without availing the proceedings were grave anomalies which rendered the judgment irregular.

In any proceedings conducted *exparte,* a court still remains under an obligation to ensure that all that is required is properly done, so that justice is not only done but also seen to have been done. The only way that could have been achieved was to avail a clear record of what actually transpired during those contested proceedings.

There was no other way of establishing which of the witnesses were competent to testify at the *locus.* In the absence of that information, this court would have no basis upon which to determine how the lower court would have arrived at the conclusions that it did.

It is of least importance therefore that the trial court may have still have arrived at the same decision, without the *locus* visit or without the record of the proceedings of the visit.

Whether or not therefore it was erroneous for this court to conclude that failure to properly conduct a visit had been irregular or that absence of proceedings rendered the trial irregular, were matters to be addressed at the court of appeal. These did not fall within the ambit of an error on the face of the record, to merit a review. The applicant therefore has no legal grievance on that basis.

Accordingly, the application is dismissed, with costs.

Alexandra Nkonge Rugadya

Judge.

30th June, 2021

Delivered via mail

1/7/2021.