

UGANDA / JUDGMENT

Blue Wave Beverages Limited & 2 Others v Kiiza (Receiver/ Manager) & Another (Miscellaneous Application 1785 of 2024) [2025] UGCommC 4 (14 January 2025)

[2025] UGCommC 4

COURT

Commercial Court of Uganda

BEFORE

Stephen Mubiru, J

CASE / FILE NUMBER

Miscellaneous Application 1785 of 2024

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IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA COMMERCIAL DIVISION

Reportable Miscellaneous Application No. 1785 of 2024 (Arising from Civil Suit No. 0095 of 2023)

In the matter between

- **1. BLUE WAVE BEVERAGES LIMITED**
- **2. LAN FANG**
- 3. LIU QUAN APPLICANTS**

And

- 1. LILIAN KIIZA (RECEIVER/MANAGER)**
- 2. SFC FINANCE LIMITED RESPONDENTS**

Heard: 18th September, 2024. Delivered: 14th January, 2025.

Civil Procedure - Order 46 rules 1 of The Civil Procedure Rules - review for mistake apparent on the face of the record - when a party is dissatisfied with a decision taken on the merits of a procedural or substantive matter (when a litigant is not satisfied with reasoning employed by the court in coming to the decision), recourse is to appeal not review.

[illegible]

The background;

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Folio 22 Plot 5, Fourth Link Road, Luzira, including the plant, machinery, equipment and stock or of such part of it as is in the possession of the respondents, failure of which possession may be obtained by eviction of the occupants.

- [4] It was further ordered that the applicants hand over to the 1st respondent as Receiver, all documents and information relating to the 1st applicant including the books of accounts, inventory, asset registers, records of company filing and other related material. It was ordered further that the 2nd and 3rd applicants cease to purport to exercise the powers of the 1st applicant company or their powers as directors of the 1st applicant including operating any of the 1st applicant's bank accounts or collecting any of the 1st applicant's receivables. The costs were awarded to the respondents.

The Application;

- [5] The application by Notice of motion is made under the provisions of section 33 of *The Judicature Act*, sections 82 and 98 of *The Civil Procedure Act*, and Order 46 Rules 1 and 8 of *The Civil Procedure Rules*. The applicant seeks orders that; (i) the ruling delivered in Miscellaneous Cause No. 95 of 2023 be reviewed and set aside; (ii) Miscellaneous Cause No. 95 of 2023 be referred to arbitration; and (iii) the costs of the application be provided for.
- [6] It is the applicant's case that there is an error apparent on the face of the record since the dispute between the parties is subject to an arbitration clause. Clause 28.2 of the loan agreement provided that all disputes between the 2nd respondent and the applicants were to be resolved by arbitration. The respondents in disregard of the aforementioned provision, moved this Court into hearing and subsequently determining Miscellaneous Cause No. 95 of 2023. The applicants were not given sufficient time and opportunity to be heard. The manner in which the application was heard denied the applicants their right to a fair hearing. All applicants had earlier instructed M/s. Kibuuka Musoke & Tendo Advocates to represent them in opposing the Miscellaneous Cause. Subsequently, due to disagreements with that

law firm, the applicants on 2nd December 2023 instructed Mr. Joseph Munoba to represent them in the matter.

- [7] When the application came up for hearing on 4th December, 2023 Mr. Joseph Munoba sought for an adjournment on the ground that he had just been instructed and as such. was unable to proceed with the matter. Court declined to grant the adjournment but only stood over the case for an hour for Counsel to prepare and appear for hearing of the case. When the Court resumed, Counsel owing to the inadequate time granted by the Court for preparation, sought to withdraw as counsel in the matter. That application was equally denied. The Court then proceeded to hear the respondents and determined the case without hearing or submission from counsel for the applicants. all parties have the right to be given adequate time and facilities by Courts to prepare for hearing of their cases and to be adequately represented by lawyers of their choice in their matters in Court. The procedure

adopted by court violated our right to a fair hearing and thus constitutes sufficient cause for review of the ruling and orders of this Court in the impugned Miscellaneous Cause.

The respondents' affidavits in reply;

- [8] By their affidavit in reply, the respondents aver that the matters that this Court is being invited to adjudicate were matters that were addressed by this Court having examined the evidence presented by the parties' respective affidavits filed on the court record when the matter was called for hearing on 4th December 2023. Upon each party being invited to give a brief of their respective cases, the Court then after hearing the parties and reviewing the evidence on the court record granted the applicant's application for possession/ eviction. The applicants were indeed represented by Counsel being Mr. Joseph Munoba who upon unsuccessfully applying for an adjournment sought to withdraw from the case but his withdrawal application was rightly refused by the Trial Judge pursuant to Regulation 3 (1) (a) of **The Advocates (Professional Conduct) Regulations** good cause not having been shown. Further, Counsel had sufficient time to prepare for the case but chose not to do so and was then given a stand over to prepare but again chose not to do so. This ground is therefore without basis.
- [9] The Court further addressed itself to clause 35 of the Debenture Deed which indicates that it is governed by Uganda law and vests jurisdiction in the Uganda courts. Further and in any event, the applicants did not deny their indebtedness and accordingly, the Court found that there was no arbitrable dispute under the facility agreement. This application for review is an appeal in disguise seeking to re-litigate matters which do not fall within the strict and limited scope of grounds for review. The matters raised herein have been the subject of an appeal vide Civil Appeal No. 1580 of 2023 **Blue Wave Beverages Limited and Others v. Lilian Kiiza and another**, which appeal was on the 4th August 2024 withdrawn following the dismissal of the Applicants' stay of execution application.

The submissions of Counsel for the applicants;

- [10] Counsel for the applicants submitted that the applicants seek setting aside and the matter be referred to arbitration. Under clause 28.2 of the parties' agreement the parties agreed that any dispute arising out of or in connection with the agreement would be referred to arbitration. The issue is not about money as claimed by the respondent. The respondent came to court seeking possession which was the dispute and it is the one on which the court made a ruling. There was an issue of whether the receiver had been appointed without notice in accordance with clause 1. The receiver was appointed on 9th August, 2023 and the cause was filed on 6th September, 2023. The procedure of appointment was not complied with. The dispute is when the Receiver attempts to take possession resisted by the applicant. At the premises of the applicant the 2nd applicant stated the reasons that the Receiver had been appointed contrary to the facility. The reasons for opposing possession have never been stated in writing. In paragraph 4 of the affidavit in reply she stated she had never

received any notice. There were a series of engagements before that response. The law applicable under the facility agreement the choice of law was English Law clause 29.1 The debenture was subject to the debenture agreement. Clause 15 subjected the debenture agreement to the arbitration clause.

The submissions of Counsel for the respondents;

- [11] Counsel for the respondents submitted that the debenture is attached as annexure B2 but the important page 24 is missing. The alleged wrongful appointment, security is governed by local law the governing law is that of Uganda. Clause 35 applied Uganda law. Clause 16 on appointment of a Receiver. Ninety days' notice of eviction was given.

The decision;

- [12] 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. According to section 82 of *The Civil Procedure Act*, any person considering himself or herself aggrieved; - (a) by a decree or order from which an appeal is allowed by the Act, but from which no appeal has been preferred; or (b) by a decree or order from which no appeal is allowed by the 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. The person applying under that provisions needs only to be one whose interests, rights, or duties are inevitably adversely affected by the decree. The section does not impose any conditions on the exercise of that power.
- [13] 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," which has been judicially interpreted to mean a reason sufficient on grounds, at least analogous to those specified in the rule. For applications 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 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)*. An error which is not self-evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying the court to exercise its power of review under order this Order and rule. In exercise of the jurisdiction under this provision, it is not permissible for an erroneous decision to be reheard and corrected.

- [14] An application for review, it must be remembered has a limited purpose and cannot be allowed to be an appeal in disguise. 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. It may also be exercised on any analogous ground. But, it may not be exercised on the ground that the decision was erroneous on merits. That would be the province of an appellate court.
- [15] An error apparent on the face of the record is one which is based on clear ignorance or disregard of the provisions of law. Such error is an error is one which is a patent error and not a mere wrong decision. Conclusions arrived at on appreciation of evidence cannot be classified as errors apparent on the face of the record. In a review it is not open to this Court to reappraise the evidence and reach a different conclusion, even if that is possible. The case of **Nyamogo & Nyamogo Advocates v. Kago* [2001] 2 EA 173* defined an error apparent on the face record, 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.

- [16] 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. A review should not seek to challenge the merits of a decision but rather irregularities in the process towards the decision. Some instances of what constitutes a mistake or error apparent on face of record are: where the applicant was not served with a hearing notice; where the court has not considered the amended pleadings filed or attachments filed along with the pleadings; where the court has based its decision on a ground without giving the applicant an opportunity to address the same; and violation of the principles of natural justice.
- [17] 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. If on appreciation of the evidence produced, the court records a finding of fact and reaches a conclusion, that conclusion cannot be assailed in an application for review unless it is shown that there is an error apparent on the face of the record or for some reason akin thereto.

- [18] It has been contended in this application that the errors are constituted by the manner in which the application was heard, since it constituted a denial of the applicants right to a fair hearing when counsel was denied an adjournment, was given inadequate time to prepare and was denied the opportunity to withdraw from representing the applicants. These matters cited as errors apparent on the face of the record are decisions taken after consideration of the facts placed before Court, hearing the submissions of counsel, taking into account the relevant legal and policy considerations. Therefore, they were decisions on the merits of the respective subject matter of the grant of adjournments, adequate time to prepare and present one's case as well as the right to counsel. When a party is dissatisfied with a decision taken on the merits of a procedural or substantive matter (when a litigant is not satisfied with reasoning employed by the court in coming to the decision), recourse is to appeal not review. Review is not directed at correcting a decision on the merits, it is aimed at the maintenance of legality in light of grave irregularities or illegalities occurring during the course of such proceedings.
- [19] To permit the applicant to argue on questions of appreciation of facts and evidence, and the conclusions to which the Court arrived, would amount to converting the application for review into an appeal in disguise. What the applicant has placed before this court as justification for the review are arguments demonstrating that the court made wrong findings of fact based on the evidence before it and that a different court would have reached a different conclusion on the same facts and arguments, not an error apparent on the face of the record.
- [20] For purposes of a submission to arbitration, a dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons. Different views of parties in respect of certain facts and situations become a "divergence" when they are mutually aware of their disagreement. It crystallises as a "dispute" as soon as one of the parties decides to have it solved, whether or not by a third party. It is not sufficient for one party to a suit to assert that a dispute exists with the other party. A mere assertion is not sufficient to prove the existence of a dispute

any more than a mere denial of the existence of the dispute proves its nonexistence nor is it adequate to show that the interests of the two parties to such a case are in conflict. It is a matter for objective determination. The two sides must be shown to hold clearly opposite views concerning the question of the performance or non-performance of their contractual obligations. It must be shown that the claim of one party is positively opposed by the other.

- [21] A dispute must relate to clearly identified issues and must have specific consequences in order to serve as a basis for arbitration. The existence of a dispute presupposes a certain degree of communication between the parties before the initiation of proceedings, in which the parties expressed clearly opposing views concerning their contractual obligations. The matter must have been taken up with the other party, which must have opposed the claimant's position. A dispute will be characterised by a certain amount of communication demonstrating opposing demands and denials. The difference of views must have formed the subject of an active exchange between the parties under circumstances which indicate that the parties wish to resolve the difference, be it before a third party or otherwise. It is the type of claim that is put forward and the prescription that is invoked that decides whether a dispute is arbitrable or not. In the instant case, the applicants only opted to be obstinate in ceding possession. That does not constitute an arbitrable dispute.
- [22] In conclusion, it turns out that what the applicant contends to be an error on the face of the record is not self-evident irregularity in the process towards the decision, but rather in the nature of errors arising from accidental slip or omission which may at any time be corrected by the court either of its own motion or on the application of any of the parties. It is evident that what the applicants are attempting to achieve is the reversal of what they consider to be an erroneous decision, by forcing a rehearing and correction by the same court which made the decision, yet an application for review, it must be remembered, cannot be allowed to be an appeal in disguise. The court exercising the power of review cannot sit in appeal over its own decision. To put it differently, an order cannot be corrected merely

because it is erroneous in law or on the ground that a different view could have been taken by the court. Therefore, the application fails and it is dismissed with costs to the respondents.

Delivered electronically this 14th day of January, 2025 ...Stephen Mubiru.....

Stephen Mubiru Judge, 14th January, 2025

Appearances;

For the applicant : M/s Crane Associated Advocates. For the respondents : M/s MMAKS Advocates.

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