UGANDA / JUDGMENT

Ebetu and 2 Others v Etiru and Others [2023] UGHCCD 228 (10 February 2023)

[2023] UGHCCD 228

COURT
HC: Civil Division (Uganda)

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The Republic of Uganda In the High Court of Uganda Holden at Soroti Miscellaneous Application No. 68 of 2022 (Arising from Civil Suit No. 08 of 2015)

Ebetu John Henry - Beneficiary of the Estate of the Late Enwangu Esegu $1.$

$\downarrow$ :::::::::::::::: Applicants

Adong Janet (Widow) Beneficiary of the estate of the Late Ebwalu Jonathan Enwangu Simon (Heir) Beneficiary of the estate of the Late Ebwalu Jonathan $3.$

Versus

Etiru Patrick $1.$ Ebitu Geofrey $2.$ Opio George $3.$ Okorio Emmanuel 4. Ejoku Mackay $5.$ Ojulong Patrick 6. 7. Musana Samuel 8. Dr. Okawana Nicholas 9. Futch Peters 10. Registered Trustees of the Church of Uganda

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$2.$

11. Soroti District Land Board

Before: Hon. Justice Dr. Henry Peter Adonyo Ruling

1. Background:

This application was brought by a Notice of Motion by the Applicants under Sections 82 and 98 of the Civil Procedure Act, Cap 71, Order 46 Rule 1, 4 and 8 and Order 52, Rules 1 and 2 of the Civil Procedure Rules SI 1-71 against the respondents for orders that;

a) Court reviews its decision in Civil Suit No. 08 of 2015 against the Applicants as there are errors, mistakes and illegalities apparent on the face of the record.

b) The order in Civil Suit No. 08 of 2015 be set aside, and

c) An award of the costs of the application.

It is supported by the affidavit of the Ebetu John Henry, the 1st applicant in which he deposes briefly that;

- a) He was one of the Plaintiff in Civil Suit No. 8 of 2015 which he filed
- against the respondents/defendants seeking recovery of land situate at Oderai, Soroti City comprised in LRV 3110 Folio 25 plot 22 Okuti Lane.
- b) On 6th March 2021, the trial judge ordered that the pleadings be amended since some of the parties had passed on which was done by the plaintiff/applicant.
- c) The amended plaint was subsequently served both physically and by way of substituted service on all the respondents in respect of which defence was filed by the $1^{\text{st}},$ $2^{\text{nd}},$ $3^{\text{rd}},$ $7^{\text{th}},$ 8^{th} and 10^{th} respondents while the, 5th, 4th, 6th, 9th, 11th and 12th respondents omitted to file their defence.
- d) On 1st November, 2021, the court directed the parties to file a joint scheduling memorandum, witness statements and trial bundles which the applicants filed.
- e) However, on $1^{\rm st}$ November 2021, court directed that the $8^{\rm th}$ defendant add the 3rd party (Soroti Municipal Council) to the suit by serving it pleadings but it was ignored and when the matter came up on 7th December 2021, the applicants' lawyers informed court that they were not able to conclude with the scheduling as directed by court since the 8th defendant had not added the 3rd party as directed by court.

f) On 7 th December 2021, when the matter came up it was adjourned to 20th December 2021 and none of the parties was in court since the

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Registrar was indisposed at the time. Further, on 31st March 2022 when the matter came up there was a minute by the Registrar adjourning the matter to 31st March 2022.

- g) That all the defendants were in court and yet none of them had been served.
- h) The Applicants stated that it was very surprising that the matter had not been cause listed for the said week.

- i) On 31st March 2022, counsel for the 8th respondent instead informed the court that it is the applicants that were frustrating and delaying the matter. The 8th respondent's counsel further noted that the applicants have deliberately omitted the 3rd party, Soroti Municipal Council from the pleadings and yet the applicants have no cause of action against Soroti Municipal Council.

The applicants state that they had never been served with the Order for the 3rd party nor was there any evidence of service to the 3rd party. The trial court dismissed the matter for not following court orders and that there was non-service and non-proper service of pleadings. The applicants contend that this was erroneous.

In the joint affidavit in reply of the 1st, 2nd and 7th respondents sworn by Etiru Patrick, he opposes the application and avers instead that the order of court issued on the 31st March 2022 dismissing the suit was properly issued.

25 That the application is baseless and is intended to waste courts time. The applicants served the respondents uncertified photocopies of pleadings in Civil Suit No. 8 of 2015.

That the court, therefore, correctly dismissed the suit on grounds that service of uncertified photocopies amounts to no service at all.

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In the affidavit of the 8th respondent sworn by Okwana Nicholas, he states $ \mathsf{S}$ that dismissal of the suit was correct since previous service upon the Defendants with uncertified photocopies was in error and no service at all. That it was mischievous of the applicants and/or their Counsel to file unsigned copies of a "joint" scheduling memorandum without the participation of the 8^{th} respondent. 10

Further, that the 8th respondent's advocates took out 3rd party notices to the 3rd parties who filed their defence on 24th April, 2018 through their Advocates then, M/S Osilo & Co. and consequently, the statement made by the applicants was an excuse for not having a joint scheduling memorandum is untruthful.

Submitting in support of the application, counsel for the applicants, M/S Omongole & Co Advocates argued that the applicants are aggrieved persons being that their right to property in land is now subject of unlawful acquisition of their land without compensation, and trespass without being given an opportunity to be heard on the contested suit land.

He relied on the case of *Mohamed Alibhai v W. E. Bukenya Mukasa* & Anor [1996] UGSC 2 on the requirement for a person to be aggrieved in order to apply for a review of a judgment.

Counsel for the applicants further submitted that it was an error on the face of the record to dismiss the matter upon failure by the Defendants to bring -25 the third party on board.

That there was no record of service of the 3rd party Notice and Order on the applicants so as to be able them to amend the plaint. That the matter, therefore, got dismissed by error which should not be allowed to stand. He

cited Kaloli Tabuta Vs Transroad High Court Misc. Application No. 478 of 2019 which relied on the case of Fx Musoke Vs UCB, HCMA No. 98 of 2005, where it was held that for a review to succeed on the face of the record, the error must be so manifest and clear that no Court would permit such error to remain on record. He opined that the decision therefore should be reviewed. Counsel for the applicants also prayed for an award of costs to be allowed.

Submitting in response, counsel for the 1st, 2nd and 7th respondents did not raise any arguments in opposition to Misc. Application No. 68 of 2022 in respect to the application for review but rather raised arguments seeking leave to file an affidavit in reply and to file their written statement of defense in respect to Civil Suit No. 12 of 2022.

Counsel's arguments were made in respect of Misc. Application No. 123 of 2022 which arises out of Civil Suit No. 12 of 2022 and yet the application before court arises out of Civil Suit No. 08 of 2015.

That this was very strange and misplaced, brought in to confuse this court 20 since they address a different application.

The 3rd, 4th, 5th, 6th, 8th, 9th, 10th and 11th respondents did not submit their written submissions.

In rejoinder, Counsel for the Applicants raised a preliminary objection that 25 the prayers sought by the $1^{\rm st},$ $2^{\rm nd}$ and $7^{\rm th}$ respondents are misplaced since they do not arise from Misc. Application 68 of 2022 arising out of Civil Suit No. o8 of 2015.

That the application addressed by the respondents arises from Civil Suit No. 12 of 2022. It was thus submitted that it would not be proper for the court to grant orders in respect of Civil Suit No. 12 of 2022 from which this application does not arise.

Accordingly, counsel for the applicants prayed this be struck out.

$2.$ Issues:

Counsel for the Applicants formulated two issues which I have reformulated into the following;

- 1. Whether the Applicants are aggrieved persons within the meaning of section 82 of the Civil Procedure Act?
- 2. Whether the application meets the criteria for review? 15
- 3. Resolution:
- a. Issue 1:

Whether the Applicants are aggrieved persons?

The Applicants are duty bound to establish that they are aggrieved persons 20 as envisaged under section 82 of the Civil Procedure Act and Order 46 rules 1 and 2 of the Civil Procedure Rules which provide as follows;

Section 82: Review.

Any person considering himself or herself aggrieved— (Emphasis added.)

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(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 $\overline{5}$ 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.'

Under Order 46 rule 1 and 2;

1)Any person considering himself or herself aggrieved— 10

(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 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 or could not be produced by him or her at the time 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 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 added)

In law, the definition of an aggrieved person is articulated in the case of Ladark Abdalla Mohammed Hussein versus **Griffiths** *Isingoma Kakuoza & 2 others; SCCA NO.08 of 1995*, as a person who 25 has suffered a legal grievance.

This definition excludes a person who is merely disappointed by the results $\overline{5}$ of a legal grievance or process, as per *Exparte Bethamin In Re Batham* (1880)14 ch. D.458 at 465.

The definition of an aggrieved person is emphasied in **Re-Nakivubo** *Chemists [1979] HCB* which held that;

"Any person considering himself aggrieved under Section 82 of the Civil Procedure Act meant a person who has suffered a legal grievance. A legal grievance does not mean a person who is disappointed by a benefit which he/she must have received if no other order had been made"

A person aggrieved must be a person who has suffered a legal grievance, a 15 person against whom a decision has been pronounced, which has wrongfully deprived him/her of something or wrongfully affected his title.

To answer the question as to whether the Applicants are aggrieved persons, there is need for this court revisit the amended plaint in HCCS 8 of 2015, which is attached to the application and marked 'A'.

In that suit, the applicants were plaintiffs seeking recovery of plots of land measuring approximately 25 acres at Oderai village, Amen parish, Soroti County in Soroti district.

The suit land was allegedly customarily owned by the late Enwangu Eegu and the late Ebwalu Jonathan which the applicants/plaintiffs claim as 25 beneficiaries to the estate of the late Enwangu Eegu and the late Ebwalu Jonathan who were brothers and member of the Atek – Ebetu clan as stated under paragraph 10 of the plaint.

They also stated that they inherited the land from their deceased brothers, $\overline{5}$ who had also inherited it from their deceased brother and consequently seek inter alia an order that the applicants/plaintiffs are the rightful owners of the suit property.

From the above averments, it is stated Enwangu and Ebwalu are both deceased. However, there is no evidence in proof of this fact in the pleadings.

Apart from referring to them as "the late", there is no 'Certificate of death' or any "letter from the Registrar of Birth and Death", or even Letters of Administrator or Probate, or any other independent evidence availed to court in proof of this fact.

There is similarly is no evidence on record that applicants are beneficiaries of the said estate, save the averment in the plaint which is not supported by independent evidence.

From the above facts, there is a serious problem in terms of the locus in bringing this application in light of the general principle that any person 20 aggrieved by a decree/order can bring this application as was held in Re Nakivubo Chemists V. Ltd (supra).

The Applicants before this court consider themselves aggrieved on grounds that their right to property in land is now subject to the unlawful acquisition without compensation, and trespass without being given an opportunity to be heard on the contested suit land to which they claim as beneficiaries.

When I read the pleadings to this application, I find the applicants tried to anchor their application on a certificate of title held by the late Enwangu and Ebwalu as stated in the plaint annexed to the motion, which they claimed

relates to the estate of their late father, in which they have an interest by $\overline{5}$ virtue of being his children and hence beneficiaries of his estate.

I have, however, found that there is no proof of the fact of death, there is no proof of the estate properties to which the said property is listed, and there is no list of beneficiaries to which applicants are named as such. At best these factors are hearsay evidence as they are not proved by evidence.

It would thus be unsafe to conclude that the applicants are aggrieved persons in the terms as alleged. Even the arguments by counsel for the applicants in this respect in his submissions on this point are not borne out of evidence on record but that from the bar.

Consequently, I am not convinced that applicants have proved to me that 15 they are aggrieved persons within the meaning of the law as was pronounced in **Re-Nakivubo Chemists [1979] HCB** so as to be able to bring this application as such. They have no locus or capacity to sue in respect of this application. This issue is answered in the negative.

b. Issue 2: 20

Whether the application meets the criteria for review under section 82 of *the Civil Procedure Act?*

The grounds under which the court can grant the application for review are laid out under Order 46 rule 1 of the Civil Procedure Rules. They are;

- Discovery of new important matter. i. 25
- ii. Error on the face of the record.
- iii. Sufficient cause.

Counsel for the Applicants argued this issue on the basis of one criteria, that $\overline{5}$ is, an error apparent on the face of the record.

The Applicants also relied on *Kaloli Tabuta Vs Transroad (Supra)* which relied on the case of *Fx Musoke Vs UCB, HCMA No. 98 of 2005* where it was held that for a review to succeed, on the face of the record, the

error must be so manifest and clear such that no Court would permit such 10 error to remain on record.

Order 46 rule 1 of The Civil Procedure Rules empowers this court to review a decision where an error is apparent on the face of the record.

According to the decision in *Attorney General and Another v James* Mark Kamoga and Another Supreme Court Civil Appeal No. 8 of 15 **2004**, such power extends to orders of the Registrars.

The case of Nyamogo and Nyamogo Advocates v. Kago [2001] 2 EA 173, it was held that 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 judiciously 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. 25 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 30 view was also possible.

Mere error or wrong view is certainly no ground for a review although it may S be for an appeal.

The applicants herein submitted that it was an error on the face of record to dismiss the matter upon failure by the Defendants to bring the third party on board. That there was no record of service of the 3rd party Notice and Order

on the applicants so as to be enable them to amend the plaint. However, counsel for the 8th respondent disputed this by arguing that the 8th respondent's advocates took out 3^{rd} party notices to the 3^{rd} parties who filed their defence on 24th April, 2018 through their Advocates then M/s Osilo & Co. and consequently, the statement made by the applicants as an excuse for

not having a joint scheduling memorandum would be found to be untruthful. 15

The matters which counsel for the applicants has made reference to in my view are not errors at all given the fact that actually the third party was served and was represented in court by M/s Osilo & Co.

- The applicants argue that because the court ignored their submissions upon making its conclusions then there was an error on the face of the record, to 20 the contrary if indeed the conclusions by court were erroneous, then the applicants remedy would lie not in a review- but appeal which I do so find and accordingly, this issue would terminate in the negative.
- 3. Conclusion:

Arising from the conclusions on the two issues discussed and resolved above, 25 both of which failed, it is the conclusion of this court that the issues raised by the applicants herein are matters which cold better be resolved through an appeal rather than by a review.

- Conclusively, the applicants' remedy does lie in an appeal if they do seriously feel aggrieved by this court's dismissal order.

- 4. Order:

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This application is found to be wanting in merits on any of the grounds $\overline{}$ raised herein. It thus would fail.

This application is dismissed with costs. $\overline{a}$

I so order.

Henry Peter Adonyo

Judge

10th February 2023

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