IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable

Civil Appeal No. 027 of 2017

In the matter between

ZURA MOHAMMED NASIM **APPELLANT**

And

LATIM ANDREW **RESPONDENT**

Heard: 22 July 2019
Delivered: 29 August 2019

Civil Procedure *— Review of decree on application by a third party — section 82 (a) of The Civil Procedure Act and Order 46 rules 1 and 2 of The Civil Procedure Rules— unless a person is prejudicially or adversely affected by the decree he or she is not entitled to file an application for its review — A person considering himself or herself aggrieved means a person who has suffered a legal grievance — Even though an agent is not under the full control of the principal, any knowledge acquired and action taken by the agent within the litigation is chargeable and imputed to the principal — As long as an agent has authorisation, either express, apparent or implied, he or she may bind the principal legally — A principal represented by an agent in the litigation cannot qualify to be "a person aggrieved" within the meaning of Order 46 rules 1 and 2 of The Civil Procedure Rules — for one to qualify as "a person aggrieved" within the meaning of Order 46 rules 1 and 2 of The Civil Procedure Rules, that person must not have been privy to the proceedings, directly in indirectly through an agent, that resulted in the decree sought to be set aside — a person applying under Order 46 rules 1 and 2 of The Civil Procedure Rules, must show that the rights prejudicially or adversely affected by the decree sought to be set aside, are pre-existing rights. They must have accrued before the commencement of the litigation — For rights which did not exist at the commencement of the litigation but accrued before the final*

determination, diligence would require the applicant to intervene before the conclusion of the litigation — the expression "person aggrieved" does not include one who was aware of the litigation, who knew that his or her rights would certainly be affected by the decision, had the opportunity and means to intervene but chose to pass up the opportunity to intervene — A principal cannot insulate himself or herself from the actual knowledge acquired by his or her agent

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JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The appellant sued a one Oryem K. L. Watmon for recovery of plot 23 School Road, formerly known as Commercial Road, Pece Division in Gulu Municipality, a declaration that she is the rightful owner of that plot in dispute, general damages for trespass to land, interest thereon, a permanent injunction and the costs of the suit.

[2] Her claim was that during or around the year 1977, her late husband Mohammed Nassim, purchased the plot and house thereon from a one Alphonse Omona. Following the break out of war in 1979, they fled into exile in Sudan where her husband died in 1983. She returned from exile in 1986 but due to the insurgency that broke out soon thereafter, she was among the returnees that were relocated to Masindi District by Government. The defendant's father, a one Keneri Oryem, took advantage of her absence from the land to take possession of the land and later in 1990, to obtain a lease offer over the land from Gulu Municipal Council. She contended that the lease offer was obtained fraudulently and the defendant's family has since harassed her and her family and prevented her from developing the property.

[3] The defendant, Oryem K. L. Watmon, filed a written statement of defence by which he refuted the appellant's claim and averred that he owns plot 38 School Road and has no knowledge nor claim over plot 23 School Road or Commercial

Road. He admitted having obtained a lease offer but contended it was not in respect of the land claimed by the appellant. He denied having committed any fraud in the acquisition of the lease offer. He prayed that the suit be dismissed with costs.

The respondent's evidence in the court below:

[4] The trial proceeded ex-parte since the said Oryem K. L. Watmon did not show up on the date fixed for hearing and there was no reasonable explanation of his absence yet there was proof that he had been duly served.

The appellant's evidence in the court below:

[5] The appellant Zura Nassim testified as P.W.1 and stated that the land in dispute was purchased by her husband in 1977. The land has a main building, pit latrine and kitchen. On return from exile, the Municipal Council helped her evict the trespasser she found occupying the land. Since then her children are in possession of the land. Later the defendant destroyed the building on that land.

[6] P.W.2 Ibrahim Okwi Abdu, testified that the land in dispute was purchased by the appellant's late husband and the defendant's father has never been in occupation. During the insurgency, many people migrated and those who stayed behind took over other people's land.

Proceedings at the *locus in quo*:

[7] The court then inspected the locus in quo on 5th October, 2015 and recorded additional evidence from a one Abdalatif and Okwonga Terrance the area L.C.1 Chairman. The defendant and his counsel did not attend those proceedings too.

Judgment of the court below:

[8] On 25th February, 2016 the court delivered its judgment by which it held that the documentary and oral evidence on record was overwhelming on basis of which it found that the land belongs to the appellant. The court observed that the defendant had filed pleadings but failed to appear compelling the court to close his defence under the provisions of Order 9 rule 25 of *The Civil Procedure Rules*. The defendant having failed to adduce evidence, he was found to be a trespasser on the land. On basis of the attachments to the written statement of defence which show that the defendant applied for a lease offer and caused a survey of the land, he was found to have acted fraudulently. The appellant was declared rightful owner of the land in dispute, a permanent injunction was issued against the defendant and the plaintiff was awarded the costs of the suit.

[9] On 22nd December, 2016 the respondent filed an application seeking a review and setting aside of the said judgment on ground that he is the holder of a leasehold title in respect of the land in issue. He contended that the defendant Oryem K. L. Watmon that the appellant had sued, was a mere caretaker of the land, holding the land in dispute on behalf of the respondent. He contended further that although he is the registered owner of the land, he was not served with court process in Civil suit No. 40 of 2008. He also prayed that execution of the decree be stayed. The appellant opposed that application contending that the respondent did not have the necessary *locus standi* for making the application.

Ruling by the court below on the third party application for review of the decree:

[10] In its ruling dated 23rd May, 2017, the trial court decided that once a third party proves that he has suffered a legal grievance as a result of a decree, he or she can apply for that decree to be reviewed. The respondent presented a copy of leasehold title L.R.V HQT 237 Folio 8 plot 38 School Road, Pece Division showing that on 5th September, 2014 he became registered proprietor of the plot

that is the subject matter of the decree sought to be set aside. The decree passed in the suit operated against him and therefore it ought to be set aside. An order was made setting aside the decree and directing the appellant to serve the respondent with summons within twenty-one days so that the suit could be heard and determined on merits.

The grounds of appeal:

[11] The appellant was dissatisfied with the decision and appealed to this court on the following grounds, namely;

1. The trial Magistrate erred in law and fact when he granted an application for order of review by a third party without *locus standi* consequently setting aside the decree hence occasioning a miscarriage of justice.
2. The trial Magistrate erred in law and fact when he considered an affidavit containing hearsay evidence in support of the application for review thus arriving at a wrong conclusion thereby occasioning a miscarriage of justice.
3. The trial Magistrate erred in law and fact when he failed to take into account the proceedings of the lower courts.
4. The trial Magistrate erred in law and fact when he failed to properly evaluate the evidence on the record thus arriving at a wrong conclusion occasioning a miscarriage of justice.

Arguments of Counsel for the appellant:

[12] In their written submissions, counsel for the appellant, argued that the decree was passed in respect of plot 23 School road while the title deed sought to be relied upon by the respondent is plot 28 School Road. There was no evidence before the Magistrate in the court below to show that plots 23 and 28 School Road are one and the same plot. Not having presented any evidence showing that the respondent had any interest in plot 23, he had no *locus standi* to seek

the review of a decree made in respect of plot 23 School Road. In paragraphs 4 and 5 of the affidavit supporting the application for review, the respondent relied on information disclosed to him by a one Oryem which shows that at all material time the respondent was aware of the existence of the suit prior to issuance of the decree. However, in paragraph 6 he denied knowledge of the existence of the suit. The contradictory positions are indicative of falsehood contained in the affidavit. This was not an interlocutory application and therefore the affidavit should not have contained statements based on belief. It should have been limited to statements based on the respondent's personal knowledge. The Magistrate in the court below failed to make reference to the proceedings that resulted in the decree that was sought to be set aside. Had he done so, he would have found that it related to a plot different from that which forms the subject matter of the decree. They prayed that the appeal be dismissed.

Arguments of Counsel for the respondent:

[13] In response, counsel for the respondent, submitted that the order appealed is not appealable as of right yet the appellant did not obtain leave of court before she filed the appeal. Both section 82 (a) of *The Civil Procedure Act* and Order 46 rules 1 and 2 of *The Civil Procedure Rules* confer *locus standi* on any person aggrieved by a decree to apply for its review. A person aggrieved is one who has suffered a legal grievance. The respondent suffered legal grievance in that he is the registered owner of land that is the subject matter of the decree yet he was not joined as a party to the proceedings that resulted in that decree. The appellant ought not to have raised issues of hearsay contained in the affidavit that supported the application for review for the first time on appeal. Such issued ought to have been raised and considered by the court below. Grounds three and four are too general. They prayed that the appeal be dismissed.

Duties of a first appellate court:

[14] It is the duty of this court as a first appellate court to re-hear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion (see *Father Nanensio Begumisa and three Others v. Eric Tiberaga SCCA 17of 2000*; *[2004] KALR 236*). In a case of conflicting evidence the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions (see *Lovinsa Nankya v. Nsibambi [1980] HCB 81*).

[15] The appellate court may interfere with a finding of fact if the trial court is shown to have overlooked any material feature in the evidence of a witness or if the balance of probabilities as to the credibility of the witness is inclined against the opinion of the trial court. In particular this court is not bound necessarily to follow the trial magistrate's findings of fact if it appears either that he or she has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on demeanour of a witness is inconsistent with the evidence in the case generally.

The fourth ground of appeal is struck out for being too general:

[16] Having re-appraised the proceedings and considered the arguments presented, I find the fourth ground of appeal to be too general that it offends the provisions of Order 43 r (1) and (2) of *The Civil Procedure Rules* which require a memorandum of appeal to set forth concisely the grounds of the objection to the decision appealed against. Every memorandum of appeal is required to set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from without any argument or narrative, and the grounds should be numbered consecutively. Properly framed grounds of appeal should specifically point out errors observed in the course of the trial, including the decision, which

the appellant believes occasioned a miscarriage of justice. Appellate courts frown upon the practice of advocates setting out general grounds of appeal that allow them to go on a general fishing expedition at the hearing of the appeal hoping to get something they themselves do not know. Such grounds have been struck out numerous times (see for example *Katumba Byaruhanga v. Edward Kyewalabye Musoke, C.A. Civil Appeal No. 2 of 1998; (1999) KALR 621*; *Attorney General v. Florence Baliraine, CA. Civil Appeal No. 79 of 2003*). The ground is accordingly struck out.

Grounds 1,2 and 3

[17] Grounds 1, 2 and 3 can be conveniently considered together since they all seek to impugn the propriety of the decision. Under Order 44 rule 1 (t) of *The Civil Procedure Rules*, an order made under rule 4 of Order 46 granting an application for review, is appealable as of right. Order 46 rule 4 of *The Civil Procedure Rules* only clarifies that an application for review should ordinarily be heard by the judicial officer who made the decree, save where such a judicial officer is precluded by absence or other cause for a period of six months next after the application, from considering the decree or to which the application refers, in which case another judicial officer with jurisdiction may hear the application. Although the application that is the subject matter of this appeal was sought under Order 46 rules 1 and 2, these are merely empowering provisions for the applicant but the substantive jurisdictional provision under which the order was granted is rule 4. The appeal therefore is properly before court since the order is appealable as of right.

[18] I find ground three to be inappropriately structured. From the submissions of counsel what was intended was to fault the Magistrate in the court below for having reached his decision without having regard to the proceedings that led to the decree. It is argued that had he done so, he would have found that the basis of the respondent's claim related to a plot 28 School Road which is different from

plot 23 School Road that forms the subject matter of the decree that was sought to be set aside. Under both section 82 (a) of *The Civil Procedure Act* and Order 46 rules 1 and 2 of *The Civil Procedure Rules*, unless a person is prejudicially or adversely affected by the decree he or she is not entitled to file an application for its review.

[19] A person considering himself or herself aggrieved means a person who has suffered a legal grievance (see *Yusufu v. Nokrach [1971] EA 104*; *In re Nakivubo Chemists (U) Ltd and in the matter of the Companies Act [1979] HCB 12* and *Ladak Abdulla Mohammed Hussein v. Griffiths Isingoma Kakiiza and two others, S.C. Civil Appeal No.8 of 1995*). A person suffers a legal grievance if the judgment given is against him or her or affects his or her interest (see *Mohamed Alibhai v. W.E. Bukenya Mukasa and another S.C. Civil Appeal No. 56 of 1996*). The applicant should demonstrate the existence of such a personal stake in the outcome of the suit that the court ought to consider his or her presentation of issues upon which the court so largely depends for illumination of questions in controversy between the parties. Injury to an economic or proprietary interest is sufficient to “aggrieve” a person.

[20] It is a principle of general application that one is not bound by a judgment *in personam* in a litigation in which he or she is not designated as a party or to which he or she has not been made a party by service of process. A judgment or decree among parties to a suit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings (see *Martin v. Wilks 490 U.S. 755, 109 S. Ct. 2180 (1989)* and *Richards v. Jefferson County, 517 U.S. 793*). In certain limited circumstances, a person, although not a party, may have his or her interests adequately represented by someone with the same interests, or an agent who is a party. One such exception is in situations when it can be said that there is "privity" between a party to the second case and a party who is bound by an earlier judgment. For example, a judgment that is binding on an agent may also bind the principal.

[21] In paragraph 2 of his affidavit supporting the application before the court below, the respondent averred that the person sued by the appellant, Oryem K. L. Watmon the defendant to the suit, was merely his "caretaker" over his land that was the subject matter of civil suit No. 40 of 2008. A caretaker performs delegated functions of the principal. A caretaker of land is therefore an agent of its owner, the principal.

[22] Generally a principal is bound by the acts of the agent executed on his or her behalf. To be bound, the principal must have authorised the agent in some manner to act in his or her behalf, and that authorisation must be communicated to the third party by the principal. There are three types of authority: express, implied, and apparent. Express means made in words, orally or in writing; implied means the agent has authority to perform acts incidental to or reasonably necessary to carrying out the transaction for which he or she has express authority. Apparent authority arises where the principal gives the third party reason to believe that the agent had authority. The reasonableness of the third party's belief is based on all the circumstances, all the facts. Even if the agent has no authority, the principal may, after the fact, ratify the action made by the agent. The strongest form of authority is that which is expressly granted, often in written form. The principal consents to the agent's actions, and the third party may then rely on the document attesting to the agent's authority to deal on behalf of the principal.

Implied Authority

[23] With regard to implied authority, the general rule is that the agent has implied or "incidental" authority to perform acts incidental to or reasonably necessary to carrying out the transaction. In that case the law permits authority to be "implied" by the relationship of the parties, the nature and customs of the business, the circumstances surrounding the act in question, the wording of the agency contract, and the knowledge that the agent has of facts relevant to the

assignment. On the other hand, a manager does not have implicit authority to undertake unusual or extraordinary actions on behalf of his principal. The full extent of the agent's authority depends on the circumstances, what is customary in the particular industry, in the particular business, and among the individuals directly concerned. Where an agent acts on behalf of a principal within the scope of his or her authority which has been granted to him or her expressly or can be implied from the circumstances, his or her acts bind the principal and the third party unless it follows from the circumstances of the case that the agent undertakes to bind himself or herself only.

Apparent Authority

[24] On the other hand apparent authority arises when the third party reasonably believes from the principal's words, written or spoken, or from his or her conduct that he or she has in fact consented to the agent's actions. Apparent authority is a manifestation of authority communicated to the third party; it runs from principal to third party, not to the agent. Apparent authority can arise from prior business transactions. Where the conduct of the principal causes the third party reasonably and in good faith to believe that the agent has authority to act on behalf of the principal and the agent is acting within the scope of that authority, the principal may not invoke against the third party the lack of authority of the agent. This Principle results from the general principle of good faith and the prohibition of inconsistent behaviour. The Principle requires reasonable reliance by the third party on the conduct of the principal, e.g. because the latter has made certain statements or has behaved in a way that causes a reasonable person in the same situation as the third party to believe that the agent has authority to act on behalf of the principal and that he or she is acting within the scope of that authority.

[25] Even when there is no implied authority, in an emergency the agent may act in ways that would in the normal course require specific permission from the

principal. If unforeseen circumstances arise and it is impracticable to communicate with the principal to find out what his or her wishes would be, the agent may do what is reasonably necessary in order to prevent substantial loss to his or her principal. It is a recognized rule of agency that in sudden emergencies un-provided for by the terms of the agency agreement, the agent, if unable to communicate conveniently with the principal, has the implied power to take whatever steps he reasonably believes to be necessary to protect or preserve the principal's property or interest, unless it has been specifically denied him.

[26] For example in *G. H. Mumm Champagne v. Eastern Wine Corp., 52 F.Supp. 167 (S.D.N.Y. 1943)*, during World War II, Eastern Wine Corporation marketed champagne in a bottle with a diagonal red stripe that infringed the trademark of a French producer. The French company had granted licenses to an American importer to market its champagne in the United States. The contract between producer and importer required the latter to notify the French company whenever a competitor appeared to be infringing its rights and to recommend steps by which the company could stop the infringement. The authority to institute suit was not expressly conferred, and ordinarily the right to do so would not be inferred. Because France was under German occupation, however, the importer was unable to communicate with the producer, its principal. The court held that the importer could file suit to enjoin Eastern Wine from continuing to display the infringing red diagonal stripe, since legal action was “essential to the preservation of the principal’s property.”

[27] In the instant case, the suit was filed on 31st July, 2008 while the respondent was registered as proprietor of LRV 3679 Folio 11 Plot 38 School Road on 12th January, 2007. In paragraphs 4 and 6 of his affidavit supporting the application before the court below, the respondent' case was that he was completely oblivious of the proceedings in court (that were pending in court for eight years before the judgment was eventually delivered on 25th February, 2016), until 10th

March, 2016 when upon perusing the court record, he established that a judgment relating to that property had been delivered on 25th February, 2016. This is despite the fact that the said Oryem K. L. Watmon had on 15th August, 2008 filed a written statement of defence and served it upon the appellant. In that defence, the said Oryem K. L. Watmon did not disclose that he was a mere caretaker of the respondent. Instead in paragraph 7 of the defence, he admitted having received a lease offer in his name and in his own right, although he denied having done so fraudulently.

[28] The respondent instead claims not to have had any knowledge of the suit. It seems to be a logical deduction when the written statement of defence is read together with the respondent's averments in his affidavit supporting the application for review, that Oryem K. L. Watmon contrived that defence as a means of advancing his principal's claimed interests in the land. It was an essential step to the preservation of the principal's claimed proprietary claims to the land, and to that extent the maintenance of that defence was practically on behalf of the respondent.

[29] As early as 15th August, 2008, the respondent's agent Oryem K. L. Watmon was aware of the existence of the suit. A principal cannot insulate himself or herself from the actual knowledge acquired by his or her agent. Imputation is relevant to a principal's legal relations with third parties when a principal's knowledge (or lack of knowledge) of a fact is material to determining the principal's rights and duties vis-a-vis a third party. The principle of imputed knowledge upon which knowledge of an agent is attributed to the principal, rests on the theory that when the agent acts within the scope of the agency relationship, there is identity of interests between principal and agent. Therefore, except for knowledge acquired confidentially, the time, place, or manner in which knowledge is acquired by the principal is immaterial in determining the imputation of the knowledge of the agent to the principal. Imputing an agent's knowledge to the principal has traditionally been justified on the basis of an assumed identity between agent and

principal and, separately, on the basis that an agent has a duty to provide information to the principal that is material to the agent's work unless the agent has reason to believe that the principal does not wish to have the information. Moreover, an agent's breach of the agent's duty to provide the principal with information does not generally create a defence for the principal.

[30] The appellant acted in reasonable reliance on the defendant's behaviour and proceeded against him to the finality of the litigation. When a person is sued as defendant in respect of tangible property but does not in his or her defence disclose that he or she is holder of the property only as agent, does not disclose the principal in whom the proprietary interest in the property vests, the question does not arise as to whether the defendant appears under implied or apparent authority. When such a person files a defence to the suit, he or she appears as defendant. There is no way any reasonable plaintiff possessing and exercising those qualities of attention, knowledge, intelligence, and judgment that the rules of civil litigation require, would discern that such a person appears only as agent. Imputing an agent's knowledge to the principal responds to a principal's ability to shape how his or her agent handles information and to shield himself or herself from information that the principal would prefer not to have, and thereby to speculate after-the-fact of an agent's actions at the likely expense of third parties with whom the agent deals. The obligation then should be cast on the defendant upon whom the rules of civil litigation must impose a duty to act for the protection of his or her interests and the interests of his or her undisclosed principal.

[31] As such I conceive that the undisclosed principal is thereby impleaded. The principal cannot be heard later, as a person claiming an interest and therefore aggrieved, to seek to undo what has been done by the agent, for the principal was by the very terms of the defence filed by the agent, impleaded by necessary implication. Unless the plaintiff has notice that the agent has an interest adverse to the principal, the plaintiff dealing with the agent is entitled to rely upon the agent’s knowledge and the actions of the agent will bind the undisclosed principal

rather than the innocent plaintiff. Even though the agent is not under the full control of the principal, any knowledge acquired and action taken by the agent within the litigation is chargeable and imputed to the principal. The knowledge and actions of the agent are imputed to the principal as longs as they are relevant to the agency and to the subject matter entrusted to the agent.

[32] Above all, even if the agent possessed no actual authority and there was no apparent authority on which the third person could rely, the principal may still be liable if he or she ratifies or adopts the agent's acts before the third party withdraws from the undertaking. Ratification usually relates back to the time of the undertaking, creating authority after the fact as though it had been established initially. Ratification is a voluntary act by the principal. Faced with the results of action purportedly done on his or her behalf but without authorisation and through no fault of his or her own, he or she may affirm or disavow them as he or she chooses.

[33] To ratify, the principal may tell the parties concerned or by his or her conduct manifest that he or she is willing to accept the results as though the act were authorised, or by his or her silence he or she may find under certain circumstances that he or she has ratified. In the affidavit supporting the application before the court below, he stated that it was on 10th March, 2016 when upon perusing the court record, he established that a judgment relating to that property had been delivered on 25th February, 2016. Despite that, he did not file an application to set aside the decree until nine months later on 22nd December, 2016. That application was clearly an afterthought.

[34] As long as an agent has authorisation, either express, apparent or implied, he or she may bind the principal legally. Where in those circumstances, a person, although not a party, has his or her interests adequately represented by someone with the same interests or an agent who is a party, he or she will be bound by a decree *in personam* in a litigation in which he or she was not

designated as a party. When that is the case, even if the principal's rights are prejudicially or adversely affected, the litigation cannot be re-opened. A principal represented by an agent in the litigation cannot qualify to be "a person aggrieved" within the meaning of Order 46 rules 1 and 2 of *The Civil Procedure Rules*. A person aggrieved is one who has suffered a legal grievance and one represented by an agent at the litigation cannot be said to have suffered a legal grievance.

[35] Therefore, for one to qualify as "a person aggrieved" within the meaning of Order 46 rules 1 and 2 of *The Civil Procedure Rules*, that person must not have been privy to the proceedings, directly in indirectly through an agent, that resulted in the decree sought to be set aside. A decree expressly or impliedly forecloses successive litigation by non-litigants privy to the parties thereto. The spirit of the doctrine of *res judicata* kicks in to prevent successive litigation over the same subject matter. It is succinctly expressed in the well known common law maxim *debet bis vexari pro una et eadem causa* (no one ought to be twice vexed for one and the same cause), otherwise great oppression might be done under colour and pretence of law.

[36] Furthermore, a person applying under Order 46 rules 1 and 2 of *The Civil Procedure Rules*, must show that the rights prejudicially or adversely affected by the decree sought to be set aside, are pre-existing rights. They must have accrued before the commencement of the litigation. When the appellant filed the suit on 31st July, 2008, in paragraph 7 of the plaint she indicated that she sought to enforce unregistered proprietary rights in the land in dispute that accrued during 1977, thirty seven (37) years before the appellant became registered proprietor on 5th September, 2014, and six (6) years after the filing of the suit. The respondent therefore sought to assert a right that arose six years after the commencement of the litigation that resulted in the decree of 25th February, 2016.

[37] For rights which did not exist at the commencement of the litigation but accrued before the final determination, diligence would require the applicant to intervene before the conclusion of the litigation. As early as 15th August, 2008, the respondent's agent Oryem K. L. Watmon was aware of the existence of the suit. A person who becoming aware of ongoing litigation that will affect his or her rights but does not seek to make a timely intervention in the proceedings, will be permitted only in exceptional circumstances thereafter to seek to have the decree set aside. This is more so when the applicant is aware that the underlying suit will most certainly affect him or her, but chooses to pass up an opportunity to intervene.

[38] It is settled law that a party seeking a judgment binding on another cannot obligate that person to intervene; he or she must be joined to the proceedings. This is because the law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger unless duly summoned to appear. Consequently, a person not privy to a suit may rest assured that a judgment recovered therein will not affect his or her legal rights.

[39] However, a person aware that the underlying suit will most certainly affect him or her interests or rights in the subject matter of the suit, who despite that knowledge chooses to pass up an opportunity to intervene, is in a different category. Such a person should not be permitted to later litigate the issues in a new action, otherwise the finality and completeness of judgments would be undermined.

[40] It is only prudent and necessary for the proper administration of justice that a person who claims an interest relating to the subject of a subsisting suit and is so situated that the disposition of the suit in that person's absence may impair or impede the person's ability to protect that interest, he or she should apply to join the proceedings and not wait to seek to have the resultant decree reviewed.

Consequently, the expression "person aggrieved" does not include one who was aware of the litigation, who knew that his or her rights would certainly be affected by the decision, had the opportunity and means to intervene but chose to pass up the opportunity to intervene. The judgment was delivered nearly two years after he acquired the title and thus there was therefore ample time for him to intervene in the then ongoing litigation.

[41] Parties to a suit presumably know better than anyone else the nature and scope of relief sought in the action, and at whose expense such relief might be granted. Although Joinder as a party, rather than knowledge of a suit and an opportunity to intervene, is the default method by which potential parties are subjected to the jurisdiction of the court and bound by a judgment or decree, there is no way the appellant could have joined the respondent to the proceeding who at the time in 2008 had no known interest in the land. The burden was therefore on the respondent to seek to join the proceedings, as soon as he acquired interest in the subject matter of the suit and after he had adequate notice or knowledge of the exiting suit relating to that property.

[42] On the other hand, the decree that the respondent sought to set aside related to plot 23 School Road while the interest claimed by the respondent is in respect of plot 28 School Road. There was no evidence before the court below showing that the two plots are one and the same. The respondent thus did not prove the existence of any interest in plot 23 that was adversely affected by that decree. Even if plots 23 and 28 School Road were one and the same plot, the rights litigated in Gulu Grade One Magistrate's Court Civil Suit No. 40 of 2008 were limited to unregistered interests in the land, which were found to have accrued to the appellant in the year 1977. The respondent claims a registered interest in the land that accrued to him thirty seven years later on 5th September, 2014. The suit resulting in the decree that he sought to be reviewed was filed six years before he acquired a registered interest in the land. The judgment was delivered nearly two years after he acquired the title.

[43] If the respondent were to initiate a subsequent suit intended to assert his registered interest to override the unregistered one established by the existing decree in favour of the appellant, there is no substantial risk of subsequent litigation of that nature between the parties resulting in inconsistent decrees. The possibility of subsequent litigation in respect of this land based on different evidence, resulting in different findings of fact and, thus, a different result, is very remote. Surely, the existence of that decree does not preclude a future suit by the respondent alleging that the appellant's presence on the land, even if authorised by the decree, is subject to his registered interest, neither does it preclude one by the appellant seeking to have a cancellation of the respondent's title. It only precludes the respondent from challenging the appellant's presence on the land as an act of trespass. Considering that the appellant's rights confirmed by the decree predate those sought to be enforced by the respondent by more than three decades, *prima facie* that avenue is not realistically open to the respondent.

[44] The respondent did not demonstrate how as a practical matter his registered interest in the land had been impaired by the outcome of a case, whose determination was limited to unregistered interests in the land. The decree did not deprive him of any legal rights.

[45] Furthermore, it is not enough that the person who seeks to have a decree set aside shows that he or she is prejudicially or adversely affected by the decree. That person is further required to show that review is sought on account of either;- (i) 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 (ii) on account of some mistake or error apparent on the face of the record; or for any other sufficient reason.

[46] In the affidavit supporting the application before the court below, the respondent did not adduce evidence establishing any of the first two possible grounds. His application was premised on "any other sufficient reason" which in that case was that he was completely oblivious of the proceedings in court until 10th March, 2016 when he upon perusing the court record, he established that a judgment relating to that property had been delivered on 25th February, 2016. Despite having acquired knowledge of the existence of the judgment on 10th March, 2016 he did not file an application to set aside the decree until nine months later on 22nd December, 2016. A party cannot set itself in contradiction to its previous conduct vis-à-vis another party if that latter party has acted in reasonable reliance on such conduct (*venire contra factum proprium*). This Principle follows from the general principle of good faith and fair dealing. The other party's reliance may be based on a specific act, a statement or on the silence of the party. The conduct must be related to the legal relationship existing between the parties.

Order:

[47] In the final result, there is merit in the appeal and it is accordingly allowed. The order reviewing the decree of the court below is set aside. Accordingly, the decree is re-instated. The costs of the appeal as well as those of the court below are awarded to the appellant.

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Stephen Mubiru

Resident Judge, Gulu

Appearances

For the appellant : M/s Makmot Kibwanga and Co. Advocates.

For the respondent : M/s Odongo and Co. Advocates.