

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
[FAMILY DIVISION]
MISCELLANEOUS APPLICATION NO. 648 OF 2023
[ARISING FROM CIVIL SUIT NO. 525 OF 2022]

- 1. NAMPEWO MARGARET**
- 2. EDWIN ALIGAH RUKOMI ::::::::::::::::::::::::::::::::::: APPLICANTS**
- 3. TIBAINGANA JOHN ROBERT**

VERSUS

- 1. DAMALIE MUKASA**
- 2. IVAN KYALIGONZA ::::::::::::::::::::::::::::::::::: RESPONDENTS**

RULING BEFORE: HON.LADY JUSTICE CELIA NAGAWA

1.0. This Ruling relates to a Notice of Motion filed in this Court by the Applicants under Section 98 of the Civil Procedure Act, Cap. 71 and Order 52 rule 1 & 3 of the Civil Procedure Rules, SI-71-1. The orders sought are that;

- 1. The Consent entered in Civil Suits No. 525 of 2022 be set aside, for violating the Applicants rights to be heard.**
- 2. Execution of the Consent signed by the Learned Deputy Registrar H/W Anyala Susanne Okeny HCCS No. 525 of 2022 be stayed.**
- 3. The Applicants be allowed to appear and defend any application by the respondents to dispose and or deal with any estate properly on its merits.**
- 4. Costs for this application be provided for.**



- 2.0. The grounds of this application are set out in the Notice of Motion explicated in the affidavits in support sworn by all the applicants, but in brief are that; the applicants are 4th, 5th and 6th Defendants in Civil Suit No. 525 of 2022 pending determination before this Honorable Court. No formal application was made by the respondents warranting any orders dealing with the estate property prior to determination of the head suit. The suit has not been heard and determined on its merits thereby the orders issued by this Honorable Court on 6th April, 2023 cannot purport to deal with the property already disposed by the Will that has not been invalidated by this Honorable Court.
- 2.1. The said purported consent was never agreed to and or signed by the parties and or their lawyer and is in contravention of court policy.
- 2.2. The purposed consent was erroneously and/or mistakenly endorsed by the Deputy Registrar of this Honorable Court in the absence of the parties. It is just, fair and equitable that the consent be set aside and any impending entry into the estate property to be stayed.
- 2.3. On the other hand, the respondents opposed this application and filed an affidavit in reply sworn by Ivan Kyaligoza (the 2nd Respondent) with authorization from the 1st Respondent. The Respondents stated that they filed Civil Suit No. 525 of 2022 against the applicants for among others a declaration that the applicants are intermeddling with the Estate of the late George Kyaligonza. At the time of filing the applications, the 1st Respondent Damalie Mukasa was in occupation and utilization the estate property situate at Plot 125, 8th Street, Namuwongo, Makindye Division, Kampala District but the applicants

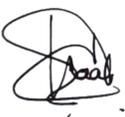


on several occasions would interfere with her possession to force her out of the property.

- 2.4. The respondents contend that the applicants employed the services of a security company known as Homeland Security to stop the 1st Respondent and her children from accessing the premises.
- 2.5. In further answer to the affidavit of the applicants, the respondents averred that when the matter came up on 6th April, 2023, counsel for the respondents intimated to court that the Applicants were interfering with the 1st Respondent's possession of the residential house situated at Plot 125, 8th Street Namuwongo in Makindye Division and asked court to invoke its inherent and Administrative powers to order that 1st Respondent occupies the said premises without interference until further orders of court. On the said day, the applicants were present in court with their counsel Mr. Bagonza Daniel and they consented to the prayer made by counsel for the respondents. Consequently a consent was recorded on court file and later extracted and endorsed by the court but the parties did not sign the same because the applicants and their lawyer had left the court premises.

3.0. Representation and Hearing.

- 3.1. When the matter came up for hearing on 17th October, 2023, the applicants were represented by Mr. Arthur Mwebasa and the Respondents were represented by Mr. Bikuri Rugolobi. The parties agreed to proceed by way of written submissions, the applicants having filed this application along with their submissions and in response the respondents filed their submissions. I have taken into consideration the



said pleadings and the submissions in determination of this application.

4.0 **Burden of Proof.**

4.1 In all civil matters like the present application, he who alleges bears the burden to prove his/her case on a balance of probabilities. The Applicants in this case by virtue of Section 101, 102 and 103 of the Evidence Act, Cap.6 have the burden to prove the facts alleged by them in not only the application but also in the supporting affidavit as well. Section 101 of the Evidence Act provides that; *“Whoever desires any Court to give judgment as to any legal right or liability, dependent on the existence of the facts which he or she asserts must prove that those facts exist”*.

4.2 **Parties’ written submissions.**

4.3 I perused and analyzed each parties’ written submissions. I thus appreciate and commend each party’s counsel for their submissions and arguments in their respective endeavor in resolving this application in favor of their respective party. The written submissions have been considered in determination of this application.

4.4 **Issues for Determination by this Court.**

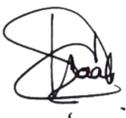
4.5 There are only two issues for determination;

1. Whether the Consent is illegal and against court policy?

2. What are the available remedies to the parties?

4.6 **Determination of Issues**

4.7 The law on consent judgments/decrees is well settled. Parties to civil proceedings are free to amicably settle a dispute and a consent judgment can be entered. The parties may do so orally before a judicial officer who then records the consent or they may do so in writing,



affixing their signatures and place the same for endorsement by the court. **See: Order 25 Rule 6 of the Civil Procedure Rules SI 71-1** and the case of **Betuco (U) Ltd & Another Versus Barclays Bank & Others, HCMA No. 243 of 2009 (Commercial Court)**.

4.8 It is also known that after a consent judgment has been entered, it may be vitiated, varied and/or set aside where it is proved that it was entered into without sufficient material facts or in misapprehension or in ignorance of material facts, or it was actuated by illegality, fraud, mistake, contravention of court policy or any reason that would enable court to set aside an agreement. **See: Ismail Sunderji Hirani Versus Noorali Esmail Kassam [1952] EA 131; and Attorney General & Uganda Land Commission Versus James Mark Kamoga & James Kamala, SCCA No. 8 of 2004.**

4.9 “Prima facie”, any order made in the presence and with consent of counsel is binding on all parties to the proceedings or action, and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court or if the consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable a court to set aside an agreement.” **Seton on Judgements and Orders, 7th Edition, Vol. 1, page 124**

4.10 A consent judgement/decree is passed on terms of a new contract between the parties to the consent judgement. **See: Brooke Bond Liebig (T) Ltd vs. Mallya (1975) EA 266 and Mohamed Allibhai vs. W.E. Bukenya & Another, SCCA No. 56 of 1996.**

4.11 The general principle of law is that Court after passing judgement becomes *fanctus officio* and cannot revisit the judgement or purport to

exercise a judicial power over the same matter. There are exceptions, however, to this general rule wherein a Court that has passed a judgment may review it.

4.12 The jurisdiction of Court to review its Orders/Judgements is provided for under Section 82 of the Civil Procedure Act, Cap.71 which provides that;

“Any person considering himself or herself aggrieved— (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or (b) 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.”

4.13 Section 82 of the Civil Procedure Act has been enlarged by Order 46 Rule 1 of the Civil Procedure Rules which provides that;

i) 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.



7.0. The principles followed by our courts as governing the discretion to allow or decline an application for review have been summarized in a number of decided cases with the following grounds as held in the case of **FX Mubuuke Vs UEB High Court Misc. Application No.98 of 2005** which are;

- i) That there is a mistake or error apparent on the face of the record.
- ii) 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.
- iii) That any other sufficient reason exists, but the expression "sufficient" should be read as meaning sufficiently of a kind analogous to (a) and (b) above See **Re Nakivubo Chemists (U) Ltd (1979) HCB 12.**

7.1. The applicants deponent averred under paragraph 7 and 8 of his affidavit in support of the motion that; "Counsel Daniel Bagonza requested court to refer the matter to mediation instead of court giving directions an idea that was welcomed and agreed upon by other lawyers and indeed court referred the matter for mediation. In addition they averred that; *" to my utter shock on the same day of 6th April, 2023 in the evening I received a document titled consent by the Deputy Registrar High Court (Family Division) Her Worship Anyala Susanne Okeny from our security guards stating that parties had consented that the 1st Respondent Damalie Mukasa occupies and or stays in the commercial property situated at Plot 125, 8th street, Namuwongo,*



Makindye Division, Kampala District until further Orders are made by this Honorable Court and yet parties never consented on anything”.

7.2. I have perused the court record and noted the following as the proceedings of court for the day herein mentioned.

“On 6th April, 2023 the learned Deputy Registrar recorded as follows;

1st Plaintiff is in court and 3rd Plaintiff. Next friend of 4th and 5th Plaintiffs in court.

Counsel Bukuri Rugolobi and Counsel Kibira Hudhaifah for the plaintiffs.

Sewalu Allan for the 1st, 2nd and 3rd defendants. 2nd Defendant- 3rd defendant also sick. 1st Defendant passed on today.

Anitah Court Clerk in Court.

Counsel for plaintiff: The matter is coming for summons for direction. However, the 4th and 5th plaintiff have withdrawn instructions from us and are withdrawing the case.

Counsel for the Defendant- Daniel Bagonza for the 1st, 2nd, 4th and 5th defendants in court.

Counsel for Plaintiffs: In the mean times let us have access to the home where we were staying in Namuwongo. While we conduct mediation.

Court for defendants. We have no objection.

Court: Since the plaintiff is not staying on any property of the late husband and were using the home in Namuwongo let them

have access in the interim since counsel for the defendants consents to the same the parties in the interim.

Since counsel for the Defendants consent to the same. The parties in the interim are referred for mediation.

The case is adjourned for mention on 23rd May, 2023 at 12:00pm”.

7.3 Following the court proceedings on 6th April, 2023, an interaction of the parties as represented by their advocates who were present in court at the time, the Learned Deputy executed the consent under Section 98 of the Civil Procedure Act, Cap. 71 which gives the Court inherit powers.

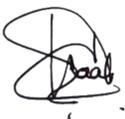
7.4 I have noted that other than the Applicants no other beneficiaries have come forth to contest the consent in as far as it would wrongly deprive them of their rights and interest in the estate property and or benefit the respondents to their detriment.

7.5 With regard to the Applicants contention of court policy and absentia or lack of signature, the Applicants have not disputed the fact that their former lawyer had full instructions to represent and defend them in the matter.

7.6 The order of court is valid, it should be implemented and this court will not set aside court order until final determination of the main suit.

8.0 Conclusion:

8.1 The applicants have failed to demonstrate and prove any ground in this application that would warrant this Court to set aside the consent. In addition, the applicants failed to show in the affidavits in support to this application any ways in which they were prejudiced by the consent.



8.2 In the premises, the consent is a valid. The Applicants are not entitled to the remedies sought. Therefore, the application is devoid of merit and is accordingly dismissed with costs to the respondents.

I so order.

Dated, signed and delivered by email this 17th day of November, 2023.



**CELIA NAGAWA
JUDGE**