

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(LAND DIVISION)

MISCELLANEOUS APPLICATION NO.312 OF 2020

(ARISING FROM CIVIL SUIT NO.741 OF 2017)

NAMUSISI KELLEN NYAMURUNGI KARARA:::::::::::::::::::::::::APPLICANT

VERSUS

1. NAKAMYA GETRUDE

2. MAYENGO JOSEPH

3. MUZIRA DAVID

4. NANGOZI PROSSY

5. BBENGO MICHEAL:::RESPONDENTS

Before: Lady Justice Alexandra Nkonge Rugadya.

RULING.

Introduction:

This application is brought under the provisions of **Articles 26, 28 & 44 (c) of the 1995 Constitution of the Republic of Uganda, Sections 82 & 98 of the Civil Procedure Act Cap 71, Section 33 of the Judicature Act, Section 91 of the Land Act & Sections 177 & 176 of the Registration of Titles Act** for orders that:

1. This court be pleased to recall the judgement and orders in Civil Suit No.741 of 2017 made on 18th February 2020 for purposes of reviewing and setting aside or otherwise varying the same to the extent to which it affects the applicant's interest.

2. This court be pleased to set aside the execution and or implementation of the said judgement and decree by the 1st to 4th respondent and specifically set aside:



5 i) ***The eviction order against the 5th respondent as it automatically amounts to the interruption of the applicant's right to quiet and vacant possession as a bonafide purchaser for value without notice.***

10 ii) ***The declaration that the 1st to 4th respondents are beneficiaries and owners of the suit land which will amount to the impeachment of the applicant's title, without any attribution of fraud to her.***

3. This court be pleased to declare the applicant the rightful registered proprietor and owner of the suit land.

15 ***4. In the alternative but without prejudice, upon setting aside the judgement, the applicant be added as a defendant to the suit and given an opportunity to defend her interest on the merits as against the 1st to 4th defendants.***

20 The grounds of the application are contained in the affidavit in support of the applicant, Namusisi Kellen wherein she states *inter alia* that she is the registered proprietor and in possession of the land described as ***LRV KCCA 524 Folio 19 Plot 58 Chorley Crescent Land at Luzira measuring approximately 0.1040 hectares*** which is the subject matter of the impugned judgement and decree of this court in ***High Court Civil Suit No.741 of 2017***, to which she was neither a party
25 nor had been aware of.

 That she is legally aggrieved by the said judgement and decree as it not only adversely affects her legal interest in the suit property but also has the effect of impeaching her title thereby rendering her liable to eviction from the suit property, and she would therefore be condemned unheard in defence of her proprietary interest in the suit
30 property since she was not party to the suit.

 That the applicant acquired equitable interest in the suit land before this court entered its judgment. Further that unaware of the judgment and decree of this court, the applicant went ahead to cause the property to be transferred into her names and that her registration is still intact.

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That there was therefore new and important evidence pertaining to the proprietorship and possession of the suit property which was not drawn to the attention of this court, and which if considered will impact the judgement and orders of this court.

5 It is further deponed that before she purchased the suit property, she was introduced to the property by brokers who informed her that the property belonged to one Michael Bbengo and upon conducting a search at the registry of titles, the applicant discovered that Mr. Bbengo had a lease thereon which had since expired, but that he was a sitting tenant thereon;, and that there was no incumbrance on the said property, except that he was in possession and he had a licensee on the property
10 known as Kyalimpa Edward.

That the 5th respondent notified the applicant of the pending suit that he had filed against Kyalimba Edward vide ***Nakawa Magistrate's Court Civil Suit No. 20 of 2017***, wherein the 5th respondent had sued for the eviction of Kyalimpa Edward from the suit property.

15 By way of settlement, a consent judgment had been entered between the 5th respondent and Mr. Kyalimpa by which the latter was to be compensated for him to vacate the land.

The 5th respondent and the applicant later agreed that the applicant acquires the property, for which a first deposit was made and that the 5th respondent would
20 facilitate the application for renewal of the lease.

That upon renewal of the lease, a sales agreement was executed between the 5th respondent and the applicant who paid a consolidated amount of ***Ugx 237,000,000/=*** and consequently took vacant possession of the property and caused a transfer of the same into her names.

25 That the applicant has been in possession, unchallenged until she was informed that unknown persons who had presented copies of the decree and judgement in ***High Court Civil Suit No. LD 741 of 2017***, under which the plaintiffs were declared as the rightful owners of the suit land.

30 Further, that the applicant was not aware of the existence of any third-party claim in respect of the suit property. Through her lawyers, she discovered that the suit was filed by the 1 to 4th respondents against the 5th respondent for trespass and that the suit was not heard on its merits. The judgment was entered on admission against the 5th respondent who at the time was no longer the owner of the property.

That no *locus* visit was conducted to ascertain the status of the property and that if it had been conducted, the applicant would have been found in possession.

The applicant further pleaded exemption from limitation considering she has been in continued possession of the suit property and that she was not aware of the suit and that it is in the interest of justice that the judgement decree in **Civil Suit 741 of 2017** be recalled for review and setting aside or varying the same.

Arguments by the respondents:

The 1st, 2nd, 3rd and 4th respondents filed their respective affidavits in reply, in opposition of the application. They each contended that the applicant did not suffer any legal grievance since she does not have any legal or equitable interest in the suit property, having purchased the same when the lease had expired.

The 2nd respondent on the other hand further deponed that the applicant was aware that the suit property was a subject matter of court proceedings but opted to connive with the 5th respondent in order to defeat the due process of court.

That while the suit was filed in 2017, he had inscribed the words, **"Plot 58 is not for sale it is in court"** as early as January, 2018. Further, that it is an admission by the applicant that at the time she allegedly purchased the suit property from the 5th respondent, she was aware that the lease had expired and therefore the purported sale agreement between them in respect of the suit property could not confer any interest, legal or equitable.

The 2nd respondent also averred by affidavit evidence that after the judgement had been delivered by this court, he visited the suit property sometime around 18th February 2020 and found that the 5th respondent had since abandoned the property and that there was a bush around the house.

That he got three individuals to look after the place but they were beaten and evicted by the applicant who has on numerous occasions been summoned to Kitintale police Station in vain, after the 2nd respondent reported the applicant.

That the applicant's occupation of the suit land is illegal and that the applicant only got registered as the proprietor of the suit land after this court had pronounced itself that the suit land belonged to the 1st, 2nd, 3rd & 4th respondents and not the 5th respondent.

The applicant did not file an affidavit in rejoinder.

Representation.

The applicant was represented by **M/s Magna Advocates** while the 1st respondent was represented by **M/s Mugenyi & Co. Advocates**; the 2nd respondent by **M/s Lumweno & Co. Advocates**; the 3rd respondent by **Lwere Lwanyanga & Co. Advocates**; while the 4th respondent was represented by **M/s A.W. Bukenya & Co. Advocates**.

The applicant and the 1st to 4th respondents filed written submissions as directed by this court on 26th March, 2021. There is no evidence on record however that the 5th respondent had been served.

The following are the issues identified for determination by this court;

- 1. Whether the applicant is an aggrieved party**
- 2. Whether the applicant has disclosed grounds that warrant review**
- 3. What remedies are available to the parties.**

Resolution of issues.

Analysis of the Law

Section 82 of the Civil Procedure Act provides that;

“Any person considering himself or herself aggrieved by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order on the decree or order as it thinks fit.”

Order 46 of the Civil Procedure Rules provides;

“1. Application for review of judgment: -

(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; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the 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 the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him or her, may apply for a review of judgment to the Court which passed the decree or made the order.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party, except where the ground of the appeal is common to the applicant and the appellant, or when, being respondent, he or she can present to the appellate Court the case on which he or she applies for the review.

The following grounds for review were enunciated in the case of **FX Mubuuke Vs UEB**
High Court Misc. Application No.98 of 2005:

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

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

(c) That any other sufficient reason exists.

For an application for review to succeed, the party applying for it must show that he/she suffered a legal grievance and that the decision pronounced against him/her by court has wrongfully deprived him/her of something or wrongfully affected his title to something. (See: **Busoga Growers Co-operative Union Ltd vs Nsamba & Sons LTD HC (Commercial Court) Misc. application No. 123 of 2000**).

Issue 1: Whether the applicant is an aggrieved party.

Submissions.

In his submissions, counsel for the applicant submitted that court rendered a judgment in **High Court Civil Suit No.741 of 2017**, a decree was passed on 18th

February, 2020 and that the orders made affected property comprised in **LRV KCCA 524 Folio 19, plot 58 Chorley Crescent Land at Luzira**, in which the applicant holds interest in the form of a 47 year long lease, and is currently registered as proprietor thereof, having purchased the same from the 5th respondent.

- 5 That by the time court rendered the judgment and decree, the applicant had a pre-existing interest in the suit land and that the applicant's equitable interest had been concluded on 4th October, 2019.

Court however ordered for the eviction of the 5th respondent who is neither the registered proprietor or in possession. That the decree is sought to be executed
10 against the applicant and yet by the time of judgement, she had innocently acquired an equitable interest and was in possession and is therefore being condemned unheard.

That the applicant is therefore not only aggrieved with the judgement and decree but has also demonstrated the manner in which it affects her, thus she has locus to seek
15 a review and setting aside, or varying of the order.

To support his point, counsel cited the case of **Nakiwala Winnie v The Registered Trustees of the Lohana Community & Anor, HCMA 793 OF 2020**.

He also referred to ground 1 of the notice of motion and *paragraph 4 & 9* of the affidavit in support, the gist of which is that the applicant is not a party to the main
20 suit, was not aware of it and only got to know of the decree on 13th February, 2021 and since he had not been a party to the suit had no right of appeal against the offending orders.

Submissions in reply:

In reply, it was submitted for the respondents that by the time the applicant
25 purchased the same based on the memorandum of understanding dated 24th July 2019, the lease had expired. Therefore the 5th respondent who purportedly sold her the suit land had no interest whatsoever in the land and could not transfer any interest, either equitable or legal.

That the applicant has not suffered any legal grievance which has wrongly deprived
30 her of something, therefore she has no locus to bring this application.

For the 2nd respondent, it was further submitted that the applicant conducted a search and found out that the lease had expired and that she should have waited for the 5th respondent to renew the lease and then purchase the suit land.

That the applicant had reason to believe that in law, she was purchasing land that did not exist, therefore she did not acquire any interest in the suit land. It was also submitted that the applicant did not conduct any due diligence at the time she allegedly purchased the suit land as the 2nd respondent indicated by affidavit evidence that house had words warning the public at large that the land was not for sale.

That the applicant got registered on the suit land after the court had delivered its judgment in favor of the 1st to 4th respondents therefore court cannot uphold the registration of the applicant let alone her possession of the same because she bought the suit land from the 5th respondent who was found not to be the rightful owner of the suit land and this amounts to an illegality.

Submissions in rejoinder:

In rejoinder, counsel relying on the case of ***Andrew Babigumira v John Magezi HCMA No. 538 of 2013*** submitted that the applicant is the current registered proprietor of the suit property and that her title can only be impeached on grounds set out in the ***Registration of Titles Act*** in proper proceedings and she is equally in possession of the suit property. That she can only be ejected upon cancellation of her certificate of title.

That at this stage, court cannot pronounce itself on the propriety of acquisition or legality of the proprietorship of the applicant unless the applicant is afforded the opportunity to defend her interest in the suit.

That the matters raised by the respondents are matters that go to the merits and which can only be considered if the applicant is heard on the merits of her acquisition of the suit property.

In regards to whether or not the 5th respondent had any interest in the suit land capable of being acquired by the applicant or not, it was submitted that when the 5th respondent's lease expired, he remained in possession of the suit land and that the records at the land office reflected his name as the last registered lessee, therefore, he was a sitting tenant.

That under the law of reversion, the suit land reverted to Kampala District Land Board which never evicted or threatened to evict the respondent and also did not allocate the land to anyone else including the 1-4th respondents.

The 5th respondent had a right to apply for a renewal as a sitting tenant, which he exercised. The MOU between the 5th respondent and the applicant which the respondents have mistaken for a sale agreement, was not for purchase of the expired lease but rather to facilitate the 5th respondent to regularize his interest by applying for a renewal of the lease and that it was clearly indicated that if the 5th respondent successfully renewed the lease, then he'd sell the same to the applicant.

Counsel further submitted that the applicant did not acquire an expired interest but rather a legal interest as indicated by the documents attached to the applicant's affidavit.

That once the lease was renewed, the applicant acquired an equitable interest in the suit property which she then elevated to a legal interest upon complying with the lease conditions.

That by 7th August 2019, the 5th respondent was the registered lessee and the agreement of sale with the 5th respondent was entered on 4th October, 2019 before judgment was passed by court, and after the 5th respondent had been registered as the proprietor vide ***Instrument No. KCCA 00064584***.

In as far as notice of the suit is concerned, it was submitted that it was the applicant's uncontroverted testimony that the only suit her attention was drawn to in the course of her due diligence was the case of Kyalimpa Edward, the licensee and that the inscriptions alluded to by the 2nd respondent, were related with the suit between Kyalimpa and the 5th respondent and not the 1st to 4th respondents.

Consideration by court.

The law:

The facts as presented seem to suggest that two competing interests were over time created over the same piece of land. the respondents appeared to claim a *kibanja* under the kabaka's land. The applicant on her part claimed to have acquired her interest from the 5th respondent who purportedly acquired his under the KDLB.

The principle of "***qui prior est tempore***", which loosely translates to "*he who is earlier in time is stronger in law*" revolves around the notion that an earlier/prior equitable

interest in land can only be defeated by a *bonafide* purchaser for value without prior notice.

Then the equities are equal and his estate prevails. If he took with notice, the position is otherwise, as the equities are not equal. If he does acquire a legal estate, then the first in time that is the prior equitable interest prevails as equitable interests rank in the order of creation. **See: *Hanbury and Martin Modern Equity (Sweet and Maxwell) Ltd 1977 at page 27.***

The applicant, having acquired what she claimed as the prior interest in the land (which was the subject of the head suit) claimed to have been aggrieved by the decision of this court, against which she sought the review.

An aggrieved party was defined in ***Mohammed Allibhai W.E. Bukenya and Another, C.A 56 of 1996, citing, Re Nakivubo Chemists (U) Ltd; In the matter of the Companies Act (1979) HCB 12;*** to include any party who has been deprived of his property.

In the case of ***Ladak Abdalla Mohammed Hussien V. Isingoma Kakiiza SCCA No. 8/1995 (unreported)*** it was further held that a third party cannot in general apply for review of an order or a decree in which he or she was not a party.

This position was however clarified in ***Mohamed Albhai v. W.E. Bukenya Mukasa and Departed Asians Property Custodian Board- SCCA No. 56 of 1996 (unreported)***, that where a third party can prove that he or she is an aggrieved person and has suffered a legal grievance, he or she can apply for review.

Court in ***Mohammed Allibhai W.E. Bukenya (supra)*** relying on the case of ***Kawdu vs Bever Ginning Co. Ltd, Akot and Others 1929 AIR Nagpur 185*** noted that whereas it has inherent powers to review an order passed where it affected a third party; it must be a person who has suffered a legal grievance and the principle applies depending upon the peculiar circumstances of each case.

Similarly in the present case, the applicant has the legal burden to prove that she is an aggrieved person who has suffered a legal grievance. She based her application on a leasehold certificate of title in respect of which, she was registered as the proprietor on 11th August 2020 vide ***Instrument No. KCCA-00071102***, after court had pronounced itself on the status of the suit land.

She further relied on a consent dated 24th July, 2019, between the 5th respondent and Edward Kyalimpa, ***vide Civil Suit No. 20 of 2017.*** Going by that consent, Mr.

Kyalimpa, a licensee on the suit land had been paid a sum of **Ugx 15,000,000/=**, to facilitate his relocation from the suit land.

The applicant also relied on an addendum to a memorandum of agreement, between her and the 5th respondent for the sale of the suit land. The memorandum was dated 24th July, 2019 while the addendum was dated 4th October, 2019. The 5th respondent under those transactions had presented himself as the vendor and owner of the suit property. (**Annextures E, F**).

Annixture D, a certificate of title indicates that he got registered onto the title on 7th August 2019. The lease to him was made for a term of 47 years, *w.e.f* 1st January, 1990. It was between the KDLB as lessor and the 5th respondent as the lessee. As noted before, the transactions took place while the suit against the 5th respondent was pending in court.

Annixture A was a certificate of title which shows that the applicant got registered onto the title on 11th June, 2020. Attached was the lease, and the information appearing on the applicant's lease was exactly the same as that appearing on the lease obtained by the 5th respondent. As duly noted, the applicant's registration onto the land took place after this court had declared the 1st - 4th respondents the rightful owners of the land.

Under **clause 2 (f)** of the annexed lease agreements however, the lessee was not to sell or sublet or part with the possession of or suffer anyone to use or confer on anyone an equitable interest without having first obtained the consent of the lessor who in this case was the Kampala District Land Board.

A legally enforceable contract intended to convey or create a legal interest, gives the party an equitable interest in property. **See: Lysaght versus Edwards (1876) 2 Ch. D 499 at pg. 506.**

Even if one was to assume therefore that the land belonged to KDLB and that the 5th respondent had validly acquired the lease from the KDLB, consent by KDLB as the lessor was a condition precedent for a valid lease.

It was necessary to effect the transfer of such interest to the applicant, or any other third party for that matter. There was no minute however to reflect the decision of KDLB as a consenting party to the subsequent assignment and/or transfer of land from the 5th respondent to the applicant, whether as a new lessee or sublessee.

In those circumstances, as a total stranger to the transaction between the KDLB and the 5th respondent, the applicant could not have acquired any protectable interest in that transaction.

5 A transfer which lacked a material element rendered the entire transaction between the applicant and the 5th therefore respondent null and void. The title obtained by the 5th respondent and later on transferred to the applicant were transactions which were tainted with fraud since the vendor had misrepresented himself as the owner; and in any case orders had already been made by which the rest of the respondents had been declared the rightful owners of the *kibanja* under kabakas land.

10 The 5th respondent never took the trouble to challenge those orders. The applicant herself had constructive knowledge that the suit concerning the land she was intending to buy was pending, since a notice to that effect had been placed on that land.

15 This was deduced from the assertion made by the 2nd respondent, which she chose not to deny. Despite her constructive knowledge of the goings on, on this land, and the prior orders of this court, she still went ahead to enter into unsanctioned transactions.

20 As noted earlier the 5th respondent who had been instrumental in all the above transactions and in respect to this application was not even served with this application.

Additional to the above, the 5th respondent had by implication admitted in his evidence under the main suit that the land did not belong to him but to the plaintiffs. Court in arriving at that conclusion only had to look at the **Annextures D and E**, each dated 24th July, 2016.

25 By the said commitment the family of the late Kaberenge George William the actual owners of the land had agreed to sell the land in dispute to the 5th respondent, at a purchase price of **Ugx150,000,000/=** which the 5th respondent had failed to pay.

30 That agreement was signed on the one hand by the widow and her children and on the other, by the 5th respondent and three other persons. The 5th respondent had been availed the opportunity by this court under the head suit to challenge that transaction but did not do so.

By such conduct he had admitted that the land belonged to the Kaberenge family. He did so admit before entering into any of the transactions with the applicant.

The meeting held on 24th August, 2016 between the parties in that suit also confirmed that this had been part of kabaka's land, and therefore under the management of the Buganda Land Board.

It goes without saying therefore that KDLB which had issued the lease to him in 2019 had no rights to manage the land on behalf of the kabaka. The summary of it was that the 5th respondent acknowledged that this land belonged to the plaintiffs under the kabaka, failed to pay for the *kibanja* as early as 2016 and decided instead to secure ownership through KDLB who had no claim over the land. Accordingly, the applicant could not acquire a title from a party who had no valid title.

A court of law cannot sanction what is illegal. Once the illegality is brought to the attention of court, it overrides all questions of pleadings. (***Makula International vs His Eminence Cardinal Emmanuel Nsubuga & Anor CACA No.4 of 1981***).

The applicant herein claims to have been aggrieved since she neither had knowledge of the suit. She chose to ignore the fact that she too got involved in transactions which had excluded the existing *kibanja* interests she had found on that same land. The transaction between her and the 5th respondent was not endorsed by any neighbor or LCs as expected of any bonafide purchaser.

It is to be noted that due diligence is a requirement of law and good practice so demands, for any prospective *bona fide* purchaser.

Thus a *bona fide* purchaser for valuable consideration of land derives protection under **section 181 of the RTA**. The term is defined in ***Black's Law Dictionary 8th Edition at page 1271*** to mean:

"One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims, or equities against the seller's title; one who has good faith paid valuable consideration without notice of prior adverse claims."

Whether or not there was fraud and whether or not a party was a *bonafide* purchaser for value without notice the question that a court would poise is whether the defendant honestly intended to purchase the suit property and did not intend to acquire it wrongfully. (***David Sejjaka Nalima vs Rebecca Musoke SCCA No. 12 of 1985***).

The 2nd respondent in his affidavit in reply, specifically *paragraph 5* stated that as early as January 2018, he had inscribed words in paint on the house on the suit property to the effect that “**Plot 58 is not for sale it is in Court**”. Since the applicant did not file an affidavit in rejoinder, the statement of fact contained in the affidavit in reply by the 2nd respondent remained uncontroverted.

It is trite law that facts as adduced in affidavit evidence which are neither denied nor rebutted are presumed to be admitted. ***Eridadi Ahimbisisbwe v World Food Program & others [1998] IV KALR 32.***

With all due respect therefore, the submission by counsel for the applicant on the point that the inscriptions on the house related to the suit between Kyalimpa and the 5th respondent but not the head suit herein, was evidence from the bar.

The implication from the above findings is that the applicant had constructive notice of the infirmities and claims concerning the suit land before she made the purchase.

A person who purchases an estate which he knows to be in occupation of another person other than the vendor is not a *bona fide* purchaser for value without notice of the fraud if he/she fails to make inquiries before such purchase is made.

Thus as per the findings in ***Uganda Posts and Telecommunications vs Abraham Kitumba SCCA No. 36 of 1995***), such failure to make reasonable inquiries or ignorance or negligence amounts to fraud.

All in all, the respondents sought justice to reclaim the land, obtained the judgment in their favour, only to find out later that the applicant had behind their back secured a title in 2020- in a short span after the judgment had been passed against the party who had irregularly sold the property to her.

The authenticity of her title and lease therefore also remained suspect. Given those circumstances, the applicant could not have therefore been a *bonafide* purchaser for value.

As a final point to note, it may be true that the applicant had not been party to the suit or any of the earlier transactions between the 5th respondent and the rest of the respondents in this application.

But similar arguments can be raised that the respondents had not been made party to any of the subsequent transactions between the 5th respondent and the applicant

that took place during the hearing of the main suit and after the judgment had been passed against the 5th respondent.

Thus the evidence as availed to court indicates that the respondents in this application were the aggrieved parties since they had been prevented from enjoying the full benefits accruing from their judgment. The transfers made thereafter were perceived as a deliberate move to defray the course of justice and defeat the interests of the 1st -4th respondents.

In the premises and given the above, the applicant has no legal grievance, has no locus to file this application and accordingly, the prayer sought for the review against the orders made by this court, vide **HCCS No. 741 of 2017** is not justified.

Costs awarded to the 1st -4th respondents.

I so order.

.....*Alexandra Nkonge Rugadya*.....

Alexandra Nkonge Rugadya

Judge

23rd April, 2021

Delivered via email on 23/4/2021