THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

[LAND DIVISION]

MISCELLANEOUS APPLICATION NO.3089 OF 2023

(ARISING FROM CIVIL SUIT NO. 371 OF 2008)

KISAKYE EMANUEL :: APPLICANT

VERSUS

JOYCE NANKYA :: RESPONDENT

BEFORE: HON. LADY JUSTICE NALUZZE AISHA BATALA

RULING.

Introduction;

1. This Application was brought by Notice of Motion under Sections 14 and 33 of the judicature Act, Section 98 and 82 of the Civil Procedure Act and Order 46 rules 1 of the Civil Procedure Rules, seeking for orders that;

   i) That this Honorable Court be pleased to review the Judgment and Decree in HCCS No. 371 formerly 114 of 2008.

ii) That the Judgement and Decree HCCS No. 371 formerly 114 of 2008 be set aside.

iii) Costs of this Application be provided for.

Background:

2. The Applicant's father died on the 6th of November 1973.

3. The Respondent instituted HCCS No. 114 of 2008 which was later given Civil Suit No. 371 of 2008 against the late Amos Were (the Applicant's late father), summons were issued in the said suit against the late and the same were served by way of substituted service by the plaintiff/respondent.

4. The suit proceeded exparte and was determined in the absence of the late applicant's father or without the knowledge of the estate of the deceased, hence this application.

Applicant's evidence;

5. The application is supported by an affidavit in support deponed by Kisakye Emanuel the applicant which briefly states as follows;

i) That I am a son of the late Amos Were who died on the 6th of November 1973.

ii) That my late father owned land comprised in Kibuga Block 11 Plots 297 and 298 at Kabowa.

iii) That the Respondent filed HCCS No. 371 of 2008 in the year 2008 against the late Amos Were.

iv) That the estate of my late father never got an opportunity to defend and be heard in HCCS No. 371 of 2008 as the suit was filed against a dead person and the estate of the deceased did not know about the suit.

v) That the claims in HCCS No. 371 of 2008 were time barred by 2008.

vi) That my late father's family and I came to know of the mentioned suits that were filed in 2008 recently when a search was made at the land's office in respect of the suit land

vii) That it came to our notice that the Respondent who had earlier sold the suit land to my late father in 1970 and transferred the same to him on the 6th of January 1970, had transferred the same land to Charles Sentamu on 12th May 2014.

viii) That the dealings between the Respondent and Charles Sentamu were based on the Judgment and Decree in HCCS No. 371 of 2008.

Representation;

6. The applicant was represented by Solomon Jagwe of Muganwa Nanteza & Co. Advocates whereas there was no representation from the respondents' despite being served with the application. Only the applicant filed submissions which I have considered in the determination of this application.

Issues for determination;

Whether the applicant's application for review is tenable before this honorable court?

Resolution and determination of the issue;

7. Actions for review are governed by Section 82 (a) of the Civil Procedure Act and Order 46 of the Civil Procedure Rules. **Section 82 of the Civil Procedure Act** which governs applications for review of court orders/judgments provides as follows; 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; (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.

8. The provisions of Order 46 of the Civil Procedure Rules re-echo the above section by stating the considerations in application for review. It provides as follows; Any person considering himself or herself aggrieved– ***i) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or by a decree of court from which no appeal is hereby allowed, 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 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, desire to obtain a review of the decree passed or order made against him or her, may apply for review of judgment to the***

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court which passed the decree or made the order." The above considerations were reiterated in the case of ***Re Nakivubo Chemists (U) Ltd (1979) HCB.***

9. The instant application is premised on the fact of discovery of new and important matters of evidence by the applicant which evidence include; discovery of HCCS No. 371 of 2008 against the late Amos Were who died in 1973 as per the death certificate attached on the application upon conducting a search at the land registry, the fact that the said suit was premised on fraud against the late Amos Were leading to cancellation of the certificate of title that belonged to the late Amos Were, the fact that the claim in the said suit was time barred by the law of limitation by 2008,the fact that the estate of the late Amos Were was never informed or served with court process in the said suit, the fact that the late Amos were was served by way of substituted service without carrying out due delligence to find out the representatives of the late Amos Were and the fact that the reinstatement of the respondent to the certificate of title to the suit land by virtue of the decree in Civil Suit No. 371 of 2008 based on wrong facts before court.

10. Review connotes a judicial re-examination of the case in order

to rectify or correct grave and palpable errors committed by court in order to prevent a gross miscarriage of justice, The person applying under review provisions needs only to be one whose interests, rights, or duties are inevitably adversely affected by the decree. The same provisions do not impose any conditions on the exercise of that power.

11. However, Order 46 rules 1 of The Civil Procedure Rules, is not that wide. It empowers this court to review its own decisions where there is an "error apparent on the face of the record" or "discovery of a new and important matter of evidence," or "for any other sufficient reason"

12. For actions based on the first ground, the error or omission must be self-evident and should not require an elaborate argument to be established. This means that an error which strikes one on mere looking at the record, which would not require any long drawn process of reasoning on points where there may conceivably be two opinions**.** ***(See; Nyamogo & Nyamogo Advocates v. Kago [2001] 2 EA 173).***

13. In actions based on the second ground, which is discovery of a new and important matter of evidence and that's the same ground

under which the instant application is based, litigants are expected to bring their complete cases before court during hearing, an action for review won't be sought merely for fresh hearing or arguments or correction of an erroneous view taken earlier.

14. It is settled jurisprudence that review is not designed for the purpose of allowing parties or litigants to remedy their own failings or oversights during trial***. (See;Ojijo vs Byakika, Misc. Application No.1028 of 2020)***

15. An unsuccessful litigant, save in very special circumstances, should not be allowed to come forward with new evidence available prior to judgment when he or she was contented to have the trial judge determine the suit based on the evidence produced at a trial in which that litigant actively participated.

16. Therefore, an applicant who decides to rely on discovery of new evidence as a ground for review must satisfy Court that the proposed evidence would probably change the result or determination of the suit, and that it could not have been discovered at the time of trial through exercising due diligence.

17. The new and important matter of evidence discovered must be one which, after the exercise of due diligence was not within the

knowledge of the person seeking the review or could not be produced by the applicant at the time when the order was made

18. The evidence upon which the review is sought must be relevant and of such a character that if it would have been brought into the notice of the court, it might have possibly altered the judgment. ***(See; Orikot Julius Vs Eduba John Misc. Application No.188 of 2022 before Justice Henry Peter Adonyo)***

19. This provision applies to evidence that existed at the time of motion or trial but that could not have been discovered with reasonable diligence prior to court's determination or before the completion of trial.

20. The applicant in the instant application clearly states that he is the son and a beneficiary to the estate of the late Amos were vesting him with the locus to bring the instant application being aggrieved with the decision of court vide Civil Suit No.371 of 2008 where the suit land formed part of the estate of the late Amos Were.

21. It is a principle of law that a beneficiary to the estate of the deceased can bring an action in his own names for the protection of the estate before grant of letters of administration***. (see; Israel Kabwa vs Martin Banoba, SCCA 52 of 1995)***

22. By virtue of the applicant being a beneficiary to the estate of the late Amos Were it can be said that the same beneficiary possess sufficient interest in the subject matter being the suit land and the said beneficiary could suffer a legal grievance where the issue at hand concerns the estate of the deceased.

23. After establishing that the applicant is vested with the locus to bring this application, I will proceed to analyze the purported evidence the applicant desires to rely on.

24. The applicant avers that he got to know of the proceedings of Civil Suit No.114 of 2008 which was later registered as Civil Suit No. 371 of 2008 upon conducting a search at the land registry over the suit land where he discovered that the suit land which the respondent sold to the late Amos Were in 1970 had been transferred to Charles Sentamu in May 2014 by the respondent further the transfer between the respondent and Charles Sentamu resulted from a decree in Civil Suit No.137 of 2008.

25. The evidence adduced by the applicant states that the late Amos Were died in 1973 this a fact supported by the death certificate adduced in court and Civil Suit No. 371 of 2008 where the late Amos Were was the defendant was filed in August 2008.

26. Service of court process in the mentioned suit was never served on the representatives of the late Amos Were as per the affidavit of service adduced in court.

27. In the affidavit of service deponed by Okis Richard, he stated that on the 3rd of October 2008 he went to the suit land to serve the Amos Were and he failed to locate the same person.

28. Due to that effect the plaintiff applied to court to have Amos Were served by way of substituted service through a newspaper of wide circulation.

29. However, as a vigilant process server going to affect service in an area that was not his area of residence, the first thing he ought to have done was to first reach out to the local authorities or area police where he would have introduced himself and the purpose of his visit to the said area, the area police would direct the said process server to the area LC1 chairperson, this the best person with knowledge of the whereabouts of the residents in his locality.

30. If the process server bothered to inquire from the area LC1 chairperson, then he would have found out from the same LC1 that Amos Were was never a resident in the said locality.

31. The rationale for service of summons by way of substituted is that service has failed to be effected in the normal way which is to the effect that service shall be in person.

32. There is no way the beneficiaries of the estate of the late Amos Were would have known of the proceedings in Civil Suit No.371 of 2008 since court process was never effected in person.

33. Further the proceedings of Civil Suit No.371 would not have been within the knowledge of the applicant at the time court was proceeding with the same suit.

34. If Okis Richard the process server had effected service on the representatives or the beneficiaries to the estate of the late Amos Were then the applicant would have known of the proceedings in Civil Suit No.371 of 2008 and the same could have been within their knowledge.

35. I am of the view that it is due to nonservice that the evidence the applicant adduces now regarding the suit land and how the late Amos Were acquired the same was not adduced during trial of the suit.

36. Had the trial Judge established that the defendant in Civil Suit No. 371 of 2008 had passed on, the matter wouldn't have been

determined exparte and that the evidence the applicant adduces regarding how the late acquired the same land would have had an effect on the decision of court since the representatives of the defendant could have been heard in the same suit.

37. Be that is it may, in addition to the discovery of new evidence, I find that there is sufficient cause to review and set a side Civil Suit No.371 of 2008.

38. The instant application hereby succeeds and the same is granted with the following orders;

i) The judgement and decree in Civil Suit No. 371 of 2008 is hereby reviewed and set aside.

ii) I make no orders as to costs of the application.

I SO ORDER.

NALUZZE AISHA BATALA

JUDGE

20th/03/2024