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THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(LAND DIVISION)

MISCELLANEOUS APPLICATION NO. 2878 OF 2023)

(ARISING FROM CIVIL APPEAL NO. 55 OF 2021)

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**(ALL ARISING FROM CIVIL SUIT NO. 51 OF 2016 IN THE CHIEF
MAGISTRATE'S COURT OF KASANGATI AT KASANGATI)**

1. MUTEZIMANA JAMES

**2. NYIRABAGANDA JOSEPHINE ::::::::::::::::::::::::::::::::::: APPLICANTS
VERSUS**

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1. DIRODINI NUKIYEHE

2. BEATRICE FULAHA ::::::::::::::::::::::::::::::::::: RESPONDENTS

**BEFORE: HON. LADY JUSTICE IMMACULATE BUSINGYE
BYARUHANGA**

RULING

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This application was brought by way of summons in Chambers under Sections 82 & 98 of the Civil Procedure Act, Order 46 rules 1 and 2 and Order 52 rules 1 and 3 of the Civil Procedure Rules seeking for the following orders;

1. The Judgment delivered on the 25th August 2023 be reviewed to make a declaration on trespass and orders for eviction.

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2. That costs of this application be provided for.

This application was supported by an affidavit in support deposed by the 1st applicant, **Mutezimana James** which was sworn on the 14th day of September 2023. The grounds of the application are laid out in the application and the affidavit in support but briefly they are the following;

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1. That the applicants instituted the above civil appeal against the respondents.

2. That the Judgment does not make declarations on trespass and orders for eviction, the subject of litigation.
3. That interpretation of the Judgment by the parties has created speculation.
4. That execution of the court orders is unenforceable.
5. That it is fair and in the interest of justice that the Judgment in Civil Appeal No. 55 of 2021 dated 25th August be reviewed to include declarations on trespass and eviction orders.

The 1st respondent filed an affidavit in reply deposed by the 1st respondent on 18th December 2023, **Diyodini Nukiyehe** wherein, it was alleged that the applicants only purchased part of their kibanja and the remaining part has the respondents' houses and a grave yard. The 1st respondent also averred that it is in the best interest of justice that the Judgment be reviewed since it did not clarify who the true owners of the suit land are.

Background

The applicants that is Mutezimana James and Nyirabaganda Josephine instituted a civil suit jointly and severally against the respondents that is Diyodini Nukiyehe and Beatrice Fulaha on the 17th day of October 2016 in the Chief Magistrate Court of Nabweru at Kasangati seeking for a declaration that the defendants/ respondents are trespassers on the suit land, a declaration that the plaintiffs are the registered proprietors and rightful/ lawful owners of the suit land, a permanent injunction, an order for opening the blocked access road to the plaintiffs, an order for payment of lost mesne profits, general damages, aggravated damages, punitive damages, eviction order, interest and costs of the suit.

The applicants/ plaintiffs alleged that during the period of 2008 and 2015, the plaintiffs jointly bought the entire land currently comprised in Block 159 plot 514 at

5 Namulonge Balita Kyadondo Wakiso District from the defendants/ respondents who
were kibanja holders. The plaintiffs further averred in their plaint that the suit land
houses the defendants' home. It was further averred that the plaintiffs and defendants
agreed on a grace period of three months from the date of purchase within which the
defendants/ respondents should vacate the suit land and give the plaintiff/ applicants
10 vacant possession.

It was further averred that with the knowledge of the defendants, the plaintiffs
negotiated with the defendant's landlord to purchase the defendants' kibanja interest
and process a title for the same and this was agreed to by the landlord, a one William
Semakula for a consideration of Ug.Shs. 13,000,000 (Uganda Shillings thirteen
15 million).

The applicants/ plaintiffs went ahead to aver that, after effecting payment, the
landlord signed the transfer forms in favour of the plaintiffs and processed the title
and the same was never objected to by the respondents/ defendants.

The applicants/plaintiffs further averred that the respondents/ defendants have
20 continued to rear animals and cultivate on the suit land and have denied the plaintiffs
access to their home which neighbours the suit land by erecting a structure which
blocked the applicants' access.

In reply, the respondents/ defendant filed a written statement of defence and averred
that they only sold part of their kibanja and retained the part that houses their home,
25 grave yard and garden.

Subsequently, the Trial Magistrate His Worship Barigye Said heard the suit on its
merits and held that the defendants who are the respondents in this application,
merely sold part of their kibanja and retained the part housing their home, grave yard

5 and garden. The Learned Trial Magistrate also held that the respondents had not trespassed on the plaintiffs'/ applicants' land.

Being dissatisfied with the Trial Magistrate's judgment, the applicants filed an appeal against the same in this court vide Civil Appeal No. 55 of 2021. The applicants filed a memorandum of appeal on the 12th day November 2021 wherein
10 they laid down the following grounds;

- i) *That the Learned Trial Magistrate erred in law and fact when he failed to properly evaluate key evidence adduced by the appellants thus arriving at a wrong conclusion hence occasioning a marriage.*
- 15 ii) *The learned Trial Magistrate erred in law and fact when he disregarded evidence of the appellant on the respondent's illegal occupation of the suit land thus arriving at a wrong conclusion that the respondents were not trespassers.*
- 20 iii) *That the Learned Trial Magistrate erred in law when he misdirected himself on the law of admission of fraud thus arriving at a wrong conclusion that the respondents are the rightful owners of the suit land.*
- iv) *That the Learned Trial Magistrate erred in law and fact when he came up with evidence that were neither adduced by the appellants nor the respondents.*

The applicants/ appellants made prayers that the appeal be allowed, the Judgment of
25 the Trial Court be set aside, the appellants' claims and prayers in the main suit be granted and that the respondents be ordered to pay costs of both the Appeal and the Trial Court.

This Honorable Court heard the said appeal on its merits and on the 25th day of August 2023, it passed Judgment in favour of the appellants to the effect that the sale

5 agreement was clear that the respondents sold their kibanja to the appellants/
applicants save for the part that had the graveyard wherein I ordered that the appeal
partially succeeded, secondly, that the appellants were the registered proprietors of
the suit land save for the graveyard and each party as to bear their own costs.

Being dissatisfied with my Judgment, the applicants brought this application for
10 review of my Judgment delivered vide Civil Appeal No. 55 of 2021. During the
hearing of the instant application, I noticed that there was no Judgment attached to
the affidavit in support of the application for review. I ordered the applicants to
attach the Judgment to their pleadings before the end of 20th February 2023, however
the same has not been done to date.

15 Before I delve into the merits of the application, I must comment that the applicants’
inability to adhere to my orders of attaching the Appeal Judgment that is being
sought to be reviewed, was contemptuous conduct and the same should not be
tolerated by court. Notwithstanding the aforementioned, the Judgment to be
reviewed was delivered by me and as such I have access to the same and I will deal
20 with it as it though it should have been attached to the affidavit in support of the
application.

Representation

During the hearing of the application, the applicants were represented by Counsel
Wanyama John while the respondents were represented by Counsel Nabukalu Irene
25 Viola who was holding brief for Counsel Najjemba.

Decision of Court

Section 82 of the Civil Procedure Act governs applications for review of court
orders/ Judgment provides as follows;

- 5 *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
10 *made the order, and the court may make such orders on the decree or order*
 as it thinks fit.

The provisions above are replicated in **Order 46 of the Civil Procedure Rules** which amplifies on the law by providing for the considerations to be taken into account when handling applications for review. It provides as follows;

15 **1. Application for review of Judgment**

- (1) Any person considering himself or herself aggrieved*
- (a) by a decree or order from which an appeal is allowed, but from which*
 no appeal has been preferred; or
- (b) By a decree or order from which no appeal is allowed and who from*
20 *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
25 *obtain a review of the decree passed or order made against him or her,*
 may apply for a review of Judgment to the court which passed the
 decree or made the order.

5 The considerations were restated in *Re-Nakivubo Chemists (U) Limited (1979) HCB 12*, where Manyindo J (as he then was), held that there are three cases in which a review of a Judgment or orders is allowed and those are;

- a. *Discovery of a new and important matter of evidence previously overlooked by excusable misfortune.*
- 10 b. *Some mistake apparent on the face of the record.*
- c. *For any other sufficient reasons, but expression 'sufficient' should be read as meaning sufficiently analogous to (a) and (b) above.*

It is trite that a party applying for review must prove that he or she is an aggrieved party. An aggrieved party was defined in **Muhammed Bukenya Allibai versus W**
15 **E Bukenya & Anor S.C.C.A No. 56 of 1996 by Karokora (JSC)**, “As any party who has been deprived of his property”. In the instant case, the applicants were the successful parties in the Appeal vide Civil Appel No. 55 of 2021. It was the finding of court that the applicants bought the entire suit kibanja save for the respondents’ burial grounds.

20 None the less, the applicants claim that the Judgment was unclear since it did not make a pronouncement on trespass, ownership and eviction hence causing speculation. Going by the definition of an aggrieved party in *Muhammed Bukenya’s case (supra)*, the applicants do not qualify to be aggrieved parties. The applicants have not been deprived of their interest in the suit kibanja, if anything the court made
25 a pronouncement on their interest in the suit hence cementing their claim in the suit kibanja as the owners save for the graveyards of the respondents.

Grounds 1 and 2

Discovery of a new and important matter of evidence previously overlooked by excusable misfortune & some mistake apparent on the face of the record.

5 From the depositions in the affidavit in support of the instant application, the applicant deposed that the Judgment of this Honorable Court delivered on 25th August 2023, did not make orders as to trespass on the suit land hence causing speculation when it came to interpretation of the Judgment as well making execution impossible.

10 According to the application and its affidavit in support, the applicants stated in paragraph three of the affidavit in support of the application that one of the grounds of appeal was failure by the lower court to declare the respondents' trespassers and this ground was held in the affirmative. It was counsel for the applicants' submission that the afore mentioned issues amount to an error apparent on the face of the record
15 and he cited the case of ***Edison Kanyabwera versus Pastori Tumwebaze Supreme Court Civil Appeal No. 6 of 2004***, where the Supreme Court held that that;

*“In order for an error to be a ground for review, it must be one apparent on the face of the record, i.e. an error which does not require any extraneous matter to show its incorrectness. It must be an error so manifest and clear that
20 no court would permit such an error to remain on record. The error may be one of fact but it is not limited to matters of a fact and includes also error of law.*

According to Counsel for the applicants, error by this court was failure to give orders on trespass regarding the suit kibanja and instead pronounced the applicants as
25 registered proprietors which was never subject to litigation. Counsel for the applicants equally cited the case of FX Mubuke versus UEB HCMA No. 98 of 2005 where the grounds for review were held to be; a mistake or error apparent on the face of the record, 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
30 him or her at the time when the decree was passed or the order made and any other

5 sufficient reason that exists. Counsel argued that the judgment was not clear on ownership and trespass. Reference was made to paragraphs 5 and 10 of the judgment at page 4 and paragraph 5 at page 6 of the judgment. According to Counsel for the applicants having resolved ground 2 in the affirmative, this court ought to have made orders on whether the respondents were trespassers. Reference was made to
10 paragraphs 15 and 20 at page 8 of the judgment.

In reply, Counsel for the respondents submitted that the kibanja holders were not catered for in the judgment and this made it difficult to understand the judgment. However, Counsel for the respondent argued that the respondents sold part of the suit kibanja to the applicants and maintained the space where their houses are and
15 the graveyards.

At page 5 of the Appeal Judgment vide Civil Appeal No. 55 of 2021 delivered by this court on 25th August, 2023, I reevaluated the evidence of the Trial Court and resolved grounds 1 and 2 of the appellants' (the applicants in this application) grounds concurrently. To be specific, ground 2 was and I quote, "*The Learned Trial*
20 *Magistrate erred in law and fact when he disregarded evidence of the appellants on the respondent 's illegal occupation of the suit land thus arriving at a wrong conclusion that the respondents were not trespassers.*"

Upon reevaluation of the evidence on record, it was the finding of the court that the in accordance with **exhibit P3**, which was a sale agreement dated 22nd April 2015,
25 the exhibit stated that,

"We, Mr. and Mrs. Diodone Nukiyehe, have sold another part of our plot. The person we have sold it to is none other than the owner of the land, James Mutezimana and Nirabanganda Josephine. We have sold this plot to them at a costs of 2,000,000/=. They have paid to us Ugx 1,800,000. The remaining

5 *balance is 200,000/= only. Of the plot we have sold, there remains a part for the burial ground. (emphasis on he underlined part).*”

As stated in the Appeal Judgment, the wording of this agreement was clear as it was to the effect that the respondents had sold their entire kibanja interest to the applicants save for the burial grounds. This in effect translated into the fact that the
10 respondents’ continued occupation of the suit land was illegal save for the burial grounds.

In the landmark case of **Justine E M N Lutaaya versus Sterling; Civil Eng. Appeal No.11 of 2002**; it was held that;

15 *“Trespass to land occurs when a person makes an unauthorized entry upon another’s land and thereby interfering with another’s person’s lawful possession of the land”.*

Therefore, once the respondents sold their kibanja to the applicants in 2015, their continued utilization of the suit land apart from the grave yard amounted into trespass. This in itself was a very clear resolution of ground 2 of the appeal.

20 It should be noted that a decision that affects one’s proprietary interest does not make this an error on the face of the record as to entitle one to file an application for review. (See *Elias Kakooza & ors versus Ahaisibwe Stephen & Anor H.C Civil Revision No. 1 of 2022*). In Mulla the Code of Civil Procedure (18th Edition) Vol. 1 at page 1146, as cited in the *Elias Kakooza Case (supra)*, the authors of the said book state
25 that, there is a clear distinction between an erroneous decision and an error apparent on the face of a record. The first can be corrected by a higher forum; the latter can only be corrected by the exercise of the review jurisdiction. Only a manifest error would be a ground for review.

5 In the instant case, I fail to see what the error on the face of the record was. Both the applicants and the respondents claim that the Appeal Judgment was unclear as to the declarations on trespass, eviction and ownership.

In an application for review, the applicants have to prove an error on the face of the record or discovery of a new piece of evidence, however in this case, the applicants
10 who were the successful parties in the appeal were not able to specifically state in their application what the error on the face of the record was or whether there was a new discovery of a piece of evidence to warrant a review but rather, I can infer from the 1st applicant's depositions in his affidavit in support that what they required is clarification on the Orders of this court particularly on the issue of trespass, eviction
15 and ownership. This clarification could have been sought for through a formal application to that effect under section 98 of the Civil Procedure Act. However, in accordance with section 33 of the Judicature Act, I have provided the said clarity and declared the respondents' trespassers in respect of the suit kibanja apart from the grave yards.

20 It turns out that what the applicants contend as an error on the face of the record is not self-evident irregularity but rather, a requirement for clarification on the court orders and a drawn out process of scrutiny of the facts and the relevant law.

In accordance with the provisions of section 33 of the Judicature Act, clarity has been provided and the following orders are hereby

- 25
- 1. The respondents are trespassers on the suit kibanja except where the grave yards are located.***
 - 2. The respondents should vacate the suit kibanja within 90 days from the date of this ruling.***

5 *3. The respondents are owners of the suit kibanja where the grave yards are situated and are in charge of the said grave yard.*

4. Each party shall bear its own costs since the applicant's counsel failed to comply with some of the directives of court in respect of pleadings.

I so order.

10 Ruling delivered at High Court, land Division on 22nd day of March 2024.



IMMACULATE BUSINGYE BYARUHANGA

JUDGE

15 **22nd March 2024**