THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(LAND DIVISION)

MISCELLANEOUS APPLICATION 1072 2021

(ARISING OUT OF MISCELLANEOUS APPLICATION NO.1479 OF 2019)

(ARISING OUT OF MISCELLANEOUS APPLICATION NO.801 OF 2018)

(ARISING FROM CIVIL SUIT NO.361 OF 2018)

1. **GRACE NABBONA**
2. **DAMALIE BABIRYE**
3. **SEKYANZI BRIAN::APPLICANTS**

VERSUS

1. **EDNA MUKASA**
2. **KAYONDO LORENZO CYPRIAN**
3. **PAUL MUKASA:::RESPONDENTS**

Before Hon. Justice Alexandra Nkonge Rugadya.

RULING.

This is an application for review and setting aside of an order of this Court by which the applicants were held in contempt of an earlier order and costs of the application be provided for.

It is filed under the provisions of ***Section 98 of the Civil Procedure Act Cap 71 and Order 46 rules 1 & 8*** as well as ***Order 52 rules 1 & 2 of the Civil Procedure Rules S.I 71-1.***

The application is supported by the affidavit in support of the 1st applicant in which she deposes that the applicants and 6 others applied to this Court for an interim injunction which was issued on 13th September, 2018 but before the same had been issued, there were developments taking place on the suit land and that after issuance of the interim order, the status quo has since been maintained to date.

That the respondents and 6 others filed an application in this court seeking a declaration that the applicants and 6 others were in contempt of the said interim order and that on 24th September, 2020, Her Worship Atukwase Justine held that the applicants were in contempt of a court order and ordered that they each pay ***Ugx 10,000,000/=.*** **T**hat the applicants will end up paying ***Ugx.50,000,000/=,*** which was harsh and unreasonable.

That the court order was issued in error under falsehoods presented by the respondents and their lawyers who disguised photographs of the suit land before the order was granted and presented them as if the developments on the land were done after the issuance of the interim order.

From the record, it is evident that the respondents were duly served with court process but they opted not to file an affidavit in reply. In result, the application stands substantially unopposed.

It is noteworthy that counsel for the respondents opted to file written submissions in opposition of this application but it is my considered view that the same does not constitute a reply to the application.

The applicants represented by ***M/s Twesigye Oyuko & Co. Advocates*** filed written submissions in support of their clients' case and I have taken the same into consideration in determining the issues below:

1. ***Whether this application meets the conditions for review under the law.***
2. ***What are the remedies available to the parties?***

Resolution:

Issue No.1: Whether this application meets the conditions for review under the law.

Section 82 CPA has been expounded by ***Order 46 rule 1 of the CPR*** which provides that:-

> ***"Any person considering him/her self-aggrieved by a decree or order from which an appeal is allowed but from which no appeal has been preferred or 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 order was 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 the judgment to the court which passed the decree or made the order."***

Both the above provisions specifically allow any party who feels aggrieved by a decree or order to seek its review. Therefore, the applicants were acting within their right and the law to present this application as persons aggrieved by the decision in ***Miscellaneous Application No.1479 of 2019***.

The court in ***Re Nakivubo Chemists (U) Ltd [1979] HCB 12*** while interpreting ***Order 46 of the CPR*** held that an applicant in order to succeed in a claim for review has to show firstly, that there is discovery of a new and important matter of evidence previously overlooked by excusable misfortune.

Secondly, that there is discovery of some error or mistake apparent on the face of the record; and thirdly, that review ought to be made by court for any other sufficient reason.

In the case of ***Yusuf vs. Nokorach [1971] EA 104***, it was held that *any other sufficient* reason ought to be read as meaning sufficiently of a kind analogous to the first two grounds.

The instant application as can be deduced from the pleadings, evidence and submissions of the applicants is premised on two grounds i.e. that there was an error apparent on the face of the record and that there is sufficient reason to have the learned registrar's ruling and orders reviewed.

For a review to succeed on the face of the record, the error must be so manifest and clear that no court would permit such error to remain on the record. ***See: F X Mubuuke versus UCB; HC MA No. 98 of 2005.***

The applicants in the instant case contend by affidavit evidence that the *status quo* in respect of the suit land has been maintained since the interim order was issued to date and that the said order holding them in contempt was issued in error under falsehoods presented by the respondents and their lawyers when they presented the photographs of the status of the suit land intended to mislead court that the said developments were done after the issuance of the interim order maintaining the *status quo*.

The learned Registrar in her ruling noted the respondent's in ***Miscellaneous Application No. 1479 of 2018*** to the effect that Grace Nabbona, the 1st applicant herein had already constructed and already occupying her premises while Damalie Babirye the 2nd applicant herein averred that she had commenced construction but the same had stalled and that Brian Sekyanzi the 3rd applicant herein averred that he had already constructed and were occupying the suit land.

It is noteworthy that the said averments as laid out by the applicants herein in their respective affidavits in reply opposing ***M.A No. 1479/2018*** were never rebutted by the respondents therein who did not file any affidavit in rejoinder and should have been taken as the truth at the time of hearing the application.

It is now settled law where no affidavit in reply is filed, the affidavit in support is taken to be unchallenged and truthful, subject to whether the contents pass the test of evidence and is cogent and of probative value. ***(See: Tororo District Administration v Andalalapo ltd [1997] KALR 126).***

It is also trite law that facts as adduced in affidavit evidence which are neither denied nor rebutted are presumed to be admitted. ***(See: Eridadi Ahimbisisbwe v World Food Program & others [1998] IV KALR 32.)***

Further still, the learned Registrar in her ruling took note of the evidence of *locus* which she however did not attend and she observed that:

> ***"Evidence of the locus was brought on record and shows that the 9th respondent has a developed structure though unfinished but it was not there at the time the order was issued ....."***

The learned Registrar further noted that:

> ***" it is not convincing as to why the respondents who were seeking an order to protect their developments choose to attach pictures that did not reflect the status quo and only showed small finished structures".***

I have had the opportunity to peruse the application and evidence adduced by the respondents against the applicants in ***M.A No. 1497 of 2019*** and I have not found any evidence of what the *status quo* was at the time the interim order was granted, since there was no specific report of the

same from the Registrar as is the usual practice. Her conclusions were therefore based on conjecture.

I am of the firm view that not only should such evidence have been adduced but court should have also physically visited the *locus* to ascertain the situation on ground and therefore not convinced that the evidence, specifically the pictures of the *locus* relied upon by the learned Registrar in her ruling was conclusive proof in as far as the respondents' claim against the applicants is concerned.

In light of the above, I find that the applicants were aggrieved by a decision which had no proper backing. Accordingly, there is sufficient cause to justify the review of the learned registrar's ruling and orders.

The orders of the learned Registrar as far as the applicants herein are concerned are hereby stayed, pending provision of further and better particulars, provable through a *locus* visit.

Costs in the cause.

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Alexandra Nkonge Rugadya
Judge
20th October, 2021.

Delivered by email
20/10/2021