**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**(LAND DIVISION)**

**MISCELLANEOUS APPLICTION NO. 1874 OF 2020**

***(Arising out of Civil Suit No. 648 of 2006)***

**1. LATIFAH SHARON BANANURA KALIISA**

**2. HADIJAH SARAH NAKIDDE KALIISA.....APPLICANTS**

**VERSUS**

1. **ABSA BANK UG LTD**
2. **SPEAR TOURISM & CARGO (U) LTD**
3. **ABBAS KALIISA**
4. **MULOWOOZA & BROTHERS LTD.....RESPONDENTS**

***Before: Lady Justice Alexandra Nkonge Rugadya***

***Introduction:***

This is an application for reinstatement of the suit which this court, presided over by J. Byaruhanga Jesse Rugyema dismissed with costs to the 1st and 4th defendants on 28th July 2020.

In brief, the applicants, Ms Latifa Sharon Bananura Kaliisa and Ms. Hadijah Sarah Nakidde Kaliisa filed this application on 11th December, 2020, seeking a review owing to the errors apparent on the face of the record, or in the alternative, a review on sufficient grounds; and costs to be provided for.

The affidavit in support was deponed by Ms Latifa Sharon Banaura Kaliisa, the 1st respondent, who also had authority to swear the same on behalf of the 2nd respondent, Hadijah Sarah Nakidde Kaliisa.

The two are lawful wives of the 3rd respondent, Mr. Abbasa Kallisa, who at the time of filing of ***Civil Suit No. 648 of 2006*** was the registered owner of the suit land.

They claimed that the property was family/matrimonial home of the applicants, their husband, Mr. Abbas Kaliisa, the 3rd respondent and the children. That the water meter account was in the names of the 2nd applicant.

On 20th September, 2006 she received notice to vacate the home for purposes of sale and they were evicted on 22nd November, 2006 yet as spouses had not been made aware of the mortgage. That the purported sale of the property without their consent was therefore illegal, fraudulent and void as it did not meet the conditions of a private treaty sale. The applicants listed the dates, from 2017 up to July, 2020 when the matter came up for hearing. On 28th July, 2020 this court however dismissed the suit.

The two applicants claimed that on 28th November, 2018 and 18th February, 2019 the respective counsel who were holding brief for Mpanga Fred did not tell court what the brief was, why his clients were not in court and why court's directives of filing witness statements were never complied with.

That the conduct by their lawyer of the main suit was contrary to their instructions that is why they were never informed of any court dates nor had they been informed of the fact that the firm no longer wanted to represent them.

Furthermore, that there was an error on the face of the record as the court dismissed the case based on the dilatory conduct of their former lawyers- an error that did not require extraneous evidence to prove. This therefore called for a review by this court since they were condemned unheard, having been prevented by sufficient cause from appearing for the hearing.

Their prayer therefore was for reinstatement of the suit in the interest of justice as the failure by their former counsel to comply with court directives ought not to have been visited onto the applicants.

The 1st, 3rd and 4th respondents each filed replies, each of them opposing the application. By their affidavit in rejoinder, the applicants objected to the affidavit in reply of the 1st respondent and the submission contending that they had been served out of time. The application according to them therefore essentially stood unopposed.

***Representation:***

The applicants were represented by ***M/s Kayongo Jackson & Co. Advocates;*** the 1st respondent by ***M/s S & L Advocates;*** the 3rd respondent by ***M/s Sebanja & Co. Advocates;*** the 4th respondent by ***M/s Ambrose Tebyasa & Co. Advocates***.

***Decision by court:***

***Issues:***

1. ***Whether the application merits a review;***
2. ***Remedies***

***Issue No. 1: Whether the application merits a review:***

I have carefully read the pleadings and the submissions filed by the applicants and the 1st and 4th respondents which are all on record and I have taken into consideration the points raised by each side.

***Preliminary objections:***

Counsel for the 1st respondent raised an objection that the application had been filed out of time. This objection however is ably responded to by the applicants in their rejoinder that upon their request, this court had issued fresh directives on 26th August, 2021. This was after the applicants had failed to serve within the time as originally scheduled by this court on 18th May, 2020.

In the rejoinder, the applicants also countered that the 1st respondent had filed its affidavit in reply on 23rd September, 2021 having been served with the same on 6th September, 2021. A copy of receipt of the directives of court was stamped onto the application.

Counsel submitted that the affidavit in reply offended ***order 12 r 3(2) of the Civil Procedure Rules,*** which requires a response to an interlocutory application since they were filed outside the 15 days as required by that rule.

Also noted, as per affidavit of service dated 11th October, 2021, the process server had served d the firm of the representing the 4th respondent, ***Ms Muloowooza & Brothers Ltd*** through their counsel, ***M/s Ambrose Tebyasa & Co. Advocates***, who however acknowledged receipt on 23rd September, 2021. Just like the 1st respondent, the 3rd respondent whom the applicants claimed had also received the documents but never signed in acknowledgment of receipt filed his reply on 23rd September, 2021.This is the same date on which their counsel had filed notice of instructions.

It is clear therefore that counsel for the 3rd respondents was instructed on the same day on which he received instructions but that alone was not alone was not enough to prevent the firm from seeking leave to file the reply out of time.

The 1st respondent on their part did not make any attempt to explain why, having been served through their counsel on 6th September, 2021 had filed its reply on 23rd September, 2021, seven days beyond the time as directed by court.

As for the 4th respondent, the process server does not offer any explanation as to why after serving the papers on 6th September, 2021, it had taken him more than two weeks to check with the said firm. He did not mention the date when he went back to check on the papers, and therefore court cannot rule out the possibility that service had been effected on 23rd September, 2021.

It is clear therefore that both the 1st and 3rd respondents had been served within the time as directed, but did not comply with the directives. They did not, seek leave of this court to file their replies out of time.

The rule cited by counsel with all due respect however did not apply where specific orders/directives are made by court as in the present case where fresh directives were made requiring respondents to serve their responses by the date of 16th September, 2021.

In light of the above observations, court can only consider the affidavit in reply by the 4th respondent who as apparent from the record, was served on 23rd September, 2021 and had filed the reply on same day. The application is therefore objected to by the 4th respondent which requires this court to delve into the merits of this application.

The affidavit in reply for the 4th respondent company was deponed by Mr. Kenneth Kamya Mulowooza, the Managing Director of the 4TH respondent company, whose objection to the application was premised on the ground that the applicants failed to lead evidence and prosecute the suit for 14 years.

That apart from blaming their former advocates there was no evidence that the applicants had been vigilant in following up the case as expected of a serious litigant. Furthermore, that there was no error apparent on face of record.

His argument was that the suit was one of those where couples connive to frustrate bank interests in mortgaged properties and that this was proved by the fact that initially the 2nd respondent was one of the plaintiffs and by an amendment, he became a defendant.

That the application did not disclose any ground for review and as such it is an abuse of court process, frivolous and vexatious and ought to be dismissed with costs. That the trial judge having exercised discretion to dismiss the suit while taking into account the provisions of the law, the only remedy available to the applicants was to appeal against the decision of court.

That accordingly the court had lawfully dismissed the suit; and should dismiss the present application for review.

***Section 82 of the Civil Procedure Act*** 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 additional factors to be taken into account in applications for review:

> ***" ..... 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,....."***

The above provisions were re-stated in ***Re-Nakivubo Chemist (U) Ltd (1979) HCB 12*** where it was held 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.***

The instant application is premised on the alleged failure by the applicants' counsel to inform of the court dates; comply with the directives of court and acting contrary to the instructions of their clients; failure to manage the case as promised; failure to inform the applicants that they no longer wanted to represent them.

According to the applicants, the above amounted to an error apparent on the face of the record and that the judge dismissed the suit basing on the dilatory conduct of their former lawyers, which error does not require extraneous evidence.

The phrase *"error apparent on the record"* is expounded upon in ***Mulla, The Code of Civil Procedure (18th Ed.) Vol. 1 at page 1147***, as follows;

> ***"Where a statement appears in the judgment of a court that a particular thing happened or did not happen before it, it ought not ordinarily to be permitted to be***

***challenged by a party unless both parties to the litigation agree that the statement is wrong, or the court itself admits that the statement is erroneous. In such circumstances, the remedy available is review."***

The learned authors further elucidated, at ***page 1146, (supra)*** that ***"there is a clear distinction between an erroneous decision and an error apparent on the face of record. The first can be corrected by a higher forum; the latter can only be corrected by the exercise of the review jurisdiction. Only a manifest error would be a ground for review."***

It has also been held that court's power of review should not be used as an alternative, or a backdoor to an appeal. ***The Kenya case of National Bank of Kenya v. Ndungu Niau [1966] LLR 469 (CAK)*** held that an order cannot be reviewed because it is shown that the judge decided the matter on a foundation of incorrect procedure and/or that his decision revealed a misapprehension of the law, or that he exercised his discretion wrongly in the case.

Much less could it be reviewed on the ground that other judges of coordinate jurisdiction and even the judge whose order is sought to be reviewed have subsequently arrived at different decisions on the same issue.

The foregoing would imply that even where court has made an erroneous decision that in itself would not amount to an error on the face of the record.

***Order 17 rule 4 CPA*** under which the suit was dismissed provides:

***Where any party to a suit to whom time has been granted fails to produce his or her evidence or to cause the attendance of his or her witnesses, or perform any other act necessary to further the progress of the suit, for which time has been allowed, the court may, notwithstanding the default, proceed to decide the suit immediately.***

***Order 17 rule 5A of the CPR,*** as amended by ***SI 33/2019*** states the evidence of a witness shall consist of a witness statement which shall be filed after the scheduling conference on the direction of the trial judge and served upon the opposite party.

The court in the instant case, had this to say:

*A plaintiff is the party who initiates a law suit before court. When you file a law suit against someone, the burden of proof fall falls upon you as the plaintiff...to prove that the defendant has violated the law.....the plaintiff should therefore take interest in getting to know the fixtures of their case because the suit is for the plaintiff.* ***(Kampala International University Ltd vs Tororo Cement Ltd & 2 others HCCA No. 0433/2006).*** *The suit in the application was dismissed under* ***section 17 rule 4 and 6 of the CPR.***

Thus under ***order 17 rule 5A*** witness statements amounted to evidence and have all along, even before the amendment been regarded as evidence. That the plaintiffs' breach of the directives and orders of filing statements therefore amounted to their offering no evidence and therefore failed to prove their case.

***Order 17 rule 4 of the CPR*** mandates court to close the plaintiffs' case which court had done, after noting that the parties had an obligation to comply with its directives issued on 5th October, 2017. It also noted that there had been an incredible delay in the trial and disposal of the suit filed on 25th October, 2006. That the said suit had been pending for 14 years.

That on two occasions 5th October, 2017 and 28th November, 2018 court directed and reminded the parties to file witness statements; joint schedule memorandum but only the 1st defendant/respondent complied. This was a session file where judiciary under the funding of the World Bank had committed funds to facilitate judges outside the Land division to appear hear and determine such suits.

That each case whose trial is unduly prolonged deprives other worthy litigants of timely access to the courts which ought to ensure that each case is dealt with expeditiously and fairly, allotting it to an appropriate share of court's resources, while taking into account the need to allot resources to other cases.

Conducting proceedings in a manner manifesting an intention not to bring them to an expeditious conclusion is a subversion of the process of the court and will constitute an abuse justifying a stay or dismissal. The judge in that instance cited the decision in ***Isadru Vicky vs Perima Aroma & 6 others Arua HCCA No. 0033 of 2014.***

In alignment with the above principles, while it is duly acknowledged by this court that a mistake or error by counsel cannot be visited on the litigant, by no means can it fall within the category of *an error on the face of record* as stipulated by the law cited earlier, to merit a review.

It would therefore also be setting a dangerous precedent to consider it on its own as *sufficient cause* for review.

Courts have also in recent times maintained that suits dismissed in cases of delayed trials/prosecutions in the spirit of ***section 17 of the Judicature Act, Cap. 13*** cannot be reinstated. The plaintiff can only appeal against such order as it constitutes a final decree. (***Kibugumu Patrick versus Aisha Mulungi & Anor; HCMA No.445 of 2014 Bashaija J.)*** It cannot therefore be reinstated by the same court that dismissed it. ***(See also: See Lukwago Erias versus Jennifer Musisi; HCT MA No. 626 OF 2018 and Kibugumu Patrick versus***

***Aisha Mulungi & Anor; HCMA No.445 of 2014; and Ntambala Faustine Kitimbo versus AG. & others; HCT MA No.898 of 2019).***

In passing, it is also clear from the record that the suit which the applicants had filed, vide ***Civil Suit No. 648 of 2006*** against the same parties had been 'terminated' following a consent judgment between the applicants and the 2nd and 3rd respondents, which the parties had endorsed, in the presence of their respective counsel. The said consent judgment was never discharged or varied.

It is not known how a suit that had been withdrawn by consent, could have been brought up again, heard and determined by the same court that had endorsed the consent. The question therefore of having the matters raised in that suit, reheard, determined and orders issued and later placed for review ought not to arise; for at the time when the suit was resurrected it had already been concluded. Court was therefore *functus officio*. An illegality once brought to the attention of court cannot be ignored. Litigation must besides, come to an end.

Had the existence of the consent judgment been drawn to the attention of the trial court I believe, court would not have wasted its time to hear the case.

The application in its form is therefore vexatious and frivolous and amounts to an abuse of court process. Counsel for the applicants did not appropriately advise his clients. In the process, court's valuable time had been wasted.

I could not agree more therefore that this is an application for a review that not only fails to disclose any grounds for review but it is also a disguised appeal. But even more absurd, the suit under which the application is based, had long ceased to exist as early as 9th July, 2010 when the consent was entered.

For the above reasons therefore, I dismiss the application, with costs to the 4th respondent, payable by the applicants' counsel.

***Alexandra Nkonge Rugadya***

***Judge***

***28th January, 2022***

Delivered through email

28/1/2022.