

UGANDA / JUDGMENT

Kalyango and 2 Others v Nsubuga and 2 Others (Miscellaneous Application 973 of 2022) [2023] UGHCFD 50 (21 January 2023)

[2023] UGHCFD 50

COURT

HC: Family Division (Uganda)

BEFORE

Katunguka Kitariisibwa, J

CASE / FILE NUMBER

Miscellaneous Application 973 of 2022

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(FAMILY DIVISION)

MISC. APPLICATION NO. 973 OF 2022

(ARISING OUT OF MISC. APPLICATION NO.311 OF 2022)

(ARISING OUT OF CIVIL SUIT NO.254 OF 2017)

1. KALYANGO NAMUTEBI SOPHIA

- 2. NAMUBIRU LUKIA
- 3. SEMBAJJWE MUSA ::::::::::::::::::::::::::::::::::: APPLICANTS

VERSUS

- 1. NSUBUGA BETTY NAKABUYE
- 2. EDDIE NSUBUGA
- 3. KIZITO TWAHA WASHINGTON GALIWANGO ::::::::::: RESPONDENTS

Before: Lady Justice Ketrah Kitariisibwa Katunguka.

Ruling.

Introduction:

1. Kalyango Namutebi Sophia, Namubiru Lukia and Sembajjiwe (herein after referred to as 'the applicants') filed this application against Nsubuga Betty Nakabuye, Eddie Nsubuga and Kizito Twaha Washington Galiwango (herein after called 'the respondents'); the application is brought under section 82 and 98 of the Civil Procedure Act; Order 46, Order 52 rule 1,2 & 3 of the Civil Procedure Rules; seeking that; orders issued by her Lordship Hon. Justice Ketrah Kitariisibwa Katunguka on the 24th of August 2022 setting aside the exparte order issued on 25th day of October 2021 be reviewed and set aside; that the exparte order issued on the 25th day of October 2021 revoking the letters of administration to the applicants on the 23rd day of August 2011 vide

Mukono Administration Cause No.279 of 2011 be reinstated; and costs of the application.

- 2. The grounds of the application are contained in the Notice of Motion and the Affidavit in support but briefly are that: - the respondents had instituted Miscellaneous Application No.0311 of 2022 for orders that the exparte orders issued on the 25th day of October 2021 revoking the letters of administration granted to the applicants (the respondents herein) on 23/8/2011 vide Mukono Chief Magistrates Court Administration Cause No.279 of 2011 permitting the respondent's letters of administration to stand alone be set aside;
- 3. Court in its ruling in Misc. Application No. 311 of 2022 stated that the respondents (the applicants herein) did not file their reply and submissions to the application; yet the same were filed on 23/6/2022; that while making the ruling, court did not consider their reply and counsel's submissions; which is an error apparent on the face of record.
- 4. It is the applicant's case that on 25/10/2021; basing on a letter dated 18/3/2020 from the respondent's counsel filed in court on 30/10/2020; wherein it was stated that; "...on the issue of letters of administration held by the 1st – 3rd defendants (the respondents) have to be cancelled..."; the previous counsel for the applicants applied for and obtained an order cancelling the respondent's letters of administration vide Mukono Administration Cause No.279 of 2011; that had court considered the respondent's (applicants herein) reply in Misc. Application No.311 of 2022, it would have come to the conclusion that there was no just cause for the nonattendance of court by the defendants (respondents herein) in the main civil suit.
- 5. The applicants maintain that the letters of administration held by them granted by the High court cannot stand together with the respondents' letters of administration vide Mukono Administration Cause No.279 of 2011 which is of a lower court in respect of the same estate.
- 6. On the other hand, the respondents contest against the application; the 1st respondent deposed an affidavit contending that; the applicants are not

entitled to any of the reliefs and or orders sought as granting the same will not only amount to an abuse of court process but also a vast destruction of the estate property as the order which the applicants seek to set aside prevents both parties from wasting the estate until the final disposal of the main cause;

7. It is the respondents' contention that; before the applicants applied for letters of administration to the estate of the late Jafaali Kibuuka Sendege, they had knowledge that the respondents held letters of administration to the same estate; and never applied for revocation of the respondent's letters of administration before petitioning for the same; further, that non consideration of the applicant's submissions is no error apparent on the face of record; the respondents aver that this application lacks merit and is a wastage of court's time and it should be dismissed with costs.

Representation:

8. The applicants are self-represented whereas the respondents are represented by counsel Senkumi Nicholas of M/s Baraka Legal Associated Advocates.

Both parties filed written submissions which I shall take into consideration.

Background to this application:

- 9. The applicants herein instituted civil suit no. 254 of 2017 against the respondents; the suit came up for hearing on the 25th day of October 202; in the absence of defendants/the respondents and their lawyer; counsel for the plaintiffs/applicants herein; basing on a letter from the defendants' counsel orally prayed to this court to revoke letters of administration to the estate of the late Jafaali Kibuuka Sendege vide Mukono Chief Magistrates Court Administration Cause No.279 of 2011 granted to the defendants/respondents; and the same was revoked.
- 10. The defendants subsequently filed Misc. Application No.311 of 2022 seeking orders that; the exparte order issued on the 25th day of October 2021, revoking the Letters of Administration granted to the defendants/applicants in Misc. Application No.311 of 2022, on the 23/8/2011 vide Mukono Administration Cause No. 279 of 2011 be set aside; in the interest of justice and under court's inherent powers under section 98 of the

Civil Procedure Act and section 33 of the Judicature Act, this court found that there was a just cause for setting aside the aforementioned exparte orders; court decided that the orders given on 25/10/2021 be set aside to accord both parties an opportunity to be heard. The applicants being dissatisfied with court's ruling in Misc. Application no.311 of 2022 have applied for review of the said orders.

Issues for court's determination:

- 11. Both counsel in their written submissions framed differing issues for court's determination; which I have reframed into two issues for the pertinent disposal of this application as bellow:
- 1. Whether the application meets the criteria for review?
- 2. What remedies are available to the parties?

Court's determination:***Whether the application meets the criteria for review?*****The law:**

12. Section 82 of the Civil Procedure Act cap.71, provides that any person considering himself or herself aggrieved by a decree or order from which an appeal is allowed by the Act but from which no appeal has been preferred or 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 or the decree as it thinks fit.

Order 46 rule 1 and 2 of the Civil Procedure Rules provides:

- *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 hereby allowed, and who from 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 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.'

An aggrieved person was described in In **Mohamed Allibhai v. W. E Bukenya Mukasa & Departed Asians Property Custodian Board**, Supreme Court Civil Appeal No. 56 of 1996, Odoki, JSC, stated that; 'A person considers himself aggrieved if he has suffered a legal grievance...a person suffers a legal grievance if the judgement given is against him or affects his interest.'

The applicants filed their affidavit in reply and submissions; court determined the application against them because they did not file the pleadings in answer to the application; clearly this makes them aggrieved persons because they were condemned unheard yet their pleadings had been filed; they are therefore found to be aggrieved persons entitled to bring this application.

I shall consider whether the application has grounds for review.

- 13. The grounds for review were stated in the case of **FX Mubuuke vs. UEB High Court Misc. Application No.9 of 2005**; that there is mistake or manifest mistake or error apparent on the face of the record; that there is discovery of new and important evidence which after the 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; that any other sufficient reason exists.
- 14. In the affidavit in support of this application and the affidavit in rejoinder; it is stated that while making the ruling in Miscellaneous Application No.311 of 2022; this court did not consider the affidavit in reply and submissions of the respondents (the applicants herein); which the applicants point out as an error apparent on the face of record.
- 15. An error apparent on the face of record as a ground of review was considered in **Medico Legal Unit Versus Attorney General of the Republic of Kenya, EACJ, Application No.02 of 2012 (Arising from Appeal No.1 of 2011)**; where court stated and I quote: "An expression 'error apparent on face

of record' has not been definitively defined by statute, etc.; it must be determined by court's sparingly and with great caution. The 'error apparent' must be self-evident; not one that has to be detected by a process of reasoning...it must be an error which strikes one on mere looking at the record, and would not require any long drawn process of reasoning on points where there may conceivably be two opinions.";

- 16. According to the evidence adduced in this case, the applicants filed an affidavit in reply and submissions in Misc. Application No.311 of 2022; the copies are attached to affidavit in support of this application and marked as 'A' and 'B' both filed in this court on 23/6/2022; yet the ruling dated 24/08/2022 in Misc. Application no.311 of 2022 states that the affidavit in reply and submissions had not been filed.
- 17. There appears to have been misfiling such that the pleadings and submissions were not on file when court made a ruling, although they were received by registry; that being the case, I find that there is an error apparent on the face of record (and there is no proof that it was the applicants' fault); warranting a review of this court's ruling in Miscellaneous Application No.311 of 2022; since the applicants are aggrieved persons due to the fact that their pleadings and submissions were not considered in court's ruling.

Issue one is answered in affirmative. I shall therefore review the ruling taking into account the respondents' (applicants herein) affidavit in reply together with their submissions.

Review of the ruling:

- 18. The dictionary meaning of the term 'review' is to examine or study again; so the review of a judgment is to examine or study again the facts and judgment of the case. The applicants filed Miscellaneous Application No.311 of 2022 under Order 6 rule 7 and Order 9 rule 27 and

28 of the Civil Procedure Rules S. I 71-1 and section 98 of the Civil Procedure Act, seeking orders that; the exparte order issued on the 25th day of October 2021 revoking the Letters of Administration granted to the applicants on the 23rd day of August 2011 vide Mukono Administration Cause No.279 of 2011 and permitting the respondents' letters of 3rd February 2016 to stand alone be set aside; that a preservation order be made to protect the estate from wastage, and sale, pledge, mortgage by the plaintiffs who are wantonly dealing with the same till the final disposal of the suit; and costs of the application;

- 19. The major contention by the applicants is that counsel for the Respondents' oral application for revocation of letters of administration in absence of both the applicants and their lawyer which was granted on 25/10/2021 when civil Suit No. 254 of 2017 came up for hearing; and yet the same was never prayed for in the pleadings, is procedurally illegal and infringed on the fundamental and non derogable rights to fair hearing.
- 20. In regards to the affidavit in support of the application specifically under paragraph 7; the applicants plead that they instructed their counsel to represent them and communicate to court of their inability to attend court as they had symptoms of COVID-19 and since they had previously met with their counsel, it necessitated him to pass by hospital to check his status which delayed him and that by the time he reached court, court had already pronounced itself and revoked letters of administration vide Mukono Administration Cause No.279 of 2011;
- 21. I have perused the affidavit in reply to the application deposed by the 3rd respondent; the affidavit in reply presents facts that delve into matters to be resolved in the main civil suit; yet this is application for setting aside exparte orders; however, the respondents argue that the applicants have no justification for failing to turn up in court when the suit was called for hearing; having been duly served with hearing notices through the respondent's counsel. Counsel for the respondents submits that the applicants did not present proof to justify counsel's failure to attend court, neither were they in court, that there was no explanation given to court for non-appearance;
- 22. The respondents counsel further submits that the application to cancel letters of administration issued to the defendants/applicants was made based on the applicants' letter through their counsel dated 18/3/2020 served on the respondent's counsel; that in the said letter the applicants expressly conceded

to cancellation of letters of administration; therefore, that the applicants did not have to be part of the proceedings in order for their letters of administration to be cancelled.

Court's consideration of Miscellaneous Application No.311 of 2022:

23. The applicants seek to set aside the exparte orders under Order 9 rule 27 of the Civil Procedure Rules; which provides that: -

"In any case in which a decree is passed ex parte against a defendant, he or she may apply to the court by which the decree was passed for an order to set it aside; and if he or she satisfies the court that the summons was not duly served, or that he or she was prevented by any sufficient cause from appearing when the suit was called on for hearing, the court shall make an order setting aside the decree as against him or her upon such terms as to costs, payment into court, or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit; except that where the decree is of such a nature that it cannot be set aside as against such defendant only, it may be set aside as against all or any of the other defendants also." (emphasis added)

- 24. The conditions in an application of this nature are: the applicant was not duly served with summons and has furnished sufficient cause to set aside the judgment of the court.
- 25. It is undisputed that the applicants were served with hearing notices for the slated hearing date of 25/10/2021; in fact, according to their pleadings, the applicants admit that they were aware of the hearing date; however, they blame COVID-19 symptoms for their non-attendance; and that their counsel was prevented from appearing on time for court hearing as he had to take precaution having previously been in contact with the applicants.
- 26. Citing **Bishop Jacinto Kibuuka v The Uganda Catholic Lawyers' Society & 2 Others, Miscellaneous Application No. 696 of 2018**; this court in the ruling found no proof of the applicant's sickness; nevertheless, court took note of the fact that the Standard Operating Procedures for the management of COVID 19(SOPs) issued by the Ministry of health required anyone who had COVID 19- like symptoms to isolate, among other measures;

court further noted that; not everybody who had such symptoms would have necessarily seen a doctor; it is on that basis that court found the reason justifiable for the non-attendance of the applicants and their counsel.

- 27. Further, in the ruling, this court decided not to delve into the question as to whether the revocation of letters of administration was prayed for or not; since such would be going into the merits of the case; court stated that*; "when an application for orders to set aside orders made exparte like in this case, the argument should be whether the matter justifiably proceeded exparte or not; for going into the merits of the decisions would be taking over powers of appeal or revision; what is required of an applicant is to show that but for specific, diligent and justifiable reasons he/she failed to attend court but would like to be let in so that he/she is heard." ;*court cited *Rawal vs Mombasa Hardware Ltd (1968) EA 392*; where it was held that; court has control over its order until it is perfected*.*
- 28. The peculiar nature of this case is that; there exist two letters of administration in respect of the same estate; this court still maintains as per the ruling that; court' orders should come from a position of fairness accorded to both parties; this is so, because the implication of the exparte orders is that the main suit would be disposed of yet no evidence had been adduced; and the defendants/applicants had not been accorded fair hearing before the cancellation of the letters of administration held by them; (see: *Article 44 of the Constitution of the Republic of Uganda, 1995*); as their claim is that the plaintiffs/

respondents never prayed for the revocation of the letters to the estate held by the applicants; therefore the oral application to revoke the afore said letters infringes on the applicants' constitutional right to fair hearing.

- 29. Therefore, upon reviewing the ruling; and in consideration of section 98 of the Civil Procedure Act and Section 33 of the Judicature Act; I am still of the view that the ends of justice require that Miscellaneous Application No.311 of 2022 be granted to afford both parties the occasion of adducing evidence and being heard in the main suit on merit.
- 30. In the premises, the orders as given in Miscellaneous Application No.311 of 2022 setting aside exparte orders in the main suit are confirmed and upheld.

In conclusion, this application partially succeeds with the following orders: -

- 1. The orders issued in Miscellaneous Application No.311 delivered on 24/8/2022 setting aside the exparte orders issued on 25/10/2021 in Civil Suit No.254 of 2017 are upheld.
- 2. Each party shall bear their own costs.

Ketrah Kitariisibwa Katunguka Judge 21/01/2023.

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