THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

[LAND DIVISION]

CIVIL APPLICATION NO. 1115 OF 2020

(ARISING FROM HIGH COURT CIVIL SUIT NO. 432 OF 2008)

LUCY NSUBUGA

(Administrator of the estate of BISHOP D. NSUBUGA) :::::::::::::::::: APPLICANT

Versus

1. **DAN SEMWANGA**
2. **JOHN KAJOBA**
3. **EDWARD BALUNGA**
4. **STEVEN NAKIBINGE**

(Joint Administrators of the estate

Of the Late Evelyn Nachwa) :: RESPONDENTS

BEFORE: THE HON. JUSTICE DR. FLAVIAN ZEIJA

RULING

This is an application for review brought by way of Notice of Motion under Order 46 & Order 52 Rules 1 & 3 CPRs SI 71-1, Section 82 & 98 CPA, Cap 71, section 33 of the Judicature Act and articles 21(1), 18(1), 44(c) and 126(2) of the Constitution of Uganda and other enabling laws.

It is seeking for orders that;

a) The judgment of the Honuorable Justice John Eudes Keitirima in C.S No. 432 of 2008 delivered on 6th August 2019 be set aside

and the said C.S No. 432 of 2008 be reinstated and heard on merit.

b) The execution of the decree passed by the Honorable Justice John Eudes Keitirima in C.S No. 432 of 2008 be cancelled.

c) Costs of the application be provided for.

The grounds on which this application is premised are contained in the application and buttressed in the Applicant's affidavit in support of the application that;

1. *The Applicant has never instructed Lawyer Ambrose Tebyasa or his law firm to represent her and the case was handled without her instructions and authorization.*

2. *The Applicant is not aware of the evidence tendered in court and has never signed any affidavits or witness statements tendering evidence in that regard.*

3. *The lawyer Ambrose Tebyasa lied to court and submitted a forged witness statement containing false evidence.*

4. *The Applicant is aware that the suit land belongs to the Church of Uganda and evidence to the contrary is unfair and wrong.*

5. *The Applicant was not given a chance to appear in court and as a party of the proceedings was not given a chance to be heard in court.*

6. *The Applicant was never notified on the decision of court and was only notified of it recently by the officials of the Church of Uganda and from Newspapers.*

7. *The Applicant being a strong believer in the Christian faith and aware of the actual truth of ownership of the land is aggrieved with the decision of the Honorable Justice John Eudes Keitirima in C.S No. 432 of 2008 delivered on 6th August 2019 and intends to challenge it.*

8. *The application has been made without delay.*

9. *The application is not intended to waste court's time or to make a mockery of justice but intends to address and redress the gross injustices that will be caused by the decision if it is left to stand.*

10. *It is in the interest of justice, public policy and to prevent fraudsters from misusing the court system that this application be granted.*

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

The 3rd Respondent deponed that;

1. *The suit land was at all material time part of the estate of the late Evelyn Nachwa but was fraudulently transferred into the personal names of Bishop D. Nsubuga, Rev. Y.S Kitaka and E.K Kizito (all deceased) as joint tenants.*

2. *The land had been subdivided to create two titles one being comprised in Kibuga Block 7 Plot No. 749 and the other being comprised in Kibuga Block 7 Plot No. 750.*

3. *Following the decree of court embodied in the judgment of Justice Eudes Keitirima attached to the affidavit of the Applicant, the Commissioner Land Registration cancelled the two titles and restored the original duplicate Certificate of Title in the names of the late Evelyn Nachwa, caused a reversal of the subdivision of the land illegally done and restored the deed plan in its original form, and pursuant to the application of the Respondents registered them on the title.*

4. *The court cannot reverse execution which has already taken place. On the 6th day of March 2020 a court bailiff carried out eviction of the people found on the premises.*

5. *The Respondents duly transferred the land in the name of a beneficiary, the 2nd Respondent who sold and transferred to Ephraim Enterprises Limited, a third party.*

6. *That following the course of trying to develop the property, Government passed a Statutory Instrument compulsorily acquiring the subject land for an alleged public purpose.*

7. *There is no live dispute in this application for the court to determine, the decree having been duly implemented and ownership of the suit property having passed to third parties. As such this application is misconceived right from the time of its filing.*

8. *That summons to file a defense were duly served on Lucy Nsubuga and she acknowledged and she acknowledged service of summons by signing on the original.*

9. *That the Applicant was first represented in the suit by M/s Nyanzi Kiboneka & Mbabazi Advocates who filed a joint defense for her and the other defendants until M/s Ambrose Tebyasa protested*

and filed a defense as duly representing her. She has never protested the representation.

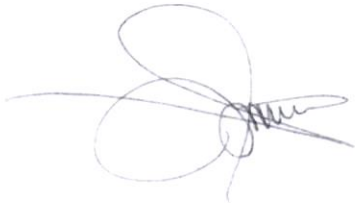
10. *When the Respondents applied for an injunction to restrain further construction of the church structure, she swore an affidavit denying her involvement in any alleged activities. It is dishonesty on her part to allege that she did not participate in the proceedings.*

11. *That on 1st December 2008 when the case proceeded before His Lordship Dr. Bashaija K. Andrew, the Applicant was present in court together with her Counsel Ambrose Tebyasa and participated in the proceedings of the day without raising any objection as to representation by Mr. Andrew Tebyasa.*

12. *The Respondents sued the Administrators of the estates of Bishop D. Nsubuga, Rev Y.S Kitaka and E.Kizito (all deceased) since they were registered as joint tenants and the affidavit that was sworn by Lucy Nansubuga simply denied the said land as forming part of her husband's estate which she was administering. The averments in her suspicious affidavit do not change that position and have no material change to the substance of the proceedings as would lead to setting them aside in their entirety even if she had not participated in the proceedings, which she did anyway.*

On the other hand, Counsel Ambrose Tebyasa deponed an affidavit in reply. Basically the fundamental point in his affidavit is that;

1. *The grounds set out in the Notice of Motion alleging that he represented the Applicant in court without instructions from her and that he presented a forged witness statement are false.*



2. *The Applicant gave him formal instructions to represent her. She also gave him copies of passport and identity cards of her deceased husband which are still in his custody to date.*

Representation

At the hearing of this application, the Applicant was represented by Kiwanuka & Mpiima Advocates while the Respondents were represented by M/S Nangwala, Rezida & Co. Advocates.

Brief Background

On 13th November 2008, the Respondents /Plaintiffs in the main 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 head suit (as Administrator of the estate of the Late Bishop D. Nsubuga), Yuda Kitaka/2nd Defendant in the main (as administrator of the estates of the Late Reverend Y.S Kitaka & the Late E.K Kizito) and the Commissioner Land Registration (as 3rd Defendant in the main suit). 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 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 record reflects two Written Statements of Defense for the Applicant /1st Defendant. The 1st Written Statement of Defense was lodged on **1st December 2008** and it is titled *"Written Statement of Defense for all Defendants"- i.e. Lucy Nsubuga, Yuda Kitaka (Administrator of the estate of the Late Rev. Y.S Kitaka and E.K Kizito).* This particular Written Statement of Defense was filed by Nyanzi, Kiboneka & Co. Advocates. The 2nd Written Statement of Defense was filed on **5th December 2008** by Ambrose Tebyasa & Co. Advocates on behalf of the 1st Defendant Lucy Nsubuga and it is titled, *"Written Statement of Defense for the 1st Defendant".*

The court record shows, by affidavit of service filed on **7th May 2009**, that a hearing notice in respect of civil suit No. 432 of 2008 was served on M/S Ambrose Tebyasa & Co. Advocates and M/S Nyanzi Kiboneka & Mbabazi Advocates. All subsequent hearing notices dated **2nd May 2012, 25th April 2014, 2oth May 2014** and **10th May 2017** were duly served on the same law firms and the affidavits of service are on court record.

The record further shows that on **19th June 2012**, Counsel Kiboneka informed court that his client, the 2nd Defendant (Yuda Kitaka) had passed away. It is then that Counsel James Nangwala for the Plaintiffs informed court that a one **Constance Nalongo Kizito was holding Letters of Administration for the Late E.K Kizito and Rose Kitaka was the administrator of the Late Y.S Kitaka.** Acting on this information, court accordingly substituted the parties. Lucy Nsubuga (Administrator of the estate of the Late Bishop D Nsubuga) maintained her position as the 1st Defendant, Constance Nalongo Kizito (Administrator of the estate of the Late E.K Kizito) became the 2nd Defendant. After the death of Yuda Kitaka, Counsel Kiboneka ceased to represent the estate of the Late E.K Kizito following a notice of change of Advocates shifting the responsibility to Counsel Tebyasa who from then on according to the record represented the **1st Defendant Lucy Nsubuga** and the **2nd Defendant Constance Nalongo Kizito through her duly appointed Attorney Kiteesa Armstrong Kizito** until the court delivered

the impugned judgment. The said Rose Kitaka who had reportedly taken over 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 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 aforesaid.

When the matter came up for defense 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 since the 2nd Defendant Yuda Kitaka (administrator of the estates of the Late Reverend Y.S Kitaka & the Late E.K Kizito) who he was previously representing had passed on.

After the trial, the learned trial judge in Civil Suit No. 432 of 2008 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 trial court's decision, the Applicant brought this application for review and set aside of the decision in Civil Suit No. 432 of 2008. Meanwhile, the Registered Trustees of the Church of Uganda also lodged an appeal in the Court of Appeal against the same trial court's decision vide Civil Appeal No. 146 of 2020.

Preliminary points

From the onset of his submissions, Counsel for the Respondents challenged the competence of this application on grounds that;

i) The application contains no relief for review and none of the grounds for review has been pleaded.
ii) The application is a disguised appeal against the decision of court.
iii) The application for review cannot lie where there is a pending appeal touching grounds of appeal common between the Applicant and the Appellant.
iv) The application does not meet the threshold for the grant of review and setting aside of the judgment of court.
v) The application and reliefs sought do not raise any justiciable dispute, are overtaken by events and are merely hypothetical and moot.

Determination of Preliminary points of law

Ground i) of the Preliminary points of law: The application contains no relief for review and none of the grounds for review have been pleaded.

Counsel for the Respondents submitted that the application does not seek to review the decision in Civil Suit No. 432 of 2008 but rather it seeks to set aside the judgment and to cancel execution of a decree which was effected long ago and is therefore irreversible. That the failure to plead review as one of the remedies sought implies that the Applicant is deemed to have abandoned it. Additionally, that the Applicant did not plead any of the grounds to show that that there is new and important matter of evidence discovered after the decree which could not have been availed to the court even with exercise of due diligence and neither did she plead that there is an error apparent on the face of the record or any other sufficient cause.

In reply, Counsel for the Applicant submitted that having successfully applied to court to bring the application under section 82 of the Civil Procedure Act and Order 46 of the Civil Procedure Rules, the application was automatically turned into an application for review with no legal requirement that the word review should be mentioned as long as the orders sought are within the powers of court to review. Additionally, that if the Applicant had been given a chance to present her evidence, court would have reached a different conclusion. Counsel further submitted that it was an error apparent on the face of the record to use the witness statement of the Applicant as evidence yet clearly, the record shows that it was never tendered by the Applicant. That judgment issued against the Applicant even though there is no court order reinstating her onto the case having been dropped from the case on 1st December 2015 and there is nothing on the court record to indicate that the Applicant was ever accorded a chance to present her case.

I have given due consideration to the submissions by both counsel. Plainly looking at the instant application, it very clearly to all and sundry that the Applicant is seeking a review and setting aside of the Judgment in HCCS No. 432 of 2008, so that, the suit is set down for hearing afresh inter parties on merits. This review sought by the Applicant is directly governed by Section 82 of the Civil Procedure Act Cap 71. However, looking at the law under which counsel for the Applicant brought the instant application leaves a lot to be desired from Counsel for the Applicant. For example, this court is perplexed as to why why Counsel for the Applicant brought this application under among others, under O.9 r 17 and 18 of the CPR which provisions are clearly not relevant to the reliefs being sought in the instant application.

Although it is worth emphasizing that Orders and Rules of Court are made to be obeyed. However, it is now trite that a court has the powers to bend its rules, where such rules will cause injustice. Denying

the application of a party, over an issue that the court has the power to grant, merely because the application was brought under a wrong Order or Rule of Court will do injustice. After all, Clients should not be allowed to suffer due to mistakes of their lawyers/Advocates. Justice should be above mere legal jargons and technicalities. It now well settled that an application brought under a wrong order is valid and good as one brought under a correct Order and Rule of court. Thus in the case of **Alcon International versus Kasirye Byaruhanga (1995) 111 KALR, Justice Musoke,** held that procedural defects can be cured by the innovation of Article 126 of the Constitution of the Republic of Uganda.
Consequently, for the reasons I have given above, this objection is overruled.

Ground ii) of the preliminary points of law: The application is essentially a disguised appeal against the decision of court.

Counsel for the Respondents submitted that the suit having been heard inter parties to finality, any prayer to set aside the judgment and order that a matter proceeds denovo before the same court can only be granted by the Court of Appeal otherwise the court would be sitting in its own appeal. Counsel cited two authorities including; ***Civil Appeal No. 288 of 2016 Apollo Wasswa Basudde & Others vs. Nsabwa Ham***, ***Njalebuza vs. The Society of Catholic Medical Limited (Civil Miscellaneous Application 1944 of 2018)*** to buttress the general principle of law that a court of law becomes functus officio in a case it has entertained and made a final decision disposing of it to finality and cannot reopen a concluded case on the basis that the court was wrong in its earlier judgment.

Contrariwise, Counsel for the Applicant submitted that it would be inconceivable to expect the Applicant to appeal against a case that she never participated in and that following the decision in ***Makula Internationational vs. Cardinal Nsubuga (1982) HCB 11*** *court cannot*

sanction illegalities and once brought to the attention of court, they override all questions of pleading including any admission made therein. Counsel contended that there was no proper service of any court proceedings on the Applicant as required under Order 5 of the Civil Procedure Rules, the Applicant was denied a right to a fair hearing, the proceedings leading to the judgment in civil suit No. 432 of 2008 were procured through misrepresentations and lies and that evidence was fabricated in favor of the Respondents and yet the Applicant was not called upon to either confirm or deny the fabricated evidence through the tendering in of her Witness Statement. Additionally, Counsel for the Applicant argued that under Order 46 Rule 6 of the Civil Procedure Rules, the court has powers to rehear the case and it is only the judge and not the court that is functus officio for purposes of rehearing the case.

With due respect to counsel for the respondents, the Applicant bases her application substantially on the ground that that she was deprived of her right as a party to participate in the proceedings in HCCS No. 432 of 2008. The Applicant's prayer to the Court is for her to be heard before Court reaches a decision. I find the Respondents' objection that the instant application a disguised appeal, unfounded. The court is not functus officio in an application for review. This preliminary objection is equally overruled.

Ground iii) of the preliminary objections: The application and reliefs sought are untenable in view of the pending appeal to the Court of Appeal by the Church of Uganda against the entire judgment of court.

While quoting paragraph 16 and 22 of the affidavit of the Applicant in the instant application, Counsel for the Respondents submitted that the Applicant disclaimed the suit land as belonging to the Registered Trustees of the Church of Uganda implying that the Applicant has no

interest in the suit land which renders her application moot. Further, the judgment sought to be set aside is already the subject of an appeal where the Registered Trustees of the Church of Uganda are seeking to reverse the decision of the trial court and this court cannot review a judgment and decree when the same is subject of an appeal.

On the other hand, Counsel for the Applicant submitted that an appeal by the Registered Trustees of the Church of Uganda is not a bar to an application for review by the Applicant since the law under section 82 of the Civil Procedure Rules gives the right review to "*Any person considering himself aggrieved*" and the fact that the Applicant was sued in C.S No. 432 of 2008 makes her an aggrieved party. In addition, she was once removed from the case by court and reinstated under unclear circumstances.

The finding of this Court is that it is very clear from the pleadings by both sides that it is the Trustees of Church of Uganda who have preferred an appeal to the Court of Appeal in HCCS No. 432 of 2008. There is no evidence that the Applicant herein has preferred an appeal to the Court of Appeal against the impugned judgment either before or after filing the instant application. The orders issued in the impugned judgment in the main suit directly affect the Applicant by decreeing that she should be deregistered from the Certificate of Title of the suit land. The Applicant asserts she was not given an opportunity to be heard before judgment was delivered against her. Therefore, the Applicant is an aggrieved party and the remedy of review in Section 82 of the Civil Procedure Act cap 71 is available to her. Consequently, this preliminary objection is overruled.

Ground iv) of the Preliminary objections that The application does not meet the threshold for the grant of review and setting aside of the judgment of the court. This ground is substantially similar to ground 1 which is to the effect that this application contains no relief for review and none of the grounds for review have been pleaded. I overrule this

objection for the same reasons as the first preliminary objection. In addition, the issues being raised are issues to be determined while resolving the substance of the application.

Ground v) of the preliminary points of law: The application and reliefs sought do not raise any justiciable dispute, are overtaken by events and are merely hypothetical or moot.

Counsel for the Respondents reiterated the averments in paragraphs 9, 10 and 11 of the affidavit in reply of Edward Balunga dated 31st May 2021 to the effect that ever since the decree in Civil Suit No. 1115 of 2020 was passed, the subject suit land has since exchanged hands several times and the Applicant is therefore seeking a review against parties whose interest in the estate has since ceased to exist which the absurd conclusion that this matter has become moot. Counsel cited a number of authorities including ***Einsbury vs. Millington (1987) 1 ALL ER 927, East African Court of Justice Appeal No.4 of 2012*** in support of the proposition that a court of law can decline to decide a case which merely raises hypothetical or abstract questions. In response, Counsel for the Applicant referred to paragraphs 18 and 24 of the affidavit in rejoinder dated 18th October 2021 to emphasize that the transactions which resulted in the cancellation of the Applicant's Late husband from the impugned certificate of title and subsequent transfer to Ephraim Enterprises Limited were undertaken in a rush and with knowledge of an existing dispute. Further, that Statutory Instrument No. 107 of 2020 the Land Acquisition (Land comprised in Kibuga Block 7 Plot 39 land at Mengo, Kampala district) was published on 28th August 2020 during the pendency of this application with the purpose of acquiring the said land from the owner who has not yet been finally determined by court and for that reason, this application is not moot.

In ***Mohammed Mohammed Hamid Hamid v. Roko Construction Limited SCMC No. 18/2017,*** the Supreme Court stated that before the

court can exercise its discretionary power, the applicant must demonstrate to the court's satisfaction that the application for review is not frivolous. While explaining the rationale, Arach Amoko, JSC quoted with approval; Tumwesigye JSC, in the case of **Kiganda John and Another vs. Yakobo M.N Senkungu and 5 others, Civil Application No. 16 of 2017, (SC),** where he stated as follows:

> ***" In my view, the question is whether the applicant's application for review of this court's decision in SCCA No 17 of 2014 should be treated as frivolous and not worthy of serious consideration, or is such as should warrant this court's attention. Deciding this question at an early stage is important because the decisions and orders of this court as the final court of this country's judicial system should not be open to constant and needless application for their alteration. <u>There must be an end and finality to litigation</u>. But there may be special circumstances that may warrant alteration of the court's decision or orders where, if not done, blatant injustice may be occasioned. That is why it was found necessary to include rule 2(2) in the rules.***

The finding of the Court is that the question as to whether this application was overtaken by events is a question of fact to be determined based on evidence adduced. Be that as it may, the High Court is clothed with inherent powers to grant remedies in order to meet the ends of the interests of Justice in each particular case. **(See section 33 of the Judicature Act Cap 13 and Section 98 of the Civil Procedure Act Cap 71).** Thus, this preliminary objection is overruled.

<u>Consideration of the application on merits.</u>

The law on Review is now settled. Applications seeking to review and set aside are appreciably 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;

> ***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.
An application for review of a decree or order of a court, upon some ground ***other than*** *the discovery of the new and important matter or evidence as is referred to in rule 1 of this Order, or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the judge who passed the decree or made the order sought to be reviewed.*

The current application is one where the Applicant decries that for all intents and purposes, she was denied a fair hearing at the trial of the main suit and she prays that the resultant judgment be set aside. The Respondents however, maintain that the Applicant's allegations in this regard are all concocted lies calculated to mislead court and they pray that the instant application be dismissed.

The 3rd Respondent presented evidence that the Applicant was served with summons to file a defense in Civil Suit No. 432 of 2008 and that she acknowledged service of summons by signing the original. This was not controverted by the Applicant or her Advocate. That furthermore, the Applicant swore an affidavit vide miscellaneous application No. 269/2009 which was an application for a temporary injunction arising out of the main suit, distancing herself from having any interest in the suit land. Specifically in paragraph 3 thereof, she stated thus;

> ***"That I stated in my defense in the main suit, I am not aware of any interest held by myself as Administrator of the Late Bishop D Nsubuga in the suit land as my late husband was never legally registered as proprietor of the said land to my knowledge and the same is not among the properties left by him"***

In paragraph 5 of the same affidavit, the Applicant lamented that;

"That not having any interest in the suit land I am continuously put on unnecessary expenses to defend the suit and the attendant application and whether to maintain and or not to maintain the status quo does not affect me as I have no interest in the suit land"

Finally in paragraph 7, she drove her point home when she conclude thus;

"I swear this affidavit to specifically state and confirm that I have not done anything on the suit land and I have no interest in the same" *(emphasis mine)*

In this application, the Applicant has equally divested herself of any interest in the suit land considering the averments in her own affidavit in support of this application. In paragraph 16 of the affidavit in support of this application, she states;

"The Applicant is aware that the suit land belongs to the Church of Uganda and the title was registered in her husband's name during his lifetime and any evidence to the contrary is unfair and wrong"

The above cited conduct of the Applicant notwithstanding, looking at the court record, there are very pertinent errors that this Court cannot allow to remain on the face of the Court Record uncorrected, to wit;

First, it is pertinent to note that there is more than one Written Statement of Defense of the Applicant on the court record both filed on behalf of the Applicant in Civil Suit No. 432 of 2008. The 1st Written Statement of Defense was filed on **1st December 2008** and it is titled *"Written Statement of Defense for all Defendants"- i.e. Lucy Nsubuga (Administrator of the estate of the late Bishop D. Nsubuga), Yuda Kitaka (Administrator of the estate of the Late Rev. Y.S Kitaka and E.K*

Kizito). This particular Written Statement of Defense was filed by Nyanzi, Kiboneka & Co. Advocates.

The 2nd Written Statement of Defense was filed on **5th December 2008** by Ambrose Tebyasa & Co. Advocates on behalf of the 1st Defendant/Applicant Lucy Nsubuga and it is titled, *"Written Statement of Defense for the 1st Defendant"*. They were filed by different Law Firms. It is therefore, not clear which of the two Written Statements of defence the trial judge relied on when he delivered the impugned judgment. This is an error on the court record which cannot remain uncorrected. A party cannot have two concurrent valid written statements of defence on the record which are not an amendment of the other. This is negligent conduct of the Applicant Counsel and an oversight by court, which cannot be visited on the Applicant.

Secondly, the court record of proceedings indicates that the Applicant who was the 1st defendant in the main suit was dropped as a party on the 1st of December 2015. However, it very clear that at the time Counsel Ambrose Tebyasa closed her defence case, she was not aware that she had been added again as a party. In coming up to this finding, I'm fortified by the contents on the Court record. The court record indicates that when the main suit came up for hearing on 5th December 2017, Counsel Ambrose Tebyasa informed court thus "... *my 2nd witness would be Lucy Nsubuga the 1st defendant. My Lord, I have heard discussions with my client after she had filed her defence we had prepared a witness statement and it had been put on file. There is a time when the case against both defendants had been withdrawn and since that time she has actually really found no reason to come back to court. When I discussed with her, she told me she put her defence on record she doesn't have any different evidence to give...*" The plain understanding from the above statement of Counsel Ambrose Tebyasa to court, is to the effect that the Applicant was not

aware on 05th December 2017 that she had been added again as a party to the main suit.

Upon perusal of the Court record, I established that the Applicant was added again in as party in the main suit on 24/05/ 2017 on application by the Respondents herein vide Misc. Appn. 585 of 2016. It is therefore, perplexing that based on the above information to the Court by Counsel Ambrose Tebyasa, that on 5th December 2017, the applicant did not know that she had been added again as a party in the main suit with a duty to defend the same. I noticed from the Court record in Misc. Appn. 585 of 2016 that Counsel Ambrose Tebyasa appeared in court on 24/05/2017 when the application by the Respondents herein to add the Applicant again as a party in the main suit was granted. The Applicant in the instant application was absent. Misc. Appn. 585 of 2016 was filed on 23rd June 2016 more than six months when the Applicant herein was dropped from the main suit. There is no evidence of Notice of Instruction by the Applicant to Counsel Ambrose Tebyasa to represent the Applicant in Misc. Appn. 585 of 2016. This clearly shows the Applicant was not aware of counsel Ambrose Tebyasa dealings in court, on her behalf. Perhaps that explains why the Applicant still thought that the case against her was dropped as counsel tebyasa informed court on 05th December, 2017.

The respondent contend that the Applicant was well represented through the trial by Counsel Ambrose Tebyasa which the Applicant vehemently contested. To buttress their argument Counsel for the respondents attached on the written submissions a Notice of Instructions dated **25th November 2008** instructing Counsel Ambrose Tebyasa to represent the Applicant who then filed the 2nd written statement of defence. It is further alleged that the Applicant attached a copy of the passport and identity card of the Late Bishop Nsubuga to the Letter of instructions to enable Counsel Tebyasa ably represent her in Civil Suit No. 432 of 2008. I'm inclined to believe that by 1st December 2015 when Applicant was dropped as a party, there existence sufficient reasons to believe that Counsel Ambrose Tebyasa had instructions to represent the Applicant. This is because, the record

of proceedings in the trial court further reveals that on 1st December 2015 when parties appeared for defense hearing, Counsel Ambrose Tebyasa was put on record as representing the Applicant and whereas the Applicant was present in court on that day, there is no record of her contesting the said legal representation when Counsel Ambrose Tebyasa introduced her as his client in the matter. As the court practice has always been, whenever an Advocate introduces a client for the record, it is expected that such a client will assent to Counsel's due representation by standing up or doing any other act as the case may be for court's due recognition. In doing so, such a client subjects himself or herself to the representation of that Advocate and is thereby bound by the outcome of his/her Advocate's labors whether fruitful or fruitless.

However, on that very day of 1st December 2015, the Applicant was dropped from the suit as party. The Applicant ceased to be a party in the suit for more than one and a half years until she was added again on 24/05/2017. My view is that by lapse of time, and the applicant having been dropped from the case, in the absence of a retainer agreement, the earlier notice of instructions the Applicant had given to Counsel Tebyasa had lapsed. Therefore, without proof of further instructions, there is no proof that Counsel Amrose Tebyasa had instruction to further represent the Applicant from the time Misc. Appn. 585 of 2016 was filed until the disposal of the main suit. There is no such a presumption that if an Advocate has represented a party before, it will presumed that such an Advocate will have instructions in future in new matters arising from the same case most especially like in the instant case where there was lapse of time of more than one and a half years between when the Applicant was dropped as party in the main suit and when the application to add the applicant as a party in the main suit was instituted and determined. Therefore, Counsel Ambrose Tebyasa should have sought further instructions from the Applicant before he purported to represent her without her knowledge both in Misc. Appn. 585 of 2016 and in the main suit. The

only way an Advocate can prove instructions from a client is by way of providing proof written Instructions/retainer. This court therefore, does not see under what basis Counsel Ambrose Tebyasa purported to have instructions when he appeared Misc. Appn. 585 of 2016 to add the applicant again as party in the main suit and when he closed the Applicant's case in the main suit on the 5th of December 2017. I'm unable to discern the motive of Counsel Ambrose Tebyasa in taking over a case or continuing a case where he did not have instructions/retainer from the Applicant. However, whichever the motive it was, it denied the Applicant her right to be heard. Consequently, it is apparently clear that the applicant did not participate in the proceedings leading to the judgment against her.

In the case of ***Caroline Turyatemba and 4 Others versus The Attorney General, Constitutional Petition No. 15 of 2008*** it was held that;

> "...***the principle of "Audi Alteram Partem" is fundamental and far reaching and it encompasses every aspect of fair procedure and the whole area of the due process of the law...Fair hearing involves the right to present evidence, to cross examine and to have findings supported by evidence."***

The foregoing principle re-echoes the non derogable standard attributed to the right to a fair hearing in the Constitution of the Republic of Uganda under article 44 (c) to the extent that if found to be true, allegations of being denied a fair hearing would in themselves amount to sufficient cause meriting a review. Denial of a right to be heard is a grave illegality that it cannot be condoned by any reasonable court of law.

In the case of ***Makula Internationational vs. Cardinal Nsubuga (1982) HCB 11*** *it was held that court cannot sanction illegalities and once brought to the attention of court, they override all questions of pleading including any admission made therein.* ***(Underlined emphasis is mine)***

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 9th day of April 2022

Flavian Zeija (PhD)