THE REPUBLIC OF **UGANDA**

IN THE SUPREME COURT OF UGANDA

AT KAMPALA

[Coram: Odoki, C.J., Katureebe, Kitumba, Tumwesigye, Kisaakye JJ.SC]

CIVIL APPLICATION NO 05 OF 2012 BETWEEN

DAVID

MUHENDA ::A

PPLICANT AND

HUMPHREY MIREMBE :::::::::::::::::::::::::::: RESPONDENT

[Application arising from the judgment of the Supreme Court (Oder, Mulenga, Mukasa-Kikonyogo, JJ.S.C) dated 17th October 2000 in Civil Appeal No. 9 of 1999.]

RULING OF THE COURT

David Muhenda, the applicant, brought this application by notice of motion under Rules 2(2) and 35 of the Judicature (Supreme Court Rules) Directions (S.l. 13-11) seeking orders that-

"1. This honourable Court recalls its judgment dated 17th October 2000 and varies or amends the same to make provision for the estate of Kezia Rujumba;

2. the words '.....the reference to "in the south Kezia" is to a land or property such as a house belonging to Kezia which was beyond the suit property which may or may not have been occupied by her and /or Mary Silver ……" appearing in the lead judgment of Hon. Justice Mr. Oder (as he then was) be clarified to cure the injustice suffered by the beneficiaries of the estate of Kezia Rujumba;

AND/OR IN THE ALTERNATIVE application be made of the slip rule to correct the error or injustice caused by the mis-description of the boundaries to the suit property;

3. The costs of this application be provided for."

Background facts

In 1976, Margaret Kamuje (deceased) sued her father Absolomu Nyabugabwa over a piece of land in a Grade II Magistrate's court, Nyaburara, in Civil Suit No. 48 of 1976. She was successful in her suit. Absolomu Nyabugabwa appealed to the Chief Magistrate's Court, Fort Portal against

the judgment but later withdrew the appeal. For over 20 years, Margaret Kamuje's efforts to occupy the suit property were in

vain as it was occupied by people who violently prevented her from its occupation.

In 1993 Margaret Kamuje made an application for the execution of the decree extracted from the Grade II Magistrate's judgment. Six people (1) Parsis Okao, (2) David Nsubuga (3) James Sabiti Kachope (4) David Muhenda (5) Nyamutale and (6) Mugyenyi made a joint application before a Grade 1 Magistrate, Fort Portal objecting to the execution of the decree. The Grade I Magistrate visited the locus and drew a sketch plan which however, got lost. He allowed the objectors' application in respect of objector 1, 2, 3, and 4 but dismissed it in respect of objector 5 and 6. So he granted Margaret Kamuje's application for execution of the decree in the original suit against objector 5 and 6 and issued a warrant of vacant possession against them.

All the six objectors appealed to the High Court in Fort Portal against the ruling of the Grade 1 Magistrate, however, the High Court dismissed the appeal and granted Margaret Kamuje's

application for execution and ordered that it be carried out forthwith.

Being, dissatisfied with the judgment of the High Court David Muhenda, the applicant, and 3 others filed an appeal to this court. In its judgment of 2000, this court dismissed their appeal and issued an eviction order against “persons who were occupying the, suit property which was decreed to the respondent (Margaret Kamuje) in Civil Suit No. MFP 48 of 1976 and the boundaries of which are as per description of the learned appellate judge”.

In September 2012, the applicant lodged this application claiming that during the course of the execution of this court’s judgment, land belonging to the estate of late Kezia that was previously preserved under the judgment of this court was unlawfully included in the execution of this court’s decree and he seeks to correct the situation through this application.

Grounds of the application

The grounds for the application are set out in the notice of motion and in the affidavits of the applicant and one

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Richard K. Baguma. In the notice of motion the applicant sets out four grounds listed as follows:

"(i) That the court having taken note of the boundaries with Kezia Rujumba as neighbour to the south as testified by the respondent, Margaret Kamuje, before the trial magistrate could not have intended to evict the said Kezia Rujumba.

(ii) That the court having accepted that Kezia Rujumba had a house or property beyond the suit property could not have intended that the house and the property of Kezia be taken by the respondent in execution.

(iii) That it is verily believed that there was a slip or error for the Honourable court to ignore the record of Kezia Rujumba as a neighbour, and accept a swamp as a boundary.

(iv) That it is fair and just that the slip rule be applied to make provision for the house and the property of Kezia Rujumba as mentioned in the court's judgment".

Affidavit in support of Notice of Motion

A summary of what the applicant averred in his affidavit to support his notice of motion is as follows: He was the 1st appellant in Civil Appeal No. 9 of 1999 in which this court passed judgment in favour of the respondent, Margaret Kamuje. He was also objector No. 4 against execution in respect of suit land in Civil Suit No. MFP 48 of 1976.

The decree holder (Margaret Kamuje, deceased) admitted, when she appeared before the High Court, the existence of Kezia's house. The learned High Court judge in his judgment stated that the boundaries were: in the East, Kasese road, in the West, Jack, in the South, Kezia and the boundary path. This court considered the evidence and agreed with the learned High Court judge that there was land of Kezia which was in the South of the disputed land.

At the time of ordering for execution, it did not come to the knowledge of this court that the execution would extinguish the interest and estate of Kezia. Many people including local leaders, the decree holder's son and village mates were surprised that Kezia's land and house was subject to execution. Kezia's family had been evicted and only her house and graves remained intact.

He made effort in 2007 to seek correction of errors and paid for legal counsel to represent him but his counsel was frustrated by failure to access letters of administration to the decree holder.

Rev. Richard Baguma who swore a supplementary affidavit in support of the applicant's notice of motion averred as follows: He was witness in Civil Suit No. MFP 48 of 1976 and he testified in favour of Margaret Kamuje. At the time of his testimony, he knew

that Kezia's land was adjacent to the disputed land. He was a Gombolola chief in 1965 and he approved building plans for a

house belonging to Kezia in which she lived until her death in 1984.

He was, therefore, surprised when Kezia's beneficiaries

were evicted from her property during the execution of this court's decree.

Affidavit in Reply

Humphrey Mirembe, the respondent, and the administrator of the estate of Margaret Kamuje, swore an affidavit in reply and his averments can be summarised as follows: The averment of the applicant and Rev. Richard Baguma are false and are a misrepresentation of the entire judgment and orders of this court. He got letters of administration of the estate of Margaret

Kamuje vide HCT-00-CV-AC-841 of 2005 on 31st March 2006 and whatever remained of the estate of Kamuje had been sold off and proceeds shared out among the beneficiaries leaving no land. Before her death and soon after execution the deceased, Margaret

Kamuje, had sold other pieces of a land to one Sunday George and one Mwirumubi who had since occupied and developed the land leaving no more land available.

Kezia did not own land as alleged and the execution carried out before the death of Kamuje did not include Kezia's land. The execution only covered land well described in the schedule to the Warrant issued by court in accordance with properly stated boundaries in the judgment of the court which tried the suit.

The complaint relating to the land ownership was resolved in the objector proceedings appeal vide Civil Appeal No. DR.MFP 1 of 1994 or Civil Appeal No. 52 of 1994. This application for the court to apply the slip rule was res judicata and time barred as the ownership of the land by Kezia was resolved in the subsequent appellate judgments of the High Court in Civil Appeal No. 52 of 1994.

The applicant was a party to the original objector application and to Civil Appeal No. 52 of 1994 where the objection was overruled by the High Court as well as the appeal before this court. Nothing was done wrong during the execution.

The applicant was guilty of gross inordinate delay having spent 12 years without acting or taking reasonable steps to pursue the remedy he is seeking in this application. There was nothing to vary or amend in the lead judgment of this court and, therefore, this application had no merit.

Affidavit in rejoinder

The applicant swore an affidavit in rejoinder and averred that he had inquired from neighbours and the area local council chairperson who confirmed that the land in issue had not been sold as alleged. His counsel had also advised him that a sale execution of land was not a bar to court's power to recall and vary or amend its judgment to determine its legal ownership.

However, rather surprisingly, he further averred that he was aware that Margaret Kamuje before her death had rightfully sold her portion of land to one Sunday George and that one

Mwirumubi had also purchased a portion of land in dispute in May 2012.

The delay of 12 years was caused by his having been disorganised by the numerous execution processes through which he was arrested coupled with the death of Margaret Kamuje. Up to this day letters of administration have not been produced in court in spite of this court ordering for their production.

Arguments of counsel

The applicant was represented by Mr. Tony Arinaitwe who filed written submissions while the respondent was represented by Mr. Muhumuza Kaahwa who made oral submissions in court.

In his written submissions, learned counsel for the applicant argued that the application was intended to cure the error and injustice suffered by the beneficiaries of the estate of Kezia Rujumba as during the process of executing this court's judgment all the land and real property comprising the estate of Kezia Rujumba was forcefully taken by the decree holder.

He argued that' the injustice caused was even appreciated by neighbours, village local council and the son of the decree holder.

He made reference to the affidavit of Rev. Richard Baguma who was a Gombolola chief in 1965 and who had at that time

approved the plans concerning developments on Kezia's land which had now been taken during the execution.

He submitted that this injustice caused by this court's judgment's failure to clearly define the decree holder's land can be corrected by this court applying the slip rule under Rules 2(2) and 35 of the Rules of this court.

He cited the cases of **Orient Bank Limited vs**. **Fredrick Zaabwe** & Anor SC Civil Application No. 17 of 2007, **Fang Min vs. Dr. Kaijuka Mutabazi Emmanuel,** SCCA No. 06 of 2009, Vallabhadas **Karsandas Raniga** vs. **Mansukhal Jurraj & Ors** (1965) E.A. 700 to show that the courts had power to amend their judgments, decrees and orders for achieving the ends of justice for the purpose of giving effect to the intention of the courts at the time when judgment was given.

In his oral submissions learned counsel for the respondent raised several issues contained in the respondent's affidavit in reply to

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oppose the application. His first argument was that the application was being brought 12 years after the judgment of this court which was inordinate delay and which this court should not accept. That though the applicant sought to rely on the provisions of Rules 2(2) and 35(2) of the rules of this court which provide that this application can be brought “at any time”, he invited the court to interpret this rule to mean that the application should be brought within a reasonable time with due diligence and not make it appear like the rule can operate in infinity. ,

On the issue of the phrase whose clarity the applicant sought i.e. **“...the reference to ‘in the south Kezia’ is to a land or property such as a house belonging to Kezia which was beyond the suit property which may or may not have been occupied by her and/or Mary Silver”,** learned counsel argued that the applicant wanted this court to interpret this phrase to mean that the deceased Kezia owned land and property within or near the decreed property, yet this court had already overruled his claim during the appellate court objector proceedings.

Counsel for the respondent contended that the case at hand did not involve clerical or arithmetic error on the face of the record necessitating the application of rule 35 of the rules of this court. What the applicant was seeking was for this court to sit on appeal against its own decision.

Concerning the, court bailiffs recommendation that the court appoint a team of independent experts to investigate the actual boundaries counsel for the respondent stated that the specificity and the correct, description of the boundaries was well handled by the High Court and this court. He argued that the clear boundaries for execution had been set out in the execution warrant and it was, therefore, not necessary to investigate the boundaries again.

Counsel further argued that the ownership of land had since changed hands and that the subsequent owners were bona fide purchasers for value without notice whose titles should not be affected by the outcome of this application.

Finally counsel argued that the procedure adopted for correcting the alleged injustice during execution was wrong and that the

proper procedure was well set out under O. 22 rule 50 of the Civil Procedure Rules.

Consideration of the applicant's grounds

In his notice of motion the applicant asks this court to recall its judgment of 17th October 2000 in which he was the appellant and amend it or vary it to make provision for the estate of Kezia Rujumba. He also asks this court to clarify the words appearing in the lead judgment of Oder, JSC (RIP), **"....the reference to 'in the South Kezia' is to a land or property such as a house belonging to Kezia which was beyond the suit property...."** to cure, in his own words, "the injustice suffered by the beneficiaries of the estate of Kezia Rujumba". He prays that this court applies the slip rule under Rules 2(2) and 35 of the rules of this court to correct the error or injustice caused by the misdescription of the boundaries of the suit property.

Under rule 2(2) of the Judicature (Supreme Court Rules) Directions SI 13-11, this court has the power to recall its judgment and make orders as may be necessary for achieving the ends of justice. In doing so, it is not limited to rule 35 of the rules of this court. See, for example, **Livingstone Sewanyana vs.**

Martin Aliker, Msc. App. No. 40/91 and **Nsereko Joseph** Kisukye & Others vs. Bank **of** Uganda, Civil Appeal No. 1 of 2002 and Orient Bank Ltd vs. Fredrick **Zaabwe fo Anor** Civil Appl. No. 17 of 2007. In **Nsereko Joseph Kisukye** case, for example, the court recalled its judgment and made clarifications on the orders it had made to make them implementable.

However, the power of the court in this respect is not open ended. As it was stated in **Orient Bank** vs. **Fredrick Zaabwe** (supra)

"the decision of this court on any issue or law is final, so that the unsuccessful party cannot apply for its reversal". This principle is based on the decision of Lakhamshi Brothers Ltd vs. R. Raja and sons [1966] E.A. 313 page 314 where Sir Charles Newbold P stated:

> **"....There are circumstances in which this court will exercise its jurisdiction and recall its judgment, that is, only in order to give effect to what clearly would have been its intention had there not been an omission in relation to the particular matter.**
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> **But this application and the two or three others to which I have referred go far beyond that. It asks, as I**

have said, this court in the same proceedings to sit on its own previous judgment. There is a principle which is of the greatest importance in the administration of justice and that principle is this, it is in the interest of all persons that there should be an end to litigation."

This principle was restated in the case of **Fangmin vs. Dr. Kaijuka Mutabazi Emmanuel SCCA No. 06 of 2009.**

This application asks this court to clarify the boundaries so that Kezia's land is left out of the execution of this court's decree. It asks for the clarity of the phrase **"...in the South Kezia"** contained in the judgment.

The appellant's appeal to this court was a second appeal and so this court had no obligation to re-evaluate evidence in the matter as the High Court had. Indeed it is the learned High Court Judge who re-evaluated the evidence as various authorities such as **Kifamunte** Henry **vs. Uganda** SCCA No. 10 of 1997 and Pandya **v.** R [1957] E.A. require.

On the issue of boundaries, this is what Oder, JSC (RIP) wrote in his judgment:

“The learned appellate Judge visited the locus-in-quo to compare the boundaries described in evidence at the trial with what was on the ground. This is how he (the learned appellate judge) then described the boundaries of the suit:”

“There is a roadway between that suit land and that of Jack, the person whose land abutted that of the plaintiff Kamuje as set out in the evidence of Kamuje at the trial. That roadway, which may be of more recent creation, therefore, constitutes an easily ascertainable boundary. There is Kasese - Fort Portal road bordering the full length of one side of this land. That again was a boundary mentioned in the evidence at the trial and poses no difficulty at all.

The third boundary is the swamp at the bottom of the land which parties appear to accept as the boundary and which in any event is not any part of the land in issue in the claims. The fourth boundary according to the evidence at the trial is stated as being the property of Kezia, mother of Mary Silver the original co-defendant

and a path. The Magistrate in the trial referred to a fence in place of the term “boundary” used by the plaintiff in her evidence. If indeed there was a fence there none exists anywhere on this land now. Magistrate Mr. Katorogo assumed that the reference to Kezia meant the house which she may have occupied which is on this land and made no attempt to find any fence or path between that house and the rest of the land. The evidence at the trial is that plaintiff wrote to one Francis who had purchased the house she had built on the land with a copy to Kezia and, as his evidence later showed, to-Defence witness Jaawa, that the house having been-demolished, she was reclaiming the land. Jaawa, says he considered the letter childish and did nothing to challenge her claim. Mary Silver, the daughter of Kezia, however, physically resisted plaintiff’s attempt to rebuild and that resistance led to this case against Mary Silver and later Karasuma and to Mary Silver disclaiming the land. Hence the reference to “in the South Kezia” is to a land or property such as a house belonging to Kezia which was

property and not to any house which may or may not have been occupied by her and/or Mary Silver. The path

as pointed out by plaintiff as being the one referred to by her borders on a property on which there are twin buildings of, recent construction with a distinct foot path between them and the path referred to in the plaintiffs evidence which is now overgrown with grass and shrubs and even has a mound of soil overgrown with weeds. This is hardly surprising after nearly twenty

years."

In his lead judgment which represented the decision of this court, Oder, JSC (RIP), agreed with the reasons, conclusions and orders of the learned High Court judge. He ordered, in the second order of the judgment that: -

"(2) Execution be and is hereby issued in favour of the respondent to secure for her vacant possession of, and for eviction of persons now occupying, the suit property which was decreed to her in Civil Suit No.

of the learned appellate judge herein before referred to."
(Emphasis mine)

It is clear that the description of boundaries of the suit land is set out in the judgment of the learned High Court judge who heard the first appeal and even visited the locus in quo. His description of boundaries were not inconsistent with the description of boundaries by the trial court so the learned appellate judge found that his visit to the locus in quo was not necessary.

This court did not, set out to describe the boundaries other than quoting the part of the learned appellate judge's judgment and agreeing with it. It is assumed that the applicant was satisfied with the boundaries as described in the judgment of the learned appellate judge otherwise he would have made it a ground of appeal to this court. He did not. In our view, therefore, there is nothing to clarify or correct or vary in the judgment of this court concerning the description of boundaries.

The grievance of the applicant as shown in the grounds of his application and affidavits in support of the notice of motion is that the property of late Kezia was taken by the respondent during execution of this court's decree. If this complaint is true,

and this is subject to proof, we think that the remedy does not lie in recalling the judgment of this court and varying or amending or clarifying it or applying the slip rule to correct the alleged injustice caused by mis-description of the boundaries because this court did not set out a description of boundaries in its judgment as earlier stated. We think that the proper procedure for addressing the complaint that has arisen during execution was for the applicant to file objector proceedings as provided for under section 31(1) of the Civil Procedure Act and Rule 50 of Order 22 of the, Civil Procedure Rules. Alternatively he can file a fresh suit to claim the property that might have been taken by the respondent during the execution.

The respondent and his counsel raised the question of delay by the applicant in filing this application. Counsel for the respondent argued that whereas Rule 35(2) of the rules of this court provides that an order of this court may be corrected by the court at any time, this did not mean that the rule applies in perpetuity. He argued that the application should be brought within a reasonable time and with due diligence and that 12

years delay was inordinate and unreasonable and this court should, on this account, reject the application.
In his affidavit in rejoinder the applicant averred, on this point, that the delay of 12 years was caused by his being disorganised by the numerous execution processes through which he was arrested, coupled, with the death of Margaret Kamuje. That this court ordered that her counsel produces letters of administration in the court which to date has not been done.

The judgment of this court was delivered on 17th October 2000.

Partial execution of this court's decree was done by the court bailiff on 4th June 2001 according to the record. During the execution the bailiff noted that the boundaries were difficult to follow and advised on the need for an independent team of experts to be constituted to investigate the actual boundaries. The applicant took no action to move the court for the establishment of the advised independent team. On 5th February 2003 a second execution seems to have been done when Kezia's fence was burnt. Margaret Kamuje died on 28th May 2005 and letters of administration were granted to the respondent by the High Court at Kampala on 31st March 2006. In his affidavit in

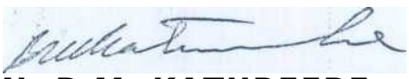
support of the, notice of motion, the applicant says that he instructed counsel, to assist him but that the counsel was frustrated by his failure to access letters of administration. On 14th September 2012 he filed this application.

We think that the[1] reasons the applicant is advancing to justify his delay are not convincing, considering the long period of his inaction, and so there was inordinate delay in bringing this application to the court. If the applicant had been diligent, he would have filed the application long before Margaret Kamuje died. This court will refuse to entertain delayed applications brought under rules 2(2) and 35 of the rules of this court unless sufficient reasons are shown to justify the delay. We agree with learned counsel for the respondent that the phrase “at any time” appearing in rule 35(2) of the rules of this court should not be interpreted to mean that inordinately delayed applications without justification will be permitted by this court.

This inordinate delay of the applicant in bringing this application apart, however, we find, as we indicated above, that this application cannot be sustained under rules 2(2) and 35 of the Rules of this court. We think this application lacks merit and it

should fail. Accordingly, we dismiss it with costs to the respondent.

Delivered at Kampala this 15th day of-May 2014.



HON. B.M. KATUREEBE

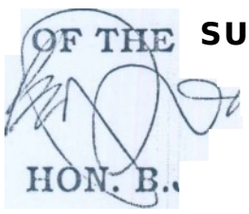
JUSTICE OF THE SUPREME COURT

HON. J. TUMWESIGYE

JUSTICE OF THE SUPREME COURT

E.M. KISAAKYE

JUSTICE OF THE SUPREME COURT



J. **ODOKI**

AG. JUSTICE OF THE SUPREME COURT

IION. C.N.B. KITUMBA

AG. JUSTICE OF THE SUPREME COURT