

2

THE REPUBLIC OF UGANDA  
IN THE SUPREME COURT OF UGANDA AT MENGO

(CORAM: S W WAMBUZI CJ, B J ODOKI JSC, & A N KAROKORA JSC)

CIVIL APPEAL NO. 56 OF 1996

BETWEEN

MOHAMED ALLIBHAI ..... APPELLANT

AND

1. W.E. BUKENYA MUKASA )  
2. DEPARTED ASIANS PROPERTY ) ..... RESPONDENTS  
CUSTODIAN BOARD )

(Appeal from High Court Order of (Kityo J)  
dated 6th July, 1995

in

Civil Suit No. 522 of 1993)

JUDGMENT OF KAROKORA, JSC

The appellant in this appeal was not a party to the original proceedings before the High Court where the consent judgment was entered. The suit before the High Court was between Wycliff Edmond Bukenya Mukasa now the present 1st Respondent and <sup>Me</sup> Deported Asians Property Custodian Board now the 2nd Respondent.

The facts of the case before the High Court were that the Plaintiff was the registered Proprietor of the land comprised in Kibuga Block 10 Plot No. 175 at Namirembe. The Plaintiff's predecessor in Title leased the Plot to Fazal Visram, an Asian, on the 25th day of May 1955 for a term of 49 years, with among others, a development covenant which the Asians fully satisfied.

After the expulsion of Asians in 1972, the building on the Plot in dispute fell under the Management of the 2nd Respondent/Defendant by virtue of the Assets of the Departed Asians Decree <sup>1973</sup> 1973. In the exercise of its Managerial powers, the Defendant/2nd Respondent allocated the said Plot to persons without his knowledge or acquiescence.

During the subsistence of the occupancy of the Board's tenants of the premises on the land, which was in breach of express terms of the lease, the 2nd Respondent/Defendant failed, refused and/or neglected to keep the premises in good and tenantable repair to such an extent that the premises were in an extremely sorry state of disrepair to the extent of being unfit and dangerous for human habitation and were in an uninsurable state. And the Board's failure to keep the premises in good, tenantable condition and repair was a fundamental breach of Lease Agreement which entitled the Plaintiff/1st Respondent to terminate the lease and take the property free from encumbrances and, to treat any occupants thereon as trespassers.

*in his suit for recovery*  
The Plaintiff/1st Respondent ~~therefore~~ prayed for inter-alia:

- (a) An Order terminating the Lease Agreement between the Plaintiff and the Defendant Corporation for fundamental breach of the terms of the lease;
- (b) An Order for vacant possession of the premises for fundamental breach of the covenants of lease;
- (c) General damages for breach of contract; and
- (d) Costs of the Suit.

In their written statement of Defence, the <sup>1</sup>dependant denied the contents of paragraphs 3, 4, 5, 7, 8 and 9 of the Plaint and prayed for dismissal of the suit with costs. However, on 24th February, 1994, by consent of both parties, judgment was entered in the following terms:

- (i) Plot No. 175 Kibuga Block 10 Hoima Road, LRV 340 Folio 11 which was leased to Fazal Visram, a Ugandan Citizen, did not become expropriated property so as to fall under the Expropriated Properties Act 9 of 1982;
- (ii) The Defendant, D A P C B, did not acquire any legal or equitable right, claim or interest in the property and could therefore not offer any valid and legal right of occupancy or tenancy to any tenant;
- (iii) Since the said Fazal Visram did not apply and has not applied for repossession of the above property, the Plaintiff being the proprietor of the property is free to re-enter or seek re-entry to the property.

On 15th March, 1995 Mohamed Allibhai/Attorney of Visram Sherali Fazal son and Excutor of the deceased's/Fazal Visram's) Will, filed an application by Notice of Motion under Order 42 rr 1 (b) & 8 of Civil Procedure Rules and Sections 83 and 101 of the Civil Procedure Act (C.P.A.) for review of the High Court consent judgment dated 24th February, 1994 and for all the orders and decrees arising from and/or incidental to the afore-said consent judgment to be reversed and/or set aside.

When the application came up for hearing, the learned trial judge dismissed it with costs as the applicant had neither made a clear and specific complaint of what actually happened and what injuries he had suffered as a result nor indicated as a claim what common non-disclosure and by who and why the mandatory requirement of provisions of Order 42 of CPR should be waived.

The appellant was not satisfied with the Ruling/Decision of the learned trial judge and hence this appeal. Two grounds of appeal were filed in the Memorandum of Appeal:

1. That the learned trial judge erred in holding that there was no sufficient evidence in support of the application for review of the consent judgment dated 24th February, 1994 and the consequential decree dated 7th March, 1994;

2. That the learned trial judge erred in fact and in law in not holding that:

- (a) The appellant being the legal representative of the deceased lessee of the suit property, the late Fazal Visram, was a person aggrieved by the said consent judgement dated 24th February, 1994 and consent decree dated 7th March, 1994;
- (b) That the evidence on record was sufficient to prove that the appellant's claim that the aforesaid consent judgment and decree were made under a misrepresentation of the true state of the material facts and the laws.

It was proposed to ask for the following Orders:

- (a) That the appeal be allowed with costs here and below;
- (b) That the consent decree and all the Orders arising out of and/or consequential upon the aforesaid consent judgment be reversed and/or vacated;
- (c) That the 1st respondent does account for all the rent received from the suit property for the period effective from the month of November 1994.

When the appeal came up for hearing, Mr. Muzambi Kibendi submitted the appeal was based on two grounds but the question that was to be determined first was whether the appellant was an aggrieved party. There is no doubt that there is no statutory definition of "legal grievance". We were referred to Sections 83 and 101 of CPA and Order 42 r. 1 (b) of CPR as relevant provisions where any person who considers himself/herself aggrieved by any decision of the Court can seek review of that decision and instances under which review can be sought.

Review can be sought where -

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

(b) by a decree or order from which no appeal is hereby allowed.

It was submitted by Mr. Kibedi for appellant that any person considering himself aggrieved in Section 83 of CPA and Order 42 r. 1 (b) includes a third party who was not a party to the original proceedings. We were referred to the Code of Civil Procedure 10th Ed. Volume 5, 1908, as an authority for the proposition that under the powers conferred by Section 101 of CPA, where a third party is affected by an Order of the Court, the Court, can under its inherent powers review its decision if it is found necessary for ends of justice or to prevent abuse of the process of the Court.

It must be noted that the decree sought to be reviewed had been entered by consent of both parties, now respondents. There is a wealth of authorities to the effect that a consent judgement may be set aside for fraud, collusion or for any reason which would enable the Court to set aside an agreement. The above view was expressed in the Case of Hirani v Kassam (1952) 19 EACA 131. Similar views were expressed by the Court of Appeal for Eastern Africa where an appeal against the review of consent judgment was allowed with costs in Brooke Band Liebig (J) Ltd v Mallya (1975) EA 266. In that case the Court quoted the following passage from Seton of judgments and Orders 7th Ed. Volume 1 <sup>al</sup> page 124 with approval:

"Prima facie, any Order made in the presence and with the consent of Counsel is binding on all parties to the proceedings or action and on those claiming under them .... and cannot be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to the Policy of the Court ..... or if consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts or in general for a reason which would enable the Court to set aside an agreement."

There is no doubt that a judgment based on fraud must be set aside under the inherent powers of the Court under powers conferred upon this Court by Rule 1 (3) of the Rules of this Court. See Livingstone Sewanyana v Martin Bliker C.A. No. 4/1991 SC unreported). However, in the instant case there

was no fraud or collusion alleged and no evidence of the same <sup>was</sup> called to prove them. It appears there was evidence of common mistake as to the law applicable to the facts when consent judgment was entered to the effect that the suit property did not fall under Act 9/82. They relied upon the decision of Lutaya v Gandesh HCCS No. 860/1982 (unreported) when there was already a Supreme Court decision which had over-ruled Lutaya's case. See The Registered Trustees of Kampala Institute v Departed Asians Properties Custodian Board C.A. No. 21/1993 (SC) where the S.C. held that such property as the suit property fell under the ambit of Section 1 (1) (c) of the Expropriated Properties Act 9/82.

Therefore in view of the above, the consent judgment must have been entered per incurium as to the law that applied to the facts of the case. Both the Plaintiff and the defendant who are now both respondents, must have been labouring under Common Mistake when they entered consent judgment and therefore a judgment of such a nature would be void as between the parties. See Bell v Lever Bros Ltd (1952) A C 161. In the circumstances and bearing in mind the case of Hirani v Kassam (1952) 19 EACA 131 and Brooke Bond and Liebig (T) Ltd v Mallya (1975) EA 266, such consent judgment would be set aside as between both the Respondents. But then, that would not solve the appellant's grievance as he was not a party to the consent judgment.

I must now deal with the question of whether or not the appellant not having been a party in the original proceedings which resulted in the consent judgment sought to be reviewed had no right to present the application for review under Sections 83 and 101 of CPA and Order 42 r 1 of CPR. In other words, the question is whether or not the appellant was an aggrieved party so as to be able to bring the application. In Re Nakivubo Chemists (U) Ltd and in the matter of the Companies Act (1979) HCB 12, where Chhaju Ran v Neki (1922) 49 IA 144 ~~3 Lah 127~~ and Yusuf v Nokrah (1971) EA 104 <sup>was</sup> ~~were~~ cited with approval that an aggrieved party includes any party who has been deprived of his property. I do agree that an aggrieved person within the meaning of Section 83 of CPA and Order 42 r 1 means a person who has suffered legal grievance.

It must, however, be noted that in this case, the appellant was not involved in the litigation which resulted in the consent judgment sought to be reviewed/set aside. In my view, despite the consent judgment, he was and he is still free to pursue his legal rights in the Court of Law. Otherwise he is ....

a stranger, as it were, to those proceedings which resulted into the consent judgment. Mr. Kiberdi, Counsel for appellant referred to 10th Ed. of Commentaries on Civil Procedure Code 1908 Volume 5 page 449 as an authority for the proposition that where a third party was affected by an Order of the Court, the Court can, under its inherent powers, review the Order passed.

I would agree that the above principle applies, depending upon the peculiar circumstances of each case, but not the present case. For instance, in Kawdu v Berar Ginning Co. Ltd., Akot and Others (1929) AIR Nagpur 185, Narayan was not a party to the proceedings. He applied to be joined as a respondent and his application was allowed. He contested the appeal on merit and succeeded in getting it dismissed.

In order to have ex-parte order, which had been made in Misc. Jud. Case No. 46 of 1927 dated 30/7/1927 set aside, Narayan presented an application to the District Judge, praying for review of the said order. Kawdu resisted the application on the ground that the applicant lacked <sup>LCWS</sup> ~~PCIS~~ Standi as he was not a party to the proceedings which resulted in the Order sought to be reviewed. The District Judge allowed the application for review and set aside the Order dated 30/7/1927 although it had been too late for one day.

On appeal by Kawdu, it was held by the Court of Appeal inter-alia:

"Narayan was undoubtedly entitled to move the lower Court for a review of its Order under Section 151 of CPC (equivalent to our Section 101 of CPA). Narayan was known to appellant as a director of the Company during its existence and subsequently as a purchaser of its assets after its extinction and as the person who had successfully opposed the winding up proceedings started by the appellant ..... With the object of avoiding all possible objections which he might have raised, the appellant deliberately omitted to make Narayan a party either to the first appeal or to the proceedings in Misc. Jud. case No. 46 of 1927 and secured an Order in the latter case behind his back, highly prejudicial to his vested interest."

The Court went on and stated:

"I cannot therefore, conceive of a more flagrant example of an abuse of the process of the Court than the one taken advantage of by the appellant in securing an Order from the Court ex-parte, the very necessary opponent in the case. This was therefore pre-eminently a case in which the inherent powers of the Court could be legitimately exercised by it in removing the apparent injustice done to Narayan in order to prevent an abuse of its process .....

The next question was whether Narayan not having been made a party to the original proceedings which resulted in the passing of the Order sought to be reviewed, had no right to present the application for review under Order 47 r 1 of CPC. It is admitted that the Company must be deemed to have been a party to the previous proceedings because the Registrar of the Company represented it. But under Order 29 rr 1 & 2 read together with Section 141 of the Companies Act, the Company could not be said to have been properly represented through the Registrar, because under the said provisions the only person who could legally put in appearance on its behalf would either be its Secretary or one of the directors. It is not denied that Narayan was a director of the Company and I therefore hold that under the circumstances, Narayan should be deemed to have been a person considering himself aggrieved within the meaning of Order 47 r 1 so as to clothe himself with a right to present an application for review. The learned District Judge has, in my opinion stated the proposition too widely ..... when he held that any person aggrieved though not a party to the original proceedings could apply for review under Order 47 r 1 ...."



I have very carefully considered the facts of the above case vis-a-vis, the facts of the instant case before this <sup>Court</sup> case, but with respect, I have not been able to find anything in the instant case similar to the case in Kawdu v Berer Ginning Co. Ltd., Akot and Others (supra). For instance, there is nothing in the instant case where the appellant could, in the circumstances of the facts presented be deemed as a person, considering himself aggrieved within the meaning of Section 83 of CPA and Order 42 r 1 so as to clothe himself with a right to present an application for review as it was in Kawdu's Case (supra). In the instant case, apart from the grant of the Letters of Administration of deceased's estate to Mohamed Alibhai (Attorney of Visram Sherali Fazal, son and Executor of deceased's Will) dated 28th June, 1994, there was nothing from which either the defendant or plaintiff (now both respondents) could have known of the appellant, the third party to the consent judgment. I know there is an affidavit by Mohamed Alibhai, the applicant paragraph 3 where he averred that by the time of the consent judgment he had already applied for repossession of the suit property and that the DA PCB had received and acknowledged receipt of his application on 30/10/93.


If the above is the true position, then the application by the applicant for repossession on 30/10/93 was made before the applicant because a legal representative, because, he obtained letters of Administration to administer the estate of deceased on 28/6/94. It cannot therefore be true that the applicant, as administrator of the estate of deceased, pursuant to the grant of the Letters of Administration dated 28th June, 1994, ever applied for repossession of the suit property. It would seem that an application made by the applicant for repossession on 30/10/93 long before the applicant was granted Letters of Administration by the Court on 28/6/94 to administer the Estate of deceased would be ineffective as the applicant had no legal status to administer the estate at that time. There was nothing from which <sup>an</sup> inference could be drawn that the respondents knew of the applicant's interest in the suit property which they attempted to defraud or <sup>defeat</sup> ~~hide~~. In fact if he had been given repossession of the suit property, there could be no reason why he never filed an independent suit against either of the respondents or both without any due regard to the consent judgment which did not concern him.

Finally, in my considered opinion the appellant, not having been a party to the proceedings which resulted in the consent judgment, sought to be reviewed, and there being no facts at the material time from which he could be considered as an aggrieved party within the meaning of Section 83 of CPA and Order 42 r 1 so as to clothe himself with a right to present an application for review, I would think, in all circumstances of the case, that he had no Locus Standi to present the application for review. In my view after he had obtained Letters of Administration to administer the estate of the deceased (Visram Fazal) he was and still is, free to file an independent suit against whoever is on the land irrespective of the consent judgment.

In the circumstances, since he had no locus standi to apply for review, the application for review was rightly dismissed.

*I would dismiss*  
Accordingly the appeal ~~is dismissed~~ with costs to respondents.

Dated at Menago this ..... *15<sup>th</sup>* of *August* 1996.

  
A. N. Karokora  
JUSTICE OF SUPREME COURT.

IN THE SUPREME COURT OF UGANDA AT MENGO  
(CORAM: WAMBUZI CJ, ODOKI JSC, & KAROKORA JSC)  
CIVIL APPEAL NO. 56 OF 1996

BETWEEN

MOHAMED ALLIBHAI ..... APPELLANT

AND

1. W.E. BUKENYA MUKASA }  
2. DEPARTED ASIANS PROPERTY } ..... RESPONDENTS  
CUSTODIAN BOARD }

(Appeal from the order of the  
High Court of Uganda (Kityo J)  
dated 6 July 1995)

in

Civil Suit No. 522 of 1993)

JUDGMENT OF ODOKI JSC.

I have had the benefit of reading in draft the judgment of ~~Wambuzi CJ and Karokora JSC~~ and Karokora JSC and I agree with <sup>him</sup> ~~them~~ that this appeal must be dismissed.

The main complaint in this appeal is that the learned judge erred in holding that the appellant had failed to show that he was entitled to a review of the consent judgment entered between the first and second respondents in a suit of which he was not a party. It was argued for the respondents that the appellant did not have locus standi to apply for review under S. 83 of the Civil Procedure Act and O. 42 r.1 of the Civil Procedure Rules.

It is I think well established that while a third party may apply for review under the above provisions, the party must establish that he is an aggrieved person. A person considers himself aggrieved if he has suffered a legal grievance. See Yusufu v. Nokrach (1971) EA 104, and In Re. Nakivubo Chemists (U) Ltd (1971) H.C.B 12, Ladak Abdulla Mohamed Hussein v. Griffiths Isingoma Kakiiza and others Civil Appeal No. 8 of 1995 (unreported). A person suffers a legal grievance if the judgment given is against him or affects his interest.

In the present case, the appellant was not a party to the suit. He was a lessee of the first respondent who owns a mailo estate. The second respondent was a successor in title to the appellants' predecessor, Fazal Visram, when the latter was expelled from the country, until at the time of the consent judgment when it surrendered its claim to the suit property. The consent judgment recognised this position that the second respondent had no interest in the property. It can be assumed that the property therefore reverted to the appellant as the former owner, irrespective of the application or otherwise of the Expropriated Properties Act 1982.

The consent judgment gave power to the first respondent to seek re-entry to the property. Although it is stated in the consent judgment that the second respondent is free to re-enter since the appellant's predecessor did not apply for repossession, I do not think that this makes the appellant an aggrieved party.

The appellant's rights against the second respondent existed independently, of those of the second respondent and were not affected by the consent judgment. The appellant was still the registered proprietor of the lease. Therefore the second respondent could not re-enter the property except in strict compliance with the terms of the lease and the provisions of Sections 102 and ~~47~~<sup>43</sup> of the Registration of Titles Act.

Under clause 4 of the lease agreement, the first respondent had power to re-enter the land or take possession of the premises if rent was in arrear for 30 days or on breach

or non-performance of any covenant or condition expressly reserved in the lease. This clause gave the same powers as those given under S. 102 of the Registration of Titles Act.

In my opinion, the consent judgment merely stated the obvious. The power of re-entry was already there in the lease and therefore the consent judgment did not prejudice the appellant. The exercise of the power of re-entry is regulated by Section 113 of the Registration of Titles Act which provides -

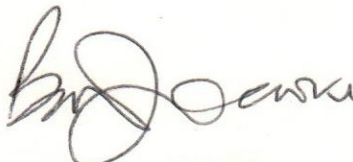
"In the case of a lease or sub-lease of land under this Act, if it is proved to the satisfaction of the Registrar that the lessor or sub-lessor has re-entered upon the premises in strict conformity with the provisions for re-entry contained in the lease or sub-lease, or under the power of paragraph (b) of Section 102 of this Act, where the lease or sub-lease is under this Act, or that the lessee or sub-lessee has abandoned the leased premises and the lease, and that the lessor or his transferee has thereupon re-entered upon and occupied the said premises by himself or the tenants undisturbed by the lessee or sub-lessee, the Registrar may make an entry of such re-entry in the Record Book or in the Sub-lease Register as the case may be, and the term for which the land was leased or sub-leased shall upon such entry being made, determine and may be removed as an incumbrance from a certificate but without prejudice to any action or cause of action which previously has commenced or has accrued in respect of any breach or non-observance of any covenant expressed in the lease or sub-lease or any law declared to be implied therein."

Therefore in order to re-enter the property the first respondent will have to comply with the lease and the procedures laid down in Section 113. It was not established that the consent judgment affected the appellant's rights and therefore I do not see how he could consider himself aggrieved within the above provisions of the Civil Procedure Act and Rules.

Secondly, the appellant did not have locus standi to bring the application for review in his name since he was merely an attorney for Fazal Visram and made the application before obtaining letters of administration. A person holding a power of attorney can only bring proceedings in the name of the donor. See Kajubi v. Kayanja (1967) EA 301. The appellant only obtained a locus standi after being granted letters of administration. This was after he had made the application for review. As he had no locus standi in the matter, he could not consider himself an aggrieved party.

It follows that this appeal must be dismissed with costs.

Delivered at Mengo this <sup>15<sup>th</sup></sup>.....day of <sup>August</sup>....., 1996



B. J. Odoki  
JUSTICE OF SUPREME COURT