

UGANDA / JUDGMENT

Kanyeihamba v Nile Construction General Contractors Ltd & Anor (Miscellaneous Application No. 485 of 2016) [2016] UGHCLD 25 (11 November 2016)

[2016] UGHCLD 25

COURT

HC: Land Division (Uganda)

BEFORE

Bashaija, J

CASE / FILE NUMBER

Miscellaneous Application No. 485 of 2016

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(LAND DIVISION)

MISCELLANEOUS APPLICATION NO. 485 OF 2016

(ARISING FROM CIVIL SUIT NO. 024 OF 2016)

PROF. DR. G. W. KANYEIHAMBA ::::::::::::::: APPLICANT

VERSUS

1. NILE CONSTRUCTION GENERAL

CONTRACTORS LTD.

1. ENGINEER SERTZU MERSKEL ::::::::::::::: RESPONDENTS

BEFORE: HON. MR. JUSTICE BASHAIJA K. ANDREW

R U L I N G:

The Applicant brought this application under Section 82 and Section 98 of the Civil Procedure Act (CPA) seeking orders that;

1. ***An order made by this Honourable Court in HCCS No. 024 of 2016, Nile Construction General Contractors Ltd. & Another vs. Prof. Dr. G. W Kanyeihamba, on 31st March, 2016 directing the Applicant to deposit in this court signed transfer forms and duplicate certificate of title for land at Bweya Busiro be reviewed and set aside; and***
2. ***Costs of this application be provided for.***

The grounds of the application are briefly that;

1. ***The Applicant is aggrieved by the said order;***
2. ***The only dispute between the Applicant and Respondents is the location of land measuring 5.16 acres leased by Applicant out of his land described in Recital 1 of the Agreement of sale dated 12th January, 2015;***
3. ***The Respondents wrongly shifted the boundary marks of 5.16 acres leased to them by the Applicant and located them in other parts of the said land which was not leased to them by the Applicant;***
4. ***Unless the said order is reviewed and set aside, the said dispute will remain undetermined to the Applicant detriment;***
5. ***The Applicant has since January 2015 been indisposed and the report by the Registrar Mediation to this court that the Applicant was not interested in mediation is incorrect;***
6. ***It is in the interest of justice that the said order is reviewed and set aside for the dispute between the Applicant and the Respondents to be determined by court on merit.***

The application is supported by the affidavit sworn by Prof. Dr. G. W Kanyeihamba, the Applicant. He essentially replicates the grounds above but amplifies on them. In paragraph 4, he states that the reason why he has failed to agree with the Respondents is that while he was hospitalized in the UK, the 1st Respondent and the Applicant's former lawyer Mr. Orono Emmanuel shifted boundary marks of the actual area of the land leased to the Respondents and located them in other parts of the Applicant's land which he had not leased to them. In the paragraph 6, that to resolve the dispute, the parties employed independent land surveyors who made their respective reports (Annexure "B" & "C") whose findings the Respondents have refused to accept at least on four occasions.

In respect to court orders in HCMA No. 405 of 2016, (Arising from HCCS No. 024 of 2016) where he was ordered to produce in court signed transfer forms and the duplicate certificate of title for the suit land, the Applicant denies being in contempt of court. He instead states that when he discovered that he was summoned very late, he nevertheless appeared on the appointed day before the Deputy Registrar of this court and the parties heard and then referred to the trial Judge.

The Applicant goes on in detail to give evidence of how he entered into a lease with the Respondents and why he disagreed with them for wrongly claiming that the land described in the Recital 1 of the lease agreement 5.16 acres included the Applicant's rock or the 0.6 acres which is situated far away from what he leased to them. Further, that he declined to transfer the land to the Respondents because he did not agree to lease all of it to them. In addition, that the balance of Shs. 198,200,000/= which is due to him is in respect of 5,16 acres only and not the whole of the land described in Recital 1 of the agreement, measuring 7.01 acres which is on the left side of the road.

The Applicant further states that the Respondents have adamantly refused to return his mailo land titles in this particular case and for another rock he leased to them for which they unlawfully constructed what they call an access road without his knowledge or consent, and yet he had already provided them access road to the said rocks, namely; Block 397 Plots 264, 284, and 287. That the Respondents were advised to return the titles but have refused.

The Applicant also states that he is aggrieved by the court order of 31st march, 2016 directing him to execute a transfer of the land in dispute to the Respondents in that the dispute between him and the Respondents is only on the exact location of acreage of the said land the Respondents should be tenants of. The Applicant also states that he is not aware of the proceedings that led to the court order which he is said to be in contempt of.

The Respondents did not file affidavits in reply owing to the fact that they had prior to the Applicant filing this application filed HCMA No.405 of 2016 (Arising from HCCS No.024 of 2016) against the Applicant for contempt of court orders. Given the very short time between their filing both applications were fixed for hearing on the same day. This court was acutely alive to the position that contempt of court proceedings ordinarily take precedence as was stated in ***Wildlife Lodges Ltd vs. County of Narok & Another [2005] 2 EA 344 ((HCK).*** However, on the date for hearing of both applications the application for contempt of court was stayed and court entertained the instant application for review of the court orders in HCCS No.024 of 2016; arising out of which the Applicant was said to be in contempt of. This was because if the instant application was a proper case for review, then the issue of contempt would not arise. The reverse would, however, have the effect that the contempt proceedings would be revived, and the Applicant be given a notice to show cause why he should not be detained in civil prison for contempt of court orders.

In order to arrive at a just and fair decision, this court directed the Commissioner for Land Surveys & Mapping Department (Entebbe) to go to the land and carry out a survey to determine the extent and exact location of 5.16 acres on the land. In particular he would determine where it starts and where it ends. The surveyor would be guided by the lease agreement of the parties in Recital 1 which made specific reference to the particular plots named therein to determine the exact location and extent of 5.16 acres on the land. He would then make a report to this court. It was further ordered that all the parties were free to be present during the survey exercise personally or through their representatives; and the surveyor was free to interview the LCs of the area, neighbors of the land, and any persons conversant with the land. Costs of the survey would

be borne by the Applicant, and costs of the application would abide the outcome of this application. As already stated above HCMA No. 405 of 2016 against the Applicant for contempt of court orders in the main suit in HCCS No. 24 of 2016 would be stayed pending the outcome of this application.

The specific issues for determination in this application are;

1. ***Whether this application meets the conditions for review under the law.***
2. ***What are the remedies available to the parties?***

Resolution:

Issue No.1: Whether this application meets the conditions for review under the law.

The application is brought under Section 82 and 98 CPA. It is worth noting that reference to Section 98 CPA (supra) regarding the inherent power of court is rather redundant. It is now settled that court cannot invoke its inherent power where there is specific provision of the law or rules which would meet the necessities of the case. See: ***Magem Enterprises vs. Uganda Breweries Ltd [1992] KALR 109; Biiso vs. Tibamwenda [1991] HCB 92.*** Therefore, the specific applicable provision of the law in respect of an application for review of court orders is Section 82 CPA (supra) which provides as follows;

“Any person considering himself or herself aggrieved by decree or order of court from which an appeal is allowed but from which no appeal has been preferred or by a decree or order from which no appeal is allowed may apply for a review of judgment to the court that passes the decree or made the order.”

Order 46 r.1 (a) and (b) more or less reproduce the wording of the Section 82 CPA (supra) verbatim but add the following;

“.....and 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 an account of same mistake or error apparent on the face of the record, or any 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.”

Clearly, O46 r.1 (b) CPR lays out the conditions which the Applicant seeking orders of review must fulfill in order to fall within the ambit of Section 82 CPA (supra). Interpreting the same Section, the court in ***Outa vs. Uganda Transport Company [1975] HCB 340*** held that the particular conditions are;

1. ***Discovery of new and important matters of evidence previously overlooked by excusable misfortune.***
2. ***Some mistake or error apparent on the face of record.***

3. *For any other sufficient reason but it has been variously held by courts that the expression “sufficient” shall be read as meaning sufficient of a kind analogous to (a) and (b) above.*

A careful reading and proper appreciation of the grounds of the application and the supporting affidavit sworn by Prof. Dr. G. W. Kanyeihamba easily reveals that there is nothing in them which in the least falls within the scope of the conditions for review under the law. There is no; and it was not even stated as a ground, that there is discovery of new and important matter of evidence previously overlooked by the Applicant after the exercise of due diligence was not within his or her knowledge*. All that the Applicant is stating in his affidavit is simply his considered justification as to why he could not meet his part of the bargain under the agreement with the Respondents. There is nothing in the grounds advanced to suggest that they are new facts or matters which were not available to him when he filed his defence to the main suit on 08/02/2016. He did not raise them; implying that he did not consider them necessary or essential to his defence. Therefore, to raise them now in an application for review is merely an afterthought and untenable. In any case, they do not meet the criteria of “new and important matters of evidence previously overlooked by excusable misfortune.”

Secondly on the same point, the reading of the content of the whole application simply shows that it is an attempt to set up an entirely new “defence” to the main suit by way of an application for review; which is again untenable. The Applicant duly filed his defence to the main suit in HCCS NO.024 of 2016. The suit was determined out of which the court made orders which the Applicant now seeks to be reviewed. He cannot be allowed to set up an entirely new and different defence to the main suit from the one he initially filed, disguised as an application for review.

It is also apparent from his application that the Applicant has certain remedies which he would seek against the Respondent. For instance he claims that the Respondent took his other mailo titles for other land unrelated to the land in issue, and that the Respondent should return them, and that this constitutes one of the reasons he has not agreed (read comply) with court orders in HCCS No.024 of 2016. Incidentally, the Applicant did not set up a counterclaim in his defence to the main suit for such reliefs against the Respondent to first hand over the allegedly retained mailo titles. These are completely different matters from the subject matter of the trial in HCCS No.024 of 2016. They cannot be raised now in an application as a ground to review the court order which was made on basis of the pleadings concerning the subject matter in HCCS No.024 of 2016.

It is also necessary to point out that the court order for which the Applicant seeks a review was duly arrived at during the Scheduling Conference in the main suit. This was done in the presence of Counsel Applicant then Mr. Raphael Baku of *M/s Rwaganika, Baku & Co. advocates* and Mr. Brian Kirima of *M/s Katarikawe & Co. Advocates* Counsel for the Respondents. The court order came about after it was duly appreciated by Counsel for both parties, during the conferencing, that the defendant was not materially disputing any of the plaintiffs’ claim in the main suit. In fact, the court order was made on basis of a consensus of both Counsel that there was indeed no credible defence to the suit. The only outstanding question was who should take the first step; whether it was defendant who would sign the transfer forms and hand over title to the plaintiffs after which the latter would make payment of the outstanding balance or vice versa. Again this

question was found to be settled by the clear terms of the parties' agreement on that point. The last installment was due on 31/12/2015 upon which the defendant would sign the transfer forms and hand over the title of the land to the plaintiffs. It happened that that was at time the defendant out of the country in the UK for medical treatment. The plaintiff had, however, earlier on 10/11/2015 written a letter the defendant to collect the last payment as he signs the transfer forms and hands over title. The received signature shows that the letter was received the following day on 11/11/2015.

Therefore, at that stage of the transaction there was evidently no any dispute; let alone in the form the Applicant would now want to portray it in this application. It was simply a question of signing the transfer forms and handing over the title and getting paid the last installment of the purchase price by the Respondent. Indeed, that was the premise upon which the court order in HCCS No.024 of 2016 was made. The proceedings pursuant to which the court order was issued are on court record dated 31/03/2016. It is therefore quite misleading of himself by the Applicant to turn around and claim that he is not aware of such proceedings when he actively participated in them through his duly appointed lawyers.

Also in this application for review, the Applicant does not show that it is premised on ground of "an error apparent on face of the record". This is simply because none exists in the order sought to be reviewed. The expression "error apparent on face of the record" refers to clerical or typographical errors, or errors in the similar category. Therefore, without either demonstrating discovery of new and important matter of evidence previously overlooked by the Applicant by excusable misfortune or an error apparent on face of the record, there would be no sufficient reason to review the court order since the expression "sufficient" means sufficient of a kind analogous to the other two.

It is sufficient upon reading the affidavit supporting the application to appreciate that the Applicant just had a change of heart after he had duly concluded the transaction with the Respondents. is easily demonstrated in a number of instances. To start with, in his written statement of defence, at paragraph 5, the defendant's defence was that the plaintiffs took all his 7.1 acres instead of 5.16 acres which he had leased to them. In his affidavit supporting the instant application, however, he shifts position and states that the Respondents took land that is different from what he leased to them at all. This is certainly untrue. There are several survey reports clearly showing the extent and exact location of the 5.16 acres on the land. This was even the basis upon which the Applicant signed the mutation forms which categorically indicate the size of the area innacreage, block and plot numbers. According to the lease agreement dated 12/01/2015 the 5.16 acres was stated to be;

"...that part of it that remains of the land on the left of the main road public road that passes through the Country Farm similarly owned by the Landlord..."

This invariably means that 5.16 acres was the only land remaining of the land the Applicant owned in that particular location. Any other interpretation would be quite absurd. A change of heart by a party cannot be the basis for reviewing a court decision.

The other instance is that when the exact acreage was ascertained the Applicant signed mutation forms and handed over his passport photographs to the Respondents on 06/05/2015, he soon thereafter refused to hand over signed transfer forms and the title. The Applicant was sued for specific performance by the Respondents, and this time round he claimed that it was the Respondents who had breached the terms of agreement by not paying the last installment of the purchase price. When it during the scheduling conference that the Respondents were not in breach at all and the Applicant ordered to specifically perform his part of the agreement by producing in court signed transfer forms and the title before the Registrar, he refused to comply and again changed position stating that the Respondents hold his other mailo certificates of title for other land which they have refused to hand back to him. He shifted stance yet again claiming that the location of the 5.16 acres is not the land where he leased to the Respondents. He also introduced totally different allegations that the Respondents connived with his former lawyer one Orono Emmanuel to shift the boundary marks of the actual area of the land he leased to the Respondents and located them in other parts of his land he had not leased to them. To put it mildly, it amounts to the Applicant taking the court on a fishing expedition and for granted. Even assuming that the marks had been shifted by the Respondents and the Applicant's former lawyer, which is a rather outlandish proposition by the Applicant, a re – survey would still establish the exact location and extent of the 5.16 on the land. It will be recalled that at that stage before the Applicant went for medical treatment abroad, the survey had already been done and completed. However to ensure that the matter is put to rest once and for all, a re-survey is precisely what this court ordered to be done and it was done as will be shown later in this ruling. Overall, the grounds advanced in the application do not meet the criteria under the law for a review of court orders in any manner whatsoever.

It would follow then that the failure and/ or refusal to comply with the court orders in HCCS No. 024 of 2016 by the Applicant for whatever reason would inevitably revive HCMA No. 0405 of 2016 for contempt of court proceedings. The Applicant will thus be required to appear in court in person in to show cause why he should not be detained in a civil prison for disobedience of a court order.

It has been held by the Court of appeal; and the decision was upheld by the Supreme Court, in ***Housing Finance Bank Ltd & Another vs. Edward Musisi CAMA No.158 of 2010,*** that a party who knows of an order, regardless of whether, in view of that party the order is null and invalid or irregular, cannot be permitted to obey it, by reason of what that party regards the order to be. It is not for party to choose whether or not to comply with such an Order. The order must be complied with in totality in all circumstances by the party concerned. This is to ensure that the court issuing the order not only must not be held in contempt, but must not whatever the circumstances, appear to be held in contempt by any litigant. Otherwise to disobey an order of court, at any party's choice or whims, on the basis that such an order is null or irregular, or is not acceptable or is not pleasant to the party concerned, as it is to commit contempt of court. A court of law never acts in vain.

The apt observations of the Superior Court reproduced above apply with equal force to the Applicant in this case. The Applicant would do better to purge himself of the contempt by fully complying to avert the inevitable consequences that naturally follow upon being found in contempt of court orders.

As already stated above the court, in order to meet the ends of justice stayed proceedings in HCMA No. 405 of 2016 (Arising out of HCCS No. 024 of 2016) against the Applicant for contempt of court orders for the reasons already assigned in this ruling. Also after carefully evaluating the Applicant's contentions in his affidavit supporting the application, this court directed the Commissioner for Land Surveys & Mapping, Entebbe, to do a re-survey to determine the exact location and extent of the 5.16 acres on the land. This would aid court to determine the issue as to the exact location of the 5.16 acres on Block 397 Plot 1802 and 1692 as per the lease agreement.

PW1 Dr. Yefesi Okia the Ag. Commissioner in charge Land Surveys & Mapping in the Country testified that upon receipt of the court order and appreciating the specific instructions therein, he assigned a staff to carry out the exercise, and that it was done to his satisfaction and a report was properly done, and he forwarded it to court. The report is marked as Exhibit P1. PW1 further stated that he never personally went to the land to do the survey but owned up the report because it was done by his staff to his satisfaction and it was correct.

PW2 Sam Okirya, the surveyor who carried out the actual work of re- surveying the land, stated that he was assigned to by PW1 demarcate 5.16 acres from Busiro Block 393 Plots 1802 and 1692. That he started by sending a letter of introduction to the LCs of the area so that when carrying out the survey exercise he is under their watch/protection.

At the land PW2 stated that he got the Applicant, the representative of the Respondent one Dewight Sertzu, the LC Chairman of the area Mr. Jimmy Kimera, and Saali Mbazira a neighbor, among others. The Applicant showed PW2 where to demarcate 5.16 acres. PW2 asked the Applicant where else to measure in case the land shown to him did not add up to 5.16 acres, and the Applicant showed him another plot. PW2 stated that the first plot showed by the Applicant was a fenced farm area measuring 3.49 acres, which PW2 marked as "B" on the map in Exhibit P1, and it falls within Plot 1802 and Plot 1692 respectively. The other part the Applicant showed falls in Plots 264, 266, and 287 and it measures 1, 34 acres and PW2 marked as "A" on Exhibit P1.

PW2 further stated when the Applicant showed area marked "A", the Respondent said that that area already had a running lease. The Respondent for his part also showed the area already marked "B". He also showed area marked "C" which measures 0.14 acres. He further showed area marked "D" which measures 1.53 acres. PW2 stated that just as he had started measuring area marked "D", the Applicant left, but told him to continue assuring PW2 that he would be back soon. He did not come back.

PW2 testified that the Plots 264, 266, and 287 covered by area marked "A" shown to him by the Applicant were not the plots he was assigned to measure. Furthermore, that area marked "B" shown to him by both parties fell within the plots which he was assigned to measure. PW2 also stated that area marked "D" and "C" shown to him by the Respondent also fell within the plots he

was assigned to measure. His findings after the computation are that the area marked “B”, “C” and “D” as shown by the Respondent added up to 5.16 acres. The area marked “B” and “A” as shown by the Applicant added up to 4.83 acres.

The above professional findings of the surveyor not only settle the issue of the extent of 5.16 acres but also its exact location on the land. Indeed when the findings of PW2 are evaluated against the pleadings of both parties in the main suit, it is discovered that when the survey map on Exhibit P.1 is substantially the same as the “Working Diagram” in Annexure “B” which is another survey report by M/s. Geo Properties Surveyors & Real Estate Consultants Ltd, attached to the plaint. It apparently indicates that it was commissioned by the Applicant as it is also addressed to him. The two are describe the same exact location of the area covered by 5.16 acres on the land.

Besides the above, Annexure “C” to the plaint which is yet another survey report, apparently also commissioned by the Applicant and addressed to him, done by M/s. Synergy Surveys & Associates, similar “Observations/Findings” were made as by PW2 and M/s. Geo Properties Surveyors & Real Estate Consultants Ltd.

PW2 also denied chasing away the Applicant as claimed by the latter in his letter to the court Deputy Registrar of this court in which the Applicant wrote that he would reject the findings of the surveyor on that account, among others, such as there being a crowd of people during the survey who were unknown to the Applicant.

Court confirms receipt of the Applicant’s letter written through his lawyers dated 26/09/2016 raising similar complaints and stating that he will vigorously reject the survey report. I can only observe that the letter was uncalled for. Parties or their lawyers are not at liberty to reject evidence adduced by witnesses. The parties or their lawyers are only entitled to cross - examine witnesses on their evidence if they so wish to discredit it, but cannot not to reject it. In this case, Counsel for the Applicant did cross-examine the witnesses on their report, but did not successfully discredit it.

I have gone to great length into the evidence adduced by the surveyors purposely to show that even assuming that the application for review succeeded, which it does not, the Applicant still has no credible defence to the main suit, and even the fresh claims raised in the application are devoid of any merit. Re-hearing the case as sought in this application would just be a futile academic pursuit, and court cannot undertake it merely to satisfy the litigious nature of a party. That is not within the business of court.

The net effect is that the application for review is dismissed with costs. The Applicant is given up to 15/11/2016 to comply with court orders in HCCS No.024 of 2016 failure of which he must appear personally on the same date to show cause why he should not be committed to prison for contempt of court order. It is then that the fate of HCMA No.405 of 2015 will be concluded.

BASHAIJA K. ANDREW

JUDGE

11/11/2016

Mr. Andrew Kabombo holding brief for JF. Kanyemibwa Counsel for the Applicant present.

Mr. Brian Kirima Counsel for the Respondents present.

Applicant absent.

1st Respondent represented by the 2nd Respondent present.

Mr. Godfrey Tumwikirize Court Clerk present.

Ruling read in open Court.

BASHAIJA K. ANDREW

JUDGE

11/11/2016

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