THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)

MISCELLENEEOUS APPLICATION NO.152 OF 2020

(ARISING FROM MISCELLANEOUS APPLICATION NO.555 of 2018)
(ARISING FROM MISCELLANEOUS APPLICATION NO.153 of 2016)
(ARISING FROM MISCELLANEOUS APPLICATION NO.192 OF 2000)
(ARISING FROM H.C.C.S NO. 207 0f 1993)

1. **STEPHEN B RWEHUTA**
2. **KATABAZI MILTON**
3. **KAKUHIKIRE WILLIAM**
4. **BYAMUGISHA EVARISTO**
5. **BWIGIRO J**
6. **TURYATEMBA BENARD**
7. **RUTANDEKIRE JOHN**
8. **KASHABANO DAVID**
9. **BIDENYI VANASIO**
10. **SABIITI JACKSON**

:: APPLICANTS

VERSUS

1. **TUMWIJUKYE MPIRIRWE**
2. **BUSINGYE NOAH**
3. **BABIGUMIRA JENIFFER**
4. **MUHEREZA ABEL**
5. **BANUHIGA HILLARY**
6. **ALIHO JUSTUS**
7. **SERESITINI NGABIRANO**
8. **DAVID TINFAYO**
9. **MILTON BAMPABURA**
10. **BENON BUTERE**
11. **LT. COL. KABAREEBE DAVID**
12. **KAGABA JOSHUA**
13. **MILTON TWEHANGANE**
14. **KATURA ONESMUS**

:::::::::::::::::::::::::::::::::: 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 and Orders of court passed in *Misc. Application No. 555 of 2018 Tumwijukye Mpirirwe & Others v Lt Col Kabareebe David & Others*, be reviewed and set aside.

2. A declaration that the impugned power of attorney held by the 11th, 12th, 13th and 14th Respondent in respect of *HCCS No. 207 of 1993 and HCMA No. 192 of 2000* is illegal, null and void.

3. Costs of the application be provided for.

The grounds in support of this application are set out in the Notice of motion and affidavits of Stephen B Rwehuta, Katabazi Milton, Kakuhikire William, Byamugisha Evaristo, Bwigiro J, Turyatemba Benard, Rutandikire John, Kashubano David, Bideyi Vanansio and Sabiiti Jackson which briefly states;

1. That Applicants are claimants and beneficiaries under *HCMA No. 192 of 2000 arising from HCCS No. 207 of 1993, Benon Turyatemba & Others vs Attorney General* wherein judgment was entered in their favour for the payment of compensation.

2. The court issued orders in *HCMA No. 555 of 2018, Tumwujkye Mpirirwe & Others vs Lt. Col. Kabareebe & others*, whereof the orders of court affect the applicants' claim and /or decree sum in *HCMA No. 192 of 2000 and HCCS No. 207 of 1993* yet the applicants were not parties to *HCMA No. 555 of 2018* and were not heard.
3. The Applicants are among the 1230 claimants and beneficiaries under *H.C.M.A No. 192 of 2000 arising from HCCS No. 207 of 1993, Benon Turyamureeba & others versus Attorney General* wherein Judgment was

entered in their favour for the payment of compensation for unlawful evictions from Mpokya forest reserve.

4. The Government of Uganda has severally effected payment to the Applicants and other claimants under *HCCS No. 207 of 1993 and HCMA No. 192 of 2000* through M/s Didas Nkurunziza & Co. Advocates who would in turn transmit the same through their recognized legal representatives.

5. This Court in March 2019 issued orders in *HCMA No. 555 of 2018, Tumwijukye Mpirirwe & other vs. Lt. Col. Kabareebe & others*, whereof the orders of court affected the Applicants' claim and/or decree sum in *HCMA No. 192 of 2000 and HCCS No. 207 of 1993* to the effect, interalia, that;
    - *The suit money shall be paid to the Mpokya claimants through M/s. Mushabe, Mununguu & Co. Advocates who are their lawyers at this material time.*
    - *Once received, some of this money shall be released for the verification process of 1097 Mpokya claimants*.

6. The Applicants being decree holders, were never made parties to *Misc. Application No. 555 of 2018* or given a right to be heard in matter affecting their proprietary interest in the decretal sum arising from *HCCS No. 192 of 1993 and Misc. Application 207 of 2000.*

7. That there are new and important matters of evidence that were not produced and considered by court in the course of the hearing of *HCMA No. 555 of 2018* and the Applicants could not adduce the same since they were excluded from the hearing process.

8. That the Applicants have never given any authority to any of the Respondents to represent them or act on their behalf at all and the power of attorney held by the 11th, 12th, 13th and 14th Respondents is illegal and intended to facilitate their scheme to interfere with payments of the Applicants' decretal sum.

In opposition to this Application the Respondents through Lt Col. Kabareeba David the 11th respondent for and on behalf of the rest of the respondents briefly stating that;

1. That I know that M/s Bashasha & Co Advocates attended the Mandamus proceedings but never objected to 11th, 12th, 13th, and 14th respondents instructions to M/s Mushabe, Mununguu & Co Advocates to prosecute the Mandamus Application.

2. That M/s Bashasha & Co Advocates never objected to M/s Mushabe, Mununguu & Co. Advocates instructions when the law firm wrote demanding payment from government upon instructions from the 11th, 12th, 13th, and 14th respondents on behalf of 1097 judgment creditors.

3. That when counsel Didas Nkuruziza withdrew from instructions due to some exigent circumstances, the 11th, 12th, 13th, & 14th respondents gave sole instructions to M/s Mushabe, Mununguu & Co Advocates and firm successfully argued the application for an Order of Mandamus which instructions M/s Bashasha & Co Advocates never opposed…… there is no error or mistake apparent on the face of the record.

4. That the alleged agreement for remuneration between Bashasha & Co Advocates and Mulenga & Kalemera Advocates signed by the late Benon Turyamureeba was irregular.

5. That when Counsel Didas Nkuruziza withdrew from the instructions due to exigent circumstances, the 11th -14th respondents gave sole instructions to M/s Mushabe, Mununguu & Co. Advocates and the firm successfully argued the application for an order of Mandamus, which instructions M/s Bashasha & Co Advocates and the applicants never opposed or objected to.

6. That some of the applicants are known to 11th applicant at personal level and the 11th respondent has always updated and consulted with them over

all the years before filing any application, but they have always told him that they did not doubt their ability to represent them in Misc. Application No. 555 of 2018.

7. That the High Court found that the 11th, 12th, and 13th respondents Powers of Attorney are as a result of abatement of the powers of attorney previously granted to Benon Turyamureeba, which had lapsed upon his death.

8. That this court cannot sit as appeal in its own decision since the learned trial Judge never varied the original orders in HCCS No. 207 of 1993 and Misc. Application No. 192 of 200, but simply gave additional orders in the spirit of administrative efficiency since the money had earlier been embezzled by many lawyers and fraudsters masquerading as our appointed agents.

9. 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 Bafilawala Elisha whereas the 1st-10threspondents were represented *Ms Farida Ikyimaana* and *Mr David Mushabe* for 11th -14th respondents.

Whether this is a proper case to review the Judgment?

The applicants counsel submitted that this application is brought under Section 82 of the Civil Procedure Act and Order 46 of the Civil Procedure Rules seeking for the orders herein above stated. The provisions cited herein were restated in **Evergreen Fields Uganda Ltd -vs- Bernard Tungwako & Another; Misc. Application No. 0003 of 2019** by His Lordship Justice Dr. Andrew K. Bashaija while quoting Manyindo J (as he then was) in Re-Nakivubo

Chemist (U) Ltd (1974) HCB 12 set out the three instances in which review of judgment or orders is allowed being;

i. *Discovery of new and important matters of evidence previously overlooked by excusable misfortune;*

ii. *Some mistake apparent on the face of the record;*

iii. *For any other sufficient reasons. [A copy of the Ruling in Evergreen Fields Uganda ltd is attached and marked as* ***Authority "B"]***

The above principles as articulated are applicable to the instant case in that the Applicants are aggrieved by the decision of this Court which ordered, interalia, that;

(a) *The suit money shall be paid to the Mpokya claimants through M/s Mushabe, Mununqu & Co. Advocates who are their lawyers at this material time.*

(b) *Once received, some of this money shall be released for the verification process of the 1097 Mpokya claimants.*

(c) *The verification process will determine the original Mpokya claimants on their agents or successors and how much each is entitled to. This verification shall be carried out by the office of the Auditor General, Police, LCs of the area and other relevant officials. [*Emphasis added.]

1. The court record manifests apparent error or mistakes as follows;

a. In the parent suit of HCCS No. 207 of 1993; Turyamureeba Benon & 132 Others -vs Attorney General & Another, Mukanza J. determined the liability of Government, listed all the 133 claimants and awarded each Ugx. 12,000,000/= with interest at 6% p.a from April, 1993 till payment

in full. Later Misc. Application No. 192 of 2000 was filed to add the 1097 claimants on the test suit on the same terms and all the 1230 were listed.

i. It is therefore an error or a mistake apparent on the court record for court to order for verification of the claimants who had already been verified by the Government authorities, led evidence in court as to their entitlements and received part-payment pursuant to the said decree.

ii. The said orders and decree in Misc. Application No. 192 of 2000 and HCCS No. 207 of 1993 have in effect been altered and the hitherto concluded case been re-opened for determination of *how much each claimant is entitled to and who the claimants are.*

iii. The entitlements of the claimants as contained in the decree and orders in HCCS No. 207 of 1993 Misc. Application No. 192 of 2000 has been appropriated by Court towards the verification exercise/process. In effect the Applicants' property in the decree has been diminished by the orders in Misc. 555 of 2018 by way assignment to the verification team of the 11th -14th Respondents and their lawyers.

iv. The uncertainty in the cost of the verification exercise has in effect lessened the Applicants' entitlements in the decree without being afforded a right to be heard.

b. The Applicants and other claimants had given powers of attorney to the late Turyamureeba Benon who executed an agreement with Government of Uganda on 11th April 2003 wherein the parties agreed on the mode of payment through the law of Mulenga & Karemera Advocates [Currently *Didas Nkurunziza & Co. Advocates*]. This arrangement/agreement concluded by the late Turyamureeba Benon was challenged in Misc. Application No. 622 of 2006; Ivan Nsigazi & Others vs Turyamureeba Benon & Attorney General, and the powers of attorney confirmed. The said orders have never been set aside or appealed. It is therefore an error apparent on court record for the court to alter this arrangement by appointing Mushabe, Mununguu & Co. Advocates with affording the applicants an opportunity to be heard. The death of donee of powers of attorney, automatically reverted the said powers of attorney to the donors/the claimants/applicants. The applicants have always received their benefits through M/s Bashasha & Co. Advocates.

Counsel further submitted that the errors or mistakes pointed out herein above are not a reflection of mere erroneous decision but a clear case of error apparent on the face of record. The mistake is so self-evident and does not require any form of elaborate argument to be established.

2. On the item of discovery of new and important matter or evidence. It as his submission that:
    a. The Applicants upon perusal of the court record discovered that there are powers of attorney held by the 11th -14th Respondents. The applicants have never authorized the 11th -14th Respondents to

act for and their behalf and they have never executed any form powers of attorney in favour of the said Respondents.

b. The Applicants were not parties to Misc. Application No. 555 of 2018 and were consequently deprived of the right to be heard.
c. The Court ordered that the law firm of M/s Mushabe, Mununguu & Co. Advocates is the Applicants' lawyers and shall receive the suit money.
d. The 11th -14th Respondents have already executed a remuneration agreement with M/s Mushabe, Mununguu & Co. Advocates to charge all the claimants including the Applicants a 5% on the suit money in the region of Ugx. 22,044,807,040/=

The 1st-10th respondents' counsel made submissions and they are very similar to the applicants' submissions. They are indeed supporting the applicants application and they ought to have been joint applicants and they have made similar prayers for review of the Judgment of court.

The respondents' counsel in his submissions contended that there was nothing to review in this application since the learned trial Judge dealt with evidence on record of the inflated numbers of claimants from 1097 to 1,870. That this formed the basis of verification coupled with the allegation of embezzlement of 10,125,907,200/= earlier paid as part payment.

It was further the submission of counsel that the verification is intended to thwart imminent threats of misappropriations and that the applicants had earlier consented to the verification exercise that was never conducted. In addition, it was the respondents' submission that the verification exercise was necessary after 28 years since they were evicted.

According to counsel, the newly discovered evidence must be relevant and with probative value to possibly have altered the judgment if it had been given in earlier proceedings.

It was counsel's contention and submission that the mistake or error apparent on the face of the record must be such an evident error which does not require extraneous evidence to show its incorrectness. Therefore the alleged errors alluded to by the applicants are not mistakes or errors apparent on the face of the record.

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 applicants fault the trial Judge for the following errors or mistakes;

1) ***It is therefore an error or a mistake apparent on the court record for court to order for verification of the claimants who had already been verified by the Government authorities, led evidence in court as to their entitlements and received part-payment pursuant to the said decree.***

2) ***The said orders and decree in Misc. Application No. 192 of 2000 and HCCS No. 207 of 1993 have in effect been altered and the hitherto concluded case been re-opened for determination of <u>how much each claimant is entitled to and who the claimants are.</u>***

3) ***The entitlements of the claimants as contained in the decree and orders in HCCS No. 207 of 1993 Misc. Application No. 192 of 2000 has been appropriated by Court towards the verification exercise/process. In effect the Applicants' property in the decree has been diminished by the orders in Misc. 555 of 2018 by way assignment to the verification team of the 11th - 14th Respondents and their lawyers.***
4) ***The uncertainty in the cost of the verification exercise has in effect lessened the Applicants' entitlements in the decree without being afforded a right to be heard.***

I find no error of law or mistake apparent on the face of record as submitted by applicants counsel and the 1st -10th respondents counsel. The Judge properly analysed the facts and applied the law to the facts and the prevailing circumstances and accordingly made appropriate orders.

I entirely agree with the 11th assertion that the trial Judge never varied the original orders in HCCS No. 207 of 1993 and Misc. Application No. 192 of 200, but simply gave additional orders in the spirit of administrative efficiency since the money had earlier been embezzled by many lawyers and fraudsters masquerading as our appointed agents.

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 applicants term as mistakes or errors made in the ruling are only a disagreement with the decision and reasoning and are not errors apparent on the face of the record.

Greater care, seriousness and restraint are needed in review applications. In the case of ***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***

The applicants tried to disguise as new parties affected by the ruling of the Learned trial Judge Mugambe Lydia in order to circumvent or short circuit the appeal process that had been lodged by other aggrieved parties to the court of appeal.

This was not an innocent application for review; it was intended to achieve some other purpose for the aggrieved parties together with the applicants. The application was brought to this court after 13th months (1year and one month) after the learned trial Judge had been transferred from the Civil division to Criminal division. This would inevitably mean that the applicants waited to file the application so that another judge would be assigned the file for review. In my humble view, it is wrong for another judge to hear an application for review of another judge's decision without any justification as envisaged under Order 46 rule 4.

Application for review to be before the same judge or judges.

Where the judge or judges or any one of the judges, who has passed the decree or made the order, a review of which is applied for, continues or continue attached to the court at the time when the application for a review is presented, and is not or are not precluded by absence or other cause for a period of six months next after the application from considering the decree or order to which the application refers, the judge or judges or any of them shall hear the application, and no other judge or judges of the court shall hear the application.

Review is a reconsideration of the same subject matter by the same court and by the same judge. If the judge who decided the matter is available, he/she alone has jurisdiction to consider the case, and review the earlier order passed by himself/herself. He or she is best suited to remove any mistake or error apparent on the face of his/her own order. Moreover, he/she alone will be able to remember what was earlier argued before him/her and what was not argued. The law, therefore insists that if he/she is available, he/she alone would hear the application for review.

There may, however, be situations wherein this course is not possible. The same "judicial officer" may not be available. Death or such other unexpected or unavoidable causes might prevent the judge who passed the order from reviewing it. Such exceptional cases are allowable only *ex necessitate* and in those cases his successor or any other judge or concurrent jurisdiction may hear the review application and decide the same.

The applicants in this matter have not made out any justification for the prolonged delay in filing the application for review and it buttresses this court's conviction that this was not an innocent application by the applicants. *Order 46 rule 4* was intended to avoid such scenarios of another judge sitting in a matter determined by another judge.

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 and resources is wasted in such matters and the practice, therefore, should be deprecated.

The applicants 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.*

This application fails and the same is dismissed with costs to the 11th-14th respondents only.

It is so ordered.

Dated, signed and delivered be email and whatsApp at Kampala this 10th day of July 2020

SSEKAANA MUSA
JUDGE