THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

MISCELLANEOUS APPLICATION NO 2140 OF 2021

(All arising from Civil Suit No. 190 of 2012)

1. SARAH KICONCO

2. KABOOGA CONSTANCE.....APPLICANTS

VERSUS

1. JAMI CONSTRUCTION LIMITED

***2.* ASSY KANAGWA .....RESPONDENTS**

(Administrator of the estate of the late Erisa Kanagwa).

Before: Lady Justice Alexanra Nkonge Rugadya

RULING:

Introduction:

This application seeks a review varying the orders made in ***Civil Suit No. 190 of 2012***.; and for costs of this application to be provided for.

Grounds of the application:

The grounds of the application are provided in detail in the affidavit in support sworn by Ms Kabooga Constance, who also has written authority to represent her sister, the 1st respondent, Ms Kiconco Sarah.

The gist of their contention is that the ruling made by this court on 29th June, 2021 against the late Erisa Kanagwa had been made in ignorance of the new and important matters of evidence which the 2nd respondent, Ms Assy Kanagwa the administrator of the estate of their late father, Erisa Kanagwa had concealed from this court.

That she did not disclose that part of the suit property had been given to the applicants a portion measuring *100 ft by 80ft* as a gift *intervivos*, by their father in appreciation of their having taken care of him.

That that particular part which was to be shared equally between the applicants did not therefore constitute part of the estate of the deceased, a fact that was well known to all family members.

That by the time of his death, their father had not yet signed the transfer forms to enable them secure their respective certificates of title. Also that at the time of attachment their portion was not in possession of the deceased, which occasioned them irreparable loss. Their prayer therefore was to have their share released from the attachment and in the alternative, declare that the suit property is subject to the equitable interest.

In her rejoinder, the 2nd applicant maintained that Assy Kanagwa, the 2nd respondent had long separated with Erisa Kanagwa, her late father and that at time of his death she was not residing in the matrimonial home and that is why her father had given them part of the suit land as a gift *inter vivos*.

Relying on a letter dated 18th March, 2021, from the Registrar of Marriage (marked 'A'), the applicants also refuted the claim that their father' had been legally married to the 2nd respondent since the purported marriage had not been registered.

That the respondents had connived to deprive her of their interest, which explains why she filed a suit at the family division: ***vide Civil Suit No. 12 of 2021.*** She referred to a copy of the plaint which she however did not attach.

That she seeks a review of among others, of the consent order the validity of which she disputed on the ground that it bears a signature different from the one she knew as that of her father. That the supporting affidavit for ***MA No.1273 of 2017*** bears the thumbprint purporting to be that of the deceased yet he had been literate. Furthermore that her signature appearing on the supporting affidavit had been also been forged, to hoodwink court that she and her elder brother Stephen Kanagwa had accepted to settle the decretal sum owed to their father within a period 4 months.

In reply to the present application, Assy Kanagwa, the 2nd respondent, the widow and administrator of the estate of the deceased deponed that the suit property was/constituted their matrimonial home which she and her husband had jointly shared. That it bears a caveat which she had registered thereon and that the allegation therefore that they had separated with her husband was malicious, intended to insult her.

According to her, the application does not disclose any new and important matters of evidence which had been overlooked by court or bear any mistake and/or error on the

face of the record relevant to the suit which had been determined interparty and disposed of vide a consent judgment executed before this court.

That the applicants, who are her step daughters had no proof that the alleged gift had been perfected during the donor's lifetime; or proof that the lessor's express consent had been obtained to enable them parcel off their purported share and therefore cannot have been aggrieved by the ruling.

To her, the application was filed inordinately out of time; an afterthought that was intended to frustrate and/or delay the execution of the court orders made vide ***MA No 2083 of 2020;***. and a way to keep the 2nd respondent stressed and indebted to the 1st respondent as administrator and equitable owner of the suit land. That accordingly the application should be dismissed with costs.

The affidavit in reply for the 1st respondent's company was filed by Eng. Jonathan Mwedde, a director and shareholder of the company, who also stated that the applicants had brought no new evidence to support their claims.

That the applicants seek to set aside the ruling and orders of this court vide ***HCCS No. 190 of 2012*** but have instead attached orders of this court vide ***MA No. 2083 of 2020.*** The suit property was registered in the names of their late father and at no point had he bequeathed it to the applicants.

That the any suggestion of a gift would be illegal and ultra vires to the lease deed attached to the certificate of title as the same restricted the use of the property for residential purposes, for only one family.

This was besides, property that constituted matrimonial property as the 2nd applicant herself had acknowledged in her affidavit deponed in ***MA No.2141 of 2021,*** and the late therefore had secured no spousal consent and/or such authority as would entitle him dispose any part of it to any other person.

That it was also a fact known to him that the property was vested in the 2nd respondent as the surviving widow, where she has always resided and therefore the allegations that she had deserted it were baseless.

Furthermore that in her earlier affidavit, ***MA No.1273 of 2017*** (which the applicant however disclaimed in her rejoinder), the 2nd applicant never mentioned to court that she had any interest in the suit land but rather prayed for more time to pay the debt, a commitment which she however never fulfilled.

The claim that she never knew about the proceedings and that she had interest were therefore false and according to him, the application was frivolous, vexatious, lacked merit and ought to be dismissed by court.

Representation:

The applicants were represented by ***M/s Joshua Musinguzi Associated Advocates;*** the 1st respondent by ***M/s Lex Advocates & Solicitors;*** while the 2nd respondent was represented by ***M/s KBW Advocates.***

Consideration of the issue:

The issue to be addressed in this application is whether the applicants were aggrieved by the orders of this court vide ***Civil Suit No. 190 of 2021.*** I must point out clearly at this stage that there were issues that the applicants had raised in their rejoinder but which the respondents had no opportunity to respond to.

But be that as it may, a careful reading of the application indicates that the major grievance stems from the Consent Judgment dated 1st July, 2015 made under ***Civil Suit No. 190 of 2012.*** This was also the basis of this court's ruling dated 29th June, 2021 vide ***MA No. 2083 of 2021.***

The gist of the contention as I understand it, is that the orders of this court resulted in the attachment of the entire property, yet a portion of it did not constitute part of the estate of the late Erisa Kanagwa.

The application therefore seeks a review or a variation of the orders made by this court on the grounds of error on the face of record. It also follows the discovery that the 2nd respondent had concealed information from court that part of the land measuring *80ft by 100ft* did not constitute matrimonial property. It belonged to the applicants as property that had been given to them by their father, as a gift *inter vivos*.

Their prayer therefore was for court to detach the said portion from that which had been attached under court orders in settlement of a debt incurred by their late father, owed to the 1st respondent.

Section 82 of the Civil Procedure Act under which this application was filed states that:

> ***" any person 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 which no appeal is allowed, may apply to the Court which passed the decree or order***

for a review of the judgment. The Court may make such order(s) as it thinks fit"

Order 46 r.1 Civil Procedure Rules provides factors to be taken into account in applications for review:

> ***" ..... and who from <u>the discovery of new and important matter of evidence which, after the exercise of due diligence,</u> 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 <u>on account of some mistake or error apparent on the face of the record,</u> or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him or her,....."***

The above provisions were restated in ***Re-Nakivubo Chemist (U) Ltd (1979) HCB 12*** where it was held by court that there are three scenarios by which a review of judgment or orders is allowed, that is, where there is:

1. ***discovery of new and important matters of evidence previously overlooked by excusable misfortune;***

2. ***some mistake apparent on the face of record;***

3. ***for any other sufficient reasons.***

<u>Issue No. 1: Were the applicants aggrieved parties?:</u>

For court to rely on the above cited provisions, it should be satisfied that the applicants fall within the category of aggrieved parties. It was the respondents' argument that the applicants were not aggrieved as they had no interest in the suit property, which they themselves had admitted to be matrimonial property.

Courts have defined an *aggrieved* person as one who has been deprived of his property or one who has suffered a legal grievance.. (***See Mohamed Allibhai vs W.E Bukenys Mukasa & Departed Asians Property Custodian Board SCCA No. 58 of 1996).***

Section 102 of the Evidence Act places the burden of proof on such party who would fail if no evidence at all were given by either side. The applicants in the instant case have to satisfy this court that they had valid and protectable equitable interest in the suit property and therefore had the *locus standi* to file the application as aggrieved parties.

According to ***Black's Law Dictionary 7th Edition at Page 925,*** *locus standi* is the right to bring an action to be heard in a given forum. It is emphasized that the unfailing requirement is that *locus standi* to institute a suit, by whatever mode prescribed must be established at the time the suit is filed. This is done by expressly pleading facts that give the plaintiff or applicant the legal standing to institute the suit.

It should not be left to the court to guess where a plaintiff/applicant derives the *locus standi* to file the suit or an application of this nature. It must be expressly clear on the facts pleaded; particularly those that give rise to the cause of action in the plaint or counterclaim.

The grounds upon which the review is sought in the instant application are four fold: first that this court had made an order touching on suit property in which the applicants claim equitable interest, yet had not been parties to the main suit. Secondly, the 2nd respondent had concealed to court the fact that the applicants held an equitable interest in the suit property.

Thirdly, that the signature appearing on the consent as that of their father had been forged and finally, that her own signature in a supporting affidavit of an earlier application ***MA No. 1273 of 2017***, had also been forged.

It was their claim that the said application, ***MA No. 1273 of 2017*** had been intended to deceive court that the 2nd applicant and her brother Steven Kanagwa had agreed to settle the debt owed to the 1st respondent.

This court also heard and determined ***MA No. 2083 of 2020*** filed by Assy Kanagwa, (the 2nd respondent in this application) against the 1st respondent company and Erisa Kanagwa under which application she had sought to challenge the order attaching the matrimonial property.

In its ruling delivered on 1st July, 2021 court ordered that the estate of the deceased was under an obligation to pay the entire sum of ***Ugx 350,000,000/=,*** with interest at a rate of *10 per cent,* payable from 1st September, 2021, till payment is made in full; and that the suit property was liable for attachment as it constitutes part of the estate of the late Erisa Kanagwa who prior to his death in 2017 had admitted his obligation to pay. This court further ordered that the attachment of the property ought to remain until full payment has been effected to the 1st respondent.

In arriving at that conclusion, court also had in mind a consent order dated the 1st July, 2015 which the applicants now seek to challenge. The matter had been presided over by

Justice Eva Luswata (as she was then) whereupon she had endorsed the consent and made the order in the terms below:

1. ***The defendant to pay Ugx 350,000,000/= as full and final settlement of the plaintiff's claim.***

2. ***The defendant pays the above sum within six months from the date of this judgment in any case not later than 31st December, 2015.***

3. ***That in the event of payment of the above, the plaintiff shall hand over the title of the suit property LRV 1694 FOLIO 8 PLOT 1B Uringi Crescent Entebbe Municipality to the defendant without any encumbrances.***

The above orders were made in the presence of the 1st respondent, ***M/s* JAMI CONSTRUCTION LTD** (who was the plaintiff in the main suit) and his counsel Mr. Edmund Wakida and the late Erisa Kanagwa himself as the defendant, who however failed to fulfill his obligations under the said order of court.

Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them and cannot be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to the policy of the court or if consent was given without sufficient material facts or in misapprehension or in ignorance of material facts or in general for a reason which would enable the court to set aside an agreement. ***Hirani Kassam (1952) 19 EACA 131; Attorney General & Anor vs James Mark Kamoga & Anor SCCA No. 8 of 2004.***

The late Kanagwa appeared in person. Counsel for the applicants further argued that the signature of their father had been forged and so was hers in a joint application which was purportedly intended to settle the debt owed by her father. Further that such illegality once brought to attention of court cannot be sanctioned by court. ***(Makula International Ltd vs His Eminence Cardinal Nsubuga (1982) HCB 1).***

Forgery is a key element of fraud, a grotesque monster and courts should hound it wherever it rears its head. It unravels everything and vitiates all transactions. (***Fam International Ltd and Ahmad Farah vs Mohamed El Fith [1994]KARL 307).***

With all due respect however, it was incumbent upon the applicants to give the details of who in the specific circumstances of this case had forged the signatures. In the view of this court the applicants ought to have put to task first, the learned counsel who handled that

application and her own brother with whom they purportedly, jointly undertook to pay their father's long outstanding debt. He did not file any affidavit to support her claims.

Going by the 2nd applicant's denial of that affidavit, it is clear that she had made neither the commitment nor had any desire to redeem the title. Her interest was only in the portion that she and the 1st applicant claimed but which she was not prepared to make any sacrifices for.

As for the forged signature appearing on the consent as that of their father, for the applicants to disown it yet the father had appeared in court in person, is no different from saying and/or believing that the said forgery was made with the participation of, or sanctioning by court. ***(ref: Annexture A order and decree, both attached to the 1st respondent's affidavit in reply).***

As correctly asserted by the 1st respondent, the applicants' father who was a defendant under the main suit had prior to his death acknowledged his indebtedness to ***JAMI CONSTRUCTION LTD.***

Whether it was true or not therefore that the 2nd applicant never made any commitment to settle the debt, neither applicant could run away from the fact that their father had failed to honor the commitment to pay the debt.

After his death, his estate or his family still remained with an obligation to settle that debt, failing which, the law had to take its course through execution proceedings for its full recovery. The applicants could not therefore claim to have been aggrieved by the consent signed by their father as the registered proprietor, and endorsed by court in his presence. It was binding not only to him but to also those who were claiming under him; and remained part of the debt owed by his estate following his death.

<u>Issue No. 2: Whether or not the applicants had received a part of the attached property as a gift inter vivos:</u>

Counsel for the applicants argued that between the two respondents was a long standing conspiracy to deprive the applicants of their equitable interest in the attached suit property, which interest had been given to them by their father as a gift *inter vivos*, in appreciation of their having taken care of him.

According to them, Assy Kanagwa, the 2nd respondent had lost interest in the matrimonial home since at the time of their father's demise, she had already deserted him and the two were living separately, a claim which the 2nd respondent however denied.

The law is that a gift inter *vivos* takes effect when three situations are fulfilled. First that there is intention to give the gift. Secondly, the donor must deliver the property and thirdly, the donee must accept the gift. '

In respect to this application, it is not mentioned anywhere in the applicants pleadings and evidence as to whether the deceased had made a verbal offer or a gift transfer by deed/ instrument.

In determining whether the deceased created a gift in respect of the disputed land, court has to ascertain the intention of the donor, and then examine whether the formal requirements of the methods of disposition which he attempted to make have been satisfied. ***(Mellows in the Law of Succession 5th Edition, Butterworth's 1977, pgs 9-10).*** The deceased's intention in the present application however could not be readily ascertained.

A gift of land is effected by a deed. Thus in ***section 92 of the RTA*** the transfer of registered land can only be effected by the transferor signing transfer forms in favour of the transferee. The gift is completed upon the signing of the transfer forms and only becomes effective upon execution or delivery of the transfer. It cannot be recalled after that, even though the donee has not been registered as proprietor.

Thus where the deceased in addition to letting the party use the land since childhood also handed over the land without signing the transfer forms, court ruled that the party was not put in position of control such as to enable him complete his title.

A party's staying on the land could not perfect his claims to the land even in equity in the circumstances where the land was registered. Had the donor done all in his power to vest the legal interest in the property to the donee, the gift would not fail even if something remained to be done by the donee or some third person. (***Norah Nassozi and anor vs George William Kalule HCCA NO. 05 OF 2012).***

Similar principles and arguments would apply in this instant application. The applicants failed to present any document /deed to prove how and when the land was handed over to them or at least present a survey report to prove the actual size of the land, location and its neighborhood.

A gift *inter vivos* could be established by evidence of exclusive occupation and user thereof by the donee during the lifetime of the donor. ***(Olweny Alfred vs Otema Civil Appeal No. 42 of 2019).***

In this instance indeed no evidence of physical occupation of the said portion was presented to court to prove that the applicants as donees had accepted the gift or made any developments on that land in acknowledgment. What is clear is that by the time of his death the matrimonial home exclusively occupied the property registered in their father's names. In short therefore, the three conditions under which the gift is presumed to have been created were not met by the applicants, to the satisfaction of this court.

The applicants do not deny that the plot they claim as theirs was part of the matrimonial property registered under their father's names and which the widow claimed as an equitable owner. To protect her own interest, she had even lodged a caveat thereon as early as 5th June, 1995. It was never challenged, or vacated when the deceased was still alive.

Section 38 of the Land Act, Cap 227 (as amended by the Land amendment Act, 2004) defines family land as that on which is situated the ordinary residence of a family and from which the family derives sustenance and which is treated as family land according to the norms, culture, customs, traditions or religion of the family.

"Ordinary residence" means the place where a person resides with some degree of continuity apart from accidental or temporary absences. ***Section 39 of the Land Act*** precludes the sale of land that constitutes family or matrimonial property without the consent of the spouse. Such requirement for consent does not however apply to a spouse who has been legally separated. ***(Subsection (5)).***

The applicants maintained that their father and step mother were not legally married; had been living together but separated at the time of his death. The evidence by the applicant could not however prove that the two were living apart by the time of his death.

It was the contention by the 2nd respondent that she was still residing in that home, as indeed confirmed by the 1st respondent. On 31st August, 2020 she had obtained letters of administration, vide: ***AC No. 285 of 2020,*** as the widow of the late Erisa Kanagwa**.** That still remains the position.

The presumption was therefore that she had satisfied the court issuing that grant that she was the widow and entitled to administer the estate; and that she had not separated from their father at the time of his death. Court further noted that despite the caveat having been

lodged in 1995, no member of the family ever took the trouble to have it removed, even those who later claimed to have a share.

As also noted by this court the land in which the applicants claimed an interest and which was a subject of attachment was registered under the names of the deceased and considered to be part of his estate. It had been leased to him by Entebbe Municipality, and therefore terms and conditions had to be met prior to any transfer. This was land which had previously been subject of a mortgage; a subject of a 2015 consent order; subject to an order for attachment and of numerous court cases.

One cannot understand how with such a chequered history the applicants could not have known what was happening in relation to this land to challenge any of the transactions occurring before the death of their father. It was not until after his demise, after the orders were issued on 1st July, 2021 by this court vide ***MA No.. 2083 of 2020*** and a warrant of attachment granted 19th October, 2021 ***(EMA No. 126 of 2021)*** that they woke up to pursue their perceived rights.

Yet ***MA No. 1273 of 2017,*** arising from ***EMA 2272 of 2016; MA No. 666 of 2019 and Civil Suit No. 190 of 2012 (***under which the consent order dated 1st July, 2015 was made), had already been heard and concluded.

It leaves court with no other explanation than that the applicants had no actual or genuine interest in the suit property and that this application was only intended therefore to further delay the 1st respondent's enjoyment of the benefits of his judgment. .

It could not have taken the applicants years to discover that the land given to them by their father had a list of accumulated encumbrances that dated as far back as 1996, which ought to have put them on sufficient notice.

Finally, it is the applicants' claim that the deceased had suffered a stroke and therefore they had qualms about the thumbprint which appeared on his affidavit in support of the application ***(MA No. 1273 of 2021***).

While court cannot rule out the possibility that it could have been anybody's thumbprint affixed onto that affidavit, going by that argument, one is left wondering however whether after having suffered a stroke their father could have been in the right frame of mind or condition to hand over to the applicants, whether verbally or through any instrument of transfer, the land which is the subject of contention in this application.

In short therefore, if prior to his death in May, 2017 the deceased was in no condition or lacked the capacity to file an application confirming his commitment through his two children to pay the sums due, then it would also imply that he had no mental capacity to give the applicants the land which they now clamor for.

Under the above circumstances, I could not agree more therefore that if at all the allegation of a gift inter *vivos* is true, then it was illegal for the judgment debtor to gift property that was under attachment by court; where no spousal consent and lessor's consent had been secured; had an undischarged caveat lodged in 1998 and an undischarged court order of 2015.

In light of those circumstances, the applicants could not satisfy court that they had any legal grievance and were therefore aggrieved by the orders of this court, so as to merit the prayers sought in this review application. In short, they had no locus to file this application.

The application was also therefore as submitted by counsel for the respondents, filed inordinately out of time; an afterthought intended to frustrate and/or delay the execution of the court orders.

Accordingly:

a) ***The application is dismissed, with costs.***

b) ***The orders of this court made vide MA No. 2083 of 2021 still stand, but with a variation that since the delay in execution was caused by the applicants, they are ordered to pay the 1st respondent all interest accruing in respect of the debt, from November, 2021 to February 2022.***

Alexandra Nkonge Rugadya

Judge

15th February, 2022.

Delivered by email
17/2/2022.