

UGANDA / JUDGMENT

Management Committee of st Kizito Integrated Primary School and 2 Others v Nakasinde and 2 Others (Miscellaneous Application No. 52 of 2022) [2022] UGHCLD 247 (1 December 2022)

[2022] UGHCLD 247

COURT

HC: Land Division (Uganda)

BEFORE

Byaruhanga Rugyema, J

CASE / FILE NUMBER

Miscellaneous Application No. 52 of 2022

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**THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT HOIMA MISC.
APPLICATION NO.52 OF 2022 (Formerly, Masindi Misc. Applcn No.36 of 2021,
Arising from C. S No.24 of 2011)**

**1. THE MANAGEMENT COMMITTEE OF ST. KIZITO INTEGRATED PRIMARY SCHOOL 2. THE
REGISTERED TRUSTEES OF HOIMA :::::::::: APPLICANTS CATHOLIC DIOCESE 3. THE
BOARD OF GOVERNORS OF UGANDA MARTYRS CENTENARY SECONDARY SCHOOL**

VERSUS

**1. ELIZABETH NAKASINDE 2. PAUL MALE 3. KAYONGO
CHRISTOPHER :::::::::: RESPONDENTS**

Before: Hon. Justice Byaruhanga Jesse Rugyema

RULING

- [1] This is an application under S.33 of the Judicature Act, S.98 CPA and O.52 rr.1&3 for the following orders;
- 1. That the ruling in Misc. Application No.13 of 2020 be reviewed, set aside and leave be granted to file an appeal out of time.
- 2. The execution proceedings of C. S No.24 of 2011 be stayed.

- 3. The costs of the application be provided.
- [2] The application is supported by the affidavit of **Rev. Fr. Ndugwa Dominic**, a member of the 2nd Applicant, The Registered Trustees of Hoima Catholic Diocese wherein the grounds of the application are set out. It was opposed by the Respondents vide the affidavit in reply deposed by their **Frank Ssewagudde**.

Background of the application

- [3] On 8/9/2011, the Respondents sued the Applicants in the Chief Magistrate's court of Hoima vide C. S No.024/2011 for inter alia, **a declaration that they were the Kibanja owners of the suit land situate in Bwanswa village, Kakumiro, Kibaale District, demolition of illegal structures thereon and general damages for trespass**. Judgment was entered in favour of the 1st Respondent with orders inter alia, for payment of general damages of Ugx 10,000,000/= and costs of the suit.
- [4] The Applicants filed in High Court, **Misc. Application. No.94/2019** for stay of execution and leave to file an appeal out of time. The Application was granted by the Registrar of the High Court.
- [5] The Respondents were dissatisfied by the decision of the Registrar and on 20/11/2012, they successfully filed **Civil Appeal No.8/2019** in which they sought to set aside the decision of the Registrar. The ground of Appeal was that the Registrar had no powers to entertain an application for leave to appeal out of time, the power belonged to a Judge.
- [6] On 6/2/2020, the Applicant again filed **Misc. Application No. 13/2020** praying for the same orders of stay of execution and leave to file an appeal out of time which was this time heard by the Judge but it was dismissed.
- [7] Consequent of the above, the Applicant felt aggrieved by the dismissal of **M. A No.13 of 2020** and filed the present application for inter alia, review of ruling in **Misc. Application No.13/2020** and set it aside.

Counsel legal representation

- [8] The Applicants were represented by **Mr. Alibankoha Norbert of M/s Alibankoha & Co. Advocates, Hoima** while the Respondents were represented by **Mr. Fahim Matovu of M/s Katende, Ssempebwa & Co. Advocates, Kampala**. Both counsel filed their respective submissions for consideration in the determination of this application as permitted by this court.

Determination of the Application

- [9] Issues for resolution
- 1. Whether there are grounds for court to grant an order of review.

- 2. Whether the Applicant is entitled to the orders sought in the application.

Issue No.1: Whether there are grounds for court to grant an order of review.

[10] S.82 of the CPA provides thus,

***"82. Review"**

Any person considering himself aggrieved,

- *a) by a decree or order from which an appeal is allowed by the Act, but from which no appeal has been preferred*
- *b) by a decree or order from which no appeal is allowed by the 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."*

O.46 r.1 CPR provides that,

"Any person considering himself aggrieved,

- *a) by a decree or order from which an appeal is allowed, but from which an appeal has been preferred;*
- *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 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 review of judgment to the court which passed the decree or made the order."*
- [11] It is the submission of counsel for the Applicants that the present application is hinged on the ground of *"discovery of new and important evidence."* That as per the averment of **Rev. Fr. Dominic Ndugwa** in his affidavit in support of the application, the Applicants had instructed **Counsel Tumusiime B. Justus of M/s Tumusiime,**

Irumba & Co. Advocates to file and prosecute an appeal in respect of **Civil Suit No.24 of 2011** which he did not do in time. The Applicants filed **M. A No.13 of 2020** for orders inter alia, that this Honourable court grants leave to the applicants to appeal out of time but the application was dismissed inter alia, for lack of evidence of having instructed an advocate. That upon discovery of new evidence i.e, an acknowledgement receipt and instructions to counsel to **Tumusiime B. Justus of M/s Tumusiime, Irumba & Co. Advocates** which is proof that indeed the Applicants instructed counsel who did not perform the instructions given to him, they were not guilty of inordinate delay and therefore, this court reviews the ruling in **M. A No.13 of 2020** and proceed to grant among other things, leave to file an appeal out of time.

- [12] Counsel for the Respondents on the other had submitted that in this case, there was no discovery of new evidence that meets the standard required under **O.46 r.1 CPR**, that the alleged acknowledgement of payment of instruction fees was to a fictitious **Counsel Tumusiime B. Justus** and therefore, does not justify a review of the decision in **M. A No.3 of 2020**. Counsel referred this court to **Misc. Application 94 of 2019** paragraphs 6 and 7 of the affidavit in rejoinder where the same deponent on oath stated that the Applicants were represented by **Counsel Irumba Justus** from the law firm of **Angwalia, Busiku & Co. Advocates**.
- [13] The trial Judge in **Misc. Application No.13 of 2020** which is being sought to be reviewed stated at **P.9 of the ruling**, last paragraph as follows;

"It is evident that in the instant case, Applicants have not presented any evidence of instruction to the firm of M/s Irumba Justus & Co. Advocates and it is also true that the Applicants were actively indulged in the taxation of the matter through the firm of M/s Angwalia, Busiku & Co. Advocates, they were also engaged in settling the matter amicably including using the RDC and only woke up to the reality of wanting to appeal after a relatively longer period considering judgment in the lower court was entered on the 21st day June 2018."*

[14] It is for this reason, among others, that **M. A No.13 of 2018** was dismissed. The Applicants now claim they discovered new and

important evidence in form of an acknowledge of payment of instruction fees to **Counsel Tumusiime B. Justus**.

- [15] As to whether **Counsel Tumusiime B. Justus** is fictitious as alleged by counsel for the Respondent, the pleadings and the affidavits of **Rev. Fr. Dominic Ndugwa** in **M. A No.13 of 2020** and **No.94 of 2019** referred to court by counsel, do not reflect that **Counsel Tumusiime B. Justus** is fictitious. It is clear as reflected in the affidavit in rejoinder of **Rev. Fr. Dominic Ndugwa** in **M. A No.94/2019**, that **Counsel Tumusiime B. Justus** was initially with **M/s Angwalia, Busiku & Co. Advocates** where he represented the Applicants and later joined **M/s Irumba & Co. Advocates**. The failure or omission by the deponent to correctly indicate the correct firm of **Counsel Tumusiime B. Justus** as **M/s Tumusiime Irumba & Co. Advocates** does not render the deponent a liar or his affidavit false.
- [16] However, under **O.46 r.1 CPR**,

"the rules on this point are clear, such a discovery of new and important matters or evidence must be of such a nature that it was not in the possession or knowledge of the Applicant after the exercise of due diligence and could not be produced by the time when the decree was passed or order was made."*

- [17] In the instant case, what **Rev. Fr. Dominic Ndugwa** has shown in his affidavit in support of the Application is merely that the Applicants instructed **Mr. Tumusiime B. Justus of M/s Tumusiime, Irumba & Co. Advocates** to represent them. The presumption here is that they must have retained a copy and if not, a copy could be obtained from the office of their counsel.
- [18] It follows therefore, the applicants, after the exercise of due diligence, it could not be said that the copy of the acknowledgment of payment of instruction fees to **Counsel Tumusiime B. Justus** as proof of instructions to his firm, if at all it was there, could not be within the Applicant's knowledge or could not be produced by them at the time when the decree was passed or the order made. Using the words of my learned sister, Justice Lydia Mugambe in **A. G Vs Lt. Col. Levy Vincent Mugenyi & 51 Ors, HCMA No. 62 of 2018**, the Applicants have demonstrated no discovery of new and important matter of evidence which after exercise of due diligence was not within their knowledge or

could not be produced at the time when the decree was passed or the order made.

- [19] What is apparent in this case, as found by the trial Judge in **Misc. Application No.13/2020** which is being sought to be reviewed is that the Applicants are merely being dishonest in whatever they are pursuing in this matter. The trial Judge at **P.10 of his ruling** stated thus;

"Considering that it was untrue that they actually instructed the firm of M/s Irumba, Justus & Co. Advocates to prosecute the appeal, there is no evidence that has been advanced in that regard and the fact that they were actively involved in the taxation of the matter with a different firm and therefore had services of counsel to advise them on all legal matters including the possibility of appealing, shows that they are being dishonest to this Honourable court. It appears to me that the applicants are using the firm of M/s Irumba, Justus & Co. Advocates as an escape route and I....find them guilty of dilatory conduct."

- [20] The truth is therefore that the claimed "acknowledgment of payment of instruction fees to **Counsel Tumusiime B. Justus**" of **M/s Tumusiime, Irumba & Co. Advocates**, was never there and therefore the Applicants could not produce its copy in **M. A No.13/2020** as proof that they gave instructions to the firm of to prosecute the appeal in respect of **C. S No.24/2011**. It was just secured for purposes of this application. Besides, no one from the firm of **M/s Tumusiime, Irumba & Co. Advocates** or **M/s Irumba, Justus & Co. Advocates**, whatever the case may be deposed an affidavit in support of the Applicants contention or claim.
- [21] As a result, I find the 1st issue in the negative. The Applicants have not presented any grounds for court to grant an order of review.

Issue No.2: Where the Applicant is entitled to the orders sought in the application.

[22] The Applicants having failed to show sufficient grounds for an order of review, it follows that there is no merit in the application and therefore, it must be dismissed. Upon dismissal of this application, it follows that the other sought order of stay of execution of proceedings in C. S No.24/2011 cannot stand. In the premises, I dismiss the entire application with costs to the Respondents.

[23] The Registrar of this court is directed to immediately dispatch the lower court file back to Hoima Chief Magistrate's court for final conclusion of the suit. There must be an end to litigation. Order accordingly.

Signed, dated and delivered at Hoima this 1 st day of December, 2022.

Byaruhanga Jesse Rugyema

JUDGE.

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