

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
LAND DIVISION
CIVIL REVIEW APPLICATION SUIT NO. 28 OF 2019
(Arising from Civil Suit No. 85 of 2005)

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1. PAUL MUHIMBURA
 2. LYNN ATUYAMBE.....
- 10 **APPLICANTS**

VS

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1. PATRICK LWANGA
 2. EDWARD ZIMULA
 3. COMMISSIONER LAND
- REGISTRATION.....RESPONDENTS**

Before: Hon. Lady Justice Olive Kazaarwe Mukwaya

RULING

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The Applicants brought this motion under section 82 and 98 of the Civil Procedure Act Cap 71 and O.46 r.1 & 2 and O.52 r.1 & 3 Civil Procedure Rules S.I 71-1 seeking the following orders that;

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1. The judgment and orders of the court in HCCS No. 085 of 2005 Patrick Lwanga Vs. Edward Zimula & 2 Others be reviewed.
2. Costs be provided for.

Grounds for the Application

Mr. Paul Muhimbura the 1st Applicant, in his affidavit in support of the application on the 14th of November 2019 stated as follows;

- a. The Applicants are the registered proprietors of land comprised in Busiro Block 380 Plot 17 at Makandwa and Nakandwa measuring 8.093 hectares (20 acres).
- 5 b. The land was purchased for valuable consideration from Agnes Babirye Mugerwa the registered proprietor, who had acquired it from Edward Zimula, the 2nd Respondent.
- c. Upon purchase, the Applicants took immediate possession of the land.
- d. On the 23rd July 2018, the Applicants received a letter of notification from the
10 Commissioner Land Registration dated 17th May 2018 requiring the Applicants and other registered owners whose plots were subdivided out of land comprised in Busiro Block 380 Plot 1 to surrender their certificates of title for purposes of cancellation under a court order vide HCCS No. 085 of 2005 Patrick Lwanga Vs. Edward Zimula & 2 Ors.
- 15 e. The Applicants were not party to HCCS No. 085 of 2005, and therefore were not heard before the said orders were issued by the court.
- f. The Applicants are bona fide purchasers for value without notice and their certificate of title is protected by the law.
- g. The effect of the judgment in HCCS No.085 of 2005 and the orders made
20 thereunder was to deprive the Applicants of their proprietary rights in the land in which they invested colossal sums of money, without affording them a hearing which is not only against the principles of natural justice and equity but also a violation of their constitutional rights.

The Respondents were duly served by substituted service by advertisement in the
25 Saturday Monitor dated 7th November 2020. No appearance was made by the 1st and 2nd Respondent. Mr. Moses Sekitto, Senior Registrar of Titles, an officer of the 3rd Respondent, appeared in court on the hearing date and undertook to file an affidavit in

reply within a period specified by court but he did not do so. This application stood unopposed.

Counsel for the Applicants filed written submissions in this matter which I have considered. Counsel for the Applicants formulated three issues which I have rearranged and narrowed down to two.

Issues

1. **Whether the Applicants are aggrieved persons within the meaning of section 82 of the Civil Procedure Act?**
2. **Whether the application meets the criteria for review?**

RESOLUTION

Issue 1

Whether the Applicants are aggrieved persons?

The Applicants as 3rd parties to HCCS 85 of 2005 were duty bound to establish that they were clothed as aggrieved persons as envisaged under section 82 of the Civil Procedure Act and Order 46 rule 1 and 2 of the Civil Procedure Rules which provide as follows;

'82. Review.

Any person considering himself or herself aggrieved— (Emphasis added.)

(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.’

Under Order 46 rule 1 and 2;

5 *1)Any person considering himself or herself aggrieved—*

(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
10 *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 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 judgment to the court which passed the decree***
15 *or made the order.(Emphasis added.)*

To answer the question as to whether the Applicants were aggrieved persons, this court revisited HCCS 85 of 2005 which was attached to the application and marked ‘P4’.

Facts, issues, judgment and orders of the court in HCCS 85 of 2005.

20 The plaintiff, Patrick Lwanga sued the 2 defendants; Edward Zimula and the Commissioner Land Registration; seeking several reliefs; a permanent injunction to restrain the defendants and/or their agents from interfering with the proper administration of the estate of the late Mika Nsimbe Mulyankota, general damages for fraud and intermeddling, a declaration that the plaintiff, as administrator, is the person entitled to oversee the administration of the said estate, an order of eviction of the

defendants from whatever property of the deceased was unlawfully seized and punitive and exemplary damages.

Five issues were framed for the court's determination;

- a. Whether or not the estate of the late Mika Nsimbe Mulyankota ever existed?
- 5 b. Whether or not the grant of letters of administration to the plaintiff to administer the estate of the late Mika Nsimbe Mulyankota was procured by fraud on the part of the plaintiff?
- c. Whether or not HCCS No. 1289 of 2000 was withdrawn from court by the first defendant?
- 10 d. Whether or not the consent judgment in HCCS No. 1289 of 2000 was procured by fraud on the part of the first defendant?
- e. What are the remedies available to the parties?

In its judgment the court found that the estate of Mika Nsimbe Mulyankota existed, that the letters of administration to the estate were procured by fraud or unlawfully on the
15 part of the plaintiff, that there was no evidence to prove that the first defendant had withdrawn HCCS No.1289 of 2000 from court and finally that the consent judgment thereunder had been procured by fraud but there was no evidence to suggest that the first defendant was responsible for that fraud.

On the issue of remedies, court found that neither the plaintiff nor the first defendant
20 were entitled to own, as registered proprietor of the suit land, comprised in Busiro Block 380 Plot 1 **and plots out of this plot** because the land was held under a trust. The court went on to find that the first defendant, knowing he was acquiring the suit land illegally, resorted to use of extra judicial means to carry on illegal dealings on the land. The court declared all dealings on the land illegal and ordered that the suit land reverts to the estate
25 of the late Mika Nsimbe Mulyankota and the registered trustees, who are still alive and willing to act as such, or those to replace them, through the procedure as willed by the

late Mika Nsimbe Mulyankota, shall manage and control the suit land for the benefit of the beneficiaries of the trust. The second defendant was ordered to effect the above orders on the registers and other records with the office of Registrar of Titles.

5 The foregoing presents an abridged version of what transpired in court between 2005 and 2011 when the judgment in HCCS 85 was delivered by the trial judge. I have highlighted the words; **‘and plots out of this plot’** because it is from these words that the Applicants’ claim to be aggrieved persons arises.

Applicants’ Claim

10 To bring the Applicants’ claim into context I shall quote verbatim from the judgment in HCCS 85 OF 2005, at page 14;

‘This court declares and orders that any purported transfers and registrations of the land comprised in Busiro Block 380 Plot 1 or any of the plots from this Plot No.1, into the names of the plaintiff Patrick Lwanga, or of the first defendant, Edward Zimula, or anyone claiming title through anyone of the said two, are null and void and the same stand hereby cancelled and revoked. The plots made out of this land by the plaintiff or the 1st defendant are hereby declared illegal. It is ordered that the suit land reverts back to the estate of the late Mika Nsimbe Mulyankota, and from there the appointed trustees, who are still alive and willing to act as such, or those to replace them through the procedure as willed by the late Mika Mulyankota, shall manage and control the suit land for the benefit of the beneficiaries of the trust’.

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The 1st Applicant averred that as a result of the foregoing orders of the court, the Applicants, together with several others, were summoned by the Commissioner Land Registration, through a letter dated 17th May 2018. The letter was attached and marked, **‘P6’**. By that letter, the Applicants were directed to surrender their certificate of title for land comprised in Busiro Block 380 Plot 17 for cancellation, to effect the orders of the

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court in HCCS 85 of 2005. The letter is attached and marked, 'P6'. The opening paragraph of the letter reads in part;

5 **'The Office of Titles is in receipt of a Court decree issued by the High Court under Civil Suit No. 85 of 2005 directing the cancellation of all the subdivisions and transfers on plots arising out of the subdivision of Plot 1, Busiro Block 380, at Makandwa...'**

And,

10 **'Pursuant to the provisions of section 73 of the Registration of Titles Act (Cap 230), this is to notify about the said Court orders and also to require you to surrender to this office the Duplicate Certificates of Title or Special Certificates of Tile, in any(sic), in your possession for purposes of effecting the Court Orders within 14 days from the date hereof'**

15 **In Mohamed Allibhai V W.E Bukenya Mukasa & Departed Asians Property Custodian Board Supreme Court Civil Appeal No. 56 of 1996, Odoki, JSC, explained that;**

20 **'A person considers himself aggrieved if he has suffered a legal grievance. See Yusufu v. Nokrach (1971) EA 104, and In Re. Nakivubo Chemists (U) Ltd (1971) HCB 12, Ladak Adulla Mohamed Hussein v. Griffiths Isingoma Kakiiza and others Civil Appeal No. 8 of 1995 (unreported). A person suffers a legal grievance if the judgment given is against him or affects his interest.'**

The Applicants before this court consider themselves aggrieved on grounds that they were denied a right to be heard in their capacity as purchasers of land comprised in Busiro Block 380 plot 17 at Makandwa and Nakandwa measuring 8.093 hectares (20 Acres) on which they are now registered proprietors.

Counsel for the Applicants relied on Mushabe Apollo Vs Mutumba Ismael & Anor MA 08 of 2019, The facts were that the applicant, initiated the formal complaint to the 2nd Respondent, the Commissioner land registration, upon which the proceedings for judicial review were commenced. The applicant was neither made a party nor served with notice of the application as required by the rules governing judicial review proceedings. Ssekaana J, in allowing the application, held that; **‘it is not disputed that this court granted an order for cancellation of the applicant’s certificate of title without being heard and consequently the said order affects his rights. The court is enjoined to apply rules of fairness and not to condemn a person unheard especially in judicial review matters. Rule 6 of the Judicature (Judicial Review) Rules, 2009, provide for notification of all the affected party in all circumstances.’**

I am persuaded by the finding of the learned judge in this case. In the instant case, it was immediately apparent on the face of the record that the Applicants’ interest in Block 380 Plot 1 was affected by the decision in HCCS 85 of 2005. And for some undisclosed reason, the orders of the court were not promptly executed after the decree was extracted on the 24th October 2011. Eight years later, the 3rd Respondent, by its letter dated 17th May 2018, informed the Applicants’ that their land comprised in Block 380 Plot 17 was the subject of the court decree, along with several others. I am of view that the orders of the court in HCCS 85 of 2005, as highlighted above, which gave rise to the direction to surrender their certificate of title for cancellation, made without giving the Applicants the opportunity to be heard, clothed the Applicants with the title of aggrieved persons within the meaning of section 82 of the Civil Procedure Act. They were persons who had an interest in the suit property as registered proprietors but were not given an opportunity to be heard prior to the court making orders that invariably led to deprivation of the land they had purchased and taken occupation of. Article 26(2) of the Constitution of the Republic of Uganda 1995, protects every person from being

compulsorily deprived of property save for the exceptions under Article 26(2) (a) and (b) which do not exist in the instant application.

I resolve this issue in the affirmative.

Issue 2

5 Whether the application meets the criteria for review under section 82 of the Civil Procedure Act?

Counsel for the Applicants argued this issue on the basis of two criteria;

a. Some mistake or error apparent on the face of the record

Counsel for the Applicants relied on the case of **Al-Shafi Investment Group LLC v Ahmed Darwish & Anor (MISCELLANEOUS APPLICATION NO. 901 OF 2017) [2017] UGHCCD 205 (13 July 2017)** where the Bashaija, J, cited with approval **Attorney General & Others vs. Boniface Byanyima HCMA No. 1789 of 2000,** and **Levi Outa vs. Uganda Transport Company [1995] HCB 340,** where it was held that; ‘the expression “mistake or error apparent on the face of record” refers to an
10 **evident error which does not require extraneous matter to show its incorrectness. It is an error so manifest and clear that no court would permit such an error to remain on the record. It may be an error of law, but law must be definite and capable of ascertainment.**’

The 1st Applicant averred that he and the 2nd Applicant were bona fide purchasers for
20 value without notice of fraud and stated that their rights as registered proprietors under the law were protected. A sale agreement between the Applicants and one Agnes Babirye Mugerwa for the purchase of Block 380 Plot 17 by the Applicants dated 28th April 2006 was attached and marked ‘P1’. Additionally, a copy certificate of title to Busiro Block 380 Plot 17, wherein the Applicants were registered on the 2rd November
25 2006, was attached and marked, ‘P2’.

The judgment and orders of the court in HCCS 85 of 2005 were made on the 20th January 2011, after the Applicants had acquired interest in the land. Counsel for the Applicants submitted that the failure to add the Applicants as parties constituted an error apparent on the face of the record. I agree. I am satisfied these circumstances warrant the Applicants to a right to review of the judgment to allow the court hear the Applicants on their proprietary interests in the suit land.

b. Sufficient reason to warrant the review

Counsel for the Applicants argued that the failure to accord the Applicants, who were registered proprietors, a right to be heard, demonstrated sufficient reason to warrant the review. I agree and find that the Applicants deserve the opportunity to be heard to defend their rights in Busiro Plot 380 Plot 17. It was just and in the interests of justice that this application for review of HCCS 85 of 2005 be allowed for the reasons given.

In conclusion, this application is allowed and I order as follows;

- 1. **The Judgment and Orders of the court in HCCS No. 085 of 2005 Patrick Lwanga Vs. Edward Zimula & 2 Others be reviewed.**
- 2. **Costs shall be borne by the Applicants.**

Olive Kazaarwe Mukwaya

JUDGE

12th February 2021

Delivered by email to Counsel to the Applicants.

