

UGANDA / JUDGMENT

Kawoya v Mawalazi (Ma No. 87 of 2013) [2013] UGHCLD 67 (4 July 2013)

[2013] UGHCLD 67

COURT

HC: Land Division (Uganda)

BEFORE

Tuhaise, J

CASE / FILE NUMBER

Ma No. 87 of 2013

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THE REPUBLIC OF UGANDA

IN THE HIFGH COURT OF UGANDA AT KAMPALA

LAND DIVISION

MISCELLANEOUS APPLICATION NO. 87 OF 2013

KAWOOYA GEORGE WILLIAM..... APPLICANT

VERSUS

MAWALAZI SAMUEL (Administrator of the estate Mesusera A Tazalika)..... RESPONDENT

BEFORE LADY JUSTICE PERCY NIGHT TUHAISE

RULING ON PRELIMINARY OBJECTION

At the time of hearing this application, learned Counsel Rukundo Henry for the respondent raised a preliminary objection (PO) that the application which seeks to review the judgement in civil suit no. 420/2010 does not identify the paragraphs sentences and words that need to be reviewed, neither does it identify which order should be varied. He submitted that there is no apparent error on the face of the record that has been identified by the motion or affidavit in support. He argued that since the applicant states in ground 2 of the notice of motion that he is the registered proprietor of the property and is in possession of the same, he cannot be aggrieved by the judgement, which would mean there is no cause of action. He submitted that the consent to an injunction was entered when the Administrator General represented by Robert Bogere brought to the attention of court an illegality as an officer of court. He prayed that the application be struck out, and if the applicant is aggrieved, he should file an ordinary suit and call witnesses so that the case is heard on the merits. He also prayed that the costs of the suit, if ordered by court, should be paid by the estate of Tazalika not Mawalazi personally as he is just an

administrator of the property which forms part of the estate.

Learned Counsel Ahmed Kassim for the applicant opposed the PO. He prayed that it be dismissed and the applicant be permitted to proceed with the application. He submitted that section 82 of the Civil Procedure Act and Order 46 of the Civil Procedure Rules provide that any person who is aggrieved may apply for review of judgement; that the grounds for review are well set out in the application and its supporting affidavit; and that the applicant is aggrieved within the meaning set out in **Muhammed Alibhai V Bukenya SCCA 56/1986**. He argued that much as the applicant is in occupation, the court order can be executed anytime.

The respondent's counsel submitted in rejoinder that the case of **Muhammed Alibhai V Bukenya** cited by the applicant's counsel is not applicable to the instant application. He argued that a person should have suffered legal grievance, and that there is no evidence that the applicant suffered legal grievance.

Order 46 rule 1 of the Civil Procedure Rules provides as follows:-

*"*Any person considering himself or herself aggrieved – **

1. **by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or**
2. **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 some other sufficient reason, desires to obtain a review of the decree passed or order made against him or her, may apply for review of judgement to the court which passed the decree or made the order.*"*

The same provisions are reflected in section 82 of the Civil Procedure Act.

I have carefully addressed the application and the affidavit evidence on record, including the submissions of both counsel on the PO.

The application seeks this court to review its judgement in civil suit no. 420/2010, to vary the decree dated 3/10/2011, to vacate the order of injunction arising from civil suit no. 420/2010, to cancel the registration of the administrators of the estate of Mesusera Tebazalika in respect of Block 17 Plot 604, and for costs. The grounds of the application are that the applicant is the registered proprietor of all that land comprised in Block 17 Plot 604 measuring approximately 0. 21 hectares having purchased the same from N and K Estates Ltd; the judgement in civil suit no. 420/2010 which adversely affects the applicant's interest in the suit land was reached without making him a party to the suit and/or giving him the right to a fair hearing; that the respondent did not disclose to court all the relevant information regarding the proprietorship of Block 17 Plot 604 before the judgement was made; that there is an apparent error on the face of the record which should be reviewed by this honourable court; and that it is in the interests of justice that

this honourable court grants the orders as prayed for.

The first question to address is whether the applicant is an aggrieved party for purposes of applying to have the **ex parte** judgement in civil suit no. 420/2010 set aside. It was held in **Muhamed Alibhai V Bukenya SCCA 56/1986** that an aggrieved person is a person who has suffered legal grievance as a result of a judgement and this includes a person not a party to the proceedings. However the grievance must be a legal grievance. In **Ladak Abdulla Muhamed Hussein V Griffiths Isingoma Kakiiza & Others Civil Appeal No. 08/1995**, unreported, it was held that a person suffers legal grievance if the judgement given is against him or affects his interests.

The applicant was not a party to the main suit, which was filed against the Administrator General and the Registrar of Titles. The hearing of the suit was **ex parte** following an a default judgement entered against the respondents by the registrar of this court, after which the case was forwarded to this court for formal proof. The grounds the applicant has set out in the instant application are, among others, that he is the registered proprietor of all that land comprised in Block 17 Plot 604 measuring approximately 0. 21 hectares having purchased the same from N and K Estates Ltd; and that the judgement in civil suit no. 420/2010 which adversely affects his interest in the suit land was reached without making him a party to the suit and/or giving him the right to a fair hearing.

Thus, without going into the merits of the application, on the face of the application, the applicant is pleading that the **ex parte** judgement adversely affects his interests as registered proprietor of the suit land. As to whether this is factually correct or not is not a subject of this PO. It will be determined when the application is heard and determined on the merits. This is in line with **Mukisa Biscuit Manufacturing Co V West End [1969] EA 696**, where Sir Charles Newbold at page 701 stated that:-

“A preliminary objection raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct.”

In the circumstances, and on the foregoing authority, I find that the applicant, on the face of the application, is an aggrieved party for purposes of applying to have the **ex parte** judgement in civil suit no. 420/2010 set aside.

The second question is on whether the applicant identified the orders to be reviewed. With respect, I do not find merit in the respondent’s counsel’s submissions that the application which seeks to review the judgement in civil suit no. 420/2010 does not identify the paragraphs sentences and words that need to be reviewed, neither does it identify which order should be varied. The application clearly seeks this court to review its judgement in civil suit no. 420/2010, to vary the decree dated 3/10/2011, to vacate the order of injunction arising from civil suit no. 420/2010, to cancel the registration of the administrators of the estate of Mesusera Tebazalika in respect of Block 17 Plot 604, and for costs of the application.

The third question is whether the apparent errors on the face of the record have been identified by the applicant. The respondent's counsel submitted that there is no apparent error on the face of the record that has been identified by the motion or affidavit in support. This, in my opinion, is a matter to be addressed when the application is heard in the merits. Delving into the merits or otherwise of the applicant's affidavit evidence would tantamount to hearing the application, which is pre mature at this stage. Suffice it to say that ground 4 of the application alleges an apparent error on the face of the record and paragraph 13 of the applicant's affidavit in support of the application alludes to the same. Questions of whether this has been rebutted by the respondent's affidavit evidence will be addressed when the application is being heard on the merits.

In the premises, for the reasons given and authorities cited, this preliminary objection is overruled with costs. The applicant is permitted to proceed with the application.

Dated at Kampala this 04th day of July 2013.

Percy Ntuhaise

JUDGE.

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