

UGANDA / JUDGMENT

Luwemba & Another v Nakibirango & 4 Others (Miscellaneous Application 349 of 2022) [2024] UGHCFD 67 (29 August 2024)
[2024] UGHCFD 67

COURT

HC: Family Division (Uganda)

BEFORE

Echokit, J

CASE / FILE NUMBER

Miscellaneous Application 349 of 2022

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA (FAMILY DIVISION)

MISCELLANEOUS APPLICATION NO. 349 OF 2022 (ARISING FROM MISC. APPLICATION NO. 614 OF 2019) (ARISING OUT OF CIVIL SUIT NO. 136 OF 2014) (ARISING FROM ADMINISTRATION CAUSE NO. 229 OF 2014)

LUWEMBA JOHN 2. NIGGUNDU MARY :::::::::::::::::::::::::::::::

VERSUS

| 1. NAKIBIRANGO JANET KIGGUNDU | |

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| | <table> ENGINEERING OF THE SECOND PARTY</table> |

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**| | 2. MUGERWA NELSON
3. KAWAGGA VICENT
4. NANYOMO JANE
5. MUKASA JAMES |**

Before: HON. JUSTICE DR. CHRISTINE A. ECHOOKIT

RULING

BACKGROUND:

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As I understand it, there was HCCS No. 1046 of 1996 by Nakibirango Janet Kiggundu against Perusi Bukirwa and the Administrator General. The decree of 18th February 2002 in that suit ordered the recovery of the principal residential holding at Kyebando by Nakibirango Janet Kiggundu from Perusi Bukirwa the 1st Defendant. In the judgement of Justice Byamugisha dated 14th November 2005 in Court of Appeal Civil Appeal No. 4 of 2003 (Perusi Bukirwa vs. Nakibirango Janet Kiggundu) arising from HCCS No. 1046 of 1996, court upheld the order for the recovery of the residential holding by Nakibirango Janet Kiggundu.

Later, the 2nd and 3rd Respondents filed Civil Suit No. 136 of 2014 against the 4th and 5th Respondents seeking to vacate a caveat the 4th and 5th Respondents had lodged on Administration Cause No. 229 of 2014 for letters of administration and to have the estate of the late Kiggundu George William distributed. A consent judgement was agreed by the parties in the said suit and was endorsed by court on 15th day of March 2019.

Subsequently, the 1st Respondent who was not a party to Civil Suit No. 136 of 2014 applied for a review of that consent judgement by way of Misc. Application No. 614 of 2019. The ruling of His Lordship Justice David Matovu dated 14th September 2020 in Misc. Application No. 614 of 2019 set aside the consent judgement in Civil Suit No. 134 of 2014.

The learned judge in paragraph 26 of his ruling stated;

"I do find that it was improper to include the principal residential holding amongst the properties that were to be shared in the Consent Judgement in Civil Suit No. 136 of 2014 because this property had been decreed by competent courts to belong to the Applicant in High Court Civil Suit No. 1046 of 1996 and upheld in Court of Appeal Civil Appeal No. 4 of 2003."

Consequently, the Applicants who were neither party to Civil Suit No. 136 of 2014 nor Misc. Application No. 614 of 2019 filed the present application against the Respondents.

This application is brought under Section 33 of the Judicature Act, Section 82 of the Civil Procedure Act, and Order 46 rule 1, 2 and 8 of the Civil Procedure Rules for orders that the ruling and orders by this court vide Misc. Application No. 614 of 2019 be reviewed and set aside; and costs of this application be provided for.

The application is supported by the affidavits of Luwemba John and Kiggundu Mary the 1st and 2nd Applicants, respectively. The grounds of the application are;

- a) that the Applicants have interest in land comprised in Kyadondo Block 210 Plot 173 at Kyebando.

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- b) That by the time the 1st Respondent brought Misc. Application No. 614 of 2019, the Applicants were occupying the said land as children of the Late Kiggundu, and the 1st Respondent threatened the Applicants with eviction on the basis of Misc. Application No. 614 of 2019.
- c) That the 1st Applicant was not party to Misc. Application No. 614 of 2019.
- d) That the 1st Respondent being a widow of the late William Kiggundu was only given rights to recover the principal residential holding from the Appellant in Civil Suit No. 4 of 2003 so the 1st Respondent and other beneficiaries like the Applicants can enjoy possession.

The 2nd Respondent filed an Affidavit in Reply on behalf of the Respondents and stated;

- a) That the 1st and 2nd Respondents (actually 2nd and 3rd Respondents on court record) are biological children of the late Kiggundu George William.
- b) That Court of Appeal Civil Appeal No. 2 of 2003 nor High Court Civil Suit No. 1046 of 1996 conferred any ownership rights over the principal residential holding comprised in Kyadondo Block 210 Plot 173 land at Kyebando to Nakibirango Janet Kiggundu as held by Hon. David Matovu in Misc. Application No. 614 of 2019.
- c) That Court of Appeal Civil Appeal No. 2 of 2003 and High Court Civil Suit No. 1046 of 1996 only restored possession rights to Nakibirango Janet Kiggundu as opposed to ownership and that the intention was not to deprive the estate of the suit land.
- d) That the said Nakibirango Janet Kiggundu is using the ruling in Misc. Cause No. 614 of 2019 to evict beneficiaries of the estate of the late Kiggundu George William from the suit land and to create third party rights thereon, to the detriment of the beneficiaries of that estate.
- e) That relying on the ruling in Misc. Application No. 614 of 2019, the said Nakibirango Janet Kiggundu has filed Civil Suit No. 168 of 2022 against the beneficiaries of the estate wherein she seeks to cancel the name of Kiggundu George William from the certificate of title in respect of Block 210 Plot 173 and enter her name thereon.

The 1st Respondent Nakibirango Janet Kiggundu filed an affidavit in reply and stated;

- a) That she would raise a preliminary objection to the effect that the application is brought in bad faith, is full of falsehoods, is defective, incompetent, fails to comply with the law, and is an abuse of court process.
- b) That the Applicants have never developed the suit land and are not in possession of the same as claimed in their affidavit, and therefore it is a lie that the 1st Respondent is threatening to evict them.
- c) That the 2nd and 3rd Respondents were the plaintiffs in civil suit No. 136 of 2014 while the 4th and 5th Respondents were the defendants.
- d) That the parties in the suit entered a consent judgement having the effect of distributing the estate of the late Kiggundu George William including land comprised in Kyadondo Block 210 Plot 173 which was the principle matrimonial home of the deceased and the 1st Respondent.
- e) That the 1st Respondent filed Misc. Application No. 614 of 2019 arising from Civil Suit No. 136 of 2014 for a review and setting aside of the consent judgement that was entered into by the 2nd \$, 3rd \$, 4th \$ and 5th \$ Respondents.
- f) That the Applicants were not parties to the consent nor to the suit which has since been concluded.

The 4th and 5th Respondents did not file affidavits in reply although they appeared in court when the matter was mentioned on 7th day of March 2023.

HEARING AND REPRESENTATION:

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The Applicant was represented by M/s Nalukoola, Kakeeto Advocates & Solicitors. The 1st and 2nd Respondents were represented by M/s Malik Advocates (these are actually the 2nd and 3rd Respondents as seen from court record). When the matter first came up on 7th day of March 2023, the Applicants and all the Respondents except the 3rd Respondent were in court. Counsel Sawunya Banadawa represented the Applicants while counsel Mukwanya Edris represented the Respondents assisted by counsel Julian Nakirijja for the 1st Respondent. Counsel Mukwanya was directed to serve Janet Kiggundu with the 1st and 2nd Respondents' affidavit in reply together with

submissions. When the matter next came up for hearing on the 11th of July 2024, none of the parties nor their counsel were in court. The Applicants and the 1st, 2nd and 3rd Respondents filed their written submissions.

ISSUE FOR DETERMINATION BY THIS COURT:

1. Whether the ruling and orders by this court vide Misc. Application No. 614 of 2019 should be reviewed and set aside.

DETERMINATION OF THE ISSUE BY THIS COURT:**Applicants' submissions:**

It was submitted for the Applicants that they are aggrieved that the suit property which is part of the estate of the late Kiggundu George William is being taken control of by the 1st Respondent Nakibirango Janet Kiggundu on the basis of an impugned order which resulted from interpretation of the Court of Appeal decision by this Court, and which interpretation is an error on the face of the record. Counsel for the Applicants cited the case of John Lubega & anor Vs UBC & Anor Misc. Application No. 589 of 2019 where the case of Re Nakivubo Chemists (U) Ltd 1972 HCB 12 was cited with approval. The Hon. Justice Bashaija K. Andrew in the John Lubega case held that an aggrieved person is a person who has suffered a legal grievance. He further cited the case of Adonia Vs Mutekanga (1970) EA 429 where court held that such a person who is aggrieved may be a party to the suit or any third party may apply for review, but such a third party must establish that he is an aggrieved person.

The case of Nalebe Ephrance Kiyingi Vs Solome Bbosa & 2 Ors Misc. Application No. 213 of 2013 was cited in support where court ruled 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 extraneous matter to show its correctness. 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."

Counsel for the Applicants submitted that court gave total ownership of the suit property to the 1st Respondent which culminated in an absurdity to the Applicants who are beneficiaries of the estate of the late Kiggundu George William. According to the Applicants, this was an error on the face of the record which this court should review.

2nd and 3rd Respondents' submissions:

The 2nd and 3rd Respondents agreed with the Applicants that there was an error on the face of the record. They cited the case of Nyamogo & Nyamogo Advocates Vs Kato [2001] 2 EA 173 where 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 judicially 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. 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 view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal."

It was submitted for the 2nd and 3rd Respondents that it would be illogical for the Court of Appeal to confer ownership rights to Nakibirango Janet Kiggundu who in the first place did not seek in

her plaint to be declared an owner. It was submitted further that instead, the Court of Appeal found that Kyadondo Block 210 Plot 173 land at Kyabando formed part of the estate of the late Kiggundu George William.

In the result, the 2nd and 3rd Respondents conceded to the application for review and setting aside of the orders issued by Justice David Matovu in Misc. Application No. 614 of 2019.

It seems to me, therefore, that the only active Respondent in the present matter is the 1st Respondent Nakigirango Jane Kiggundu who filed an affidavit in reply opposing the application.

It was submitted for the 1st Respondent that this application cannot be entertained as per Order 46 rule 7 of the Civil Procedure Rules. The 1st Respondent argues that there was no error on the face of the record as to warrant a review and setting aside of the ruling in Misc. Application No. 614 of 2019. She cited the case of Mpigi Town Council Vs Jamil Kisuule Misc. Application No. 6 of 2016 citing Batuk K. Vyas Vs Sutrat Borough Municipality & Ors [1958] BOM 133 where it was held that "no error can be said to be apparent on the face of the record if it is not manifest or self-evident and requires an examination or argument to establish it."

It was submitted for the 1st Respondent that the remedy available to the Applicants is appeal since they are dissatisfied with the ruling of the learned judge in Misc. Application No. 614 of 2019. It was also argued for the 1st Respondent that the Applicants have not shown how they are aggrieved by the decision in Misc. Application No. 614 of 2019; and that even the allegation that the 1st Respondent is threatening them with eviction is not proved.

Findings of this court:

Order 46 rule 7 of the Civil Procedure Rules bars subsequent applications for review when a review has already been made. On a preliminary point of law, it is not proper for this application to be entertained as this would be a second review regarding the same subject matter. The first

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review was by Misc. Application No. 614 of 2019, although by a different party who is the 1st Respondent in the present application. Whether or not the parties are different, the point is that there has already been a review regarding the same subject matter.

That said, I agree with the finding in the case of Nyamogo & Nyamogo Advocates Vs Kato that 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 view was also possible.

The Court of Appeal in Civil Appeal No. 4 of 2003 arising from HCCS No. 1046 of 1996, upheld the order for the recovery of the residential holding by Nakibirango Janet Kiggundu. His Lordship Justice David Matovu in Misc. Application No. 614 of 2019 set aside the consent judgement in Civil Suit No. 134 of 2014 on the ground that "the principal residential holding had been decreed by competent courts to belong to the Applicant in High Court Civil Suit No. 1046 of 1996 and upheld in Court of Appeal Civil Appeal No. 4 of 2003."

The Hon. Justice David Matovu interpreted the use of the word "recovery" to mean that the said residential holding was decreed as belonging to Nakibirango Janey Kiggundu. I find that interpretation not only possible but also naturally consequential. Of course, it can be said another interpretation is also possible.

However, a review having been made under Misc. Application No. 614 of 2019, a second review is barred as it would be an abuse of court process.

That brings me to the question as to whether the Applicants not having been party in the original proceedings in Civil Suit No. 134 of 2014 which resulted in the consent judgment for whose review Misc. Application No. 614 of 2019 was filed, have the right to present the present application for review under Section 82 of CPA and Order 46 r 1 of CPR.

An application for review should be by an aggrieved party. An aggrieved person within the meaning of Section 82 of CPA and Order 46 r 1 of the CPR means a person who has suffered legal grievance. A person suffers a legal grievance if the judgement given is against him or affects his interest.

In the present case, the Applicants were not involved in the litigation which resulted in the consent judgment which the 1st Respondent had reviewed in Misc. Application No. 614 of 2019. The 1st Respondent herself was not a party to that litigation. Hence, both the 1st Respondent and the Applicants did not have opportunity to make their case in Civil Suit No. 134 of 2014 and were for all intents and purposes strangers to the suit that resulted into the consent judgement.

That notwithstanding, despite the consent judgment, the Applicants and the 1st Respondents could still pursue their legal rights in the Court of Law.

How should they have done so? Is it by review or other means?

I find guidance in the decision of the Hon. Justice Odoki, JSC in *Ladak Abdulla Mohamed Hussein Vs Griffiths Isingoma Kakiiza & 2 Ors* SCCA 8 of 1995 which cited the case of *Jackques Vs Harrison* (1883 — 4) 12A. C.165 where Bowen L. J. said,

"There are so far as we can see only two modes open by which a stranger to an action who is injuriously affected through any judgment suffered by a defendant by default can set that judgment aside; and these two modes are amply sufficient to protect any stranger in all cases in all rights. He may, in the first place obtain the defendant's leave to use the defendant's, name, if the defendant has not already bound himself to allow use of his name to be made; and he may thereupon in the defendant's name, apply for leave to have the judgment set aside on such terms as the judge may think reasonable. Or he may if he is entitled without further proceedings to use the defendant's name take out a summons in his own name at chambers to be served on both the defendant and plaintiff asking leave to have the judgment set aside and to be at liberty either to defend the action for the defendant

on such terms of indemnifying the defendant as the judge may consider right or at all events to be at liberty to intervene in the action in the manner pointed out by the Judicature Act 1873 S.24 Subs.5."

The Learned Hon. Justice Odoki was of the view that although the above exposition was directly related to setting aside ex-parte judgments, the same principles apply to setting aside consent judgments as authorised under Order 9 rule 12 of the Civil Procedure Rules.

The learned Hon. Justice Odoki held;

"In my judgment the procedure adopted and the grounds supporting the application for setting aside the consent judgment gave the respondent sufficient locus standi to bring the said application. It is also my view that those grounds justified the setting aside or varying the consent judgment."

It is evident from the decision in *Ladak Abdulla Mohamed Hussein Vs Griffiths Isingoma Kakiiza & 2 Ors* that it is not enough to show that a stranger to the litigation is aggrieved. That stranger should also adopt the correct procedure if in fact they had the right of possession or repossession of the suit property. In my view the options are 3:

- a) They could have filed an application to set aside the consent judgment in the names of the original parties to the suit as well as in their own names;
- b) They could have applied to be joined as defendants in the suit in order to defend the suit; \$or\$

- c) They could have filed an independent suit(s) against one or more respondents without any due regard to the consent judgment to which they were not party.

They did no such thing but instead chose to apply for review upon review – an improper and unacceptable procedure, in my view (Ladak Abdulla Mohamed Hussein Vs Griffiths Isingoma Kakiiza & 2 Ors (supra); and Mohamed Allibhai Vs W. E. Bukenya Mukasa & Anor, SCCA No. 56 of 1996).

CONCLUSION:

In the premises, I hereby dismiss this application and order that;

- a) The Applicants being strangers to Civil Suit No. 136 of 2014 from which Misc. Application No. 614 of 2019 arose or indeed any prior cases referenced in the heading of the present application, ought to employ the correct procedure for orders that property comprised in Kyadondo Block 210 Plot 173 land at Kyabando be treated differently from the manner envisaged in the consent judgement in Civil Suit No. 136 of 2014.
- b) Each party bears its own costs.

I so order.

Dated at Kampala this..... 2024.

Hon. Lady Justice Dr. Christine A. Echokit Judge.

The right of appeal explained.

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