THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

MISCELLANEOUS APPLICATION NO.663 OF 2019

(ARISING FROM CIVIL SUIT NO. 459 OF 2017)

SWIFT SAFARIS CO LIMITED---------- APPLICANT

VERSUS

KENZA JOHN---------- RESPONDENT

BEFORE HON. JUSTICE MUSA SSEKAANA

RULING

The Applicant brought this application by way of Notice of Motion against the respondent under Section 82 Civil Procedure Act and Order 46 r 1,2 & 8 of the Civil Procedure Rules, for orders that;

1. An Order for review of judgment & Orders/decree entered in Civil Suit No. 459 of 2017.

2. Costs of the application be provided for.

The grounds in support of this application are briefly set out in the Notice of motion and the same are set out in detail in the affidavit of Adam Mubilu which briefly states;

1. That the applicant is aggrieved by the judgment entered under civil suit No. 459 of 2017.

2. That there has been a discovery of new and important evidence which could not be produced at the time of trial or judgment.

3. That the said Motor vehicle Registration No. UAU331L is not and has never been registered in the names of either the defendants appearing on the plaint.

4. That at the time of the hearing, the defendants were not registered proprietors of the said motor vehicle and did not have that information.

5. That according to applicant a wrong party was sued and therefore the respondent has no cause of action.

In opposition to this Application the Respondent filed an affidavit in reply briefly stating that; the application is intended to delay the execution process and stop the applicant from enjoying the fruits of the judgment.

The application has not set out or proved any grounds sufficient for the grant of this application. The same is brought in bad faith.

In the interest of time the respective counsel were directed to make written submissions and i have considered the respective submissions. The applicant was represented by *Counsel Bakundane Esther* whereas the respondents were represented *Mr Karugaba Levis*.

Whether there are grounds that warrant the grant of an order for review?

The main ground for this application is that the Motor Vehicle that was involved in the accident was not registered in the names of the applicant. Therefore a wrong party was sued in the matter.

According to counsel there is an error apparent on the face of the record since Swift Coaches Co. Ltd is a non existing party and according to counsel the proper name of the company is Swift Safaris Limited and not Swift Coaches Co. Limited. Therefore the suit filed by the respondent was a nullity, bad in law and the judgment issued therefrom cannot stand.

Secondly, the applicant contends there is discovery of new and important evidence. The said motor vehicle belonged to 24/7 ADS Limited and not the applicant.

The respondent submitted that the applicant's contentions cannot be an error apparent on the face of the record. A misnomer in the name of one of the defendants is in no way apparent as it requires extraneous matter, examination and argument. According to counsel a misnomer in the name of one of the defendants was such one which does not prejudice the applicant.

The mistake of counsel in naming the 1st defendant should prejudice the respondent who suffered injuries and suffering occasioned by the applicant's bus Swift bus/coach

The respondent further submitted that the applicant has not proved any due diligence exercised by her in finding out this information during the trial and that the law requires that the party to strictly prove that after the exercise of due diligence, the new evidence was not within his or her knowledge and could not be produced at that time the decree was passed.

The applicant has not by any means demonstrated how and when she conducted due diligence so as to determine the registered ownership of the motor vehicle. In addition the applicant contended that the bus was a Swift Bus which belonged to the 1st defendant, was branded with the images of the 1st defendant and was being used to carry out the 1st defendant's transport business. Therefore, ownership does not necessarily require the owner to be the registered owner.

Analysis

The law on review is set out in Section 82 of the Civil Procedure Act and Order 46 rule of the Civil Procedure Rules. The applicant has premised his application on ***" Mistake or error apparent on the face of the record"***

Review means re-consideration of order or decree by a court which passed the order or decree.

If there is an error due to human failing, it cannot be permitted to perpetuate and to defeat justice. Such Mistakes or errors must be corrected to prevent miscarriage of justice. The rectification of a judgment stems from the fundamental principle that justice is above all. It is exercised to remove an error and not to disturb finality.

Reviewing a judgment/ruling based on mistake or error apparent on the face of the record can only be done if it is self-evident and does not require an examination or argument to establish it.

An error which has to be established by a long drawn out process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. ***See Civil Procedure and Practice in Uganda by M & SN Ssekaana page 453***

In the present case the applicant contends that there is an error apparent on the face of the record because of wrong party named as the defendant. The said error rotates around the name of the company sued i.e ***Swift Coaches Co. Limited*** instead of ***Swift Safaris Co. Limited***.

Whereas it is true there is mis-description of the 1st defendant this does not go to the root of the name to be categorized as a wrong party. It is rather a misnomer could have been corrected at the trial and indeed the applicant did not suffer any prejudice. This was merely an incorrect spelling of the corporate name of the 1st defendant.

The applicant counsel did not find any problem while defending the suit and duly filed a written statement of defence in the same matter for the alleged non-existing company Swift Coaches Co. Ltd.

It is apparently clear that the same company was represented in the matter and therefore suffered no prejudice. It may have been different if the company had not filed a written statement of defence in the matter. Otherwise the company would have been condemned unheard as a result of the wrong description.

This is not an error apparent on the face of the record but rather a mis-description of the 1st defendant, the name represented an existing party and was able to be identified by the same name. This court will treat it as a misnomer and the 1st defendant is estopped from denying that it was the proper party.

The applicant is also challenging the decision by way of review since she has discovered new and important evidence about ownership of the motor vehicle in issue; UAU 331L.The applicant contends that the said Motor Vehicle belonged and was registered in the names of 24/7ADS LIMITED.

As a general rule, where a litigant has obtained a judgment in a court of justice, he/she is by law entitled not to be deprived of the fruits thereof without strong reasons. Therefore, where a review of a judgment is sought by a party on ground of discovery of fresh evidence, utmost care ought to be exercised by the court granting it.

It is very easy for the party who has lost the case to see the weak points in his/her case and would be tempted to try to fill the gaps by procuring evidence which will strengthen that weak part of the case and put a different complexion upon that part. The maxim *interest reipublicae ut finis litium* is strictly followed. Courts should not be mired by endless litigation which would occur if litigants were allowed to adduce fresh evidence at time during and after trial without any restrictions. See ***Aluma Micheal Bayo & Others v Said Nasur Okuti Misc. Application No. 12 of 2016***

The underlying object of Order 46 rule 1 on discovery of new and important matter or evidence; is neither to enable the court write a second judgment not to give second innings to the party who lost the case because of his/her negligence or indifference. Therefore a party seeking review must show that there was no remiss on his/her part in adducing all possible evidence at the trial.

In the present case, the matter proceeded *exparte* after the applicant's counsel failed to attend court. This therefore means that the said evidence would not have been produced in any event. In addition, the applicant never raised the issue of ownership of the Motor Vehicle in the written Statement of Defence.

The new evidence must be such as is presumably to be believed, and if believed to be conclusive. The issue of ownership of motor vehicle cannot be conclusively determined by the registration log book. Section 30 of the Traffic Road Safety Act provides;

The person in whose names the motor vehicle is registered shall unless the contrary is proved be presumed to be the owner of the Motor Vehicle…..”

The law merely presumes ownership and the alleged ownership can be rebutted with cogent evidence like in the present case where the said vehicle was operating under the brand name of SWIFT COACHES.

The applicant had not rebutted the allegation of ownership of the bus and it is also undisputed that she exercised control over the bus and had an interest in its operations. The Police report also described the applicant as the owner of the motor vehicle. See ***Khan v Cooke & Others [1975] EA 318***

This court is doubtful whether the evidence, even if produced, would have had any effect on the judgment and it is merely an afterthought that has been brought to try and fill the gaps and delay the execution process.

This application fails and the same is dismissed with no order as to costs.

It is so ordered.

Dated, signed and delivered be email and whatsApp at Kampala this 7th day of August 2020

SSEKAANA MUSA
JUDGE