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**THE REPUBLIC OF UGANDA**

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

**[CORAM: ARACH-AMOKO; OPIO-AWERI; MUGAMBA; MUHANGUZI & TUHAISE, JJ.S.C.]**

**MISCELLANEOUS CIVIL APPLICATION NO. 42 OF 2019**

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**(Arising from Supreme Court Civil Appeal No. 06 of 2018)**

**BETWEEN**

1. SOPHATIA BEITH  
2. NGOBI FRED  
3. MUTAKA TOM  
4. JOSEPHINE KAIRU

.....APPLICANTS

15

**AND**

1. NANGOBI JANE  
2. NANGOBI ROSE  
3. IRENE WAMBI

.....RESPONDENTS

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*(An application for setting aside the judgment made by this Court on the 10<sup>th</sup> December, 2019 in Civil Appeal No.06 of 2018)*

**RULING OF THE COURT**

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By a Notice of Motion dated 23.12.19, the applicants, Sophatia Beith, Ngobi Fred, Mutaka Tom and Josephine Kairu, have moved this court seeking for orders that the Judgment of this court in Civil Appeal No.06 of 2018 be reviewed and set aside. They also pray for the costs of the application.

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The application is made under Sections 82 and 98 of the Civil Procedure Act cap 71, Rules 2(2), and 42 of the Supreme Court Rules as well as Articles 28(1) and 131 of the 1995 Constitution.

**Background**

The Judgment that the applicants seek to set aside arose out of a dispute over a piece of land situated at Magamaga Trading centre



5 in Mayuge District. The 2<sup>nd</sup> and 3<sup>rd</sup> applicants are the sons of the  
1<sup>st</sup> applicant and the respondents are his daughters. In 2000, the  
1<sup>st</sup> applicant “bequeathed” the said land to the respondents who  
constructed buildings thereon. However in 2005 the 1<sup>st</sup>, 2<sup>nd</sup> and  
3<sup>rd</sup> applicants sold the said land to the 4<sup>th</sup> applicant who  
10 subsequently evicted the respondents from the land. The  
respondents successfully challenged the sale in the Magistrate  
court at Iganga. The applicants’ appeal to Jinja High Court was  
successful. Aggrieved by the decision of the High Court, the  
respondents appealed to the Court of Appeal and were successful.  
15 The applicants’ third appeal to this Court was unsuccessful. Upon  
a perusal of the Judgment of this Court, they raised concerns  
about an anomaly in the Coram as well as errors in the Judgment  
hence this application.

The application is anchored on the grounds that there is a mistake  
20 and error apparent on the face of the record as the Judgment was  
made without a proper Coram and as such, a nullity.

The application is supported by an affidavit sworn by Josephine  
Kairu, the 4<sup>th</sup> Applicant, wherein she expounds the grounds. Her  
complaint is that Justice Tibatemwa-Ekirikubinza, JSC was  
25 among the Justices who delivered the impugned Judgment  
although she was not on the Coram at the hearing of the appeal.  
The actual Coram was Arach-Amoko, Mwangusya, Opio-Aweri,  
Mwondha and Mugamba; JJSC.

Secondly, it was averred that the same Justice had participated on  
30 the Coram that considered the applicant’s application for a  
certificate to lodge a 3<sup>rd</sup> appeal to this Court at the Court of Appeal.  
The Coram was Kasule, Kakuru and Tibatemwa-Ekirikubinza,  
JJA. That application was dismissed. The applicant annexed  
copies of the impugned Judgment as well as a copy of the Ruling  
35 by Justice Tibatemwa-Ekirikubinza at the Court of Appeal to  
illustrate her point.



5 Thirdly, the applicant alleged that there were a number of inaccuracies and mistakes in the lead Judgment of Justice Opio-Aweri; JSC.

Counsel for the applicants contended that there had been violation of the rights of the applicants to a fair hearing enshrined in Article  
10 28(1) of the Constitution.

The respondents filed an affidavit sworn by Nangobi Rose, the 2<sup>nd</sup> respondent. They conceded to the absence of a proper Coram and to the inaccuracies raised by the applicants. She attached a copy of a letter from their lawyer, addressed to the Registrar of this  
15 Court, bringing this to his attention and requesting for corrections. She avers that this was not done.

The deponent however averred that the inclusion of the Judgment of Justice Tibatemwa-Ekirikubinza, JSC, did not cause any injustice to the applicants as alleged. She averred that it was a  
20 simple mistake which was caused by an administrative mix up that can be corrected by expunging the Judgment of Justice Tibatemwa-Ekirikubinza, JSC and replacing it with the one of Justice Mugamba, JSC. She further averred that this application is ill conceived and frivolous and it is intended to allow the 4<sup>th</sup>  
25 applicant to continue enjoying the respondents' property; which amounts to a blanket abuse of the process of the court. She added that this should not be allowed and that the application should be dismissed.

### **Representation**

30 At the hearing of this application, Mr. Robert Okalang, Mr. Byamukama Gregory and Ms. Kevin Amojong represented the applicants while Mr. Joseph Rukanyangira appeared on behalf of the respondents.

Submissions by both counsel were based on the affidavits above  
35 and we do not need to repeat them.

### **Determination**



5 We have considered the application, the affidavits on record, the authorities cited and the law. The discretion that we are called upon to exercise in determining this application is provided for under Rule 2(2) of the Supreme Court Rules which states as follows:

10 **“Nothing in these Rules shall be taken to limit or otherwise affect the inherent power of the court, and the Court of Appeal, to make such orders as may be necessary for achieving the ends of justice or to prevent abuse of the process of any such court, and that power shall**  
15 **extend to setting aside judgments which have been proved null and void after they have been passed, and shall be exercised to prevent an abuse of the process of any court caused by delay.”**

### **The principles**

20 The power of the Supreme Court to revisit its decision has been a subject of several applications. The locus classicus is found in the Ruling of this Court in **Orient Bank Limited v Fredrick Zaabwe & Anor, Civil Application No. 17 of 2007** where this court stated as follows:

25 ***“It is trite law that the decision of this Court on any issue of fact or law is final, so that the unsuccessful party cannot apply for its reversal. The only circumstances under which this Court may be asked to re-visit its decision are as set out in Rules 2(2) and 35(1) of the Rules of this Court. On the one hand, Rule 2(2) preserves the inherent power of the Court to make necessary orders for achieving the ends of justice, including orders for inter alia –***  
30 ***‘...setting aside judgments which have been proved null and void after they have been passed...’ (Emphasis is added).***



5        ***On the other hand, under Rule 35(1), this Court may correct inter alia any error arising from accidental slip or omission in its judgment, in order to give effect to what was its intention at the time of giving judgment.”***

### **Findings**

10    We have perused the record of proceedings in Civil Appeal No. 06 of 2018 out of which the impugned Judgment arose. We find that the Coram indicated on the cause list and the transcript of the proceedings on the 20<sup>th</sup> September, 2018 comprised of Arach-Amoko, Mwangusya, Opio-Aweri, Mwondha and Tibatemwa; JJSC.  
15    However, the audio recording of the proceedings for that day revealed that Justice Tibatemwa-Ekirikubinza, JSC did not participate at the hearing. It was Justice Mugamba, JSC. It is therefore apparent that the last minute change to the Coram by replacing Justice Tibatemwa-Ekirikubinza, JSC with Justice  
20    Mugamba, JSC was inadvertently not recorded on the court record.

Further, the record of proceedings shows that Justice Tibatemwa-Ekirikubinza, JSC wrote and delivered a Judgment in the said appeal. This was obviously from the mistaken belief that she was  
25    on the Coram that had heard the appeal on the 20<sup>th</sup> September, 2018, whereas not.

Regarding participation of Justice Tibatemwa-Ekirikubinza, JSC on the Coram that dismissed the application in Civil Application No. 80 of 2014(CA) we have established that to have been the case.

### 30    **Conclusion**

Regrettably there was inaccuracy. That inaccuracy is a serious error because it affected the rights of the applicants to a fair hearing enshrined in Article 28(1) of the Constitution which is non derogable (See: **Bakaluba Peter Mukasa v Nambooze Betty Bakireke. Election Petition No.04 of 2009** and **Mohammed Mohammed Hamid v Roko Construction, Civil Appeal No.1 of 2013 (SC)** where this court stated as follows:  
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5       ***“ ....in a legal system and tradition in which Justice must not only appear to be done but must be seen to be done properly and impartially, the appearance on record of a Justice who never personally participated in the hearing raises genuine concern about the fairness, propriety and impartiality in the decision of the Court.***

10       ***.....it is improper and contrary to natural Justice for a stranger to the hearing to decide and sign a purported judgment or ruling. Under our legal system and this is reflected in Article 28(1) of our Constitution, a person is entitled to a public hearing before an independent and impartial court. Parties have to know who is due to hear and decide their case. This enables litigants to raise objections against a Judicial Officer or Judicial Officers due to hear a case where a litigant has a basis for such an objection. Obviously no objection can possibly be raised where, as in this appeal, a Judicial Officer is brought in the case without the knowledge of the parties and during the final stage of the appeal namely during deciding and writing a judgment in the case.”***

25       In that case, a Justice who had not participated in the hearing of the appeal at the Court of Appeal had signed the Judgment. We allowed the appeal and set aside the impugned Judgment on that ground alone and ordered for a re-hearing before a different panel at the Court of Appeal.

30       Similarly, in this case, we find that the errors go to the root of the appeal and therefore the Judgment is a nullity. We accordingly grant the application for recall of the Judgment and order as follows:

- 35       1. The Judgment in Civil Appeal No.06 of 2018 delivered on the 10<sup>th</sup> December, 2019 is hereby recalled and set aside.
2. Civil Appeal No.06 of 2018 be placed before a different panel for re-hearing as soon as possible.

5        3. Parties are to bear their own costs given that the error arose  
extraneously.

Dated at Kampala this 24<sup>th</sup> day of July.....2020

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Arach-Amoko

**JUSTICE OF THE SUPREME COURT**

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Opio-Aweri

**JUSTICE OF THE SUPREME COURT**

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Mugamba

**JUSTICE OF THE SUPREME COURT**

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Muhanguzi

**JUSTICE OF THE SUPREME COURT**

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Tuhaise

**JUSTICE OF THE SUPREME COURT**

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- Ruling Delivered in the presence of
- Joseph Mukanyangwe Jr Resp.
  - Phillip Kasindi Biary Sewanyama Jr the Appellants.
  - the 1st & 3rd Respondents

Absent: Appellants.

Heech JC

24-7-20