THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(LAND DIVISION)

MISCELLANEOUS APPLICATION NO. 0003 OF 2019

(ARISING HIGH COURT [LAND DIVISION] MISCELLANEOUS CAUSE No. 61 OF 2014)

EVERGREEN FIELDS UGANDA LIMITED ::::::::::::::::APPLICANT

VERSUS

1. BERNARD TUNGWAKO

2. THE COMMISSIONER LAND REGISTRATION ::RESPONDENTS

BEFORE HON. MR. JUSTICE ANDREW K. BASHAIJA

RULING:

Evergreen Fields Uganda Limited *(hereinafter referred to as the Applicant)* brought this application against Bernard Tungwako and the Commissioner for Land Registration *(hereinafter referred to as the 1st and 2nd Respondent respectively)* under Section 82 of the Civil Procedure Act Cap. 71 and Order 46 rule 8 of the Civil Procedure Rules (SI 71-1) seeking orders that;

a) ***The decision of this court, in Miscellaneous Cause No. 61 of 2014 be reviewed owing to discovery of new and important evidence and an apparent error on the face of the record.***

b) ***The Order to note the Applicant's re-entry upon the land comprised in Busiro Block 405 Plot 100 and cancellation of the lease title for the leasehold comprised in LRV 3063 Folio 3 at Sisa (suit land) be set aside.***

c) ***Costs for the application be provided for.***

The grounds of the application are expounded upon in the affidavit in support sworn by Ssebatta Mathew the holder of a Power of Attorney for the Applicant but are briefly that the Applicant is aggrieved by the decision of this court in Miscellaneous Cause No. 61 of 2014 where the court cancelled the Applicant's lease comprised in LRV 3063 Folio 3 on ground that the Applicant was involved in the illegal activities of growing of Marijuana, yet it is not true and the decision was arrived at without affording the Applicant a hearing. That despite the fact that the hearing centered on the lease of the Applicant, it was not a party and was never served with the application and the 1st Respondent premised his application on ground that the Applicant was involved in the illegal activities of

growing of Marijuana and were deported by the Chieftaincy of Military Intelligence (CMI). That credible and verified evidence has, however, been discovered/obtained that the Applicants were never involved in the alleged illegal activities and were never at any one time deported by the CMI, who expressly confirmed to have never deported the directors of the Applicant and even the Ministry of Internal Affairs and Interpol have confirmed the same fact.

In addition, that the Applicant has never abandoned the suit land and as such there is an error apparent on the face of the record as the court noted re-entry, yet Clause 3 of the lease agreement expressly forbids/excludes re-entry. That the said error does not require extraneous evidence to prove; and that no appeal has preferred from the decision of this court. That there is sufficient cause for this court to review its decision in Miscellaneous Cause No. 61 of 2014.

In his affidavit in support of the application, Ssebatta Mathew, depons that is the holder of a Power of Attorney and attached a copy thereof; marked *Annexture "A";* which authorizes him to swear the affidavit, that on the 9th of May 2002, the Applicant entered into a lease agreement *Annexture "B1"*; with Fred Sempira the former

registered proprietor of the a mailo land in *Annexture "B2"*. The Applicant was granted a lease title vide LRV 3063 Folio 3 *(Annexture "C").* Clause 3 lease agreement specifically forbids in re-entry, and that the Applicant used the suit land for agricultural purposes to grow greens, vegetables, beetroot, okra, hot pepper and green chili for export. That subsequently due to various reasons to wit; personal and medical reasons, the directors of the Applicant went back to the United Kingdom (UK) but the farm's operations and produce and export to the UK continued even in the absence of the directors of the Applicant, as they had set up structures which allowed the company and its operations continue even in their absence.

That in 2020, the 1st Respondent purchased and acquired the reversionary interest from Sempira Fred when the Applicant's lease was still subsisting. That the 1st Respondent then filed an application in this court seeking for the cancellation of the Applicant's lease and orders for his re-entry to be noted on the certificate of Title (copy of the application is *Annexture "D") and* premised his application on ground that the Applicant was involved in the illegal activities and growing of marijuana for production of

prohibited narcotics and its directors were deported by the CMI as a result of the aforesaid illegal activities. That subsequently the application was fixed for hearing on 7th July 2015 at 9. 00 a.m. and the said matter was heard this court which ordered that the re-entry be noted (copy of the ruling is *Annextute "E").*

That despite the fact that the hearing centered on its lease, the Applicant was not a party and was never served with the application, which was only served against the Commissioner Land Registration (CLR) who had no interest in the suit land. That upon return to Uganda, the Applicant's directors were dismayed to learn that their lease had been cancelled on grounds of use of the land for illegal and unlawful purposes and the noted re-entry; and petitioned the Office of the President which in turn contacted the CMI, Interpol and Immigration (Ministry of Internal Affairs) to confirm whether the said directors had indeed been deported. (copy of petition is *Annexture "F").* That credible and verified evidence has been discovered that the Applicant was never involved in growing marijuana and were never at any time deported by the CMI *(Annexture "G").* That the CMI expressly confirmed to have never deported the directors of the Applicant. That Interpol also confirmed

that the said directors were not in their database and had never been deported *(Annexture "H").* That the Applicant has never abandoned the suit land, and as such there is an error apparent on the face of record as the court noted re-entry, yet Clause 3 of the lease agreement expressly forbids/excluded re-entry. That the said error does not require extraneous evidence to prove. That no appeal has been preferred from the decree/decision of court, and that as a result of the material irregularity giving rise to the decision, this court is empowered to review the decision.

Kisajjaki Christopher, swore a supplementary affidavit in support of this application. Of relevance to this application is that he had been the LC1 Chairman of Lutaba Village from 2001 to 2017 where the suit land is situated. That the Applicant grew on the suit land a number of crops to wit; greens, vegetables, beetroot, okra, hot pepper and green chili. Further, that he never saw marijuana planted in the farms of the Applicant. Further, that he does not know the person of the 1st Respondent and nor has he ever met him or informed him that the Applicant or its directors were arrested for growing marijuana and deported by the CMI.

The 1st Respondent swore an affidavit in reply opposing the application. He states that this application is a disguised action for ejectment and is barred by law in as much as it an abuse of court process. That the Applicant previously filed an application against him in the High Court (Commercial Court) vide Miscellaneous Cause No. 38 of 2013 seeking to challenge the 1st Respondent's re-entry and termination of the lease and finally the Applicant conceded to his re-entry and withdrew the application with costs.

That the fact of the illegal activities of the Applicant and/ or through its directors was attested to in the affidavit of one Mr. Godfrey Kalazi, a son to the late Fred Sempira the previous proprietor and former lessor, by affidavit dated 19th February 2014 submitted in reply to the Applicant's said previous suit against the 1st Respondent s in the High Court Commercial Court Division *(copy of the said affidavit is Annexture "R1").*

That the abandonment of the land formerly leased by the Applicant is uncontested and all statements to the contrary in the affidavits in support of this application are outright falsehood as the abandonment of the land by the Applicant and all staff and directors was attested to by the late Mr. Fideli Castro Mujambere

Gumisiriza who was formerly LC1 Chairman of Lutaba Village where the suit lad is located, by affidavit dated 26th February 2014, and also submitted in reply to the Applicant's said previous suit in the High Court Commercial Court Division *(A copy of the said affidavit Annexture "R2").* That the 1st Respondent believes that the alleged new evidence now discovered or as alleged by the Applicant is false and misleading as the background facts and chronology of this matter is that in 2010 the 1st Respondent acquired the mailo land located in Lutaba Ssisa, Wakiso District comprised in Busiro Block 405 Plot 100 from the then registered proprietor, late Mr. Fred Sempira, who was proprietor as Administrator of the estate of the late Valentine Lwanga *(A copy of the title deed is Annexture "R3").* That the land was at the time of his acquisition subject to a lease that had been granted by the previous proprietor as lessor to a company called Evergreen Fields Uganda Limited as lessee and the said lease was registered under LV 3063 Folio 3. That due to various violations of the lease agreement and by virtue of powers conferred upon him by Section 103 (b) of the Registration of Titles Act Cap. 230, as lessor he re-entered upon the lease land and recovered possession of it sometime in early 2012 in order effect a

termination of the lease. That from the time of his re-entry to date he has been in possession of the said land and has since been carrying out farming and various activities thereon.

Further, that he executed and filed with office of titles Mailo Registry at Kampala a notice of the re-entry and cancellation of the lease and a statutory declaration detailing the facts and basis for the re-entry to notify the Respondent of his recovery of possession of the land. That the said notice of re-entry was registered under *Instrument Number KLA 551245* on 29th June 2012 at 11. 24a.m *(Annexture "R4").* That subsequently he received a letter from the CLR which appeared to attempt to reverse the noting of his re-entry and affirmed that the noting of re-entry had been rejected. That upon receipt of the aforesaid letter his Advocates wrote to CLR urging it to reconsider its position. That his Advocates subsequently met with CLR in this matter but CLR insisted on rejecting to note the re-entry and advised that an application be made to court for an order to note the re-entry *(Annexure "R5").* That under the law, the refusal by CLR to note his re-entry does not invalidate or nullify it and that only a court order is needed

commanding the CLR to effect the necessary changes on the Register in order to note the re-entry thereon.

That the Applicant filed a suit against the 1st Respondent in the High Court (Commercial Court Division) but by letter dated 4th July 2014 to the Registrar said Court the Applicant withdrew the application against the 1st Respondent *(Annexture "R9").* That following the aforesaid letter, counsel for the Applicant forwarded to his Advocates, a consent withdrawal of the application dated 18th August 2014 for execution by his Advocates and for filing on the court record *(Annexture "R10)*. That pursuant to the said consent withdrawal, the former lessee's suit was terminated and the attempt to challenge his re-entry abandoned until sometime last year when he received calls and summons from State House demanding to visit and inspect his land with a view to challenge his ownership and return the land to the Applicant/former lessee. That to date his re-entry was perfected by possession and he remains in possession of the suit land and he is using it for farming activities.

That the 1st Respondent has previously made inquiries about the Applicant and has renewed those inquiries recently and established that the Applicant has no assets in Uganda and its directors are not

resident in Uganda. That he has been advised by his Advocates to apply for a deposit of security for costs by the Applicant in accordance with Section 284 of the Companies Act 2012. That it would be unjust and inequitable to allow such an application in this court.

This court has had sufficient time to read and consider the evidence of the parties which was adduced by way of affidavits, and the submissions of counsel and the authorities referred to this court have also been considered. The issues for consideration are as follows;

1. Whether the application meets the criteria for review.

2. What remedies are available to the parties?

Resolution of the issues:

This application is brought under Section 82 of the Civil Procedure Act(supra) and Order 46 rule 8 of the Civil Procedure Rules (supra) seeking for the orders above stated. Section 82 of the Civil Procedure Act (supra) provides as follows;

"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 r.1 CPR amplifies the above provision by providing additional factors to be taken into account in applications for review by adding the following expression to the section;

" ..... 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 restated in ***Re-Nakivubo Chemist (U) Ltd (1979) HCB 12*** where Manyindo J (as he then was) held that there are three cases in which a review of judgment or orders is allowed are those of:

a) *Discovery of new and important matters of evidence previously overlooked by excusable misfortune;*

b) *Some mistake apparent on the face of record;*

c) *For any other sufficient reasons.*

The instant application is premised on the ground of an error apparent on the face of the record and that there is new and important evidence that was not available at trial and which was by some excusable misfortune not availed to court.

Starting with the error apparent on the face of the record, this court previously in the case of ***Al-Shafi Investment Group LLC vs. Ahmed Darwish Dapher & Darwish Al Marar (Land Division) Miscellaneous Application No. 901 of 2017*** citing with approval ***Levi Outa vs. Uganda Transport Company [1995] HCB 340;*** held that the expression "mistake or error apparent on the face of record" refers to an evident error which does not require extraneous matter to show its incorrectness. It is an error so manifest and clear

that no court would permit such an error to remain on the record. It may be an error of law, but law must be definite and capable of ascertainment.

As applicable to facts of the instant case, the right to re-entry on the Register of titles of the lessor is an implied term in the Registration of Titles Act under Section 103 (b) which provides as follows;

"In every lease made under this Act there shall be implied in the lessor and his or her transferees the following powers—

(b) that in case the rent or any part of it is in arrear for the space of thirty days, although no legal or formal demand has been made for payment of that rent, or in case of any breach or nonobservance of any of the covenants expressed in the lease or by law declared to be implied in the lease on the part of the lessee or his or her transferees, and the breach or nonobservance continuing for the space of thirty days, the lessor or his or her transferees may reenter upon and take possession of the leased property."

In the instant case, the parties expressly in their lease agreement forbade re-entry. In Clause 3 thereof the parties covenanted as follows;

"The Lessor's power to re-enter upon the demised premises is hereby excluded."

Where the parties expressly agreed to a condition in their lease agreement, it would follow that then that the implied covenant is specifically excluded from operation by the agreement of the parties. The implied covenant is only a latent but potential provision which would only come into play if the lease were silent on the particular situation which the implied covenant is intended to cover. Given that position, the noting of re-entry in the instant application was an error of law apparent on the face of the record as the lease agreement was clear on the situation of re-entry. It does not need extraneous evidence to prove or establish. Accordingly, the application would succeed on the ground that there is an error apparent on the face of the record and the order of re-entry would be review and set aside on that account. On that ground the application meets the criteria for review under the relevant cited law.

Regarding the aspect of a discovery of new and important matters of evidence previously overlooked by excusable misfortune, it is noted that in Miscellaneous Cause No. 61 of 2014, only the evidence led at the trial was that of the 1st Respondent. The application, however, dealt with the interest in the suit land wherein the Applicant owned a lease interest. This fact was invariably known to both the Applicant and 1st Respondent as it is evident from the depositions of the 1st Respondent's in paragraphs 7 (a), (b) of his affidavit in reply. It would appear clearly, that the 1st Respondent intentionally did not to add the Applicant herein as party to his Application. He instead brought evidence which he knew could not be controverted and challenged because the Applicant was not present at the hearing and was not aware of the same. The evidence had the intrinsic effect of misleading the court that the directors of the Applicant had been arrested for growing Marijuana for use in the manufacture of prohibited narcotics and were deported by the CMI and had, for that matter, not only breached the term of the lease but also abandoned their lease.

However, new and important evidence has now been obtained which establishes that to the contrary, the directors of the

Applicant have never been arrested for growing Marijuana and have never been deported by the CMI or any other concerned Government institution. This is apparent in the depositions of Kisajjaki Christopher the area LC1 resident who swore the affidavit in support of the application. In paragraphs 7 and 8 thereof, he depones that he has never seen marijuana in the farms of the Applicant and that he denied having ever informed the 1st Respondent that the directors of the Applicant had been arrested and deported. Also in paragraphs 16, 18 and 19 of the affidavit of Ssebatta Mathew in support of the application, the Applicant adduces the new evidence in the attached *Annexture G* where the CMI stated as follows;

> ***"3.Inquries and consultations were made in Directorate of the Chief of Military Intelligence, incidentally there is no information pertaining the arrest of Mr. Richardson Peter Richard, Sethui Bipin Kumar and Gosai Dhirajgar Chambhuger....In any case CMI is not responsible for the arrest and deportation of criminal elements of a foreign state but rather a responsibility of the Uganda Police and Citizenship and Immigration Department....It is advisable***

that the Legal Department of State House may liaise with Citizenship and Immigration, Anti-narcotics unit and Interpol to find out the authenticity of the allegation."

Further *Annexture "H"* shows that the Directorate of Interpol and International Relations communicated to Citizenship and Immigration Control Board, inquiring into the matter as follows;

"The purpose of this is to request your office to verify whether the following Directors have ever been deported from Uganda as they are not appearing in our database of Interpol."

In their reply in *Annexture I* the Directorate of Citizenship and Immigration Control, while making reference to the communication from Interpol, stated that the directors of the Applicant had never been deported. From the foregone, there is credible new and important evidence which was not availed to court at the time, showing that the directors of the Applicant were never deported from Uganda for the reasons as had been presented to court by the 1st Respondent. Sir Dinshaw Fardunji in ***Mulla, The Code of Civil Procedure18th Edition,*** elucidates at page 3663, that;

"When a review is sought on the ground of discovery of new evidence, the evidence must be relevant and of such a character that if it had been given in the suit it might possibly have altered the judgment."

In the instant application the new and important evidence adduced is relevant so much that if it had been availed to the court at the time of the hearing of Miscellaneous Cause No. 61 Of 2014, the court would not have cancelled the Applicant's lease and ordered a re-entry of the 1st Respondent. This is quite evident from the ruling of court in the said application, at page 9 thereof, that the court was laboring under the a mistaken and erroneous impression presented by the 1st Respondent in his evidence therein, that the use of leased land for growing marijuana and the deportation of the directors constituted a fundamental breach of the lease covenants under Clause 2 (d) which forbade the leasee from using the land for obnoxious of offensive trade, business, or occupation and that the breach would entitle the leasor to automatic re-entry. It is on that premise that the court proceeded to cancel the lease and order the noting of re-entry.

The new and important evidence now presented to court which was not previously presented and for the excusable misfortune that the 1st Respondent did not make the Applicant a party and neither served the Applicant with the application, clearly manifests that the Applicant did not use the leased land for any obnoxious or offensive trade, business, or occupation of for growing marijuana and never were the directors deported. Had this new evidence now presented been adduced at trial in Miscellaneous Cause No. 61 Of 2014, certainly it might have had a very strong bearing on the opinion of court which would have reached a different decision. Going by the postulation of ***Mulla, The Code of Civil Procedure18th Edition,*** (supra) this court finds the new evidence relevant and based on the same reviews its decision and orders in Miscellaneous Cause No. 61 of 2014 and sets them aside.

Regarding the criteria that there is sufficient reason to warrant a review of the decision and orders of the court, in ***Re-Nakivubo Chemist (U) Ltd*** (supra) it was held that the expression "sufficient" should be read as meaning sufficiently of a kind analogous to the other two considerations. Also in ***Mulla, the Code of Civil Procedure*** (supra) at page 3672; it is noted that the expression

"any other sufficient reason" means that the reason must be one sufficient to the court to which the application for review is made and cannot be held to be limited to the discovery of new and important matter or evidence, or the occurring of a mistake or an error apparent on the record. The learned authors quoted the Indian case of ***Ghansham vs. Lal Singh (1887) ILR 9 All 61,*** where a reference was disposed of in the absence of the respondent, who subsequently demonstrated that this absence at the hearing was due to the fact that notice of the reference was not duly served upon him. The court held that this constituted a sufficient reason for granting review.

Apart from the above, it is in no doubt that owing to the manner in which the application proceeded, the Applicant herein was not accorded a hearing before its lease was cancelled. It is now settled that a fair hearing is the bedrock of any judicial process and no party should be condemned unheard as that would grossly contravene the principle of natural justice. It leaves no doubt that for the reasons advanced above, the Applicant was condemned unheard Miscellaneous Cause No. 61 of 2014. This was aggravated by that fact that the subject matter of that application was the lease

owned by the Applicant. That too constitutes sufficient cause for this court to review its decision in the said application. ***Mulla, the Code of Civil Procedure*** (supra) at page 3673 line 5**,** further elucidates that;

> ***"...where the additional evidence produced on record showed that the charge was based on assumption, which in fact did not exists, the orders.....were set aside."***

The evidence in the instant application shows that the1st Respondent, by his evidence, led court to believe in the false assumptions, which in fact did not exist, that the Applicant was involved in the illegal activities and as a result its directors had been deported. That constitutes sufficient reason for court review its decision in Miscellaneous Cause No. 61 of 2014, and accordingly set it aside.

Issue No.2: What remedies are available to the parties?

Having found as above that the application wholly meets the criteria for review under Section 82 CPA and Order 46 CPR, the application is allowed with the following orders;

1. ***The decision of this court, in Miscellaneous Cause No. 61 of 2014 is hereby reviewed and set aside owing to***

discovery of new and important evidence and an apparent error on the face of the record.

2. ***The order to note the Applicant's re-entry upon the land comprised in Busiro Block 405 Plot 100 and cancellation of the lease title for the leasehold comprised in LRV 3063 Folio 3 at Sisa is hereby set aside.***

3. ***The Applicant is awarded costs for this application.***

BASHAIJA K. ANDREW
JUDGE
13/03/2020