

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(LAND DIVISION)
MISCELLANEOUS APPLICATION NO.476 OF 2022

5

AND

MISCELLANEOUS APPLICATION NO.
(Arising out of Civil Suit No.378 of 2013)

NASSUNA
CHRISTINE:.....:APPLICANT

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VERSUS

- 1. MOSES KAMOGA MATOVU
- 2. JESPAL SINGH BIRDI
- 15 3. KULWINDER KAUR:.....:RESPONDENTS

Before: Justice Alexandra Nkonge Rugadya.

RULING:

Introduction:

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Ms. Nassuna Christine (hereinafter referred to as the "applicant") brought this application against the respondents under **Sections 82 & 98 of the Civil Procedure Act Cap.71, Section 33 of the Judicature Act cap.13 and Order 46 Rules 1 (b) & 4 & Order 52 rules 1 & 3 of the Civil Procedure Rule SI 71-1** for orders that;

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- 1. *The judgement/decree delivered on the 2nd day of March 2022 by Her Lordship Honorable Lady Justice Jean Rwakakoko be reviewed and set aside on account of a mistake/error apparent on the face of the record for failure to serve nor add the applicant as a party to HCCS No.378 of 2013 yet the judgement in the said suit affects the rights of the applicant in the suit land;*
- 2. *The applicant be made a party to the Civil Suit No.378 of 2013 since the suit land was sold to her in 2009;*
- 30 3. *Costs of the application be provided for.*


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Grounds of the application:

The grounds of the application are amplified in the supporting affidavit of the applicant but are briefly that she has been in occupation of a parcel of land comprised in **LRV 2220, Folio 1 plot 13 Kome Drive Luzira Nakawa Division Kampala district** since 2009 having
5 acquired the same from the 1st respondent who had occupied the same since 2006 and that the contested portion of the suit land/*kibanja* had been developed with a mud residential house where she (applicant) has been living with her family.

That prior to purchasing the *kibanja*, she conducted due diligence with the local authorities who confirmed that the 1st respondent was the equitable owner of the land having acquired
10 the same from a one Mawanda Joseph, Fred Baguma, Maberu Tom & Wambwe Charles who had occupied the land before 1981; and that at the time of the purchase, the two parcels were separated by a boundary wall which is more than 20 years old and gives independence to each occupant therefore no access was left anywhere on the wall to show that the two parcels were related or owned by one individual which confirmed that the 1st respondent was the
15 owner.

That she took possession of the *kibanja* and was peacefully utilizing the *kibanja* until a one Mulira threatened her with eviction. In addition, that the 1st respondent informed her that he had some issues with the 2nd and 3rd respondents who had obtained a certificate of title without compensating his predecessors in title and that she (applicant) sued all the
20 respondents in a bid to secure her occupancy.

Further, that the 1st respondent had without her (applicant's) knowledge sued the 2nd and 3rd respondents in **High Court Civil Suit No.378 of 2013** and that it is during the pendency of the applicant's suit that she learnt that a judgement affecting her rights was delivered without being accorded an opportunity to be heard.

25 That the orders in the judgement affect the applicant's rights since she is in possession of the suit land and she was not given an opportunity to produce evidence proving that she is the equitable owner of the *kibanja* or that she was in lawful possession of the same at the time was heard and determined.

That because she was not heard, the applicant is aggrieved by the said judgement because
30 was neither served nor made a party to the said suit and that she stands to be evicted from the land and that her interest will be defeated.

2nd respondent's reply.

The 2nd respondent opposed the application through his affidavit in reply wherein he objected to the application on grounds that the same is not only vexatious, misconceived and
35 untenable in law, it is also an abuse of court process and was brought in bad faith therefore court should dismiss the same.

He states that he and the 3rd respondent are the registered proprietors of land comprised in **Plot 13 Kome Drive LRV Folio 1 Luzira** and that the land sale agreement attached as *Annexure 'A'* describes the land the applicant allegedly purchased and occupies as a fenced off kibanja at Luzira off Kome Crescent as opposed to the land they own which is located on
5 **Kome Drive plot 13 LRV 2220 Folio 1**, not Kome Crescent.

The two are different and that it was the 1st respondent's testimony in cross examination that he did not know that the 2nd and 3rd respondents were the registered proprietors of the suit land therefore he did not carry out any due diligence to ascertain the particulars of the land before he entered into the alleged purchase agreement with the sham kibanja holders.

10 That before he purchased the land, the 2nd respondent first verified that the land was empty, without any banana plantations or mud and wattle house and that when he applied and received a permit to construct a chain link around the undeveloped land from the City Council of Kampala, there was no one occupying the same and that the chain link was intended to shield the land from possible encroachment as well as trespassers as the front part of the
15 land had been developed.

Further, that the photographs attached as *Annexure 'B'* depicting the status of the contested suit land were the same pictures presented by the 1st respondent in his trial bundle in **HCCS No.378 of 2013** as his residence where he lives with his family.

Paragraphs 3 & 6 of the applicant's affidavit are not only false but they also contradict the
20 evidence given by the 1st respondent as well as the 2nd respondent's on the findings of the trial judge.

In addition, that the applicant is not known to the 2nd respondent as an occupant of the suit land and that it has always been the 1st respondent who encroached on the suit land and has continued to stay there since 2013 and that he (1st respondent) admitted that he was living
25 on the land for more than 10 years since 2006; and that he has a *kibanja* interest on the suit land.

The 2nd respondent further stated that he has never issued instructions to his lawyers for eviction from the suit land nor have they acted through any third parties as alleged by the applicant who admits in *paragraph 8 & 18* of the affidavit in support that she sought for
30 direction from the 1st respondent on the status of **HCCS No.378 of 2013** which clearly indicates that there was connivance and collusion between the two. Therefore it is not true that the applicant was not aware of the said suit as alleged in her affidavit.

Further, that while the applicant's suit was dismissed with costs awarded to the 3rd respondent, the orders in **HCCS No.378 of 2013** have nothing to do with the applicant who
35 has not shown how she is affected by the said judgment and orders and that the 1st respondent is the one who has been in occupation of the land.

He even lodged a caveat on 30th July, 2014 vide **instrument no. KCCA-00008726** claiming as a bonafide/lawful occupant in possession.

That the applicant has not established the slightest traces of an error manifest or evident on the face of the record as falsely alleged and that she has not established any sufficient grounds or reason for review or setting aside the judgement and orders of court in **HCCS No.378 of 2013**.

The 1st and 3rd respondents did not file their respective affidavits in reply despite having been served with court process.

In her rejoinder, the applicant stated that the instant application is not misconceived since the judgement in **Civil Suit No.378 of 2013** affects her interest in the suit land which she is currently occupying yet she was never made a party and she is aggrieved by the said judgement as she stands to be evicted therefore she does not require to file the instant application for review because she is aggrieved.

That she bought the *kibanja* which forms part of the suit land that was surveyed and includes the title of land comprised in **Leasehold Register Volume Folio 1 plot 13 Kome Drive Luzira Nakawa Division Kampala District** in 2009 therefore her *kibanja* indeed forms part of the suit land and that they are not different.

She maintained that she was not party to the main suit, the 1st respondent whom she has also sued in **Civil Suit No.17 of 2022** has nothing to do with the applicant's possession of the land because at the time of the purchase, the 1st respondent not only warranted that the interest he was selling to her was free from any encumbrances, but he also undertook to help the applicant obtain quiet possession of the land.

That although the 2nd respondent's affidavit in reply implies that the 1st respondent and the applicant are the same person, they are not and had the applicant been made a party to the suit, the 1st respondent's evidence would have been discredited.

In addition, that she was not given an opportunity to produce evidence demonstrating that she was in lawful possession of the suit *kibanja* having lawfully purchased the same prior to the hearing and determination of **Civil Suit No.378 of 2013** and that due to this error apparent on the face of the record, the applicant stands to be evicted from the land.

She further contends that she was not aware of **Civil Suit No.378 of 2013** which she only learnt about when counsel for the 2nd respondent threatened her with eviction as soon as the judgement was delivered in their favor and that since she was not made party to the suit, the judgement affects her interests as she stands to be evicted in 90 days.

Further, that she is the one in possession of the suit land which she has since developed with a residential house where she has been living with her family, undisturbed and that the

respondents were aware of the same which is confirmed in their affidavit in reply in **Miscellaneous Application No.40 of 2022.**

That the 2nd and 3rd respondents have never been in occupation of the suit land since they got registered as the proprietors thereof considering their whereabouts are unknown to the applicant until recently when Mr. Moses Mulira informed her about the pending eviction.

Representation:

The applicant was represented by **M/s KSMO Advocates** while the 2nd respondent was jointly represented by **M/s Majoli Bogere Mutakirwa Advocates and M/s Wante & Co. Advocates.** Both sides filed written submissions in support of their respective clients' cases as directed by this court.

The following are the issues for determination;

- 1. Whether the application meets the criteria for review.**
- 2. What remedies are available to the parties?**

Resolution of the issues:

The application is brought under **Section 82 CPA** and **Order 46 rule 8 CPR**; seeking for the orders stated above. **Section 82 CPA** which governs review provides as follows;

"82. Review.

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."

Order 46 r.1 CPR amplifies the above cited provisions with the addition of other factors to be taken into account in review as follows;

" 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 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 the case of **Re-Nakivubo Chemist (U) Ltd (1979) HCB 12. Manyindo J (as he then was)** held that the three instances in which a review of a judgment or order is allowed are:

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- i. *Discovery of new and important matters of evidence previously overlooked by excusable misfortune.*
 - ii. *Some mistake apparent on the face of record.*
 - iii. *For any other sufficient reason, but the expression "sufficient reason" should be read as meaning sufficiently of a kind analogous to (a) and (b) above.*

10 In the instant case, the applicant herein seeks for the review of this court's orders in **Civil Suit No.378 of 2013** citing lack of service and to have her added as a party to the suit. From the judgement of **Civil Suit No.378 of 2013**, the 1st respondent instituted the suit against the 2nd and 3rd respondents seeking a declaration that he was a sitting tenant and *bonafide* occupant.

He claimed to be the rightful owner of the land measuring approximately 27 decimals now part of land comprised in **Volume 2220 Folio 1 plot 13 Kome Drive Luzira Nakawa Division**; consequential orders for cancellation of the 2nd and 3rd respondent's certificate of title; permanent injunction; general damages, as well as costs of the suit.

15 This court presided over by *Hon. Lady Justice Jeanne Rwakakooko* dismissed the suit and made the following orders;

"a) That the plaintiff is not a lawful or bonafide occupant on the suit land comprised in LRV 2220 Folio 1 Plot 13 Kome Drive Luzira Nakawa Division Kampala District;

b) that the plaintiff/counter defendant is a trespasser on the suit land;

20 *c) an eviction order doth issue against the plaintiff/counter defendant to vacate the suit land and to remove all of his structures therefrom within a period of 3 months from the date of this judgement;*

25 *d) a permanent injunction doth issue restraining the said plaintiff /counter defendant, his agents, administrators and successors in title from deriving interest /claim of right in the suit land and from carrying out any activity on the suit land or occupying the same in accordance with the timelines set in paragraph (c) above;*

e) the defendants/ counter claimants are hereby awarded general damages of ten million only (Ugx 10,000,000/=) with an interest of 12% per annum from the date of this judgement until payment in full.

30 *f) The defendant's/counter claimants are hereby awarded costs of the suit. "*

35 The applicant avers that she has been in occupation of the suit *kibanja* since 2009 having purchased the same from the 1st respondent who had been in occupation of the same since 2006 and who without the applicant's knowledge instituted **Civil Suit No.378 of 2013** against the 2nd and 3rd respondents because they had obtained the certificate of title without compensating him.

In addition, that the foregoing orders affect her interests in the land since she is the one in possession of the suit land and not the 1st respondent who was the plaintiff in **Civil Suit No.378 of 2013** in which she had not been made party to. That because she was not heard, she is aggrieved by the said judgement which appears to have been stage managed among the respondents.

The term 'an aggrieved person' was explained in the case of **Mohamed Allibhai V W.E Bukenya Mukasa & Departed Asians Property Custodian Board Supreme Court Civil Appeal No. 56 of 1996, Odoki, JSC**, explained that:

'A person considers himself aggrieved if he has suffered a legal grievance.

Courts have further declared that a person suffers a legal grievance if the judgment given is against him or affects his interest. (See **Yusufu v. Nokrach (1971) EA 104, and In Re. Nativubo Chemists (U) Ltd (1971) HCB 12, Ladak Adulla Mohamed Hussein v. Griffiths Isingoma Kakiiza and others Civil Appeal No. 8 of 1995 (unreported).**)

In the present case, the applicant considers herself aggrieved on grounds that she was denied a right to be heard in her capacity as the purchaser and current occupant of the suit land/*kibanja*.

The 1st respondent who in **Civil Suit No.378 of 2013** claimed to be the owner and occupant of the suit *kibanja* did not file an affidavit to refute the applicant's claim that she purchased the suit property from him and that she is currently in occupation of the land.

It is trite law that where facts are sworn to in an affidavit and they are not denied by the opposite party; the presumption is that they are accepted. (See: **Samwiri Mussa versus Rose Achen (1978) HCB 297, Makerere University versus St. Mark Education Institute Ltd. & Others [1994] KALR 26; Eridadi Ahimbisibwe versus World Food Programme & Others [1998] KALR 32; Kalyesubula Fenekansi versus Luwero District Land Board & Others; Miscellaneous Application No. 367 of 2011.**)

In the case of **Mushabe Apollo Vs Mutumba Ismael & Anor MA 08 of 2019** which I find persuasive, it was also held that where an order affecting a person's rights is made court is enjoined to apply rules of fairness and not to condemn a person unheard.

In the present application, the judgment and orders of the court in **Civil Suit No. 378 of 2013** were made on the 2nd March, 2022, after the applicant had purportedly acquired interest in the land which would entitle her to be added as a party.

The sale agreement, *Annexure A* to the plaint affixed the plaint in **Civil Suit No.0017 of 2022** pending before another judge of this Division shows that the applicant had bought land from the 1st respondent in 2009. The validity of the said transaction is a triable issue under that suit.


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Similarly the issues and objections raised by the 2nd respondent in his reply concerning the inconsistencies between the averments by the applicant on the one hand and the evidence led by the 1st respondent/plaintiff at the trial on the other hand are also matters pending determination under **Civil Suit No.0017 of 2022**, which from the court system has already been fixed for hearing on 31st August, 2022. The applicant/plaintiff is to be accorded a fair hearing in that suit.

Given the circumstances as highlighted above however, a review by this court of its decision in **Civil Suit No 378 of 2013** would not serve any useful purpose since there is already a pending suit which will conclusively determine the rights of the applicant.

I also take note of the fact that **MA No. 475 of 2022** had been filed by the applicant seeking a stay of the execution of the orders made in **Civil Suit No 378 of 2013**. I have carefully considered the submissions made by each side in relation to that application which to me could well have been presented in this same application, since the parties are the same and the prayers sought are in relation to the same/similar facts and the same subject matter.

This court therefore applying its inherent powers under **section 98 of the CPA** accordingly orders as follows:

a. The execution of the judgement and orders in Civil Suit No.378 of 2013: Moses Kamoga Matovu vs Jaspal Singh Birdi and Another are stayed pending the determination of the applicant's interest in the suit land under Civil Suit No. 017 of 2022, which also therefore disposes of MA No. 475 of 2022.

b. Costs of this application shall abide the outcome of the pending suit: Civil Suit No.0017 of 2022.

Alexandra Nkonge Rugadya

Judge

13th June, 2022

Devised by email
Alexandra Nkonge Rugadya
13/6/2022.