THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

[*CORAM: Kavuma, DCJ, Mwangusya & Egonda-Ntende, JJA*]

Civil Appeal No. 42 of 2014

(Arising from HCT-00-CC-MA-763-2013)

BETWEEN

Richard Henry Kaijuka==========Appellant

And

Kananura Andrew Kansiime==========Respondent

(Appeal from a Ruling of the High Court of Uganda (Commercial Court Division) delivered by Wangutusi, J., on the 12th December 2013 sitting at Kampala)

JUDGMENT OF THE COURT

Introduction

1. This matter has a long and chequered history before the High Court of Uganda, punctuated by agreements and disagreements at almost every stage. The parties had multiple transactions between the two of them. Disputes arose and a suit, Civil Suit No. 90 of 2008, was filed in the High Court of Uganda [Commercial Court Division]. The initial consent judgment agreed in this case was dated 2nd October 2008. It was varied by the consent judgment dated the 8th July 2009. This consent judgment was subsequently challenged, vide proceedings for review in MA No. 445 of 2009, by the appellant on account of mistake for including in that judgment M/V Reg No. UAH800R which had not been part of the original consent judgment of 2nd October 2008.

2. After hearing MA No. 445 of 2009 the trial Judge, (Kiryabwire, J., as he then was), on 7th September 2009, allowed the application, holding that the consent judgment has been vitiated by mistake, and set it aside. He ordered the release of M/V No. UAH800R, to the appellant, and the refund of any monies that the respondent had deposited in court.

3. Kiryabwire, J., [as he then was], proceeded to hear the main suit Civil Suit No. 90 of 2008, and delivered his judgment on the 3rd November 2011, under which he dismissed the respondent's claims with regard to the claim for M/V Reg No. UAH800R and ordered the respondent to pay to the appellant Shs.200,000,000.00, the sum that had been initially agreed to pay under the consent judgment that had been set aside.

4. The respondent then filed M A No. 763 of 2013, seeking the following orders:

> ‘(1) The order for the return of Motor Vehicle Registration No. UAH 800R to the Applicant as decreed under the terms of the consent judgement dated 8th July 2009 be reviewed and or varied by way of valuation of the same said vehicle and the value thereof paid to the applicant.
>
> (2) The value of the motor vehicle registration No. UAH 800R be settled by way of set off against the decretal sum owing to the Respondent as per the said consent judgment and or any part thereof and the balance falls where it is due.’

5. Wangutusi, J., heard the said application and he reviewed the judgment of Kiryabwire, J., [as he then was], of 3rd November 2011, and extinguished the outstanding decretal to the appellant of Shs.200,000,000.00 by purporting to set it off against the value of M/V Reg No. UAH 800R. It is this order and ruling of Wangutusi, J., that the appellant now appeals against, seeking the same to set aside, with costs here and below.

Grounds of Appeal

6. The appellant set forth three grounds of appeal which we reproduce below.

'1. That the issue of including motor vehicle UAH800R in the varied consent judgment dated October 2, 2008 was conclusively determined by the High Court Commercial Division vide Miscellaneous Application No. 445 of 2008 thus rendering Miscellaneous Application No. 763 of 2013, *res judicata*.

2. That having reviewed the varied consent decree / judgment vide Miscellaneous Application No. 445 of 2008 in relation to motor vehicle UAH 800R, the court became *functus officio* and acted without jurisdiction in entertaining and granting Miscellaneous Application No. 763 of 2013 in respect of the same vehicle.

3. That the order to offset the speculative value of motor vehicle UAH 800R which was not part of the said varied consent fell outside the jurisdiction, realm and ambit of review of judgments.'

7. The respondent opposed the appeal and supported the decision of the court below.

Civil Application No. 300 of 2014

8. Before we proceed with the determination of the appeal we need to revert to Civil Application No.300 of 2014 which we allowed and promised to give our reasons for

doing so in this judgment. This application made by the appellant was seeking extension of time for the service of notice of appeal on the respondent, institution of appeal and service of the memorandum of appeal on the respondent. Though a notice of appeal had been filed in the trial court it was served on the respondent out of time. Although the record of appeal including the memorandum of appeal was filed and served on the respondent it was also done out of time. All those errors were ascribed to the appellant's former counsel. The appellant sought that all these documents that had been filed and served out of time be validated.

9. We were satisfied that all these errors had been committed by the appellant's counsel. In our view the appellant should not be penalised for the fault of his counsel in this regard. We therefore validated what had been done out of time and proceeded with the hearing of the appeal.

Analysis

10. The main issue for determination in this appeal is whether or not Wangutusi, J., rightly exercised the powers of review available to the High Court of Uganda, to review the Judgment of Kiryabwire, J., (as he then was), and it is what we shall examine. This issue is raised in ground of appeal no.3. Mr Chandia, learned counsel for the appellant submitted that the grounds of review as found in Order 46 Rule 1 of the Civil Procedure Rules were the discovery of a new and important matter, or an error on the face of the record or any other sufficient cause. The sufficient cause ought to be considered *ejusdem generis* in relation to the first two grounds. He submitted

that no such grounds existed in this case and the application for review ought not to have been entertained.

11. Mr Nangumya, learned counsel for the respondent, submitted that once the trial judge reinstated the consent judgment of 8th July 2009 in his judgment of 3 November 2011 it was open to the respondent to seek review of the same as it had done in the court below.

12. It is important to note that the respondent in filing the application for review which is now contested on appeal did not seek to review the judgment of Kiryabwire, J.,[as he then was], of 3rd November 2011 which is the judgment that disposed of the main civil suit or dispute between these 2 parties. He chose to seek a review of the 'consent judgment' of 8th July 2009. Was such a judgment in existence? Certainly not. This judgment had been set aside by Kiryabwire, J.,[as he then was], on 7th September 2009. The learned judge stated in part in that judgment,

> 'I therefore agree with the applicant that the inclusion of motor vehicle Reg. No. UAH 800R in the consent judgment drafted by Mr Nangumya dated 1st July 2009 [endorsed by the Registrar of the Court on 8th July 2009] was a mistake.
>
> How then can the said consent judgment be reviewed as prayed for by the Applicant? A review of a consent judgment by a court is problematic as it is an agreement of

> the parties and not the judgment of a court on a case it has tried on the merit. The court will be hard pressed to write its own understanding of the consent judgment into the consent judgment of the contesting parties. I think this is why the legal authorities state that where a consent judgment has been vitiated, then it has to be set aside.
>
> Both counsel in their oral submissions to court made alternative submissions that the consent judgment dated 1st July 2009 could be set aside and the parties put to their original positions. I agree with the prayer. I hereby set aside the consent judgment dated 1st July on the ground of mistake.
>
> Of course that means that the case now has to go for normal trial unless a better and more binding consent judgment is fashioned.'

13. It is therefore quite clear that the consent judgment referred to as either of 1st July 2009 or 8th July 2009 in the proceedings on record was no longer in effect. Kiryabwire, J., [as he then was], set it aside, holding it was vitiated for mistake. He ordered that the matter proceed to hearing and ordinary resolution.

14. Once vitiated that consent judgment no longer had any life or efficacy. It could not be enforced nor could it be purportedly reviewed as it was no judgment. It did not exist.

The application that sought to review the same was incompetent as there was nothing any longer to review.

15. Instead of reviewing that which the applicant in Misc App No. 763-2013 had applied to be reviewed Wangutusi, J., proceeded to review the judgement of Kiryabwire, J.,[as he then was], stating in part,

> 'A judgment may be reviewed for any sufficient reason. In Attorney General v James Mark Kamoga SCCA 8/2004 (supra) the AG sought to have a consent order set aside on grounds of mistake. In dismissing the appeal, it was held inter alia that the principle that would vitiate consent as envisaged under the principle must be ignorance of a fact that is material to the case. In the instant case, the trial judge Justice Kiryabwire (as he then was), reinstated the varied consent judgment. He did not pronounce himself on the issue of the contentious motor vehicle. The value of the motor vehicle now is a fact that is material to the case. This would amount to sufficient reason to review the judgment as the motor vehicle in question is the sole bone of contention.' (*sic.*)

16. Kiryabwire, J.,[as he then was], in his judgment, set out initially three issues for determination but subsequently set out another issue arising on the counter claim of the defendant (now respondent before us). He stated,

‘On the basis of O. 15 r 1(5) of the Civil Procedure Rules, I find that the appropriate issue for determination therefore of the counterclaim by the court therefore is: **Whether the defendant is entitled to the claims in the counter claim against the plaintiff?**

The defendant counterclaims for the return of the land title for the land at Kyagwe Block 121 Plot 3 at Senyi, and the return of the cheque of Ushs.90,000,000.00 since the motor vehicle UAH 800R had been transferred into the plaintiff’s names.

In the alternative, the defendant counterclaimed for payment of the sum of Ushs.150,000.000/= for the land at Senyi, which he allegedly sold to the plaintiff. He also prayed for the sum of Ushs. 70,000,000/= as payment of the motor vehicle UAH 200T which was sold to the plaintiff and transferred into his daughter Sheila Kebirungi Kaijuka’s names. In addition to this, the plaintiff would take motor vehicles UAH 80U, UAH 800R and UAH 888R. The defendant prayed for interest on the sums claimed and costs of the counterclaim.

The plaintiff in his testimony stated that he had only two vehicles UAH 800U and UAH 888R which he released after the consent and denied knowledge of the other cars. The defendant in his testimony testified that he received Ushs.30,000,000/= from Moses Mulindwa for UAH 200T which is in the names of Sheila Kaijuka and he still holds the logbook waiting for court to finish the case then have the car transferred into Moses Mulindwa's names. It is therefore clear that the car UAH 200T was in the defendant's possession and control and was not sold to the plaintiff and therefore should not have been the subject of the counterclaim.

Furthermore, the defendant admitted to dealing with Mr Bitangaro (counsel for the plaintiff) with regard to the sale of motor vehicle UAH 888R, and that motor vehicle UAH 800U was sold by the defendant to Ronald Sebuguzi, it follows that the plaintiff is not in possession of any other vehicle except the Land Cruiser UAH 800R which he purchased from the defendant, as agreed by both parties in their testimony. The prayer therefore for Ushs.70,000,000/= as payment for the motor vehicle UAH 200T, and the that the plaintiff takes motor vehicles UAH 800U, UAH 800R and UAH 888R, cannot be granted, and

appears to have been overtaken by events, since the defendant sold all the cars in question.

It follows that the defendant's counterclaim fails and as thus, the defendant is not entitled to any of the reliefs prayed therein.'

17. It is clear from the foregoing that Kiryabwire, J., (as he then was), considered fully the claims in relation to the vehicles, including in particular, UAH 800R, which he found that the respondent had sold to the appellant. He rejected all the defendant's prayers in relation to the vehicles. He clearly pronounced himself on the issue of the so called contentious vehicle. The value for the same could not therefore form a material fact that could entitle a review of the judgment of Kiryabwire, J.,[as he then was], as Wangutusi, J., had claimed. Wangutusi, J., had no basis, after examining the judgment of the Kiryabwire, J., [as he then was],to claim that the learned trial judge had not addressed a contentious issue in the case.

18. We are satisfied that Wangutusi, J., had no basis in law or fact upon which to allow an application for review in the circumstances of this case. Firstly the judgment that he reviewed is not the one the respondent (applicant) sought to be reviewed. A judge cannot formulate a case for the parties. He must only hear the case that the parties have put before him on the basis of the pleadings filed.

19. Secondly what the respondent sought to be reviewed did not exist as it had been vitiated following an *inter parties* hearing in which both parties agreed that it be set aside.

20. Thirdly the purported justification for review is contrary to the record of the case in the court below. There was no omission of the determination of an essential issue between the parties in the judgment of Kiryabwire, J., [as he then was], of 3rd November 2011.

21. Fourthly a court cannot impose a consent judgment on the parties. After throwing out the consent judgment of 8th July 2009 it was only up to the parties to agree upon a consent judgment. Neither a vitiated consent judgment, nor a fresh consent judgment can be imposed by court. It is only an agreement of the parties that constitutes the basis of a consent judgment rather than an order of court. The court recognises that agreement and confirms it as the consent judgment of the parties. There is nothing in the judgment of Kiryabwire, J., of 3rd November 2011 to suggest that the parties did in fact agree to either reinstatement of the consent judgment of 8th July 2009 or a fresh consent agreement. Even if Kiryabwire, J., had in fact reinstated the consent judgment of 8th July 2009 such reinstatement would have been null and void. After having set it aside it was only the parties that could enter into a consent judgment.

22. The Judgment of Kiryabwire, J., makes reference to the consent judgment but this is only in so far as to determine the amount due to the appellant from the respondent. After hearing both parties' cases as presented he decided to fix the sum due to the appellant based on the sum that had been expressed by the parties and it is what he

ordered was due to the appellant from the respondent. In taking the value expressed in the consent judgment of Shs.200,000,000.00 the trial judge was neither reinstating the 8th July 2009 consent judgment nor formulating a fresh one. He made a specific finding that this sum was due to the appellant.

23. The trial judge, as we have shown above, also considered fully the counter claim of the defendant (respondent before us) and dismissed it as it had no merit. There was nothing in the circumstances of this case to be reviewed.

Ground No.2 of the Appeal

24. Ground No.2 of the Memorandum of Appeal contends that Wangutusi, J., did not have the jurisdiction to review a reviewed judgment as the court was functus *officio*. We agree that Wangutusi, J., did not have jurisdiction to review the consent judgment of 8th October 2009, not because he was *functus officio* but rather on account of Order XLV1 [46] Rule 7 of the Civil Procedure Rules which states,

> 'No application to review an order made on application for review of a decree or order passed or made on a review shall be entertained.'

25. The consent judgment of 8th July 2009 was the result of an application for review of the consent judgment of 2nd October 2008. Even assuming that the consent judgment of the 8th July 2009, was in existence, [which we have found not to be the case], Wangutusi, J., was barred by the foregoing rule to entertain such an application. He

had no jurisdiction to entertain the same as it was the result of a previous application for review. This ground succeeds.

Ground No.1

26. In light of our holdings with respect to grounds of appeal nos.2 and 3, it is unnecessary to consider ground No.1 of the Memorandum of Appeal.

Decision

27. We therefore allow this appeal with costs here and below, set aside the order of review made by Wangutusi, J., and reinstate, in its entirety, the judgment of Kiryabwire, J., (as he then was) of 3rd November 2011.

Signed, delivered and dated at Kampala this 4th day of November 2015

Steven Kavuma

Deputy Chief Justice

Eldad Mwangusya

Justice of Appeal

Fredrick Egonda-Ntende

Justice of Appeal