

UGANDA / JUDGMENT

Abdala v Agony (Miscellaneous Civil Application No. 0067 of 2016) [2017] UGHCFD 3 (2 March 2017)

[2017] UGHCFD 3

COURT

HC: Family Division (Uganda)

BEFORE

Stephen Mubiru, J

CASE / FILE NUMBER

Miscellaneous Civil Application No. 0067 of 2016

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT ARUA

MISCELLANEOUS CIVIL APPLICATION No. 0067 OF 2016

(Arising from Arua High Court Civil Suit No. 0014 of 2007)

ABDALA RAMATHAN (Administrator of the }

estate of the late Noah Ramathan) } APPLICANT

VERSUS

AGONY SWAIB RESPONDENT

Before: Hon Justice Stephen Mubiru.

RULING

This is an application under the provisions of section 33 of *The Judicature Act*, section 82 of *The Civil Procedure Act*, Order 9 rule 12 and Order 46 rules 1 (1), 8 of *The Civil Procedure Rules*, for orders that the judgement entered against Noah Ramadan (the second plaintiff) in High Court Civil Suit No. 0014 of 2007 be reviewed and set aside, execution of the decree entered therein be stayed and set aside and provision be made for the costs of the application.

It is supported by the affidavit of the administrator of the estate of the late Noah Ramathan who deposes that he is a biological son of the deceased who died on 12th March 2011. In his capacity as administrator, he was not aware of proceedings in Arua High Court Civil Suit No. 0014 of 2007 until 28th June 2016 when he was served with a notice to show cause why execution should not issue and summoned in court on 4th August 2016 whereupon he was informed that the estate of

the deceased was indebted in the sum of shs. 19,294,000/= as the taxed costs of the suit. He subsequently established that the judgment was delivered in curt on 20th October 2014, three years after the death of the deceased on 12th March 2011. This fact was not brought to the attention of court by the advocates representing the deceased until 18th March 2015.

In the affidavit in reply, the respondent contends that the applicant was aware of the proceedings since the judgment notice was served on him. The late Noah Ramathan was alive and participated throughout the trial but died before judgment could be delivered but after the closure of evidence and final submissions.

I have considered the written submissions of both counsel. I have considered the authority cited by counsel for the applicant, **Babubhai Dhanji Pathak v. Zainab Mrekwe [1964] E. A. 24** to the effect that a case filed against a dead person is a nullity and of no legal consequence, and found it inapplicable to the facts before me.

Be that as it may, it is trite law that when a defendant to a suit dies, and the right to sue survives, the legal representatives of the deceased defendant have to be brought on record before the court can proceed further in the suit. Where the defendant dies during the pendency of the suit, any judgment rendered on hearing the suit, without bringing the legal representatives of the deceased defendant on record, will be a nullity. That principle though is not to be applied mechanically. It applies with full force where the suit is heard on merits in the absence of a legal representative of a deceased person. In such cases, the suit should proceed only after the legal representatives of the deceased are brought on record. But in this case, on the dates when the suit was heard and evidence closed, the defendant was still alive and participated fully in the proceedings. At the time of his death, only the judgment was pending. Delivery of the judgment did not require any further contribution of the defendant. Consequently the judgment of the court delivered on 20th October 2014 will not be disturbed or set aside since there was no error.

Order 46 rule (1) of **The Civil Procedure Rules** empowers this court to review its decisions where there is a mistake or a parent error on the face of the record. The case of **Nyamogo & Nyamogo Advocates v Kago [2001] 2 EA 173** defined it thus:

An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal.

A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. That the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law is not a proper ground for review. Misconstruing a statute or other provision of law cannot be ground for review but could be a proper ground for appeal since in that case the court will have made a conscious decision on the matters in controversy and exercised his discretion in favour of the successful party in respect of a contested issue. If the court reached a wrong conclusion of law, in circumstances of that nature, it could be a good ground for appeal but not for review otherwise the court would be sitting in appeal on its own judgment which is not permissible in law.

In the suit underlying this application, when the defendant died, the right to prosecute the suit survived against his estate. Therefore it was necessary to bring the legal representatives of the deceased on record to proceed with the post-trial aspects of the suit, which required hearing the legal representatives on the merits of the quantum of costs and modes of execution. Only when such legal representative is brought on record, can it be said that the estate of the deceased is represented. To proceed with post-judgment aspects of the suit without first joining the legal representatives, amounted to the suit being heard against a dead person. That is clearly impermissible in law. When the defendant died, the legal representatives who succeeded to his estate ought to have been brought on record and they should have been heard in their capacity as persons representing the estate of deceased defendant. I, therefore, hold that the entire proceedings following the judgment that was delivered on 20th October 2014 are a nullity and inoperative and they are hereby set aside. The parties are to bear their respective costs.

Dated at Arua this 2nd day of March 2017.

Stephen Mubiru

Judge

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