

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

LAND DIVISION

MISC. APPLICATION NO. 478 OF 2019

(ARISING FROM CIVIL SUIT NO.621 OF 2017)

KALOLI TABUTA:.....APPLICANT

VERSUS

TRANSROAD UGANDA LIMITED:.....RESPONDENT

BEFORE HON. MR. JUSTICE HENRY I. KAWESA

RULING

The Applicant brought this application for review of the Judgment in Civil Suit No.621 of 2017.

The grounds of this application are that;

- a) The Applicant is the Administrator of the estate of the late Benedicto Sajjabi Kalongoli on land comprised in Kyadondo Block 222 Plot 2353 at Namugongo formerly plot 96, to which Plaintiff a body corporate brought this suit against the Defendant for a declaration that the Plaintiff's title over land comprised in Kyadondo Block 222 Plot 2353 Land at Namugongo to which Civil Suit No.621 of 2017 relates.

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The Applicant allege that the land was fraudulently transferred contrary to the applicant's interest, wherefore matters were reported to Court in 2006 and are pending todate; when Judgment was finally delivered in Civil Suit No.621 of 2017.

It is the Applicant's contention that there are other pending suits on the same subject matter between the same/similar parties under Civil Suit No.91 of 2007, Civil Suit No.443 of 2007 and Misc. Application No. 189 of 2018, Civil Suit No.205 of 2011 and Civil Suit No.102 of 2011. It is further alleged that Civil Suit No.102 of 2011 was proceeding in Court as a test suit and the other suits were all stayed.

It was further pleaded that there was collusion and connivance between the 2nd Respondent and the 1st Respondent to defeat the Applicant's interests, whereupon the applicant filed Misc. application No.1300 of 2017 to be added as a party to the suit, to protect his interest; but the application was still pending by the time the main suit was heard, thereby not considering the applicant's interest, which is an apparent error on the record. It is a further ground of the Applicant that the judgment prejudices the Applicant's interest and suit property is in danger of being dealt with or sold, wasted, alienated or damaged. By reason of the said grounds, the Applicant prays that the judgment be reviewed or be set aside.

The application is supported by the affidavit of Karoli Tabuta. The 1st Respondent filed an affidavit by Kiyimba Alex opposing the application, to which Karoli Tabuta filed an affidavit in rejoinder in which he re-affirms his contentions as per the grounds of his application. The Applicant, through his Counsel; M/s. Tebusweke Mayinja & Co. Advocates filed written submissions and the Respondent filed a reply through M/s. Nakachwa & Partners Advocates. The Applicant filed a rejoinder.

Arising from the above, this court has to determine the following questions:

- i) Whether the Applicant is an aggrieved person within the meaning of Order 46 of the Civil Procedure Rules,
- ii) Whether the Applicant has *locus* to institute this application,
- iii) Whether the Notice of Motion by the Applicant is bad in law,
- iv) Whether there is an error apparent on the face of the record.

- v) What remedies are available to the parties.

I now resolve the questions above as follows:

i) **Whether the Applicant is an aggrieved party:**

Order 46 r1 of the Civil Procedure Rules and Section 82 of the Civil Procedure Act state 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 r1 of the Civil Procedure Rules specifically provides that;

“any person considering himself or herself aggrieved as above who on the discovery of new and important matter(s) or evidence which after the exercise of due diligence was not within his or her knowledge or could not be produced by him/her at the time when the decree was passed or order made or on account of the same mistake or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review of the judgment, may apply to the Court which passed the decree for a review”.

Who is an aggrieved party?

An aggrieved party has been defined in **Muhammed Bukenya Allibai versus W E Bukenya and Anor; SCCA No. 56 of 1996**, by Karokora (JSC) as;

“Any party who has been deprived of his property”

The Hon. Judge relied on an earlier decision of **Re-Nakivubo Chemists (U) Ltd, in the matter of the Companies Act (1979) HCB 12 and Kawdu versus Bever Ginning Co. Ltd, Akot and Others 1929 AIR Nag par 185** which further noted that where Court considers a matter for review of an order passed affecting a third party, it must be a person who has suffered a legal grievance and this principle applies, depending on the peculiar circumstances of each case.

Looking at the grounds in the motion and supporting affidavits both in support, reply and rejoinder, all the deponents show that there is a conflict regarding Block 222 Plot 2353, which is the subject matter in civil Suit No. 621 of 2017; between the 1st and the 2nd Respondents.

The same block 222 Plot 2353, is alleged by the Applicant to be the subject matter in civil Suit No. 102 of 2011 which is a test suit in which the Applicant is the Plaintiff. The Applicant is also the Applicant in Misc. Application No. 1300 of 2017 in which he sought to be added as a party in Civil Suit No. 621 of 2017 so that his interests are considered, while Civil Suit No. 21 is now determined, Misc. Application No. 1300 of 2017 is not yet determined hence prejudicing his interests in the in the said block 222 Plot 2353,.

The Applicant, though not a party to Civil suit No. 621 of 2017, is hereby found to be an aggrieved party by virtue of the fact that he has shown that he is a party in several other suits to which his interests in the subject matter of Civil Suit No. 621 of 2017 is the same as that in the test suit in Civil Suit No. 102 of 2011 which is still pending.

I do find this issue in the affirmative. I did not find merit in the arguments raised by the 1st Respondent to the contrary on this point.

ii) Whether the Applicant has locus standi to bring this application,

This issue was raised by the 1st Respondent as a preliminary objection. He argued that the Applicant's grant of Letters of Administration as stated in paragraphs 5,6,7 and 8 of the affidavit in reply, was an artwork of forgeries.

He relied on Section 2(a) of the Succession Act Cap 165 to argue that the Applicant is not an Administrator and hence cannot sue on behalf of the said estate.

Secondly as a litigant, counsel argued that the Applicant has no enforceable rights to protect by way of review and hence has no *locus standi*.

The above two preliminary objections in my view are baseless. There is no need of going into the issues of whether the Applicant has letters of Administration. All those questions are substantively before Court. I guess in all pending in Court.

The Respondents does not address the effect of Court's not giving the Applicant a hearing in Civil Suit No. 621 of 2017 and whether, if it had the Applicant would have a chance of succeeding or not.

The basis of determining if the party is aggrieved or not is not on the evidence before Court at the time of the Application for review, but rather on what was before Court at the time the order was pronounced.

The fact here is that an application to add the Applicant as a party vide Misc. Application No. 1300 of 2017 had been filed making him an interested party in Civil Suit No. 621 of 2017, and hence an aggrieved party for purposes of this application. He therefore has *locus* to bring this application.

iii) Whether the notice of motion is bad in law;

Regarding the objection that the motion is prolix and not sustainable, since contrary to O.52 R3 of the Civil Procedure Rules, the Notice of Motion is grounded on a list of 19 grounds. He argued that going by the holding in *Mugalula Mukibi versus Colline Hotel Ltd (1984) HCB 35*, the requirement to be precise is mandatory and the same holding should be used to dismiss the motion. In rejoinder, counsel for the Applicant pointed out that there is no hard and fast rule in drafting motions and there is no limit to the paragraphs.

I do agree. The purpose of O.52 r3 of the Civil Procedure Rules is to emphasise the fact that the notice of motion must contain grounds on which the application is based. Actually the supporting affidavit is to contain the evidence. Therefore the notice of motion contains two sets of information, the first is the general grounds (not evidence) of what a party is pleading for in the motion.

The 2nd part is the evidence upon which part one is based; which is normally an affidavit. It is therefore possible that very complex pleadings involving numerous facts may not necessarily fit in four paragraphs, so as to be termed as 'general'. I believe the word general should be assigned its natural English meaning which is, according to **Merriam Webster's Dictionary** '*related to*

or affecting all the things in a group, or includes the main or major parts'. "It is something such as a concept principle, or statement that involves or is applicable to the whole".

The use of the word general was therefore meant to mean a reference to the 'whole' subject of contention.

In my view then, the notice of motion before me gives grounds which capture the general nature of the contention and does not violate O.52 R3 of the Civil Procedure Rules. The Preliminary objection is therefore overruled.

iv. Whether there is an error on the face of the record.

Having found that the Applicant has locus before me as an aggrieved party, the next question is whether he has successfully demonstrated that there is an error on the face of the record.

In *F X Mubuuke versus UCB; HC MA No. 98 of* 2005; it was held that;

"For a review to succeed on the face of the record, the error must be so manifest and clear that no court would permit such error to remain on the record.

In this case, Counsel for the Respondent argues that no such error was proved. However, the Applicant argues that facts pleaded showed both an error and sufficient cause for reasons that;

- 1) The Applicant filed Misc. application No. 1300/2007; seeking to be joined as a party to the suit so as to unveil his interests, but the application never received Court's consideration before reaching its decision hence manifesting an error on the record.
- 2) That the Applicant has litigation in Court for over 12 years and is party to another test case; Civil Suit No. 102 of 2011, which stayed all other suits, yet Civil Suit No. 621 of 2017 went ahead to be determined without his participation. This, according to Counsel for the Applicant in his rejoinder submissions, amounts to sufficient case. Sufficient cause has been defined in *Buladina Nankya versus Bulasio Konde (1979) HCB 239* to mean that;

"the words, 'any other sufficient reason' mean as a reason sufficient on grounds at least analogous to those specified immediately previously'.

In *Re-Nakivubo Chemists (U) Ltd (1979) HCB 12*, it was held that;

‘ expression sufficient should be read as meaning sufficiently of a kind analogue to the discovery of new and important matter of evidence previously overlooked by excusable misfortune and same mistake or error application on the face of the record’.

The above two cases explain the scenario before me. It is a scenario whereby the Applicant knew for sure that Court would not go ahead to determine Civil Suit No. 621 of 2017, since, according to the grounds and affidavit of Karoli Tabuta paragraph 4, Court was hearing Civil Suit No. 102 of 2011 after a consent by the parties to stay the rest of the cases and hear Civil Suit No. 102 of 2011 as a test case.

The facts depend to in paragraph 5 – 20 of the affidavit of Karoli Tabuta and replied to, in the affidavit of *Kiyimba Alex* in paragraph 12 – 27 of his affidavit, to confirm that fact that a hearing took place.

This confusion (arguments that there was an error committed by this Court, when it went ahead to determine Civil Suit No. 621 of 2017 and give judgment affecting the subject matter of a test case in Civil Suit No. 102 of 2011, which Applicant is a party, inspite of the fact that he had filed Misc. Application No. 1300 of 2017, to try and come on board as party and protect his interests.

I agree with the Applicant’s counsel that sufficient cause has been shown, which lend credence to the notice that there is an apparent error on the face of this record.

I do not agree with the Respondent’s arguments and I uphold this ground in the affirmative.

5 Remedies

Having found that the Applicant is an aggrieved party and that there is an error on the face of the record, I find merit in this application for review.

I therefore grant this application and due to the intricate issues brought to light by the Applicant involving many other parties, yet in hearing Civil Suit No. 621 of 2017, the said other interests like that of the Applicant were not taken into account, this Court, by way of remedy, will order that;

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- i) The Judgment in Civil Suit No. 621 of 2017 be set aside and the matter be re-heard *denovo*, taking into consideration the outcomes of Misc. application No. 1300 of 2017.

- ii) Costs to the Applicant.

I so order.

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Henry I. Kawesa

JUDGE

17/07/2019

17/07/2019:

Mr. Tebusweke David for the Applicant.

Applicant absent.

Respondent absent.

Clerk: Grace.

Court:

Ruling delivered in chambers.

Before me:

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Samuel Emokor

DEPUTY REGISTRAR

17/07/2019