THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA-MAKINDYE
(FAMILY DIVISION)
MISC. APPLICATION NO. 463 OF 2014

(ARISING FROM MISC. APPLICATION NO. 122 OF 2018)
ALSO ARISING FROM MISC. APPLICATION NO. 121 0F 2018)
(ALL ARISING FROM CIVIL SUIT NO. 26 OF 2018)

1. PRINCE CHARLES MATOVU SSIMBWA
2. PRINCE JOSEPH SSIMBWA
[ADMINISTRATORS OF THE ESTATE OF LATE PRINCE SAMSON SSIMBWA] …….... APPLICANTS

VERSUS

1. KAMYA SAMUEL
2. KYASA FRED
3. KIBUUKA ROBERT
4. KIZZA SSANYU IRENE …..……. RESPONDENTS

BEFORE: HON. LADY JUSTICE KETRAH KITARIISIBWA KATUNGUKA

RULING

Introduction

[1] This Application is brought under **Sections 82 and 98 of the Civil Procedure Act Cap 71, Order 46 rule 1 and Order 52 of the Civil Procedure Rules S.I. 71-1,** by way of Notice of Motion, seeking orders that the interim order and ruling in Misc. Application No. 122 of 2018 be reviewed and set aside and that costs of the application be provided for.

[2] The grounds for the application are set out in the affidavit of the 2nd Applicant, Prince Joseph Ssimbwa, and are briefly that; the ruling which was passed by this honourable court in Miscellaneous Application No.122 of 2018 in total disregard of the applicant's affidavit in reply and submissions, was passed in error apparent on the face of the record and resulted into an erroneous ruling and order thereof; the learned trial Registrar's orders which interfered with the status quo of the suit property were made in error apparent on the face of the record; the applicant is

aggrieved by both the ruling and interim orders of the learned trial registrar which in effect changes the legal regime on the law governing interim orders.

[3] Counsel for the 2nd and 4th respondents raised the issue of non-service of the application and thus filing their affidavit in reply out of time. Counsel's submission was that courts have allowed such affidavits that have been filed out of time, in the interest of substantive justice and he therefore prayed for extension of time within which to file the affidavit. (Courts have endorsed such affidavits even when filed out of time - See Oburu & Anor v Equity Bank (U) Ltd MA 809 of 2015, also cited by counsel for the respondent). The intention behind this is that for as long the pleadings are on record albeit late and both parties have had the opportunity to respond to them, justice demands that the handmaidens of substantive justice be deemed simply that, and serving substantive justice prevails. I therefore allow the affidavit in reply.

[4] The application was therefore opposed by the 2nd respondent who filed an affidavit in reply while the 1st, 3rd and 4th respondents did not file any affidavits in reply.

Representation

[5] The Applicants are represented by Counsel Mwebaza Lydia of M/S Luzige, Lubega, Kavuma & Co. Advocates; while the Respondents are represented by Counsel Mugerwa Herbert of M/S Kusiima & Co. Advocates. Written submissions were filed for the applicants and for the 2nd and 4th respondents.

The case.

[6] The gist of the application is that the respondents filed MA 122/2018 seeking an interim order against the applicants; that the registrar did not consider the affidavit in reply and submissions of the applicants and in the process changed the status quo thereby changing the legal regime on interim orders.

[7] Counsel for the applicant cited the cases of **Muyode v Industrial and Commercial Development and Ors *(2006)1 EA 243 (CA – K),* Kanyabwere v Tumwebaze (2005) 2 EA (SC – U)** and **FX Mubwike vs UEB HCMA No.098 of 2005** and argued that this is a proper case for review.

The issues for determination are;

1. Whether there is an error of law on the face of the record in MA 122/2018 to warrant its review.
2. What are the available remedies.

[8] Court shall consider the grounds for the application to wit;

i. There is an error apparent on the face of the record since all averments from the applicants' affidavit in reply and the submissions of their counsel were never considered by the learned trial registrar while arriving at her decision;

ii. The learned trial registrar's orders which interfere with the status quo of the suit property were made in error and are a clear manifest of an error apparent on the face of the record;

iii. The applicant is aggrieved by both the ruling and interim orders of the learned trial registrar which interfered with the status quo of the suit property and in effect change the legal regime on the law governing interim orders.

iv. The ruling is tainted with errors apparent on the face of the record in as far as it was predetermined and signed on 13th July 2018 and yet only an administrative order was issued on that date.

v. It is just and equitable and in the interest of justice that court reviews its ruling and orders in Misc. Application No. 122 of 2018.

vi. The 1st and 3rd applicants did not instruct M/S Kusiima & Co. Advocates to file the application on their behalf;

The position of the law.

[9] Section 82 of the Civil Procedure Act, provides that any person considering himself or herself aggrieved—

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) 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 rule 1 (1) (b) of the Civil Procedure Rules provides that **any person considering himself or herself aggrieved by a decree or order from which no appeal is hereby allowed** … 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.

[10] Grounds for review were enunciated in the case of ***FX Mubwike v UEB High Court Misc. Application No.98 of 2005***(also cited by counsel for the Applicant) to be;

i. That there is a mistake or manifest mistake or error apparent on the face of the record.

ii. That there is discovery of new and important evidence which after exercise of due diligence was not within the applicant's knowledge or could not be produced by him or her at the time when the decree was passed or the order made.

iii. That any other sufficient reason exists.

[11] An error apparent on the face of the record was defined as one which *is manifest or* self-evident *and does not require an examination or argument to establish it (see* ***Batuk K. Vyas v Surat Municipality AIR (1953) Bom 133)***.

Examples of situations that may be described as **mistake or manifest mistake or error apparent on the face of the record** were listed in the case of **Kalokola Kaloli v Nduga Robert Misc. Application No. 497 OF 2014 to include;**

-where a suit proceeds ex-parte when there is no affidavit of service on record; (see the case of ***Edison Kanyabwera v Pastori Tumwebaze SCCA 6/2004)***, or where the court enters a default judgment when there is no affidavit of service or where a summary judgment is entered under Order 36 when there is a pending application for leave to appear and defend on record.

[12] **A perceived** misdirection or error in judgement by a judicial officer on a matter of law cannot be said to be an error on the face of the record (see the case of **Kalokola Kaloli Vs Nduga Robert (supra).**

[13] In the Supreme Court case of ***Edison Kanyabwera Vs Pastori Tumwebaze (supra),*** court stated that an error may be a ground of review and must be apparent on the face of the record i.e. an evident error which doesn't require any extraneous matter to show its incorrectness. It must be an error so manifest and clear that no court would permit such an error to remain on the record. The error may be of fact or law.

If one needs to 'enter the head" of the trial judge to investigate the error then in my considered opinion this error is not apparent on the record and cannot be a ground for review but a legal argument that can only be opened by the appellate court.

Resolution.

In the resolution of this case I shall resolve ground one and then depending on the outcome, the rest of the grounds may be moot.

Ground 1: **The ruling in Misc. Application No.122 of 2018 was in total disregard of the applicant's affidavit in reply and submission and was thus passed in error apparent on the face of the record.**

[14] The 2nd applicant's affidavit states that there was an error apparent on the face of the record in the ruling in MA 122/2018 since all the averments in their affidavit in reply together with their counsel's submissions were never considered by the learned trial registrar while arriving at her decision; that the applicant's affidavit shows that the applicants filed their affidavit in reply together with their submissions on 30th May 2018; the ruling is dated 13th July 2018 and therefore the affidavits and submissions were on record before the ruling was delivered.

The 1st respondent averred that the court considered the parties' affidavit evidence and that counsel for the respondent did not demonstrate how court ignored the affidavit in reply and submissions; that there are no grounds for review and the application is frivolous and already overtaken by events since the 2nd applicant has complied with the court order; that the application should be dismissed.

[15] The law on contents of judgments/rulings under O. 21 r 4 of the Civil Procedure Rules is that judgments in defended suits must contain a concise statement of the case, the points for determination, the decision on the case and reasons for the decision.

The above are mandatorily required to show the major points for determination and the manner in which the decision is arrived at. While there is no mandatory requirement for a judgment, or ruling for that matter, to make mention of all the evidence before it or submissions of counsel, it is pertinent that the reasons for the decision arrived at should as much as possible reflect both sides of the case rather than stating the applicant's case without balancing it against that of the respondent for to do so would be to make the result look tilted and lopsided.

[16] A look at the ruling shows mention of the affidavit of Kyasa Fred and the submissions of counsel for the applicant and no mention of the respondents' defence but only states the case and agrees with the applicant without any analysis of the opposite party's defence. Although the applicants have not shown that their evidence or submissions were not considered or that the trial registrar did mention that she did not, balanced analysis ought to be seen on the face of the record without necessarily considering the reasoning leading to the decision. The maxim that justice must not only be done but must also be seen to be done, in my view comes into play. The absence of reference to the case as presented by both sides but mere statement of the case as presented by the applicant is in my view a factual error apparent on the face of the record which doesn't require any extraneous matter to show its incorrectness (see the case of ***Edison Kanyabwera v Pastori Tumwebaze (supra));*** thereby justifying review.

I find that the trial registrar erroneously failed to consider the affidavit in reply and submissions of the applicants (respondents in MA 122/2018) and in the process changed the status quo thereby changing the legal regime on interim orders. Ground 1 therefore succeeds and I shall go ahead and review the ruling and make orders under section 98 of the Civil Procedure Act and section 33 of the Judicature Act.

Review of the Ruling.

[17] I have studied the affidavit in reply and the submissions of counsel for the respondent in MA 122 of 2018. The Affidavit in reply was deposed by Prince Charles Matovu Simbwa who delved into matters of the main suit which I shall not state here and shall not address; he stated that the applicant had failed to establish a prima facie case, irreparable loss and that the balance of convenience lies with the respondent. Counsel made written submissions and raised points of law to the effect that the application was served out of time and ought to be dismissed. He relied on the case of Soroti Municipal Council v Pal agencies (U) Ltd MA No. 181/2012 and Ziriyo Edison & Ors v Kampala Capital City

Authority & Ors CS No. 396/2012; raised the issue of the matter having been filed without instructions of the 1st and 3rd Applicants; the issue of form where he faults counsel for the applicant for signing the application giving grounds that are later supported by the Affidavit of Kyasa Fred; On merit he cited the case of Hussein Badda vs Iganga District Land Board &Ors MA 47/2011 on conditions for granting an interim injunction, the case of Nitco Ltd v Nyakairu {1992-1993} HCB 135, and contended that there is no prima facie case, that no irreparable damage has been proved and that the balance of convenience tilts in their favour and that on the premises the status quo ought to be preserved. They cited the case of **Kalokola Kaloli V Nduga Robert Misc. Application (supra).** They prayed that the application be dismissed with costs. I have considered both the application, the affidavit in reply and submissions of both counsel.

[18] On matters of form and delayed service, the record shows that the notice of motion was endorsed on 10th April 2018 and the affidavit in reply was filed on 23rd April 2018.

[19] The principles governing interlocutory applications of this nature are known; that there should be a prima facie case; that any injury must be one that cannot be adequately compensated by way of damages and if the two fail court should consider the balance of convenience and granting such an order is by judicial discretion for the purpose of preserving the status quo until the rights of parties are established.(See the case of **American Cyanamid Co. vs. Ethicon Ltd [1975] AC 396** where Lord Diplock laid down the guidelines that have been followed by Ugandan Courts in the cases of **E.L.T Kiyimba Kaggwa Versus Haji Abdu Nasser Katende [1985] HCB 43, Francis Babumba and 2 others vs. Erisa Bunjo HCCS No. 697 of 1999**, **Robert Kavuma vs. M/S Hotel International SCCA No.8 of 1990** and **Nasser Kiyingi and another vs. Attorney General and 2 Others, Constitutional Application No.29 Of 2012).**

In the case of **Godfrey Sekitoleko and others vs. Seezi Mutabazi CACA 65/2001** the Court of Appeal made the position on the grant of an injunction clear by stating as follows;

"*The court has a duty to protect the interests of parties pending the disposal of the substantive suit. The subject matter of a temporary injunction is the protection of legal rights pending litigation.*

[20] On Prima facie case, in Civil Suit No.26/2018 the plaintiffs' claim is that the defendants/respondents fraudulently obtained Letters of Administration for the estate of late Omulangira Samusoni Simbwa. Alleged fraud requires investigation of this honorable court. A prima facie case therefore is established.

[21] On whether there is likely to be irreparable damage the applicants must prove that the respondents are about to be or are in the process of changing the status quo of the suit property such that they will alienate and put it out of the reach of the applicants unless the application is granted. While Affidavit evidence is the practice in applications of this nature it must be supported by documentary or other proof. It is not enough to claim that suit property is in danger without showing to court how it is. It is the applicants' case that the respondents are intermeddling with the suit property. They attached a copy of a document purported to be a cow sale agreement by the Administrator while the respondents attached an inventory as administrators duly appointed by court. I am constrained to find that sale of 3 cows is alienating property that cannot be atoned for by way of damages instead of tying the administrator's hands and preventing them from performing their duties. I do not find that irreparable damage has been proved.

[22] On balance of convenience, the aggrieved party must show that as a matter of urgency the estate property is protected from proved and not imagined eminent danger and that between the holder of Letters of Administration and a claimant to the estate the convenience balance tilts towards the claimant applicant. I have not been convinced that the balance of convenience tilts in the applicant's favour.

In the premises the application lacks merit. The rest of the grounds are moot and I shall not address them. I shall however address the issues of the Administrative Order and the legal representation of the 2nd and 3rd respondents.

Administrative Order

[23] The 2nd applicant's affidavit states that the administrative order altered the status quo to their detriment by directing the 4th respondent to collect rent from the suit premises. Counsel for the applicant contended that the respondents were allowed to collect the estate rents and yet it was previously collected by the applicants as administrators of the estate thus changing the status quo. Counsel for the respondent argued that the only error would be that no person was appointed to collect the rent proceeds.

The administrative order shows that the 4th applicant was directed to collect rent on behalf of all the beneficiaries pending delivery of the ruling in MA 122/2018.

[24] The ruling in MA 122/2018 at page 3 reads and I quote;

> "The other two prayers concerning appointing the applicants temporarily as receivers of rent fees and receive all the collected monies will not be granted by me because it will seem like I have assumed the powers of the judge."

The applicants' averments seem to have been overtaken by events and their averment and argument by their counsel that the ruling was already predetermined on 13th July 2018 is without substance since the ruling reversed the position in the administrative order.

[25] Counsel for the applicants argued that the Administrative Order and the Ruling were given the same dates and yet the latter was delivered on another date (22nd August 2018) and therefore this is an error apparent on the face of the record.

I have read the administrative order, and it shows that the ruling was to be delivered on a later date. The order under paragraph 2 states that "The 4th applicant . . . will from now on collect rent . . . until the ruling is delivered in this

Application MA No. 122 of 2018. . .” The administrative order and ruling are both dated 13th July 2018.

This is a clerical error and shall be corrected under S. 99 of the Civil Procedure Act.

Legal Representation of 2nd and 3rd respondent

[26] Counsel for the applicants raised issue with the legal representation of the 2nd and 3rd respondent by counsel for the 1st and 4th respondent, M/S Kusiima & Co. Advocates, and argued that M/S Kusiima acted without the instructions of the 2nd and 3rd respondents (1st and 3rd applicants then) in MA 122/2018, in contravention of Reg 2 (1) of the Advocates Professional Conduct) Regulations. He relied on the case of Kabale Housing Tea Estates Tenants Association v Kabale Municipal Local Council SCCA 15/2013 for the argument that the ruling in MA 122 of 2018 is null and void for the lack of instructions by counsel from the 2nd and 3rd respondents and that therefore the trial registrar by ignoring this aspect and proceeding to entertain the matter, was an error on the face of the record.

I note that this issue was not raised as a ground for review in the application and is tantamount to submitting from the bar. I shall nevertheless consider the argument in the spirit of Art. 126 (2) (e) of the 1995 Constitution.

[27] It was submitted for the respondent that the arguments of the applicants’ counsel should be rejected as it amounts to submitting from the bar as there is no affidavit of the 3rd respondent on court record to support such submissions.

I disagree because there is a supplementary affidavit in support of MA 463/2019 dated 5/04/2019 to the effect that M/S Kusiima & Co. Advocates was not given instructions to proceed with C.S 26/2018 and MA 122/2018. The position is the same with the 1st respondent.

[28] I agree with counsel for the applicants that an application without instructions to counsel is rendered incompetent (See Kabale Housing Tea Estates Tenants Association v Kabale Municipal Local Council (**supra**). However, counsel did have instructions for the 2nd and 4th respondents and so the suit concerning them was competent; to render the entire suit incompetent would in my view be undue regard to technicalities contrary to Art. 126 (2) (e) of the 1995 Constitution of Uganda.

In summary;

i. I therefore find that there was an error apparent on the face of the record when the trial registrar proceeded to entertain the application with the 1st and 3rd respondents (1st and 3rd applicants in MA 122/2018) as parties to the suit in absence of their instructions to M/S Kusiima & Co. Advocates.

ii. There is an error on the face of the record concerning the lack of consideration of the applicants' affidavit in reply and submissions by the learned trial registrar while arriving at her decision;

iii. There is a clerical error on the date of the ruling which is hereby corrected to show that it was delivered on 22nd August 2018 and not 13th July 2018.

iv. The ruling is hereby reviewed;

v. The application succeeds;

I therefore make the following orders;

1. The suit brought by the 1st and 3rd applicants is struck out for lack of instructions;
2. The Application has merit and it is hereby granted;
3. The ruling and orders in MA 122/2018 are hereby set aside;
4. Costs of this application shall be borne by the respondents.

Dated at Kampala this 20th day of December 2**019**

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KETRAH KITARIISIBWA KATUNGUKA
JUDGE.