THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

[CORAM: ARACH-AMOKO; TIBATEMWA-EKIRIKUBINZA; MUGAMBA; TUHAISE & CHIBITA, JJ.S.C.]

CIVIL APPLICATION NO. 19 OF 2019

(Arising from Supreme Court Civil Appeal No. 08 of 2018)

BETWEEN

DAVID KIZITO KANONYA & 7 OTHERS::::::::::::::::APPLICANTS

AND

BETTY KIZITO::RESPONDENT

(An application to recall the judgment made by this Court on the 19th September, 2019 in Civil Appeal No.08 of 2018)

RULING OF THE COURT

On 19th September, 2019, we delivered a judgment in Civil Appeal No. 8 of 2018 in favour of the respondent and the summary of our final order was:

1. The appellant be reinstated onto the property at Muyenga.
2. The Commissioner for Land Registration reinstates the appellant's name onto the certificate of title of the Muyenga land as a tenant in common with the 1st respondent.
3. General damages of shillings 100,000,000/= is awarded to the appellant.
4. Costs of the appeal in this Court and courts below are awarded to the appellant.

Six days later, on the 25th September, 2019, David Kizito and seven others, filed this Notice of Motion under Rules 2(2), 35(1), (2) and 42(1) of the Supreme Court Rules, 1996, seeking for orders that Court recalls the judgment and varies or amends the order awarding the respondent shillings 100,000,000/= as general damages. The applicant also prayed for costs of the application.

Grounds

The application was supported by the affidavit of the 1st applicant sworn on 24th September, 2019 and it is based on the grounds that:

a) This honourable Court made an error on the face of the record when it stated that the respondent was dispossessed of her share in the suit property for 17 years.

b) That the Court's decision to award general damages shs. 100,000,000/= (One hundred million shillings) to the Respondent was based on an error on the face of the record.

c) That if the above errors or omissions had not been made, the court orders would have been different.

d) That because of the errors on the face of the record, the judgment did not give effect to the intention of the Court.

Betty Kizito, the respondent, opposed the application in her affidavit in reply sworn on 5th June, 2019 where she averred that it was misconceived and incompetent before this Court because it was a disguised appeal against the exercise of the Court's discretion, which is not permitted in law.

The 1st applicant filed an affidavit in rejoinder dated 24th June, 2020, in which he denied that the application was a disguised appeal. He contended that it was competent before this Court under the above cited Rules of the Court.

Background

The background to the application is briefly that the 1st applicant and the respondent, who are siblings, were registered jointly as tenants in common on the title for land comprised in Kyadondo, block 244 plot 5091 situate at Muyenga (hereinafter referred to as "the Muyenga land").

In 2002, by an oral contract (arrangement), the respondent transferred her interest in the said land into the names of the 1st applicant and his children, the 2nd to 8th applicants, in exchange for part of his land at Kisugu and Katwe. However, the 1st applicant did not honour his obligation to sub-divide and transfer the land at Kisugu and Katwe to the respondent.

Consequently, the respondent challenged the transfer of the Muyenga land to the applicants in the High Court vide HCCS No.534 of 2003, on ground of fraud. On 25th May, 2012, the High Court ruled in her favour and cancelled the registration of the 2nd to 8th applicants on the title and ordered her immediate possession of her portion of the property.

The respondent took possession of the land until 16th October, 2017 when the applicants successfully appealed the decision of the High Court at the Court of Appeal. The Court of Appeal set aside the judgment and orders of the High Court and ordered that the 1st applicant instead compensates the respondent with other

property. He immediately took possession of the property and has refused to relinquish it to date.

The respondent was dissatisfied with that decision and successfully appealed to this Court vide Civil Appeal No.08 of 2018. As shown in the orders earlier cited, she was reinstated on the suit land and awarded shs. 100,000,000/= (One hundred million shillings) in general damages. Hence this application.

Representation

At the hearing of this application, Mr. Martin Mbanza Kalemera represented the applicants while Mr. Kenneth Ssebabi appeared for the respondent.

Submissions

Counsel for the applicants submitted that the applicants' main complaint is the basis for the award of shs.100,000,000/= as general damages by the Court to the respondent. He contended that the Court based its assessment on the period of 17 years from 2002 till the date of judgment. He argued that this was an error because the respondent took possession of the property immediately after the High Court judgment on 25th May, 2012 and that she occupied it until 16th October, 2017 when the Court of Appeal reversed the decision of the High Court. According to him, the total period in which the applicants had been in possession of the Muyenga property was therefore 12 years, taking into account the period from 2012 to 2017. He submitted that if the Court had considered the 12 years in exercising its discretion, then it would have, awarded a lesser sum. He proposed the sum of shs.

70,000,000/= being two thirds of the original award as a fair amount for the 12 years.

Counsel also denied that the application was a disguised appeal as alleged by counsel for the respondent. He submitted that this Court has power to correct its judgments under Rule 35 of its rules, also known as the slip rule, in cases where there is an error apparent on the record such as this one. He relied on the cases of **Fang min v Dr Kaijuka Mutabaazi Emmanuel. Civil Application No.06 of 2009(SC), Vallabhdas Karsandas Raniga v Mansukhlal Jivraj & Ors [1965]1 EA 700 and Non-performing Assets Recovery Trust v General Parts (U) Ltd. Misc Application No. 8 of 2000** in support of his submissions.

Counsel therefore invited Court to recall its judgment in Civil Appeal No.08 of 2018 and amend the orders on general damages using the slip rule by revising it downwards to shs. 70,000,000/=. He also prayed for the costs of the application.

Counsel for the respondent strongly opposed the application and submitted that it was a disguised appeal against this Court's decision which is not allowed under the law since this Court's decision is final. He however conceded that the applicant had been in possession of the land for 12 years rather than 17 years as was found by the Court but contended that the award was not based on the 17 years but on the discretion of Court and as such, could not be an error apparent on the record. Counsel argued that even if it was 12 years, there was no difference in the pain suffered by the respondent as a result of the breach of contract by the 1st applicant. He prayed that the figure should be maintained.

Counsel further asserted that the 1st applicant was in possession of the entire land to date, in utter contempt of the judgment of this Court. He informed Court that they had even failed to extract the order despite several attempts because the 1st applicant together with his lawyer were uncooperative and have refused to endorse the order.

Counsel therefore invited Court to find that the application had not established any error apparent on the face of the record and dismiss it with costs.

Consideration of Court

We have carefully perused the application, the affidavits, and submissions by both counsel and looked at the relevant authorities.

Article 132 of the Constitution provides that the Supreme Court shall be the final court of the land and as a general rule, the Court has no jurisdiction to sit on appeal over its decisions. However, the Supreme Court, being a final court of justice, is clothed with inherent powers which it may invoke, if the circumstances so demand, in order to do justice by recalling its judgments, orders or rulings and correcting or varying them, under Rules 2(2) and 35 of the Supreme Court Rules.

Rule "2(2) provides that:

> **"Nothing in these Rules shall be taken to limit or otherwise affect the inherent power of the court, and the Court of Appeal, to make such orders as may be necessary for achieving the ends of justice or to prevent abuse of the process of any such court, and that power shall**

extend to setting aside judgments which have been proved null and void after they have been passed, and shall be exercised to prevent an abuse of the process of any court caused by delay."

Rule 35 commonly called "the slip rule" reads:

"(1) A clerical or arithmetical mistake in any judgment of the court or any error arising in it from an accidental slip or omission may, at any time, whether before or after the judgment has been embodied in an order, be corrected by the court, either of its own motion or on the application of any interested person so as to give effect to what was the intention of the court when judgment was given.

(2) An order of the court may at any time be corrected by the court either of its own motion or on the application of any interested person, if it does not correspond with the order or judgment it purports to embody or where the judgment has been corrected under sub rule (1) of this rule, with the judgment as so corrected."

The circumstances in which this Court will exercise its power under this Rule are well settled. The Court of Appeal for Eastern Africa said in **RANIGA v JIVRAJ, (supra)** at p. 703 that:

"A court will, of course, only apply the slip rule where it is fully satisfied that it is giving effect to the intention of the Court at the time when the judgment was given or, in the case of a matter which was overlooked, where it is satisfied, beyond doubt, as to the order it would have given had the matter been brought to its attention."

In the decision of the same Court in **Lakhamshi Brothers Ltd VS R. Raja and Sons [1966] EA 313** at page 314 Sir Charles Newbold P. stressed that the circumstances are very circumscribed, and after citing that sentence in Raniga, stated:

> ***"These are circumstances in which the court will exercise its jurisdiction and recall its judgment, that is, only in order to give effect to what clearly would have been its intention had there not been an omission in relation to the particular matter."***

Further, under the slip rule, the applicant must establish:

i. An acknowledgement that there is either a clerical, arithmetical mistake or an error which has arisen in the judgment;

ii. The alleged clerical, arithmetical mistake or error identified arose as a result of an accidental slip or omission; and

iii. Its rectification is necessary in order to give effect to the intention of the court in the said judgment.

These statements have been repeatedly cited with approval in various decisions of this Court including the ones cited by counsel for the applicant on application of the *slip rule.* In **Fang vs. Dr. Kaijuka Mutaabazi Emmanuel (supra)** the Court summarised it in the following words:

> ***"The law governing the slip rule is 35(1) of the Supreme Court Rules. It reads thus:***

(1) Where the court is satisfied that it is giving effect to the intention of the court at the time when the judgment was given ; or

(2) In the case of a matter which was overlooked, where it is satisfied beyond doubt, as to the order which it would have made had the matter been brought to its attention."

It is also well settled that the jurisdiction of this Court to recall its judgment and correct or otherwise alter it, is however, not limited to the slip Rule. It may, also be exercised under its inherent power, which is set out in Rule 2(2) .Under this Rule, the Court has power to recall its judgment and make orders as may be necessary to achieve the ends of justice. It has been applied in a number of cases including the ones cited by counsel in this application. See: **Orient Bank v Fredrick Zaabwe & Anor, Civil Application No.17 of 2007** followed by **Otim Moses v Uganda.No.14/18** and **Sophatia Beith & 3 Ors v Nangobi Jane & 2Ors, Civil Application No.42/19(SC)** among others.

It is therefore clear from the above authorities that the circumstances under which to invoke this Court's Jurisdiction under Rules 2(2) and 35(1) of the Supreme Court Rules are not open ended. Most importantly, an application for review must not be a disguised appeal asking this Court to sit on appeal against its decision.

In the instant application, the core issue for our determination is whether the applicants have brought themselves within the ambit of Rule 2(2) and 35 of this Court's Rules.

In awarding general damages, this Court in the lead judgment by Hon. Justice Tibatemwa-Ekirikubinza, JSC, that has given rise to this application stated as follows:

> *"Having held that there was breach of contract, it would follow that the appellant be put in a position that she would have been in had the 1st respondent fulfilled his obligation. This would entitle the appellant to an award of general damages arising out of breach of contract. The question is: how does the Court arrive at the appropriate quantum?*
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> *As Katureebe, JSC (as he then was) noted in his paper entitled Principles Governing the Award of Damages in Civil Cases:*
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> ***"It would be prudent for the parties or their lawyers to provide the court with proper guidance relating to the inquiry of damages generally. The impression that general damages are damages at large and any figure picked from the blue would suffice, is at best, disturbing and, at worst entirely erroneous ... The parties, their lawyer and the court must at all times suggest a reasonable hypothesis for their inquiry of damages."***
>
> *I note however that in the present matter, no evidence has been adduced to guide Court on the quantum of damages to be awarded. Nevertheless, the failure to adduce evidence to guide court does not disentitle the appellant from an award of general damages. The difficulty of assessing damages is no reason for the court not granting them. In the persuasive authority of* ***Chaplin vs. Hicks the court held that:***

"where it is impossible to assess the appropriate measure of damages with certainty and precision, the defendant must not be relieved of his liability to pay the plaintiff any damages at all in respect of a breach of contract or any other actionable wrong".

In all such cases, where ascertainment of damages is difficult, the court must attempt to ascertain damage in some way or other.

The ***East Africa Court of Appeal in Obongo vs. Kisumu Council*** *offered some guidance on how to ascertain general damages arising out of breach of contract. The court among other things held that:*

"When damages are at large and a court is making a general award, it may take into account factors such as malice or arrogance on the part of the defendant and the injury suffered by the plaintiff, as, for example, by causing him humiliation or distress."

Furthermore, this Court in ***Crown Beverages Ltd vs. Sendu Edward*** *held that the amount of general damages which a plaintiff may be awarded is a matter of discretion by the court.*

Therefore, in exercise of that discretion and on account of the fact that the respondent denied the appellant enjoyment of her share in the property located in an upscale Kampala suburb from 2002 to date (a period of 17 years) as well as the impossibility of subdividing the property located at Katwe, I would award the appellant general damages in the sum of Ushs.100, 000,000/=....."

(The underlining is added for emphasis.)

Counsel for the applicants submitted that the last paragraph of the above extract shows that at the time of judgment, the intention of the Court was to restore the judgment of the High Court and penalise the applicant for keeping the property away from the respondent for 17 years. He submitted that the Court did this, by making an order for general damages of shs. 100, 000,000/= as a result of the erroneous assumption that the applicant had possession of the land for the entire period of the dispute. Relying on the authorities cited herein, he submitted that this is a matter in which the limited circumstances under Rule 2(2) and Rule 35(1) of the Supreme Court Rules apply.

Counsel for the respondent submitted on the other hand that the applicants have not established any error apparent on the face of the record. He argued that they have therefore not satisfied the requirements for the grant of the order sought.

The dispute between the parties in this case was breach of contract. It is clear from the above extract that, having held that there was breach of contract on the part of the 1st applicant, the intention of the Court was to try as much as possible to put the respondent in the position she would have been had the 1st applicant fulfilled his obligation under the contract. The question was, therefore, how to arrive at the appropriate quantum. In order to answer this question, the extract shows that the Court went about this task after carefully considering the principles for the award of general damages and the relevant authorities from Uganda and other jurisdictions, before arriving at the sum of shs.100,000,000/=. It is true that the Court based this quantum

on a period of 17 years possession of the property by the 1st applicant with effect from 2002 when the breach occurred to the date of judgment.

However, it is now apparent from the submissions and the affidavits on record that the 1st applicant was actually in possession of the Muyenga property for 12 years only, having handed it over to the respondent from 2012 to 2017. This fact was acknowledged by the respondent in her affidavit in reply and her counsel repeated it in his submission. The assessment was thus based on an error apparent on the face of the record and its rectification is necessary, in our view, in order to give effect to the intention of the Court in the said judgment.

We therefore find that the applicants have brought their complaint within the ambit of Rules 2(2) and 35 of the Rules of this Court. We are accordingly of the firm view that the justice of the case will be served by correcting the error by deleting the 17 years period and replacing it with 12 years. As a result of that correction which amounts in essence, to a reduction of the period on which the Court had based the assessment of the award by thirty per cent, we think the sum of shs.70,000,000/= proposed by counsel for the applicants is fair in the circumstances. We are further alive to the fact that the award will take time to be paid by the 1st applicant. We are therefore of the view that the interest of justice will best be served by imposing interest on that sum at the Court rate of 6% p.a from the date of judgment till payment in full.

In order to give effect to the intention of the Court in the judgment, we hereby correct the error by deleting the expression ***"a period of 17 years"*** appearing on page 21 of the lead judgment and

replacing it with ***"a period of 12 years taking into account the five years period from 2012 to 2017 when the respondent was in possession of the property."***

We also delete the award of general damages in the sum of shs. ***"100,000,000/=."*** on the same page and replace it with the sum of ***"shs. 70,000,000/= (Seventy million shillings)".***

In the result, the application is allowed and the orders of the Court in Civil Appeal No. 8 of 2018 are amended as follows:

"1...

2....

3.(i) General damages in the sum of 70,000,000 (Seventy million shillings) shall be awarded to the respondent.

(ii)The sum in (3 (i) shall attract interest at 6% per annum from the date of judgment (19th September, 2019) till payment in full.

4...."

As for costs, we think that this long running litigation between siblings must come to an end and since none of the parties is to blame in these proceedings, we make no order as to costs.

Dated at Kampala this.....7th.....day of.....October.....2020

Arach-Amoko

JUSTICE OF THE SUPREME COURT

Tibatemwa-Ekirikubinza
JUSTICE OF THE SUPREME COURT

Mugamba
JUSTICE OF THE SUPREME COURT

Tuhaise
JUSTICE OF THE SUPREME COURT

Chibita
JUSTICE OF THE SUPREME COURT