

UGANDA / JUDGMENT

Nabirye v Basoga (Miscellaneous Application 133 of 2023) [2025]

UGHC 125 (21 March 2025)

[2025] UGHC 125

COURT

High Court of Uganda

BEFORE

Batema, J

CASE / FILE NUMBER

Miscellaneous Application 133 of 2023

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT IGANGA MISC. APPLICATION NO. 133 OF 2023 ARISING FROM CIVIL APPEAL NO. 072 OF 2015 (FURTHER ARISING OUT OF CIVIL SUIT NO. 18 OF 2008)

MADINA NABIRYE ::::::::::::::::::::::::::::::

VERSUS

BASOGA PATRICK::::::::::::::::::::::::::::

BEFORE: HON. MR. JUSTICE BATEMA N. D. A, JUDGE**RULING**

\$10\$

\$20\$

Introduction

This is an application for review against the exparte Judgment and decree on appeal of Hon. Mr. Justice Tom Chemtai delivered on 31/05/2022 at High court of Uganda, sitting at Jinja. The learned Judge held that the trial magistrate rightly found that the suit land is property of Basoga Patrick (Respondent) but gave a contradictory order giving Madina Nabirye (Applicant) the option to either refund the purchase price of the suit land or surrender the suit land to Basoga Patrick.

It is this contradictory order that the respondent (The then successful plaintiff) appealed against.

That my learned brother Judge, allowed the appeal. He set aside the orders of the lower court and ordered as follows:

- 1. "The suitland is a property of the appellant as the trial magistrate rightly concluded.
- 2. The order of refund of the purchase price is set aside.

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- 3. Costs are awarded to the appellant."

The applicant has filed this application for review of the above decision on the following grounds;

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gungan praedi

- 1. That there was an error apparent on the face of the record as the court denied the applicant an opportunity to be heard before entering the Judgement when it proceeded exparte.
- 2. That there is a mistake apparent on the face of the record since the order to refund the purchase price of the suit property was made after the respondent had already deposited the money pursuant to the lower court.
- 3. That if the decree/judgement is not reviewed and or set aside, it will occasion a miscarriage of justice and the applicant will suffer irreparable damages since the suit land was sold to a third party.
- 4. That it is in the interest of substantive justice and equity that the application is granted by this honourable court as sufficient reasons have been shown.

Preliminary Objections

\$30\$

\$40\$

\$50\$

When the application came up for hearing, Counsel for the Respondent raised two preliminary objections, namely;

- 1. The Instant application no longer subsists for having not been served on the Respondent within a period of twenty-one (21) days as from the 29th day of August, 2023 when the same was signed and sealed by the Deputy Registrar of the Court.
- 2. A wrong procedure by way of review to reverse and/ or set aside the Judgment and Decree on Appeal passed without the participation of the Applicant (Respondent in the Appeal) has been adopted.

The 1st Preliminary objection was overtaken by events since this court by its direction issued on 8/11/2023 ordered the Applicant, Madina Nabirye to serve the application on the Respondent. Effective Service was made and the parties were given schedules to put in their written submissions. This directive has equally been complied with.

On the 2nd Preliminary Objection, the Respondent argued that the adoption of review as a mode of challenging the *ex parte* judgment and decree on appeal is contrary to Order 43 rule 18 which provides for reinstatement and/ or rehearing of the appeal rather than review. Counsel for the Respondent relied on the case of *Ayob Suleiman v. Ssalim Kabambalo S. C. C. A No. 32 of 1995*.

In rebuttal, the Appellant argued that Section 82 of the Civil Procedure Act provides for an avenue for review where no appeal has been preferred or by a decree or order from which no appeal is allowed. The Appellant relied on the case of **Attorney* General & ULC v. James Mark Kamoga & Anor, S. C. C. A No. 8 of 2004*, for the position that the purpose of re-hearing an Appeal is to give a Respondent who loses an Appeal in which for sufficient cause he failed to participate at the hearing a fresh opportunity to be heard. The learned Justices further held that the provisions are permissive and not mandatory and therefore cannot be construed as imposing a condition precedent for such a losing Respondent to apply for a rehearing before exercising the right of appeal to this court.

\$70\$

In my opinion the applicable prescribed procedure should have been an application for setting aside an *ex parte* decree and hearing the appeal afresh.

Order 43 rule 18 of the Civil Procedure Rules S1 71-1 provides;

"Where an appeal is heard *ex parte* and judgment is pronounced against the Respondent, he or she may apply to the High Court to rehear the appeal; and if he or she satisfies the court that the notice was not duly served or that he or she

Skeit 1

was prevented by sufficient cause from appearing when the appeal was called on for hearing, the court shall rehear the appeal on such terms as to costs or otherwise as it thinks fit to impose upon him or her"

The gist of this rule in as far as rehearing is concerned is that you apply for reinstatement and not review. Review works where both parties were in court while an application for re-instatement works where one party was not in court.

It follows that the Applicant, Nabirye Madina had an opportunity to apply for reinstatement which in the instant case was not done.

Therefore for failure by the Applicant to follow the laid down procedure, this court would rule that the 2nd Preliminary Objection is sustained.

I would dismiss this application.

\$100\$

I just want to emphasize that my learned brother His Lordship Justice Tom Chemutai in his decision went deeper in discussing the merits of the appeal and it would be absurd for me to act as an Appellate court by way of reviewing his decision.

The learned trial Judge pointed out an error apparent on the face of the record and set aside that error made by the trial magistrate. He rightly ruled that the order by the learned trial Magistrate of refund of the purchase price to the Respondent by the Applicant was a wrong option. It cannot stand in the face of the first declaration that Patrick Basoga is the rightful owner of the suit land.

Instead the options should have been given to the successful plaintiff and not to the errant defendant to choose between getting a refund of the purchase price or retaining the land. Having rightly found that the suit land belongs to Basoga Patrick, the trial court could not in the same judgment give orders depriving him of the legal right to exercise ownership over the land.

Disputed Execution of the Judgment.

Without discussing the merits and demerits of this case, I wish to point out the misconceived notion that depositing the money at the cashier's office was execution of the judgment. The court never ordered that the refund be deposited with the cashier or any other court staff. Receipt and acceptance of the refund should have been acknowledged by Basoga Patrick or his lawyer or a court bailiff with instructions from the court. I did not see any execution proceedings directed by court or court returns filed by whoever executed the court decree on the court record to that effect. The third party, Dhikusooka Awali who deposited the so-called refund with the cashier was also not a party to the suit, he just played suspicious games with the cashier and not court. For avoidance of doubt the Cashier is a \$→\$ support staff and not an officer of the court.

In conclusion, the application for review is hereby dismissed with costs.

Order

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The order for vacant possession in favour of Basoga Patrick should be enforced forth will.

I SO ORDER.

BATEMA-N. D 130 HUDGE \$21/03/20\$

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