

UGANDA / JUDGMENT

DFCU Bank Limited v Colline Hotel Limited & Another (Miscellaneous Application 799 of 2023) [2024] UGCommC 148 (22 May 2024)

[2024] UGCommC 148**COURT**

Commercial Court of Uganda

BEFORE

Abinyo, J

CASE / FILE NUMBER

Miscellaneous Application 799 of 2023

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5 THE REPUBLIC OF UGANDA**IN THE HIGH COURT OF UGANDA AT KAMPALA****(COMMERCIAL DIVISION)****MISCELLANEOUS APPLICATION No. 0799 OF 2023****(ARISING FROM MISCELLANEOUS APPLICATION No. 743 OF 2019)****10 (ARISING FROM CIVIL SUIT No. 404 OF 2019)****DFCU BANK LIMITED APPLICANT****VERSUS**

- **1. COLLINE HOTEL LIMITED**
- **15 2. MUKONO BOOKSHOP PRINTING & PUBLISHING LIMITED
RESPONDENTS**

BEFORE: HON. LADY JUSTICE SUSAN ABINYO**RULING****20 Introduction**

This application was brought by Notice of Motion under the provisions of sections 82 and 98 of the Civil Procedure Act, Cap 71 and Order 46 Rules 1 and 8 of the Civil Procedure Rules S. I 71-1 (as amended) seeking orders that:

- 1. The order dismissing Miscellaneous Application No. 743 of 2019, in respect
- 25 of Crane Bank Limited (In receivership) be reviewed, and the default judgment be set aside.
- 2. The proceedings in High Court Civil Suit No. 404 of 2019, be stayed pending disposal of this application.
- 3. The costs of this application be borne by the Respondents.

5 Representation

The Applicant was represented by Mr. Brian Kajubi of MMAKS Advocates, and the Respondents were represented by Dr. James Akampumuza of M/S Akampumuza & Co. Advocates.

During the hearing of this application, Counsel for the Respondents indicated to the Court that he had preliminary points of law to raise. This Court therefore, gave Counsel for the parties herein, a schedule to file written submissions.

I shall therefore, consider the preliminary points of law raised by Counsel for the Respondents hereunder.

- 1. That the application is incompetent for non-sealing of summons.
- 2. That the application is incompetent for non-service.
- 3. That the application is an abuse of Court process.
- 4. That the application is barred by law on account of res judicata.

Applicant's evidence in support of this application

This application is supported by an affidavit deposed in paragraphs 1-12, by Mr. 20 Muhammad Ssenoga the Legal Manager of the Applicant Company, and summarized as follows: -

That the Respondents filed High Court Civil Suit No. 404 of 2019 against Crane Bank and served the summons to file a defence on Crane Bank on 19th October, 2016.

That Crane Bank filed its written statement of defence in the suit on 1st November 2016, with the last day to file the said written statement of defence being 3rd 25 November, 2016.

That whilst Crane Bank had filed its written statement of defence within time, the Registrar of the Court entered a default judgment against it on the premises that it had not filed a defence.

30 That on 24th October 2018, Crane Bank (In Receivership) filed Miscellaneous Application No. 1668 of 2018 in the High Court Land Division, which upon transfer of the file to the High Court Commercial Division was registered as Miscellaneous Application No. 743 of 2019.

That during the pendency of the suit, and Miscellaneous Application No. 743 of 35 2019, Crane Bank was placed in receivership, and consequently its assets and liabilities including those which are the subject of the suit, and Miscellaneous

Application No. 743 of 2019 were transferred to DFCU Bank the Applicant on 25th 5 January, 2017.

That by virtue of the transfer of the Assets of Crane Bank (In Receivership), which included the assets the subject of the suit, and Miscellaneous Application No. 743 of 2019, the Applicant is an aggrieved party hence this application.

10 That the Applicant is aggrieved by the Ruling, and Order of the Court to dismiss Miscellaneous Application No. 743 of 2019, and uphold the default judgment entered in the suit, since the defence on behalf of Crane Bank was duly filed in time.

That Civil Suit No. 404 of 2019 involves the cancellation of mortgages to secure 15 substantial sums of money, this being in excess of USD 500,000 now the property of DFCU Bank Limited as indicated in the plaint.

That the Applicant subsequently filed Miscellaneous Application No. 1532 of 2022 without undue delay but when the application was fixed by the Court for hearing, the Applicant was not notified of the same thus could not serve the application 20 within the prescribed timelines.

That it is in the interest of justice that this application is allowed, and the Applicant is allowed to defend the suit on its merits.

Respondents evidence in reply

The Respondents filed an affidavit in reply deponed in paragraphs 1- 22, by 25 Augustine Kasozi the Director of the 1st and 2nd Respondents, and summarized as below:

That he is advised by their Lawyers M/S Akampumuza & Co. Advocates, whose advice he verily believes to be true as follows: -

That the application is incompetent, bad in law and barred by law on account 30 of being res judicata, covenant estoppel, lack of locus standi, time limitation, abuse of Court process, being frivolous and vexatious, and that they would at the earliest time raise a preliminary objection to have it dismissed with costs.

That the Applicant filed an incompetent photocopied application, which was not sealed by Court and thus making it a nullity. That the contents of the affidavit in

35 support are false, as the deponent conceals the truth when summons to file a

5 defence to the civil suit filed in 2019, could not have been served on Crane Bank on 19th October, 2016, which was over three years before the alleged filing.

That there is no new matter raised in this application, which is a disguised appeal against the dismissal order, and default judgment in this case, and this does not form the grounds for review.

- 10 That it is in the interest of justice for Court to uphold the dismissal order in HCMA No. 743 of 2019, and the default judgment entered in 2016, from which the case was transferred from Land Division to Commercial Division now HCCS No. 404, a fact which the Applicant conceals.
- The 3rd Respondent further filed a supplementary affidavit, deposed in 15 paragraphs 1- 8, in which he contends that the Applicant is not an aggrieved party, and that the application does not meet any of the grounds for review, and is an abuse of Court process.

That there was a consolidated Ruling in HCMA No. 742 of 2019, and HCMA No. 743 of 2019, which were dismissed by Court however, the Applicant's Lawyers only 20 preferred an appeal in respect of HCMA No. 742 of 2019.

That the Court in its Ruling of 13/7/2022 dismissed HCMA No. 743 of 2019 filed by Crane Bank Ltd for abuse of Court process.

Applicant's evidence in rejoinder

- The Applicant's Legal Manager filed an affidavit in rejoinder, deposed in 25 paragraphs 1-21 that both the affidavit in reply, and the supplementary affidavit deposed by Augustine Kasozi were filed, and served out of time and that the supplementary affidavit in reply was filed without leave of Court therefore, both affidavits ought to be struck out with costs with the result that the application is unopposed.
- 30 That this Honorable Court did not determine the issue of whether or not Crane Bank Limited filed its defence in time, which itself is an error on the face of the record, and that this application for review is based on errors apparent on the face of the record, and not discovery of new and important matters of evidence.

That the Applicant is an aggrieved party, since it is the successor in title to Crane 35 Bank Limited, in respect of the loan sums due from, and securities granted by the Respondents pursuant to the Deed of Assignment attached to the application.

5 That the Applicant stands to lose the said loan sums, and securities unless this application is granted.

That it is clear that HCMA No. 743 of 2019, sought to set aside the default judgment which was erroneously issued against Crane Bank Limited, and now this application seeks to review the Ruling in HCMA No. 743 of 2019, and that

10 accordingly, the Respondents' averments have no basis in law.

That HCMA No. 743 of 2019 was dismissed by Court on 13th July 2022, as such, it would not have been possible for the Applicant to file this review application earlier than that, and that there was no undue delay on the part of the Applicant.

That the Applicant did not file, and withdraw any application for setting aside 15 default judgment against Crane Bank.

That the Applicant is a separate, and distinct entity from Diamond Trust Bank (U) Ltd (DTB), and that it was DTB that preferred an appeal against the ruling in HCMA No. 743 of 2019.

Determination of the preliminary points of law

20 I have considered the evidence of the parties as above, and the submissions of Counsel for the parties herein, to find as follows: -

1. Whether this application is incompetent for non-sealing of summons?

The Electronic Court Case Management Information System (ECCMIS), in one of its functionalities, and features, generates case documents based on pre-25 defined templates with auto populated case information, for example summons, hearing notice etc, in which the document has a provision for a specific judicial officer, who has that role in the system to perform it namely, signing of a document by either the Registrar or the Judge.

- It is notable that the electronic filing system does not have a provision for sealing 30 of documents however, for a document to be considered authentic in this digital era, the e-signature of the requisite judicial officer is sufficient. *(See the objectives of the Constitution (Integration of ICT into the Adjudication Processes for Courts of Judicature) (Practice) Directions, 2019)*
- 35 In addition, this Court has taken into account paragraph 2 of the preliminary part of the Civil Procedure Rules, SI 71—1, which provides that:

5 "These Rules shall apply, as far as practicable, and unless otherwise expressly provided, to all matters arising and to all proceedings taken on any matters under the Act, or any Act amending the Act." [Emphasis is mine]

For the foregoing reasons, I find that the practicability of sealing documents filed 10 electronically is not possible in the system. Therefore, the question of unsealed summons in this case does not arise. The signing of the document by a judicial officer is sufficient to authenticate it. *(See Lawrence Martin Mugerwa Musisi Vs Mugubi Stephen Banja, and Anor, SCCA No. 0009-2022)*

It is notable that the Electronic Court Case Management Information System 15 (ECCMIS), does not do away with the Rules of procedure. The main purpose thereof, is to provide the Court users with a convenient process of e- case filing, and the subsequent processes, and to enable the Courts to use technology for the effective, and efficient management of cases.

This Court has taken into account that the cases cited by Counsel for the 20 Respondents were decided in the period of the pre – electronic system(ECCMIS), and are not relevant in this case.

Accordingly, this Court finds that there is no merit in the preliminary objection.

2. Whether this application is incompetent for non-service?

The Applicant's evidence was that the Respondents filed High Court Civil Suit No. 25 404 of 2019 against Crane Bank, and served the summons to file a defence on Crane Bank on 19th October, 2016. That Crane Bank filed its written statement of defence on 1st November 2016, with the last day to file the said written statement of defence being 3rd November, 2016.

That whilst Crane Bank had filed its written statement of defence within time, the 30 Registrar of the Court entered a default judgment against it on the premises that it had not filed a defence.

The Respondents contended that the evidence of the Applicant in the affidavit in support are false, as the deponent concealed the truth when summons to file a defence to civil suit filed in 2019 could not have been served on Crane Bank on

35 19th of October, 2016, which was over three years before the alleged filing.

5 I have taken into account that this is a matter for review, and it was proper for this preliminary objection to be raised during the hearing of the application to set aside the default judgment, and not at this stage, where this Court has heard both parties in the said application, and rendered a decision.

The above notwithstanding, the Respondents cannot be seen to claim that the 10 application is a nullity for non service of the summons, yet the summons was not issued in respect of the application but in the suit.

It is notable that the facts in the Supreme Court decision of **Bitamissi Namuddu v Rwabuganda Godfrey*, Civil Appeal No. 016 of 2014*, cited by Counsel for the Respondents is distinguishable however, this Court will not delve into the 15 distinction here. The principle as applied in that case is not relevant in the instant case.

For the foregoing reasons, I find that this preliminary objection lacks merit.

3. Whether this application is an abuse of Court process?

The term "abuse of Court process" involves the use of the process for an improper purpose or a purpose for which the process was not established. *(See Attorney General & Uganda Land Commission Vs James Kamoga & James Kamala, SCCA No. 8 of 2004* cited by Counsel for the Respondents.

The Respondents contend that this application is an abuse of Court process, as Miscellaneous Application No. 756 of 2017 (transferred from Land Division to 25 Commercial Division, and upon registration, is now Miscellaneous Application No. 742 of 2019) was dismissed for abuse of Court process.

This Court finds that Miscellaneous Application No. 742 of 2019, between *Diamond Trust Bank (U) Limited, and Crane Bank (U) Limited (in receivership) Vs Colline Hotel Limited, and Mukono Bookshop Printing & Publishing Limited*, was dismissed for

30 lack of merit, and not abuse of Court process, as Counsel for the Respondents wants this Court to believe.

In the instant matter, the Applicant herein, (the successor in title to Crane Bank (U) Limited) seeks review of the above decision in Miscellaneous Application No. 742 of 2019, as an aggrieved party, in which *Crane Bank (U) Limited (in* 35 *receivership)*, sought orders to set aside a default judgment entered by the Registrar in Civil Suit No. 681 of 2016, which was transferred to Commercial Division, and given a new number of Civil Suit No. 404 of 2019.

5 The ground for review in the instant application is based on an error on the face of the record, which this Court is yet to determine.

Accordingly, I find that this preliminary objection is frivolous, and devoid of merit.

4. Whether this application is barred by law on account of res judicata?

Section 7 of the Civil Procedure Act, Cap 71 provides that:

10 "7. Res judicata

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try the subsequent suit or the suit in 15 which the issue has been subsequently raised, and has been heard and finally

decided by that court."

In the case of *Mansukhlal Ramji Karia & Another Vs Attorney General & 2 Others SCCA No. 20 of 2002*, Justice Tsekooko JSC (as he then was), observed that the provision indicates that the following broad minimum conditions have to be 20 satisfied: -

- (1) There has to be a former suit or issue decided by a competent court.
- (2) The matter in dispute in the former suit between parties must also be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar.

25 (3) The parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title."

This Court having found as above, that the instant application for review is based on grounds of an error on the face of the record, which is yet to be determined, considers this preliminary objection to be frivolous, and vexatious.

30 Accordingly, I find that the preliminary objections raised by Counsel for the Respondents, lack merit in entirety.

Consequently, the said preliminary objections are dismissed.

5 I will now turn to consider the merits of this application as below

The issues for determination was amended by this Court, in accordance with Order 15 Rule 5(1) of the Civil Procedure Rules, SI 71-1 as follows:

- 1. Whether this application meets the criteria for review?
- 2. What are the available remedies?

Issue No.1: Whether this application meets the criteria for review?

It was submitted for the Applicant that the Applicant is an aggrieved party within the meaning of the above provisions, because as Crane Bank's successor in title, the Applicant has an interest in respect of the legal mortgages, which are the

15 subject of the suit, and the application was heard, and determined without the Applicant, who had at the time acquired the assets, and liabilities of Crane Bank.

Counsel contended that at the time the Registrar purported to enter a default judgment, the predecessor to the Applicant had filed a defence two days before the timeframe of 15 days had lapsed, as prescribed in the Civil Procedure Rules,

20 and that this was brought to the attention of this Court in the application to set aside the default judgment, which is an error on the face of the record to warrant the default judgement to be set aside.

In reply, Counsel for the Respondents submitted that the Applicant is not an aggrieved party, since she was not party to the main suit, and never had any

25 relationship with the Respondents thus the decision never affected her.

Decision

Section 82 of the Civil Procedure Act, Cap 71, provides as follows: -

Review

"Any person considering himself or herself aggrieved—

30 (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 made the order, and the court may make such order on the decree or order as it thinks fit."

5 Order 46 Rule (1) of the Civil Procedure Rules, SI 71-1 provides as follows: -

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

- 10 (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or 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

- 15 other sufficient reason, desires to 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." [Emphasis is mine]

The well-established grounds for review of a judgment or an order are as below;

- (i) 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 him or her at the time when the decree was passed or the order made.

- (ii) A mistake or error apparent on the face of the record.

- (iii) Any other sufficient reason.

- 25 On the phrase "any other sufficient reason", the Courts have interpreted the term "sufficient" to be read as meaning sufficiently of a kind analogous to (i) and (ii) above. *(See Re Nakivubo Chemists (U) Limited [1979] H. C. B 12; Yusuf Vs Nokrach [1971] E. A 104, and FX Mubwike Vs Uganda Electricity Board, HCMA No.98 of 2005*(unreported)

- 30 It is noteworthy that a party who claims any of the above grounds for review, should prove that he or she is an aggrieved person within the meaning of section 82 of the Civil Procedure Act, Cap 71, and Order 46 Rule (1) of the Civil Procedure Rules, SI 71-1. *(See Mohamed Allibhai Vs W. E Bukenya Mukasa & Departed Asians Property Custodian Board, SCCA No. 56 of 1996)*, cited by Counsel for the
- 35 Applicant on the definition of an aggrieved person.

5 The phrase "an error apparent on the face of the record "was well explained in the case of *Edison Kanyabwera Versus Pastori Tumwebaze, SCCA No. 6 of 2004* that;

"In order that an error may be a ground for review, it must be one apparent on the face of the record, i.e. an evident error which does not require any* 10 *extraneous matter to show its incorrectness. It must be an error so manifest and clear that 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 fact, and includes also error of law."* [Emphasis is mine"]

It is also settled law, that review is a matter of discretion however, the

15 circumstances of each case should be considered. *(See Abdulla Jaffer Dewji Vs Ali Raza Mohamedali Sheriff Dewji [1958]1 E. A 558 at 562, and Patel Vs E. A Cargo Handling Services Ltd [1947] E. A 75 at 76-77)*

It was the Applicant's evidence that they acquired Crane Bank(U) Limited on 25th January, 2017, and that the Respondents filed High Court Civil Suit No. 681 of 2016 20 against Crane Bank, and served the summons to file a defence on Crane Bank on 19th October, 2016. That Crane Bank filed its written statement of defence on 1st November 2016, with the last day to file the said written statement of defence being 3rd November, 2016.

For the foregoing reason, this court finds that the Applicant's interest was affected 25 by the said decision therefore, the Applicant is an aggrieved party in

Miscellaneous Application No. 742 of 2019, within the meaning of section 82 of the Civil Procedure Act, Cap 71, and Order 46 Rule 1 of the Civil Procedure Rules, SI 71-1.

In addition, this Court finds that since the Applicant herein, is a successor in title to 30 Crane Bank(U) Limited, the contention by the Respondents that the Applicant was not a party to the application to set a side default judgment, and is not an aggrieved party in this application for review is illogical.

This Court found in Miscellaneous Application No. 742 of 2019 that the Respondents' contention on the alterations of the Court record, and nonpayment of Court fees among others, was uncontroverted by the 1st 35 Applicant, and consequently, the said application was dismissed for lack of merit, and not abuse of Court process, as Counsel for the Respondents wants this Court to believe.

5 The above allegations by the Respondents introduced matters of illegality in the said application, and in the absence of any contrary evidence adduced by the Applicant, this Court cannot not ignore such illegalities*. (See Makula International Vs His Eminence Cardinal Nsubuga & Anor [1982] HCB 11)*

It's settled law that an illegality once brought to the attention of the Court, 10 overrides all questions of pleading, including any admission made thereon. *(See Belvoir Finance Co. Ltd Vs Harold G. Cole & Co. Ltd [1969]2 ALLER 904 at 908),* cited with approval in Makula case above.

For reasons stated above, I find that the Applicant failed to prove that there is an error apparent on the face of the record.

15 Issue No.2: What are the available remedies?

Having found issue (1) above in the negative, this Court further finds that this application lacks merit.

It's trite law that costs follow the event unless for justified reasons the Court otherwise orders (See section 27(2) of the Civil Procedure Act, Cap 71), and the 20 decision in *Uganda Development Bank Vs Muganga Construction Co. Ltd (1981) H. C. B 35* where Justice Manyindo (as he then was) held that:

> *"A successful party can only be denied costs if its proved, that, but for his or her conduct, the action would not have been brought, the costs will follow the event where the party succeeds in the main purpose of the suit."*

25 I find that the Respondents wasted Court's time on unnecessary preliminary objections as above.

Accordingly, this application is dismissed with half of the costs to the Respondents,

Dated, and delivered electronically this 22nd day of May, 2024.

SUSAN ABINYO JUDGE 22/05/2024

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