THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL DIVISION

MISC. APPLICATION NO. 497 OF 2014

KALOKOLA KALOLI :::::::::::::::::::::::::::::::::::::: APPLICANTS

VERSUS

NDUGA ROBERT :: RESPONDENTS

BEFORE: HON.JUSTICE STEPHEN MUSOTA

RULING

This is an application for Review of the judgment and orders of this court in Civil Appeal No. 001 of 2013 striking out the appeal with costs. It is brought under Sections 82 and 98 of the Civil Procedure Act and Order 46 r 1&2 of the Civil Procedure Rules.

The grounds of application are briefly set out in the Notice of Motion as follows:

1. That the applicant filed Civil Appeal 001 of 2013 Kalokola Kaloli Vs Nduga Robert.
2. That on 19th May 2014 Civil Appeal 001 of 2013 was struck out with costs because a decree from the lower court had not been extracted.
3. That there is an apparent error on record which needs to be corrected.

4. That it is in the interest of justice that the judgment and orders in Civil Appeal 001 of 2013 be reviewed.

The grounds of the application are supported by the affidavit of Kalokola Kaloli, the applicant. The respondent Nduga Robert filed an affidavit in reply on 27th April 2015.

At the hearing of the application, Mr. Kasumba appeared for the applicant while Mr. Deus Byamugisha appeared for the respondent. Court allowed respective counsel to file written submissions but only learned counsel for the applicant complied.

I have considered the application as a whole and submissions by learned counsel for the applicant.

As can be deduced from the Notice of Motion and submissions, the summary of the applicant's case is that my striking out of the appeal No. 001 of 2013 was an error apparent on the face of the record. That since the applicant was diligent in prostituting the appeal, the mistake was by his counsel which is sufficient reason to warrant setting aside the striking out of the appeal.

On the other hand, the respondent opposes the application arguing that this application is misconceived and bad in law. That there is no

error apparent on the face of the record since the court's decision did not offend any law to make it erroneous.

The issues for consideration are:

1. Whether there are grounds for court to grant an order of review.
2. Whether the applicant is entitled to the orders sought in the application.

Issue 1;

It is trite law that just like the right of appeal, an order in review is a creature of statute which must be provided for expressly. In considering an application for review, court exercises its discretion judicially as was held in the case of ***Abdul Jafar Devji Vs Ali RMS Devji [1958] EA 558.*** The law under which review is provided is Section 82 of the Civil Procedure Rules and Order 46 of the Civil Procedure Rules.

The grounds for review are clearly provided for and were outlined in ***FX Mubwike Vs UEB High Court Misc. Application No.98 of 2005.*** These are:

1. That there is a mistake or manifest mistake or error apparent on the face of the record.
2. That there is discovery of new and important evidence which after exercise of due diligence was not within the applicant's knowledge or could not be produced by him or her at the time when the decree was passed or the order made.

3. That any other sufficient reason exists.

The applicant appears to rely on the 1st and 3rd reasons. Regarding whether there is a mistake or error apparent on the face of the record, examples of such situation could be where a suit proceeds ex-parte when there is no affidavit of service on record; see: ***Edison Kanyabwere Vs Pastori Tumwebaze SCCA 61/2014*** or where the court enters a default judgment when there is no affidavit of service or where a summary judgment is entered under Order 36 when there is a pending application for leave to appear and defend on record.

Therefore, a misdirection by judicial officer on a matter of law cannot be said to be an error apparent on the face of the record. An error apparent on the face o f the record was defined in ***Batuk K. Vyas Vs Surat Municipality AIR (1953) Bom 133*** thus:_

> ***"No error can be said to be apparent on the face of the record if it is not manifest or self evident and requires an examination or argument to establish it……."***

In the instant case therefore, I am not convinced that there is an error apparent on the face of the record in this case. What is being raised by learned counsel for the applicant require examination and argument because in my considered view it would have instead been an error apparent on the face of the record if I had proceeded with the appeal without a decree since the law up to now has never been amended.

Issue 2

Regarding sufficient reason, this means a reason sufficient on grounds analogous to those in the rule. In the instant case, a sufficient reason put forward by the applicant is that failure to extract a decree cannot be blamed on the applicant because the duty to extract the decree is on the Magistrate under order 21 r 7(3) of the Civil Procedure Rules and that the mistake of counsel who filed the appeal cannot be visited on the litigant. This is not such a case. There is no evidence at all that the appellant and his advocate took any steps to comply with the law like it was in the case of ***Banco Arabe Espanol Vs Bank of Uganda SCCA 42 of 1998*** where the failure of the appellant to pay was occasioned while taking steps to comply with a court order because they had used an unacceptable method to do so.

In the instant case the advocate did not take any step to comply with the law by moving court to extract the decree. The requirement to extract the decree before appealing is not a technicality especially in the Magistrates Courts which are not courts of record. In proceedings before magistrates, what is of paramount importance is the decree. That is why it has to be extracted and filed by the trial magistrate himself or herself. The decree is the only evidence that the matter had been finally disposed of.

The remedy for a party who neglects to include an extracted order or decree in the record of appeal is to make an appropriate adjustment

and apply for restoration of the appeal as was the case in ***Frank Kibanya Vs ACU Limited Civil Appeal No.24 of 2004 CA (T) at Arusha.***

Alternatively a party ought to extract a decree and seek for extension of time to appeal.

Consequently I will order that this application be dismissed with costs.

Stephen Musota

J U D G E

18.11.2015