

UGANDA / JUDGMENT

Nassolo and Others v Sekitoleko and Another (Miscellaneous Application 138 of 2017) [2022] UGHCLD 287 (25 January 2022)

[2022] UGHCLD 287

COURT

HC: Land Division (Uganda)

BEFORE

Ojok, J

CASE / FILE NUMBER

Miscellaneous Application 138 of 2017

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MPIGI

MISCELLANEOUS APPLICATION NO. 138 OF 2017

(Arising from formerly High Court of Uganda at Nakawa C. S No. 111 of 2013)

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- 1. CISSY NASSOLO $\overline{\$}$
- 2. FLORENCE NDAGIRE
- 3. COSTA NAKIMBUGWE
- 4. STEVEN KASOZI
- 5. JOSEPH HENERY NDAWULA

10 (Executors of the Estate of the Late Sempa Ggoloba Joseph Kateregga)

VERSUS

LWANDASA SAMUEL SEKITOLEKO.....

VERSUS

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FREDRICK SEMU LWANGA

DEFENDANT

BEFORE: HIS LORDSHIP HON. JUSTICE OYUKO. ANTHONY OJOK, JUDGE

Ruling

The applicants brought the instant application under Order 46 Rule 1 and Order 52 Rules 1, 2 and 3 of the Civil Procedure Rules, Sections 82 and 98 of the Civil 20 Procedure Act against the Respondent for the following orders;

- 1. That the judgment delivered on the 27th/06/2014 in Civil Suit No. 111 of 2013, Lwandasa Samuel, Sekitoleko v. Fredrick Semu Lwanga, arising from formerly High Court of Uganda at Nakawa be reviewed and varied accordingly.
- 2. Costs.

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The application is supported by an affidavit sworn by Florence Ndagire and premised on the following grounds;

- 1. That the applicants are the executors of the estate of the Late Joseph Katerega who died on the 20th of March 2007.
- 2. The former High Court of Uganda at Nakawa presided over by His Lordship Wilson Masalu Musene passed judgment on the 27/6/2014 wherein he gave several orders in relation to Block 112 Kyeyitabya, Kilingente – Mpigi where the late Joseph Katerega owned land comprised on Block 112 Plot 31, 35, 45, 46 and 54 at Kyeyitabya, Mawokota.
- 3. That court made material errors apparent on the face of the record in so far as it did not ascertain that the applicants owned several plots on the suit property and how they acquired the same.
- 4. That it is just and equitable that this application be allowed for clarity and for purposes of avoidance of further litigation.

The application was opposed by an affidavit sworn by the respondent who was the successful party in the original suit.

20 Representation:

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M/s Kasumba, Kugonza & Co. Advocates represented the applicants and M/s Tibamanya Urban Advocates, represented the respondent. Both parties filed written submissions.

Issues for determination:

- 1. Whether the applicants are aggrieved persons in accordance with the law?

- 2. Whether there is sufficient cause/reason for the grant of this application?
- 3. What remedies are available to the parties?

Resolution of issues:

Issue 1: Whether the applicants are aggrieved persons in accordance with the law? 30

Counsel for the applicants cited Section 82 of the Civil Procedure Act and Order 46 Rule 1 of the Civil Procedure Rules on the law governing review applications.

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Counsel for the applicants went on to submit that the late Joseph Katerega acquired land on Mawokota Block 112 Plot 45 and 46 from the late Daniel Sekiziyivu as early as 1972 before his demise; he also acquired Mawokota Block 112 Plots 31 and 35 from Fredrick Semu Lwanga in 1967 and further acquired Plot 54 in 1972 from Uganda Land Commission.

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Counsel for the applicants added that the applicants then came across the judgment in Civil Suit No. 111 of 2013 formally of High Court of Uganda at Nakawa in which they were not parties. That they were greatly aggrieved by the judgment which affected their interests on land comprised on Mawokota Block 112 Plots 31, 35, 45, 46 and 54 land at Kyeyitabya which is registered in their names while others are still registered in their late father Joseph Katerega whose estate they administer to date. That Plots 45, 46 and 54 are the subject of the orders in that judgment and this aggrieved the applicants.

- Further, that in the process of implementing the said judgment, the respondent included Plots 31 and 35 in the list of Plots to be cancelled and consolidated to 15 form 157 acres that belonged to the late Daniel Sekiziyivu (137 acres) and Wadimba Kafeero (20 acres) which plots were sold to the applicants' father the late Joseph Katenga around 1967.
- Counsel for the respondent on the other hand also cited **Section 82** of the Civil Procedure Act and Order 46 Rule 1 of the Civil Procedure Rules and the case of 20 Muhammed Bukenya Llibai v. W. E. Bukenya & Another, S. C. C. A No. 56 of 1996, where it was held that;

"It is I think well established that while a third party may apply for review under the above provisions, the party must establish that he is an aggrieved person."

Counsel for the respondent went on to submit that the applicants were erroneously registered by the office of titles and as such they have no interest in Plot 45 and besides the said decree and judgment were already executed and there is nothing to review and they have no interest thereof.

I have carefully read the submissions, the law cited and authority quoted under 30 this issue by both parties. I do agree that the applicants fall under the ambit of who an aggrieved party is as per the provisions of **Section 82** of the Civil Procedure Act and Order 46 Rules 1 and 2 of the Civil Procedure Rules which will reproduce below for ease of reference.

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Section 82 of the Civil Procedure Act provides;

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"Any person considering himself or herself aggrieved by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or by a decree or order from which no appeal is allowed by this 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."

Order 46 Rules 1 and 2 of the Civil Procedure Rules provides;

"Any person considering himself or herself aggrieved by a decree or order 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 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 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 any other 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."

The applicants allege to have interests in Block 112 which was the subject matter in Civil Suit 111 of 2013. And that the entire block was decreed to the §20 respondent thereby alienating their rights/interest by cancelling their certificates of titles in part of the suit land comprised in Block 112 Plots 31, 35, 45, 46 & 54. It is on that basis that the Applicants considered themselves aggrieved resulting into the instant application.

It is my finding and holding that the applicants are indeed aggrieved parties. An aggrieved person is a person who has suffered a legal grievance, which has wrongly deprived. (See: *Re Nakivubo Chemists (U) Ltd* 1979 HCB 12)

In this case the applicants have successfully demonstrated that they are aggrieved persons who have suffered a legal grievance. The pleadings rightly indicate that applicants were the registered proprietors of part of the suit land as administrators, the same titles have since been cancelled as a result of the decision in Civil Suit No. 111 of 2013. The applicants in their affidavit and submissions state that they were never parties to Civil Suit No. 111 of 2013 wherein orders were made that affected their rights in part of the suit land. This

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fact is not contested by the respondents. I have no doubt that the applicants have ably demonstrated that indeed the decision in Civil Suit No.111/2013 has aggrieved them by taking away their proprietary rights over part of the suit land without being afforded a hearing. I have also had the benefit of perusing the pleading in Civil Suit No. 111/2013 and have satisfied myself that indeed the applicants were never parties to the suit. It is also notable on the same pleadings that no issues were raised as regards to any fraudulent acquisition of Block 112 Plots 31,35, 45, 46 & 54 by the applicants herein.

This issue is therefore answered in the affirmative.

Issue 2: Whether there is sufficient cause/reason for the grant of this 10 application?

Counsel for the applicants relied on the case of Alshafi Investment Group LCC v. Ahmed Darwin Dagher and Another, H. C. M. A No. 901 of 2017 which relied on the case of Re-Nakivubo Chemist "U" Ltd (1979) H. C. B 12, in laying the grounds for review as;

- a. Discovery of new and important matters of evidence previously overlooked by excusable misfortune.
- b. Some mistakes apparent on the face of the record.
- c. For any other sufficient reasons but the expression "sufficient" should be read as meaning sufficiently analogous to (a) and (b) above.

Discovery of new evidence:

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Counsel for the applicants went on to submit that it was never brought to the attention of court that there were other interests such as the ownership of Plots 31, 35, 45, 46, and 54 by other than the three original owners (Daniel Skiziyivu, Wadimba Kafero and Fredrick Semu Lwanga). 25

Secondly, that Fredrick Semu Lwanga sold to the applicants' late father in the 1960s.

Thirdly, that the late Joseph Katerega acquired Mawokota Block 112 Plot 45 and 46 from the late Daniel Sekiziyivu before his demise and the same was transferred to him in 1992.

Fourthly, that Block 112 Plot 54 in 1972 was leased to the late Joseph Katerega by Uganda Land Commission. That Block 112 Plots 31, 35, 45, 46 and 54 at

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Kyeyitabya were acquired by Joseph Katerega before 2008 when Fredrick Semu Lwanga acquired Letters of Administration to the estate of Daniel Sekiziyivu and Yosia Wadimba Kafeero as Plot 31 and 35 were acquired in 1960s.

Furthermore, that based on the above a lot of evidence was not disclosed to court by the respondent with the intention of misleading court to believe that Block 112 entirely belonged only to the late Daniel Sekiziyivu, Yosia Wadimba Kafeero and Fredrick Semu Lwanga which was not true. Thus, this application warrants a grant of review orders sought.

Counsel for the respondent on the other hand submitted that there was no discovery of new evidence that in regard to the late Daniel Sekiziyivu transferring to him land in 1992 is not possible because the said Daniel Sekiziyivu died in 1985.

Mistake on the face of the record:

Counsel for the applicants submitted that it was evident on the face of the record that none of the transactions that were purported to have been made by Fredrick 15 Semu Lwanga was proved and mentioned in the judgment, instead the judgment merely mentions of the transactions which have not been justified and as a result it has been justified and as a result it has affected the applicants' interest in plots 31, 35, 45, 46 and 54. That the respondent is simply executing and intending to execute orders not reflected in the judgment. Thus, the need for review. 20

In regard to this condition, counsel for the respondent submitted that there was no mistake on the face of the record as alleged by the applicants but rather a multiplicity of suits have been filed with the issues for resolution which amount to an abuse of court process.

25 Sufficient reason:

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It was submitted for the applicants that due to the said judgment they are being deprived of their right to property enshrined in Article 26 of the Constitution of the Republic of Uganda, 1995 which they legally acquired. Thus, the applicants ought to be given a fair hearing as per Article 28 (1) of the Constitution of the Republic of Uganda, 1995 through review of the ex-parte judgment that arises from Civil Suit No. 111 of 2013 and the same be set aside.

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Counsel for the respondent concluded that the application had been overtaken by events due to delay. That the respondent had already recovered three quarters of the 157 acres decreed by court.

Counsel added that the applicants should have proceeded by way of a plaint and not affidavit since there are allegations of fraud which made plot 45 part of plot 5 47 be cancelled. That Plot 45 no longer exists and more than 30 plots have been executed.

It is my considered view and I agree with the conditions set out for an application for review to be granted as quoted above.

In the instant case the applicants contended that a lot of information was not brought to the attention of the trial court and I entirely agree. The original suit proceeded ex-parte and there was no way the court could have been possessed with the evidence that there were other interests in Block 112. It should also be noted that the applicants were never part of the main suit. The applicants in their submissions stated that they would wish to have a fair hearing and thus, the

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parte judgment be set aside or varied.

It is in the interest of natural justice that indeed the applicants be accorded a fair hearing and in the case of Tinyefuza v. Attorney General, Constitutional Petition No. 1 of 1996 (Court of appeal) defined "fair hearing" as;

"Fair hearing connotes that in accordance with the law a party is given the necessary opportunity to canvass all such facts as are necessary to establish his case."

The right to fair hearing is not derogable as was further held in the Tinyefuza case (supra).

- I find and hold that there is sufficient reason warranting the setting aside of the 25 judgment in Civil Suit No. 111 of 2013, the applicants whose interests are valid were never parties to the suit that determined and took away their rights in part of the suit land. The trial court was never possessed with the evidence that there were any other interests in the suit property.
- This application in my view meets the test under which review can be granted. 30 The ex-parte judgment affected the applicants' rights over land which is a sensitive matter. Varying the ex-parte judgment is not possible because there is no evidence for this court to rely on to make any variations.

This issue is also resolved in the affirmative.

Issue 3: What remedies are available to the parties?

Having found that the applicants are aggrieved parties and the application meets the conditions for review; this application is hereby allowed and the ex-parte judgment set aside with costs to the Applicants.

Let the applicants apply to be added as parties to Civil Suit No. 111 of 2013 so that the suit can be heard on its merits.

I so order.

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OYUKO ANTHONY OJOK

JUDGE

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