**THE REPUBLIC OF UGANDA**

**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**

**MISCELLANEOUS APPLICATION NO. 386 OF 2018**

*(Arising from Civil Appeal No. 40 of 2004 and H.C.C.S No. 119 of 1999)*

**YAHAYA WALUSIMBI :::::::::::::::::::::::::::::::::::::::::::::::: APPLICANT**

**VERSUS**

**1. JUSTINE NAKALANZI**
**2. LEVI LUYOMBYA**
**3. RUTH NAMUSISI**
**4. ROBINSON ABRAHAM KITENDA ::::::::::::::: RESPONDENTS**
**5. JOSEPH MUKASA**
*(Administrators of the Estate of Late Erisa Musoke)*

**CORAM: HON. JUSTICE KENNETH KAKURU, JA**

**HON. JUSTICE STEPHEN MUSOTA, JA**

**HON. JUSTICE CHRISTOPHER MADRAMA, JA**

**RULING OF COURT**

The applicant brought this application by way of notice of motion under Rules 2(2) and 43 of the Rules of this Court for;

1. An order that the judgments in HCCS No. 119 of 1999 and Court of Appeal Civil Appeal No. 40 of 2004 be set aside and the head suit be dismissed.
2. In the alternative, an order for retrial of the head suit in the High Court.
3. Costs of this application, court of Appeal in Civil Appeal No. 40 of 2014 and in the High Court Civil Suit No. 119 of 1999 be provided for.

The grounds upon which this application is premised as set out in the notice of motion are that;

1. This application arises from the decision of this court delivered on 26-11-2004 in Civil Appeal No. 40 of 2004 which upheld the decision of the High Court, dated 05-05-2003 in Civil Suit No. 119 of 1999 which resolved the suit in the favour of the plaintiff.
2. The plaintiff was Jackson Kikayira suing as administrator of the estate of late Erisa Musoke and the defendants were the applicant as the 1st defendant and Rose Nalubega as the 2nd defendant.
3. Rosemary Nalubega is a granddaughter and administrator of the estate of the Late Lukanika who was the proprietor of the suit land Kibuga Block 5 plot 584 at Mulago-Kalerwe, Kampala District.
4. Rose Nalubega sub-divided the above stated plot 584 into plots 1120 and 1121 and sold the former plot to the applicant and retained the latter, the residue plot 1121.
5. The plaintiff sued the defendants to recover from them the suit land on the basis that it was part of what late Erisa Musoke had bought from late Tito Lukanika on an agreement dated 22-03-1932, that the said vendor and purchaser died before the land was transferred to the latter and yet the defendants transacted on it to the detriment of the estate of the late Erisa Musoke.
6. After the judgments in the High Court and Court of Appeal were passed, the applicant discovered that the said 1932 sale agreement for sale of 6.33 acres, which both courts based upon to make their decisions in favour of the plaintiff was forged, written long after the alleged vendor late Tito Lukanika had died before 26.1.1924 and by then he only had 3.84 acres.
7. The plaintiff together with the 2nd respondent herein were charged and prosecuted at Buganda Road Chief Magistrate's Court for forgery and uttering false documents in court as exhibits in High Court Civil Suit No. 119 of 1999 and on 19-4-2016, they were convicted of uttering a false document; the said sale agreement.

8. That earlier before the decision in HCCS No. 119 of 1999 was delivered, the 2nd respondent and others had filed Civil Suit No. 1343 of 1999 in the same court before Justice P. Tabaro who decided the issue of ownership through the court's appointed arbitrators Award in favour of the defendants as proprietors of the suit land and plaintiff thereof as tenants.
9. That the said Arbitrators' Award signed by the parties thereto determined the terms and conditions governing the relationship between the landlords and the tenants and their respective lawyers.
10. That the decision in HCCS No. 1343 of 1999 and the Award made res judicata the proprietorship of the suit land in favour of the defendants as landlords and the plaintiff and his other relatives claiming under the estate of Late Erisa Musoke as tenants but the parties lawyers in the High Court as well as in Court of Appeal did not, through negligence or by oversight, bring to the attention of the trial court and Court of Appeal the legal consequence of results in HCCS No. 1343 of 1999 and the Award, and this omission should not be visited on the applicant.
11. After the judgment in the Court of Appeal was passed, the plaintiff in Civil Suit No. 119 of 1999 was replaced by the respondents in this application as administrators of the estate of the late Erisa Musoke and he later died.
12. The applicant contends that the judgments in Civil Suit No. 119 of 1999 and of this court in Civil Appeal No. 40 of 2004 are null and void on grounds of;
    i) Forgery of the 1932 agreement which was discovered after judgments were passed.
    ii) The suit land ownership being Res judicata, since proprietorship thereof was earlier resolved by the same court in High Court Civil Suit No. 1343 of 1999 in favour of the defendants.
    iii) This honorable court is vested with inherent power to set aside judgments which have been proved null and void after they have been passed.

The application is supported by the affidavit of the applicant. The respondent filed an affidavit in reply deposed by Levi Luyombya.

At the hearing of this application, *Mr. Eric Muhwezi* appeared for the applicant while *Mr. Augustine Kibuuka Musoke* appeared for the respondent.

**Applicant's arguments**

It was submitted for the applicant that after dismissal of Civil Appeal No. 40 of 2004, he realized that the impugned agreement may not be authentic and he reported the matter to police to investigate the said document. The police engaged a handwriting expert whose findings showed fraud tainting the impugned agreement. This information proved that the late Tito Lukanika was dead by the year 1924 and could not have sold to the late Erisa Musoke in 1932. After the judgments had been delivered, there was discovered new evidence to show that the crucial document (exhibit P2) which was relied on in the lower court was subsequently found to have been forged.

Counsel relied on **Rule 2(2)** of the Rules of this Court which provides that nothing shall be taken to limit or otherwise affect the inherent powers of this court to make such orders as maybe necessary for attaining the ends of justice or to prevent abuse of the process and that such power shall extend to setting aside judgments which have been proved null and void. He also relied on the Supreme Court decision in **Orient Bank Ltd vs. Fredrick Zaabwe and another S.C.C.A No. 17 of 2007** that a judgment obtained by fraud ought to be set aside.

**Respondent's arguments**

In reply, counsel for the respondent submitted that fraud cannot be proved by affidavit evidence and there should be finality to litigation. He submitted that the applicant has filed similar applications in this court before and they have been dismissed. He prayed that this application be dismissed with costs.

**Court's Resolution**

We have carefully considered the submissions of both counsel as well as the pleadings on record.

The applicant in this application asks this court to set aside its own judgment in Civil Appeal No. 40 of 2004.

The brief background to this application is that one Jackson Musoke Kakayira filed the original suit No. 119 of 1999 in the High Court as one of the beneficiaries of the estate of his late father, Erisa Musoke. The late Erisa Musoke had bought a piece of land measuring 6.33 acres from the late Tito Lukanika situate at Kalerwe, Gayaza road. After executing the sale agreement, no transfer was effected in the names of Erisa and as such, he lodged a caveat on the title of the late Tito to protect his interest. When Erisa died, his son, the 2nd respondent, lodged further caveats to protect the estate of the deceased.

In 1994, one Rosemary Nalubega, a granddaughter to the late Tito Lukanika, got letters of Administration and sold part of plot 584 to Yahaya Walusimbi after removing the caveats. The trial Judge found fraud on the part of the applicant and entered judgment for the respondents. The applicant filed an appeal to this court and the appeal was dismissed with costs. The applicant now filed this application seeking this court to set aside its own judgment on grounds that there is important evidence that has been found and would impact the court's decision on the mater. He filed this application under Rule 2(2) of the rules of this court which states that;

> *"(2) Nothing in these Rules shall be taken to limit or otherwise affect the inherent power of the court, or the High Court, to make such orders as may be necessary for attaining 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 abuse of the process of any court caused by delay."*

Whereas this court is empowered under Rule 2(2) of the rules of this court above to make such orders necessary to meet the ends of justice, this power only extends to judgments proved to be null and void after they have been passed. Both the trial court and the court of appeal made their decisions based on the existing evidence presented to court at the time and the discovery of new important evidence cannot be a ground for setting aside judgment of this court. Counsel relied on the Supreme Court decision in **Orient Bank Vs Fredrick Zaabwe and another Civil Application No. 17 of 2007** which we find distinguishable from this case. In Orient Bank vs Fredrick Zaabwe (supra), the issue was procedural as to the judgment of the High Court because the Honourable justice had retired so the issue was whether it was null and void because it was signed by a judge who had retired. The learned justices of the Supreme Court held that;

> *"Like this court's predecessor said in Livingstone Sewanyana Vs Martin Aliker (supra), "we [too] would not hesitate [by order] to set aside [our] judgment based on fraud under our inherent powers". However, we hasten to add that before exercising that power to make such order, we would have to be satisfied on three conditions; namely that the fraud is proved strictly, that the judgment is based on that fraud and that the order is necessary either for achieving the ends of justice or prevent abused of court process."*

In the present case, there is no fraud proved in procuring the judgment in this court. The fraud the applicant is alleging is that there were material facts attributable to people who have since passed away. This alleged fraud has not been proved and cannot be proved by affidavit evidence. Ideally, the parties would have to apply to adduce fresh evidence which we think will meet the ends of justice if adduced in the trial court and not this court. In the premises, this application to set aside the judgment in Civil Appeal No. 40 of 2004 cannot succeed. It is accordingly dismissed with no order as to costs.

Since the appeal in this court was dismissed, effectively the High court judgment remained intact. The applicant is at liberty to apply

to set aside the judgment and decree and re-hear the matter in respect only of the fresh evidence.

We so order.

Dated this 30th day of July 2019

**Hon. Justice Kenneth Kakuru, JA**

**Hon. Justice Stephen Musota, JA**

**Hon. Justice Christopher Madrama, JA**