

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(LAND DIVISION)
MISCELLANEOUS APPLICATION NO. 1750 OF 2020
(ARISING FROM H.C.C.S No. 432 OF 2008)

1. NATEMBO KITAKA RUTH
2. RICHARD KITAKA ESAU **APPLICANTS**

Vs.

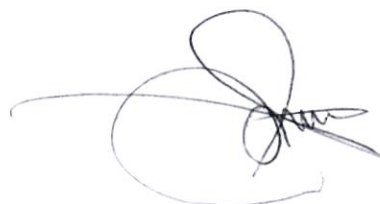
1. DAN SEMWANGA
2. JOHN KAJOBA
3. EDWARD BALUNGA
4. STEVEN NAKIBINGE
(Joint Administrators of the Estate of
The estate of Late Evelyn Nachwa)..... **RESPONDENTS**

BEFORE: THE HON. JUSTICE DR. FLAVIAN ZEIIJA

RULING

This is an application for review brought by way of Notice of Motion under Order 46 CPRs and Section 82 of the CPA. It is seeking for orders that;

- a) The judgment of the Honorable Justice John Eudes Keitirima in C.S No. 432 of 2008 delivered on 6th August 2019 be reviewed.
- b) Costs of the application be provided for.



The grounds upon which this application is premised are contained in the affidavits of Natembo Kitaka Ruth and Richard Kitaka Esau who are respectively daughter and son of the late Reverend Yakobo Andrew Kitaka. Briefly, they respectively deposed that;

1. Their Late father who passed away in 1989 was a church Minister and had been entrusted with various church responsibilities in the Church of Uganda.
2. Their Late father the Late Reverend Yakobo Andrew Kitaka (in the suit wrongly referred to as the Late Reverend Y. S Kitaka) was one of the proprietors of the land comprised in Kibuga Block 7 Plot 39 at Mengo.
3. The Applicants are aggrieved by the judgment and decree in Civil Suit No. 432 of 2008.
4. The Applicants were not aware of Civil Suit No. 432 of 2008 against their Late father until only recently about August 2020 when news on radios, Bukedde newspaper and social media indicated that the Ndeba Church had been demolished.
5. That the allegations at the Church were that the family of the Late Reverend Yakobo Andrew Kitaka and Esau Kiteesa Kizito had conspired to steal church land.
6. When the family consulted with a Lawyer, it was later revealed that the estate was initially represented by Lawyer Kiboneka of Mbabazi Kiboneka and Nyanzi Advocates who is unknown to the deponents and had never been consulted. The Lawyer further revealed that Mr. Ambrose Tebyasa took over representation of the estate later on.
7. That the family has an interest in the suit land as the title was registered in the names among others Y.S Kitaka whose correct

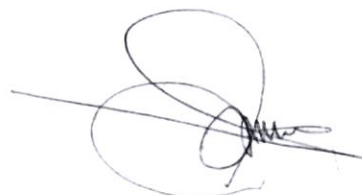
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names are Y.A Kitaka. It is the desire of the family that if this was not family property it indeed goes to the rightful persons.

8. The name of the family has been maligned by the stories, family members feel embarrassed and hurt by the trial, judgment and the breaking down of the church.
9. It is deeply hurting emotionally as this was a house of God which was broken down leaving their father's name in the mud yet he was a very Honorable man of God with a very good reputation which is now tarnished.
10. There is an error apparent on the face of the record.
11. There are new facts which that could not be adduced at the time of the trial namely; that the estate of Y.S Kitaka had beneficiaries and no Administrator has ever been appointed.
12. The whole suit against the estate of Y.S Kitaka proceeded on the wrong premise as;
 - i) The estate was not aware of the suit.
 - ii) The estate has at no time ever appointed a Lawyer.
13. The entire suit and demolition has tarnished the family name.

The application was opposed by two affidavits. One deponed by Counsel Ambrose Tebyasa and the other deponed by the 3rd Respondent, on his behalf and on behalf of the other 3 Respondents.

The 3rd Respondent deponed that;

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1. The Applicants have no locus to bring this application as the alleged beneficiaries of the Late Y.S Kitaka and also having alleged that no Administrator was ever appointed to manage the estate of the Late Y.S Kitaka who had been, in his personal capacity, fraudulently registered as a joint tenant together with Bishop D. Nsubuga and E.K Kizito (also deceased) in respect of the suit land.
2. That one of the proprietors of the subject land as rightly referred to on the then Certificate of Title that was being challenged was Reverend Y.S Kitaka and not Rev. Yakobo Andrew Kitaka as alleged by the Applicants.
3. During the pendency of the suit, it emerged that the Registered Trustees of Church of Uganda, as 5th Defendant was joined to the suit on allegations that the Church owned the suit land. The subject land was registered in the names of Bishop D. Nsubuga, Reverend Y.S Kitaka and E.K Kizito not in their personal capacity but as constructive trustees of Namirembe Diocese Christian Community which is part and parcel of the Church of Uganda.
4. Following a full hearing of the suit and judgment of court on 6th August 2019 the Respondents were registered Administrators of the Estate of their mother the Late Evelyn Nachwa on the genuine title, duly transferred the subject land in the name of the beneficiary, the 2nd Respondent who sold and transferred it to Ephraim Enterprises Limited, a third party.
5. That court cannot reverse execution which has already taken place. On 6th March 2020 a court bailiff carried out eviction of the people found on the premises.
6. An effort to develop the property was defeated by the Government that passed Statutory Instrument compulsorily acquiring the subject land for an alleged public purpose.

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7. This application is based on sentiments and the Applicants are just seeking an opinion of court as there is no live dispute for the court to determine, the decree having been duly implemented and ownership of the suit land having been passed to third parties.
8. The Applicants have filed this application for Review of the subject judgment and decree, yet the Registered Trustees of the Church of Uganda have previously filed an appeal against the same vide Court of Appeal Civil Appeal No. 146 of 2020 and the same has never been withdrawn.
9. This application cannot stand because an Appeal, in respect of the same judgment and decree that they seek this Honorable court to review and set aside, was previously preferred by the Registered Trustees of the Church of Uganda.

On the other hand, Counsel Ambrose Tebyasa deponed an affidavit in reply basically stating that;

1. He has never represented the estate of the Late Reverend Yakobo Andrew Kitaka or the estate of Y.S Kitaka either in Civil Suit No. 432/ 2008 or any other proceedings or transactions.
2. He has never interacted with any family member of the estate of the Late Y.S Kitaka and he has no knowledge whatsoever about that family.
3. At all material times and throughout the proceedings in Civil Suit No. 432/2008, he represented Ms Lucy Nsubuga who was / is the Administrator of the estate of the Late Bishop Dunstan Nsubuga and Constance Nalongo Kizito as Administrator of the estate of the Late E.K Kizito through her Attorney Kiteesa Armstrong.



4. That he was in court before Yuda Kitaka died and before he was dropped from the proceedings on the application by Counsel Kiboneka Richard who was representing the estate of Y.S Kitaka was represented by Nyanzi, Kiboneka & Mbabazi Advocates as the court record indicates.
5. That the court record indicates that he was not in court on 19/6/2012 and 28/8/2012 when Mr. Kiboneka Richard informed court that his client had passed on.
6. That on 5/10/2012 as evidenced from the court record, in his absence as Counsel for the 1st Defendant, court directed that Constance Nalongo Kizito be substituted as administrator of E.K Kizito and Rose Kitaka as administrator of Y.S Kitaka and that is how Constance Nalongo Kizito became the 2nd Defendant in the matter.
7. That it was on 1/12/2015 when he personally first heard from Mr. Kiboneka Richard stating that since his client had passed on, he wanted the Registered Trustees of Church of Uganda to be substituted and joined as a party.
8. That as evidenced from the court proceedings of 1/12/2015, he was representing the 1st and 2nd Defendants. The 1st Defendant was Lucy Nsubuga and the 2nd Defendant was Constance Nalongo Kizito whose attorney was Kiteesa Armstrong, though there were occasions on court record when Kiteesa Armstrong was also singularly referred to as a party because he was also joint Administrator of the estate of Esau K. Kizito and both Lucy Nsubuga as 1st Defendant and Constance Nalongo Kizito, the 2nd Defendant through her attorney were physically present in court on that day.
9. That on 1/12/2015, Mr. Kiboneka Richard observed that 1st and 2nd Defendants i.e Lucy Nsubuga and Constance Nalongo

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Kizito were sued as Administrators and his desire was to have the Registered Trustees of Church of Uganda to be joined as a party which was done while at the same time court accepted his prayer to drop his clients from the suit, which was done in their presence.

10. That he has never filed any Notice of representation of the estate of Y.S Kitaka as he did for the parties he was representing and the allegation that he took over representation of the estate of Y.S Kitaka is born out of speculation.
11. That even when he was filing Witness Statements in court for the parties he was representing, he filed Witness Statements for Lucy Nsubuga and Kiteesa Armstrong who was an attorney of Constance Nalongo Kizito, which statements clearly indicate the capacities and the parties for which they were filed.
12. That in 2018, M/s Nyanzi, Kiboneka & Mbabazi Advocates filed an application in court vide M.A No. 1232 /2018 wherein they mistakenly described Armstrong Kiteesa as Administrator of Yuda Kitaka and as one of the Applicants.
13. That earlier in 2016, M/s Nangwala Rezida & Co. Advocates filed an application to reinstate Lucy Nsubuga and Constance Nalongo Kizito into the proceedings but mistakenly never included Constance Nalongo Kizito or her Attorney Kiteesa Armstrong as a parties but instead cited the deceased as a dropped party.
14. That in both Miscellaneous Applications No. 585 /2016 and 1232/2018 neither Counsel Ambrose Tebyasa nor his client was involved in drafting and presenting pleadings erroneously re-introducing Yuda Kitaka into the proceedings or describing Kiteesa Armstrong as administrator of the estate of Yuda Kitaka.

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15. That Counsel Ambrose Tebyasa could not have been instructed by a person who was deceased whose Lawyer was present in court and had already informed court that his deceased client was not a relevant party to the proceedings.
16. That while Counsel for the Plaintiffs were preparing their written submissions filed in court on 26/6/2018, in the heading of the suit they erroneously indicated Armstrong Kiteesa as administrator of the estate of Yuda Kitaka which mistake was carried forward in the heading for the submissions of both defendants and the judgment of court but the record remained clear and consistent as to the parties I represented.

Representation

At the hearing of this application, the Applicants were represented by M/s Sekabanja & Co. Advocates while M/S Nangwala, Rezida & Co. Advocates represented the Respondents.

Brief Background

On 13th November 2008, the Respondents /Plaintiffs in the suit acting as administrators of the estate of the Late Evelyn Nachwa, instituted Civil Suit No. 432 of 2008 against the Applicant /1st Defendant in the suit (as Administrator of the estate of the Late Bishop D. Nsubuga), Yuda Kitaka/2nd Defendant in the suit (as administrator of the estates of the Late Reverend Y.S Kitaka & the Late E.K Kizito) and the Commissioner Land Registration /3rd Defendant. The Plaintiffs' claim against the Defendants jointly or severally was for a declaration that the Late Bishop D. Nsubuga, the Late Y.S Kitaka and the Late E.K Kizito were fraudulently registered in respect to land comprised in Kibuga Block 7 Plot No. 749 & 750 formerly plot No. 39 at Mengo. The Plaintiffs further sought a declaration that the suit land vested in the estate of

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the Late Evelyn Nachwa and they also sought an order directing the 3rd Defendant /Commissioner Land Registration to cancel the special certificate of title still registered in the names of the Late Bishop D. Nsubuga, Rev. Y.S Kitaka and E.K Kizito, an order of vacant possession and a permanent injunction restraining the 1st & 2nd Defendants or anybody claiming through them from carrying out any activity on the land. The trial judge thereby ordered the Commissioner Land Registration to cancel the impugned entries and register the name Evelyn Nachwa. Following the court's decision, the suit land was transferred into the names of the 2nd Respondent as beneficiary who also sold and transferred it to Ephraim Enterprises Limited. Subsequent to the said transfers however, Government passed Statutory Instrument No. 107 of 2020 dated 26th August, 2020 compulsorily acquiring the suit land in public interest for purposes of reconstructing the church that was demolished in the process of execution. Dissatisfied with the court's decision, the Registered Trustees of the Church of Uganda lodged an appeal vide Civil Appeal No. 146 of 2020 while the present Applicants lodged this application for review of the same decision.

Preliminary points of Law

Counsel for the Respondent raised preliminary points of law to the effect that this application is meritless because the applicants have no locus standi to bring this application, there is already a pending appeal and that even if there are any merits in the application, it has been overtaken by events as the suit land has since changed hands several times. That is to say; from the time that the decree was passed, the Certificate of Title then in the names of Bishop D Nsubuga, Reverend Y.S Kitaka and EK Kizito was cancelled and registered in the names of the Respondents who later transferred the same into the names of John Kajoba, the 2nd Respondent who also sold it for value to Ephraim Enterprises Limited. Following Statutory Instrument No. 107 of 2020, The Land Acquisition (Land comprised in Kibuga Block 7 Plot 39 land at Mengo, Kampala District) Instrument 2020, the said land

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was compulsorily acquired by Government in public interest. While citing a number of authorities including; **High Court Miscellaneous Cause No. 2019 of 2013, Human Rights Network for Journalists & Anor vs. Uganda Communications Commission, Joseph Borowski vs Attorney General of Canada (1989) ISCR 342, Einsbury vs. Millington [1987] 1 ALL ER. 927** and **East African Court of Justice Appeal No. 4 of 2012, Legal Brains Trust vs. The Attorney General**, Counsel for the Respondents further argued that this application is moot and court should therefore not entertain it.

The Applicants did not file any submissions in rejoinder (replying to the objection) to respond to the preliminary objection raised by Counsel for the Respondents in their submissions in reply.

Be that as it may, I don't find any merit in the preliminary objections. This is because review is available to any party who considers him/herself aggrieved by a decision of a court. The question of whether a party is aggrieved is a question to be determined from the evidence adduced at trial. Be that as it may, it is clear from the pleadings that it is the registered Trustees of the Church of Uganda, who appealed and not the Applicants herein. Therefore the remedy for review is still available to the applicants. The question of whether the application is moot is also one of fact to be proved by evidence adduced by the parties. Consequently, all the preliminary objections are overruled.

The Law on review

The law on Review is now settled. Applications seeking to review are governed by the provisions of section 82 of the Civil Procedure Act, Cap 71 and Order 46 rules 1 and 2 of the Civil Procedure rules. For ease of reference, I will reproduce the said provisions hereunder.

Section 82 of the Civil Procedure Act provides;

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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 rules 1 and 2 provide;

1. Application for review of judgment.

(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 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 or made the order.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party, except where the ground of the appeal is common to the applicant and the appellant, or when, being respondent, he or she can present to the appellate court the case on which he or she applies for the review.

2. To whom applications for review may be made.

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' expression sufficient should be read as meaning sufficiently of a kind analogue to the discovery of new and important matter of evidence previously overlooked by excusable misfortune and same mistake or error application on the face of the record'.

In the instant application, this court has been called upon to review the decision in Civil Suit No. 432 of 2008 on all the three grounds for review discussed above.

In the case of ***Aetna Life Ins. Co. Vs Haworth, 300 U.S. 227***, which was cited with approval by the East African Court of Justice in ***Legal Brains Trust (LBT) Ltd vs. Attorney General Appeal No. 04 of 2012 (EACJ)***, the Court defined justiciable controversy as being distinguished from;

"a difference or dispute of a hypothetical character; from one that is academic or moot. The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts."

In laboring to determine whether the estate of the Late Y.S Kitaka was indeed not represented, recourse can be had to the record of proceedings in trial court. The record shows that on **19th June 2012**, Counsel Kiboneka informed court that his client, the 2nd Defendant (Yuda Kitaka) had passed away. The said Yuda Kitaka had been sued as administrator of two estates. i.e the estate of the Late Y.S Kitaka and the estate of the Late E.K Kizito. After the death of Yuda Kitaka, Counsel Kiboneka ceased to represent the estate of the Late E.K Kizito

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following a notice of change of Advocates shifting the responsibility to Counsel Tebyasa who from then on represented the **1st Defendant Lucy Nsubuga** and the **2nd Defendant Constance Nalongo Kizito** through her duly appointed Attorney Kiteesa Armstrong Kizito.

When the matter came up for hearing on **1st December 2015**, Counsel Kiboneka of M/S Nyanzi, Kiboneka & Mbabazi Advocates sought leave and it was granted to add the Church of Uganda as the 4th Defendant in the matter. From then on, M/S Nyanzi, Kiboneka & Mbabazi advocates only represented the Church of Uganda.

Court record indicates that on 5th October 2012, Counsel James Nangwala informed Court that he had found out that a one Rose Kitaka was the administrator of the estate of Y S Kizito. Consequent to that information by Counsel James Nangwala court proceed to substitute the said Rose Kitaka as a party replacing the deceased Yuda Kitaka. However, pursuant to that substitution, it is very clear that Rose Kitaka the alleged administration of the estate of the Late Y.S Kitaka never appeared throughout the proceedings. It would then appear that the estate of the Late Y.S Kitaka was unrepresented in the suit after the death of Yuda Kitaka who had been the administrator of both the estate of the Late E.K Kizito and Y.S Kitaka as aforementioned.

As indicated above, the trial court acted on mere information of Counsel for the Plaintiffs without any evidence of Letters of Administration or any indication that the said Rose Kitaka was in court on that day. There is no record of court ever summoning Rose Kitaka to appear in court and there is equally no evidence of her ever appearing throughout the trial proceedings.

Therefore, the foregoing is an error very apparent on the face of the record which cannot be allowed to remain unrectified. It is very clear from the court record that after the death of Yuda Kitaka who had been the administrator of both the estate of the Late E.K Kizito and Y.S

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Kitaka, the estate of the Late Y.S Kitaka was unrepresented thought out the trial until the date of judgment. Upon substituting Rose Kitaka for Yuda Kitaka, the said Rose Kitaka who was not in Court was never served to appear in Court to defend the interests of the estate of Y S Kitaka yet court proceeded to give orders against the estate of Y S Kitaka. This alone is sufficient reason to warrant review by setting aside the judgment in the main suit.

A beneficiary of an estate has a right to sue in his or her personal capacity to defend his or her interest. Such a beneficiary does not need to prove possession of Letters of Administration. The respondent allege that the applicants have no locus in the suit because they are uncertain as to whether the suit land was family property. This and later are question that perhaps would been determined if the respondents and the court had been vigilant by adding a proper representative as party and summoning him or her to appear in court to be heard in respect of the interests of the estate and beneficiaries thereto, in the suit land.

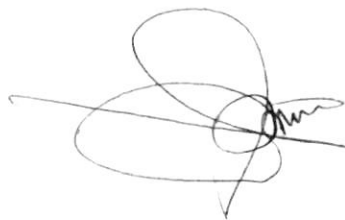
In the circumstances, for the reasons above-mentioned, this application succeeds with the following orders;

- a) The Judgment in HCCS No. 432 of 2008 dated 06th August 2019 is hereby set aside.
- b) HCCS No. 432 of 2008 shall be fixed and heard afresh inter parties and on merits.
- c) Since it is not contested that Ephraim Enterprises Limited is now the registered proprietor of the suit land, the company should be added as a party in accordance with O.1 r 10 of the CPR, so that all issues concerning the suit land are heard and determined once and for all.
- d) Costs shall abide the outcome of the fresh hearing of the suit.

Dated this 11th day of April 2022

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Flavian Zeija (PhD)

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