THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL COURT DIVISION)

MISCELLANEOUS APPLICATION NO. 40 – 2007

(Arising from H.C.C.S. No. 234 of 2005 and H.C.C.S. No. O.S. 29 of 2004)

JOYCE. L. KUSULAKWEGUYA :::::::::::::: APPLICANT/OBJECTOR

VERSUS

1. **HAIDER SOMANI :::::: RESPONDENT/JUDGMENT-CREDITOR**
2. **NAJIB MUBIRU :::::::: RESPONDENT/JUDGMENT-DEBTOR**

BEFORE: THE HON. JUSTICE GEOFFREY KIRYABWIRE.

R U L I N G

R U L I N G:

This is an application under Order 46 Rules 1 and 4; Order 52 and Sections 82 and 98 of the Civil Procedure Act for a judicial review of my ruling and orders in Civil Application 234 of 2005. Civil Application 234 of 2005 was itself an objector proceedings brought by the current applicant against the judgment creditor gaining vacant possession of property comprised in Block 208, Plot 2179 at Kawempe out side Kampala City following an attachment of the same

land. The grounds are numerous but are drafted out as a form of a hybrid of an appeal and review all rolled up as one. I shall address this procedural mix up later in this ruling; but for now I shall disentangle what looks like the case for review that I can address.

The facts of this matter stretch as far back as 1963 arising from a will of the late Kulanima Matovu Ngambompya (who passed away on the 8th March 1997) which distributed land to his children a parcel of the said land which later became the subject matter of the objection proceedings which came before me in 2005.

Clearly from the evidence adduced by affidavit, the later subdivided parcel of land inherited by the current Applicant has been the subject of a family dispute with her brother one Apollo Matovu (the customary heir to her late father) and generated cases in court as far back as 1994 to wit H.C.C.S No. 509 of 1994 **Joyce Kusulyakweguya V Apollo Matovu & 3 Others** (unreported) before Justice J. P. Berko (as he then was).

In the objection proceedings before me the current Applicant contested her being removed from her land which in her evidence at the time described to be Block 208, Plot 1098 at Kawempe. However, the court order for vacant possession had been issued with

RULING

regard to an adjoining parcel of land namely; Block 208, Plot 2179 also at Kawempe. Clearly the two parcels of land were not the same but I ordered a joint survey to establish why an objection would arise in these circumstances when the parcels of land were different. Whereas the parties agreed to this for some reason the objector and her lawyers on two occasions did not show up when the boundaries were to be opened. The survey however went ahead and the evidence before court showed that 3 separate buildings were encroaching on Plot 2179 though it was difficult to tell if any of them belonged to the objector. That being the case this court ordered that based on the warrant issued by court, the objector / current Applicant's property on Block 208, Plot 1098 was not liable for attachment but that Plot 2179 was. Any matters relating to possible encroachment in my view were in effect a land dispute to be settled in a different suit and not by way of an objection proceeding.

RULING

The Applicant now through a new lawyer asserts that she has ascertained that land on Block 208, Plot 1098 at Kawempe is actually wholly comprised of the Kampala – Gulu road highway. It is therefore not possible for her properties to be situated on the said public highway but rather on Block 208, Plot 2179. Mr. Kulumba –

Kiingi appeared for the Applicant while Mr. Makeera appeared for the Respondents.

Mr. Kulumba for the Applicant submitted that at the time of the hearing of the objection no land title to said Block 208, Plot 1098 which was said to have been allotted to and owned by the Applicant was adduced in court. However, a special certificate of title to the said Block 208, Plot 1098 still in the names of the Applicant's late father was issued on the 24th November 2005. The cadastral plan to the said title and a subsequent surveyors report commissioned by the Applicant on the 16th March 2006 showed that the whole plot was occupied by the Kampala – Gulu road highway. The surveyors report also showed that the Applicants properties actually are on Block 208 and plots 1097, 2179 and 2180.

Counsel for the Applicant blames this mix up of plots on the Applicant's brother who concealed the true facts to his sister the Applicant with the intention of depriving her of property and her inheritance.

The Applicant (in para 9 of her affidavit dated 19th January 2007) further blames her former lawyers of compromise and neglect in failing to attend to the opening of the boundaries as had been

RULING

directed by this court thus making the court believe that she the Applicant was in occupation of Plot 1098 and merely encroached on Plot 2179 whereas not. The Applicant in her second affidavit dated 9th February 2007 further states that her buildings on the land that was mortgaged by the judgment creditor belong to her as a customary tenant/tenant by occupancy and that by that reason is protected from eviction by virtue of the Constitution and the Land Act.

Counsel for the Applicant argues that these circumstances are a discovery of new and important matters of evidence of fraudulent conduct on the part of the customary heir and his daughter Robinah Namatovu which were not within the knowledge of the Applicant and could therefore not be adduced as evidence at the trial. It is therefore just and equitable that this court's rulings and orders be reviewed.

Mr. Makeera for the Respondent in reply denies that there is any new evidence. He argued that the survey report relied upon is dated 16th March 2006 and yet the initial ruling of the court was given on the 6th June 2006 and so the evidence was available. He further argues that the Applicant did not exercise due diligence to put the

RULING

evidence before court. Mr. Makeera submitted that court in 1994 allowed for the subdivision and distribution of the plots in question. He argued that claim of customary tenancy was being raised for the first time and was therefore an after thought. Mr. Makeera submitted that the Applicant was only seeking to do what she failed to do in court in 1994 when the judgment went against her. He therefore argued that the application did not meet the criteria for review.

I have read the motion, the affidavits for and against it and have heard the submissions of both counsel. The law relating to review is well settled. Order 46 rule (1)(a) provides

> *"(1) Any person considering himself or herself aggrieved…*
>
> *(a) by a decree or order from which an appeal is allowed but from which no appeal has been preferred…*
>
> *…and who from the discovery of new and important matter or 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 the decree was passed or the order made or on an account of some mistake or error apparent on the face of the record, or for any other sufficient cause… may apply for a review… to the court which made the order…"*

RULING

The authorities on this procedure are equally clear as to when a court may order a review of its own orders.

In the case of **Abasi Balinda** **V** **Fredrick Kangwamu [1963] EA 557** it was held that a point may be a good ground of appeal may not be a ground for an applicant for review and an erroneous view of evidence or of the law is not a good ground for review though it may be a good ground for appeal. This position was adopted with approval by Justice F. Egonda Ntende in the case of **Godfrey Ssentongo V Stanbic Bank of Uganda** M.A 59 of 2007 (unreported)

In that case the question was whether a plaint did not disclose a cause of action.

Ground one of the present motion states that *"…the learned Judge erred in law and fact in failing as he did to find that the Applicant was in physical possession and occupation of the land…"*

Clearly this ground seeks to review an *"erroneous view of evidence or the law"* and is therefore not a good ground for review though it may be a good ground for appeal. This is the mix up in the pleadings that I referred to at the beginning of this ruling and should this ground had stood alone I would have had to dismiss the motion in favour of an appeal. As it is, there are another 14 grounds that the motion

RULING

alludes to for the review and thus in a way the motion cures itself as the other grounds can be viewed separately. The correct intention and test for review was brought out in the case of **Nakabugo V AG [1967] EA 60** where Sir Udo Udoma (Chief Justice as he then was) held at 62 – 63

> *"…if the order was ultra vires… that should be a good ground to take this matter to the Court of Appeal; as it is doubtful whether this court would be competent to sit as a Court of Appeal on its own order and decree. It is also doubtful whether the provisions of 042 r 1 (now 046 r 1) were ever intended to deal with a matter where a court had made an order which is ultra vires its power.*
>
> *It seems to me that provisions of the order aforesaid would apply only where there has been a discovery of new and important matter or evidence which after the exercise of due diligence was not within the knowledge or could not be produced by the Applicant at the time when the order or decree complained of was made…"*

I agree with the reasoning of The Lord Chief Justice (as he then was) as a review must relate to the discovery of a new matter or evidence and not a challenge such as ultra vires to a matter or evidence already on record. Allow me only to add that a review at the end of

RULING

the day is to guard against injustice and abuse of court process because the court did not have the correct evidence before at the time of the hearing due to no culpable fault of an aggrieved person.

Has there therefore been the discovery of a new matter or evidence in this case? I say yes, there has. The court did not have evidence that Block 208, Plot 1098 was part of a public highway road! What a contradiction! Surely the Applicant could not have been in possession of a public highway with her buildings on it. Could this new evidence have been known at the time, after the exercise of due diligence or was it in the knowledge of the aggrieved party? Certainly the Applicant was not aware of this matter of a highway. In paragraph 7 of her affidavit dated 21st March 2005 in C.A. No. 234 of 2005 the present Applicant deponed

> *"…That the houses which I occupy and live in and have occupied and lived in for a considerable time are **located and situated on Plot No. 1098**…"* (Emphasis mine).

One wonders how this could be if Plot No. 1098 was a public highway road? Mr. Makeera for the Respondents submitted that this is evidence that the Applicant did not exercise due diligence to establish as to the facts and therefore did not meet the criteria for

RULING

being granted a review. Indeed it baffles my mind given the age and history of this family dispute and the cases that it has generated how this matter of the highway could not have been discovered earlier. The record shows that lawyers, the office of the Administrator General and even surveyors have all at some stage been called in to assist in this dispute. Even this court directed a joint opening of boundaries but there was reluctance with some parties to follow through with the direction. With hindsight I am not surprised that now, this mess has been uncovered.

I am inclined to agree with Mr. Kulumba – Kiingi counsel for the Applicant that the Applicant's former lawyers must bear some blame for this. Any diligent lawyer in my view should have first conducted a search in the land office and called for an opening of the land boundaries to properly protect his client. This apparently was not done. I am also inclined to believe the Applicant when she depones that her brother and heir to her late father concealed these matter facts about Plot 1098 from her. In any event if she is not the registered proprietor of Block 208, Plot 2179 then her presence thereon on the evidence in court makes her a customary tenant thereon as it was family property. I therefore find that these critical

RULING

facts were not within the knowledge of the Applicant at the time of the hearing. That being the case this court cannot allow such an injustice to stand against the Applicant.

I accordingly allow the application for review as follows:-

1) The warrant for vacant possession for Block 208, Plot 2179 at Kawempe as far as it relates to the Applicant is ordered to be in operative.

2) The property of and occupied by the Applicant on Block 208, Plot 2178 is not liable for attachment in respect of the orders and decree in H.C.C.S, OS No. 29 Of 2004.

3) That if any of the applicants property has been attached then it is hereby released from execution and attachment.

4) That the order of costs is hereby reversed and now awarded here and in CA 234 of 2005 against Najib Mubiru the 2nd Respondent judgment debtor whose actions let to this situation.

Geoffrey Kiryabwire

JUDGE

Date: 16/01/08

RULING

16/01/08

9:10pm

Ruling read and signed in Court in the presence of;

- **Kulumbi - Kiingi for Applicant**
- **Makeera for Respondent**
- **Applicant present**
- **Rose Emeru – Court Clerk**

……………………………

Geoffrey Kiryabwire

JUDGE

16/01/08

RULING