**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA**

**MISCELLANEOUS APPLICATION NO.425 OF 2017**

**(ARISING FROM CIVIL SUIT NO. 382 OF 2014)**

**MK FINANCIERS LIMITED----------------------------------------------- APPLICANT**

**VERSUS**

1. **N.SHAH & CO LTD**
2. **PARIKH HETAL**
3. **OWERE FRANCO T/A LEADS ASSOCIATES**
4. **OBIRO ISAAC EKIRAPA**
5. **JOHN MUHAISE-BIKALEMESA----------------------------------- RESPONDENTS**

**BEFORE HON. JUSTICE MUSA SSEKAANA**

**RULING**

The Applicant brought this application by way of Notice of Motion against the respondents under Section 33 of the Judicature Act cap 13 and Order 46 r 1,2 & 8 of the Civil Procedure Rules, for orders that;

1. The ruling of Her Lordship Oumo-Oguli on 7th June 2017 dismissing Misc. Application/Appeal No. 343 of 2015 be reviewed and
   1. Grounds 6 & 7 of Misc Application/Appeal No. 343 of 2015 be determined.
   2. Civil Suit No. 382 of 2014 be reinstated or in the alternative it be only withdrawn with no order as to costs.
2. Costs of the application be provided for.

The grounds in support of this application are set out in the Notice of motion affidavit of Male H Mabirizi K Kiwanuka dated 22nd June 2017 of 35 paragraphs which briefly states;

1. That the learned judge did not determine grounds 6 & 7 of the appeal/application yet they formed the core of the appeal.
2. That the decision as reached in contravention of the non-derogable right to fair hearing.
3. That the judge’s decision is per incuriam as it contravenes the clear provisions of the 1995 constitution , Civil Procedure Act and the rules and binding decisions of the High Court and the Court of Appeal.
4. That ground 6 of the appeal stated that *“ The learned deputy registrar erred in law and fact when he relied on counsel for the defendant’s insistence on costs by a mere letter dated 30th July 2015 to award costs without considering the general circumstances of the intent to withdraw the suit”*
5. That ground 7 provided that *“ The learned Deputy Registrar erred in law and fact when he did not consider the fact that the dispute between parties was still subsisting in the same court under Civil Suit No. 169 of 2015 between the same parties and thus failed to forecast that any award of costs at this stage will lead to double or double benefit after the final outcome of Civil Suit No. 169 of 2015”*
6. That the failure by the Court to determine those grounds or even to state whether the grounds had been determined in any other way was an error apparent on the face of the record and an oversight by court which needs to be rectified.
7. That further, in her determination of other grounds of appeal, the learned judge made several errors of law apparent on the face of the record and which are so glaring that they need to be reviewed by this honourable court.

In opposition to this Application the Respondent through Hetal Parikh the Country Director of the 1st respondent for and on behalf of the rest of the respondents briefly stating that;

1. That I know that the learned trial judge considered grounds 6 7 7 of the applicants’ appeal which the applicant had argued jointly at pages 22-24 of her ruling and found the same misconceived and dismissed it accordingly.
2. That there is no error or illegality apparent on the face of the record since grounds 6 & 7 were determined by the Learned trial judge.
3. That this court cannot sit as appeal in its own decision.
4. That the application does not disclose any grounds for review of the decision of This honourable court.

In the interest of time the respective counsel were directed to make written submissions and i have considered the respective submissions. The applicant was represented by its Managing-Director *Male H Mabirizi K Kiwanuka* whereas the respondents were represented *Mr Warren Byamukama*.

***Whether this is a proper case to review the Judgment?***

The affidavit in support of the applicant of 35 paragraphs was argumentative and this is contrary to rules governing affidavits and the same ought to have been struck out. However, for completeness this court shall proceed to determine the matter in the interest of justice.

The applicant’s Managing Director stated in his submissions that this court has jurisdiction to correct its own record either to weed out errors on the record or to serve the ends of justice. This power is exercised by High Court whether it is sitting as a court of first instance or an appellate court. That the Civil Procedure Act and the rules of the court are not discriminative on what nature of cases a review application can be made meaning that it permits review of normal suits in the same measure as appeals

He further contended that there are several errors of law and fact apparent on the face of the record and which stares at the face of anyone who sees without any other question and they need to be rectified so that they do not remain on record to be followed by lower courts.

The applicant’s representative acknowledges that the Judge dealt with grounds 6 & 7 of the appeal and after reproducing his arguments she simply stated that when the plaintiff withdraws a suit, he/she pays costs and the matter had nothing to do with Justice Owiny Dollo’s judgment. According to him this was the 1st error.

The last argument presented by the applicant is what he termed as 2nd error-making per *incuriam* decisions.

The respondents’ counsel in his submissions contended that there was nothing to review in this application since the learned trial Judge dealt with both grounds 6 & 7.

According to counsel, the main thrust of the said ground 6 & 7 was that costs had been wrongly awarded against it. The court rightly found that this ground of appeal is misconceived and dismissed it accordingly.

The second ground for challenging the decision of court by way of review was that, the Judge made decisions that were per incuriam. The respondents counsel submitted that the grounds of appeal are best suited for an appeal. It is clear the applicant did not agree with the finding of the Judge.

***Determination***

The law on review is set out in Section 82 of the Civil Procedure Act and Order 46 rule of the Civil Procedure Rules. The applicant has premised his application on ***“ Mistake or error apparent on the face of the record”***

Review means re-consideration of order or decree by a court which passed the order or decree.

If there is an error due to human failing, it cannot be permitted to perpetuate and to defeat justice. Such Mistakes or errors must be corrected to prevent miscarriage of justice. The rectification of a judgment stems from the fundamental principle that justice is above all. It is exercised to remove an error and not to disturb finality.

Reviewing a judgment/ruling based on mistake or error apparent on the face of the record can only be done if it is self-evident and does not require an examination or argument to establish it.

An error which has to be established by a long drawn out process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. ***See Civil Procedure and Practice in Uganda by M & SN Ssekaana page 453***

In the present case the applicant faults the trial Judge for not determining ground 6 & 7. A close examination of the ruling, the court dealt with these grounds together as argued by the applicant;

***“ “In the instant case, I have looked at the record of this case and by letter dated 22nd July,2015 the appellant sought leave to withdraw CS No. 382 of 2014 on condition that no costs are awarded to either party”***

***I have also looked at the law under Order 25 Rule 1 on discontinuance of suits by a plaintiff and where it is by notice in writing, it does not seem to state whether the defendants should respondent or not on the issue of costs as in itself it is mandatory that when you withdraw a suit, you pay costs………***

***I find this ground of Appeal misconceived and dismiss it accordingly”***

I find no error of law apparent on the face of record as submitted by applicant’s Managing Director. The Judge properly analysed the facts and applied the law to the facts.

The applicant also contended that the Judge made decisions that were per *incuriam*.

The power of review should not be confused with appellate powers which enable an appellate court to correct all errors committed by a subordinate court. The applicant tried to dissect the entire ruling in order to find some grounds that can be used to justify the application for review.

What the applicant terms as errors or decisions made per incuriam are only disagreement with the judgment and reasoning and are not errors apparent on the face of the record.

Greater care, seriousness and restraint are needed in review applications. In another case with similar parties-***MK Financiers Limited vs Shah & Co Ltd Misc. App No. 1056*** Justice Flavia Senoga Anglin held that;

***“If the applicant was not satisfied with court’s decision, he ought to have appealed instead of applying for review. Since it has been established that an erroneous view of evidence or of law and erroneous conclusion of the law is not ground for review, though it may be good ground of appeal.” Misconstruing of a statute or other provisions of law cannot be a ground for review.***

***The proper way to correct a judge’s alleged misapprehension of the procedure or substantive law or alleged erroneous exercise of discretion is to appeal the decision, unless the error be apparent on the face of record and therefore requires no elaborate argument to expose”***

The per *incuriam* decisions ought to be appealed to a higher court since they are not apparent on the face of the record. They are not manifest and clear to any court but rather are an apprehension of the law and evidence. ***See Edison Kanyabwera v Pastori Tumwebaze SCCA No. 2004***

It is neither fair to the court which decided the matter nor to the huge backlog of cases waiting in the queue for disposal to file review applications indiscriminately and fight over again the same battle which has been fought and lost. Public time is wasted in such matters and the practice, therefore, should be deprecated.

The applicant did not have any justification for filing this application and the same was merely an abuse of court process.

Abuse of Court Process was defined in Black’s Law dictionary (6th Ed) as

“***A malicious abuse of the legal process occurs when the party employs it for some unlawful object, not the purpose which it is intended by the law to effect, in other words a perversion of it***.”

Parties and their respective counsel should take the necessary steps to safeguard the integrity of the judiciary and to obviate actions likely to abuse its process. See ***Caneland Ltd & Others vs Delphis Bank Ltd Civil Application No. 344 of 1999 (Kenya Court of Appeal)***

Similarly, in the case of; **Benkay Nigeria Limited vs Cadbury Nigeria Limited No. 29 of 2006** (*Supreme Court of Nigeria*), their Lordships held:

“*In Seraki vs Kotoye (1992) 9 NWLR (pt 264) 156 at 188, this court on abuse of court process held….the employment of judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. This will arise in instituting a multiplicity of actions on the same subject matter against the same opponent on the same issue.*

The Court further observed that;

“*….to constitute abuse of court process, the multiplicity of suits must have been instituted by one person against his opponent on the same set of facts*”

This application fails and the same is dismissed with costs to the respondents

It is so ordered.

**SSEKAANA MUSA**

**JUDGE**

**24th/06/2019**