

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL COURT DIVISION)

HCT – 00 – CC – MA – 116 OF 2012

Arising from HCCS No. 486 of 2007

KEN GROUP OF COMPANIES LTD} -----APPLICANT

VERSUS

STANDAND CHARTERED BANK (U) LTD & 02 ORS} -----RESPONDENTS

BEFORE JUSTICE CHRISTOPHER MADRAMA

RULING

The Applicants application was filed under section 82 and 98 of the Civil Procedure Act, order 46 rules 1 and 2 and 8 of the Civil Procedure Rules for an order that the Consent Judgment executed between the Applicant and the Respondent dated 29th of February 2008 be reviewed and set aside.

The grounds of the application are that by the time the Consent Judgment was executed the Applicant's representative who signed was not aware that it was to be used as a final judgment. That the Consent Judgment is now being treated and relied on as a final judgment by Counsel for the Respondent and is intended to be executed to the prejudice of the interest of the Applicant as it does not address the rest of the reliefs sought in the plaint and cannot be used as a basis for determination of the entire suit. The Consent Judgment does not settle the Applicant's complaint against the second and third Respondents at all. Execution of the Consent Judgment as it stands without first determining the legality or appropriateness of the drawdown facility number two and consolidation of the facilities which are pertinent issues in the matter and prejudicial to the interests of the Applicant. The audit report arising out of the Consent Judgment and upon which exemption is likely to be based does not conform to the terms of the Consent Judgment and the terms of reference given to the auditors. That the auditors who carried out the audit were not independent while executing the assignment given to them. That unless the Consent Judgment is reviewed and set aside the matter will not justly and fairly be concluded and if concluded it will be to the great detriment and loss of the Applicant. The application is supported by the affidavit of the Managing Director of the Applicant Company Mr Edward Nakabaale Kigongo. The affidavit gives the background of HCCS No 486 of 2007 which was filed against the Respondents seeking several reliefs. The suit was for orders that the appointment of the first and second Respondents by the first Respondent as Receivers/Managers of the Applicant was unlawful and that the Receivership be lifted. It was also for a permanent injunction against the second and third Respondents jointly and severally restraining them from exercising or purporting to exercise powers as Receivers/Managers of the plaintiff. Special damages, general damages and a declaration that the plaintiff is not indebted to the first

Respondent and the facility letter or any documentation executed there under to the tune of Uganda shillings 771,175,026/=.

The affidavit in reply is sworn by Barnabas R Tumusingize Counsel for the Respondents; Nicholas Eciimu the 2nd Respondent and George Opiyo the Country Managing Partner of Deloitte and Touché the Auditor appointed by the parties.

The facts in the affidavits are summarised in the submissions of Counsels and ruling of the court.

At the hearing of the application, the Applicant was represented by Chrysostom Katumba while the Respondents were represented by Counsel James Mukasa Sebugenyi. Counsels filed written submissions and gave highlights of their submissions orally.

Applicants Submissions:

According to the Applicant the issues for determination in this application are:

1. Whether there are sufficient grounds for reviewing and setting aside the Consent Judgment.
2. Remedies available to the parties.

On the first issue learned Counsel for the Applicant summarised the facts in support of the application. As far as facts are concerned the Applicants case is that it applied for credit facilities in the first Respondent Bank under a banker facility letter dated 24th of July 26 amounting to Uganda shillings 100,000,000/= and US\$530,000. The credit facility was described as facility 2. The Managing Director of the Applicant Company had previously applied for a facility in the names of Kigongo Edward T/A Ken Group and described as facility 1. This facility was not backed by a debenture but was secured by a mortgage deed on two certificate of title of land comprised in Kyadondo block 254 plot 861 and Kyadondo block 244 plots 2503. There were three components under facility 2. A sum of US\$330,000 was for the purchase of raw materials; a sum of US\$200,000 was for the purchase of machines against letters of credit that would turn into long-term loans for 42 months and finally an overdraft of a sum of Uganda shillings 100,000,000/= for operation and tax purposes. Not all the three components were utilised as the Applicant wrote a letter cancelling the facilities because it was availed late and due to the seasonal nature of its business. It was agreed that the first Respondent would not dispose US\$200,000 until the Applicant's Managing Director retires the letters of credit already obtained under facility 1. The Applicant on 28 September 2006 executive the debenture loan agreement of US\$530,000 in respect of facility 2 there was a running facility by Edward Kigongo trading as Ken Group of US\$370,000 that was to be used for opening letters of credit only. It was not secured by debenture. The second and third components of US\$200,000 and Uganda shillings 100,000,000/= under facility to were purportedly drawn down on 7 December 2006 and 14 days thereafter the Respondents lawyers demanded for payment of all monies yet instalments under facility 2 were to become due after a period of 30 days. Although the Applicant had not taken the amount under facility 2 on 6 January 2007 it wrote to the first Respondent bank seeking an appointment to enter into a payment schedule for the disputed amount in terms of legal fees, interest and insurance charges. An amount of Uganda shillings 771,175,026/= demanded by the Respondent as outstanding amount on the loan was not correct and was disputed. In a meeting with officials of the first Respondent bank it was agreed that the Company pays what it takes to be the amount due

and the parties later reconcile accounts regarding the disputed amount at the exchange rate to be applied at the time of payment. The Applicant's Managing Director gave the first Respondent bank a schedule of payment. However after agreeing and issuing some bank drafts with respect to the agreed schedule of payment the Respondents on 1 February 2007 advertised the Receivership of the Applicant in the newspapers.

Subsequently the Applicant instituted civil suit number 46 of 2007 seeking for an order that the appointment of the first and second Respondents by the first Respondent as Receivers/Managers of the Applicant was unlawful and that the Receivership be lifted, a permanent injunction against the second and third Respondents jointly and severally restraining them from exercising or purporting to exercise powers as Receivers/Managers of the plaintiff, special damages, general damages, a declaration that the plaintiff is not indebted to the first Respondent under the facility letter or any documentation executed to the tune of Uganda shillings 771,175,026/= and interest at the rate of 20% per annum from the date of judgment till full payment.

While the suit was still pending Edward Kigongo trading as Ken Group continued paying and actually paid a sum of US\$380,864 and interest under facility 1. On the other hand the Applicant Company paid a sum of Uganda shillings 12,530,336/= as charges incurred in processing facility 2. Mediation between the parties failed and Counsel for the Respondent proposed appointment of an independent auditor to establish the indebtedness of the Applicant to the first Respondent and that the finding of the auditors would be binding on the parties. On 3 March 2008 a Consent Judgment was executed between the parties appointing an independent auditor to reconcile all entries on the accounts which were the subject matter of the suit. Before the Consent Judgment was executed Edward Kigongo trading as Ken Group had paid an amount of US\$320,000 out of US\$381,000 amounting to 82% of the total amount under facility 1. The first Respondent is alleged to have already recommended the release of two certificates of title upon payment of Uganda shillings 400,000,000/=. The return of the two certificates of title was delayed by the Respondent's lawyers. It is for that reason that the two certificates of title were received upon signing of the Consent Judgment. Two other certificates of title were retained by the first Respondent as security for any indebtedness to be determined by the audit report.

The submissions of the Applicant's Counsel are elaborate in that it also asserts facts showing that the audit report had several inadequacies. There is however no need for me at this stage to recount the facts relating to the time after the appointment of the auditors pursuant to the Consent Judgment of the parties.

Counsel referred to the principles applied by courts to vary or set aside a Consent Judgments as explained in the case of **Hirani vs. Kassam (1952) EA 131**. In that case the Court of Appeal of East Africa approved and adopted a passage from Seton on Judgments and orders 7th edition volume 1 page 124. That consent order:

“made in the presence and with the 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 public 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 any reason which would enable the court to set aside an agreement.”

Counsel prayed that the court answer the following questions: What the purpose of the Consent Judgment was? What was the spirit and intention of the parties at the time of signing the Consent Judgment? Whether the audit report conformed to the Consent Judgment and terms of reference? Whether the Consent Judgment answers all the claims and reliefs between all the parties in civil suit number 486 of 2007? Whether the Consent Judgment can be executed in its current form?

The Applicant's Counsel submitted that the purpose of the Consent Judgment is indicated in clause 1 thereof and was to reconcile all entries on the accounts which were the subject of the suit on which funds under facility number 1 and number 2 were drawn down and repaid so as to verify the balance owing under the two facilities. The purpose of the consent was to carry out an audit to determine and ascertain the amount due from the Applicant to the first Respondent at the time of appointing the second and third Respondents as Receivers of the Applicant. The finding would determine the legality and propriety of the Receivership. The Consent Judgment does not state whether it is a final judgment and that it settles the rest of the claims/or reliefs in the plaint. Furthermore the Applicant's Managing Director and representative of the first Respondent was the only person who executed the consent. Nowhere in the Consent Judgment did the second and third Respondents sign. Consequently the conclusion is that the purpose of the Consent Judgment was to determine and ascertain the amount due from the Applicant to the first Respondent at the time of appointing the second and third Respondents as Receivers. The second and third Respondents were not privy to the Consent Judgments yet they are parties to the suit.

Counsel contended that the spirit and intention of the parties at the time of signing the Consent Judgment was not to act as a final determination of the suit.

In view of all factors surrounding the signing of the Consent Judgment together with the confirmation and assurance given by Counsel for the Respondents, the Applicants Managing Director and the Applicants lawyers were under a misapprehension that the Consent Judgment was not a final judgment and were made to understand that the Applicant reserved the right to challenge the legality of the Receivership and determination of all other prayers in the main suit.

In support of the argument learned Counsel for the Applicant referred to the affidavit of Edward Kigongo paragraphs 10, 11, 12 and 13 where he demonstrates that the deponent sought clarification on whether the Consent Judgment which was drafted by Mr Barnabas Tumusingize was not in final settlement of the claims in the suit and he was assured that it was not. He was informed by the Respondent's Counsel that the Consent Judgment was not meant to extinguish the Applicants other claims in the main suit but was rather meant to lift the Receivership, allow the release of two certificates of title and the determination of the level of indebtedness of either party to the suit before court proceeds to entertain the rest of the reliefs in the main suit after the audit report. He further referred to the affidavit of Mpanga Frederick dated 11th of June, 2012 paragraphs 13, 14, 15 and 16. The deponent signed the Consent Judgment after assurance and undertaking by Mr Barnabas and Nicholas.

Counsel Fredrick Mpanga deposes that he was alive to the reservation of a right to continue with the suit against the first Respondent based on the impropriety of the Receivership. That it was agreed that the issue of impropriety of the Receivership be kept out of the Consent Judgment. Consequently the Applicant had reserved the right to challenge the legality of the Receivership and determination of all other prayers in the main suit. Consequently the factors surrounding the signing of the Consent Judgment together with a confirmation and assurance given by Counsel for the Respondents, the Applicants Managing Director and the Applicants lawyers were under a misapprehension that the Consent Judgment was not a final judgment and were made to understand that the Applicant reserved the right to challenge the legality of the Receivership and determination of all other prayers in the plaint.

Learned Counsel also submitted on whether the audit report conformed to the Consent Judgment and terms of reference. Thirdly Counsel submitted on whether the Consent Judgment answers all the claims and reliefs between all the parties in civil suit number 486 of 2007. Furthermore learned Counsel submitted on whether the Consent Judgment can be executed in its current form.

I would first deal with the question of whether there are any grounds for setting aside the Consent Judgment. Where no grounds are disclosed for setting aside the Consent Judgment, the court cannot entertain any other matter which may or may not be the subject matter of the main suit. My task is to establish whether any grounds are disclosed for setting aside the Consent Judgment of the parties.

In reply learned Counsel for the Respondent addressed the court and the submissions are summarised below:

Respondent's submissions

The Applicant applied for credit facilities from the first Respondent Bank under a banking facility letter dated 24th of July 2006 amounting to Uganda shillings 100,000,000/= and US\$530,000. On 28 September 2006 the Applicant executed a debenture loan agreement in respect of the facility. Under clauses 9 and 10 and the debenture empowered the bank to appoint a receiver in the event that the principal amount and interest accrued becomes repayable. The debenture was registered with the Companies Registry on 16 October 2006 under instrument number 6712. The Applicant defaulted on the terms of the facility and on 22 December 2006, a demand note to pay all the outstanding sums was written by the bank to the Applicant requiring it to pay within 14 days. The Applicant defaulted and the bank exercised its rights under the debenture and appointed the Receivers Mr Nicholas Ecimu and Bertram Kamugisha as Receivers/Managers in a letter dated 18th of January 2007 with powers to take over the assets and properties of the Company and recover the money owed to the bank standing at **Uganda shillings 771,175,026/=** excluding interest. The notice of appointment of Receivers was duly registered with the Companies Registry on 1 February 2007 and advertised in the New Vision newspaper on 5 February 2007. On 30 March 2007, the Applicant instituted High Court Civil Suit No 486 of 2007 challenging the appointment of Receivers and sought, among other remedies, a permanent injunction restraining the Receivers from acting. The parties underwent court mediation and from which a Consent Judgment was executed on 3 March 2008. The parties agreed to appoint an independent auditor to establish the indebtedness of the Applicant and that the audit report would be binding on both parties. It was also agreed that the bank would lift the Receivership and

release two certificates of title but continue to hold onto other certificates of title for land comprised in block 254 plot 861 Kyadondo Mengo and block 244 plot 2503 Kyadondo Mengo as security for the balance of indebtedness to be established. The parties implemented the terms of the Consent Judgment and submitted the issue of determination of the balance due to the audit firm, Deloitte and Touché. The audit firm established an outstanding amount of **Uganda shillings 264,524,808/=**. Additionally the Receivership was lifted and two of the four titles were returned to the Applicant and the parties waited for the audit report to determine the level of indebtedness.

When the audit report was released A.F Mpanga Advocates raised an issue about the report with respect to item 6 of the agreed terms of reference. The issue raised by the Applicants advocates for clarification was referred to the then Registrar of the Commercial Court on 21 April 2009 and the Registrar wrote a letter to the auditors requesting for clarification. The Applicant paid a total of **US\$28,123** to reduce its indebtedness to the first Respondent. On 4 July 2009 the Applicant wrote to the Respondent demanding for the release of the remaining two titles for the properties. The Respondents through their advocates informed that the Applicant that the demand was premature since **Uganda shillings 208,442,274/=** remained outstanding. On 7 April 2010 the first Respondent's advocates applied for execution of the consent decree in respect of **Uganda shillings 194,951,750/=** outstanding together with interest and costs of this suit since the Applicant had not taken steps to clear the remaining balance determined by the agreed auditors.

In response to the Applicant's application to set aside the Consent Judgment, learned Counsel for the Respondent submitted that the Applicant's attorneys acted with full authority and knowledge and agreed that the Consent Judgment would be the final settlement of the dispute between the Applicant and the Respondent bank. Secondly the Applicant was ably represented by an advocate who should have addressed the concerns of the Applicant before he signed the Consent Judgment himself. Thirdly the audit firm was independent and appointed through a transparent process. Lastly the matters not included in the Consent Judgment if considered would amount to *res judicata*. Additionally the Applicant substantially benefited from the Consent Judgment in as far as the Receivership was lifted and two certificates of title returned to the Applicant. The Applicant also made further payments to reduce his indebtedness after the Consent Judgment was entered. Accordingly the parties cannot be returned to the position they were in before the Consent Judgment was entered by the court.

Counsel submitted on **whether the Consent Judgment was and is a final settlement of the issues between the Applicant and Respondents in civil suit number 486 of 2007**. Secondly whether there are sufficient and justifiable reasons for reviewing or setting aside the Consent Judgment.

Whether the Consent Judgment was and is a final settlement on the issues between the Applicant and the Respondent.

On whether the Respondents advocates misrepresented to Mr Edward Kigongo or the effect of the Consent Judgment before he executed the same, learned Counsel relied on the case of **Betuco U Ltd vs. Barclays Bank of Uganda Ltd and 3 others High Court miscellaneous application number 243/2009** for the principle that an advocate is under a duty to properly advise his/her client and his/her client's interest. An advocate is his/her client's advisor on technical legal matters. That duty

was vested upon the Applicants Counsel and not on the Respondents Counsel. Mr Nicholas Ecimu additionally denies ever having any telephone conversation with Mr Edward Kigongo. In any case they did not owe any duty to him. Secondly a Consent Judgment is an agreement or contract between the parties and the parties are assumed to have read the terms of the agreement. The Consent Judgment was first sent in draft form to the Applicant's Counsel who made the proposal for a comprehensive settlement of all matters arising between the bank and the client. They further indicated in the letter that payment of the balance shall be in full and final settlement of all claims by the bank against the Applicant. Consequently it is evident that the parties agreed to the Consent Judgment on the understanding that it was to be a final settlement of all disputes between them.

Counsel further submitted that the position of the law is that a Consent Judgment operates as estoppels against a party who wishes to challenge or to assert a different position than that in the agreement he or she endorsed. He relied on the case of **Huddersfield banking Co Ltd versus Henry Lister & Ltd (1895) 2 Chancery Division page 273** for the principle of law that a consent order is an order and as long as it stands it must be treated as such and as long as it stands it is a good estoppels as any other order.

Learned Counsel further contended that matters not included in the consent if considered are res judicata. He relied on explanation number 4 under section 7 of the Civil Procedure Act cap 71 which provides that "any matter which might and ought to have been made a ground of defence or attack in the former suit shall be deemed to have been a matter directly and substantially in issue in that suit." He further relied on the case of **Kamunye and others versus the Pioneer General Assurance Society Ltd [1971] EA 263** which holds that res judicata applies not only to points upon which the first court was actually required to adjudicate but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence might have brought forward at the time.

Counsel further submitted that one cannot approbate and reprobate. A person who takes advantage of a judgment cannot challenge it. He relied on the case of **Stephen Seruwagi Kavuma versus Barclays bank Uganda Ltd miscellaneous application number 634 of 2010** per Mulyangonja J cited with approval the principle stated by **Scrutton LJ in Verschures Creameries Ltd versus Hull and Netherlands Steamship Company limited (1921) 2 KB 608** that it was a well-known principle of equity that one cannot approbate and reprobate all at the same time. The principle is based on the doctrine of election which postulates that "*no party can accept and reject the same instrument and that a person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purposes of securing some other advantage*". He submitted that the Applicant has already benefited from the Consent Judgment in that they Receivership was lifted and two certificates of title were returned to the Applicant as agreed under the Consent Judgment. The Applicant is now seeking to set aside the Consent Judgment.

Finally learned Counsel submitted on whether there are sufficient reasons for reviewing or setting aside a Consent Judgment. He contended that a Consent Judgment may not be set aside except for fraud, collusion or for ignorance of material facts. He relied on the cases of **Peter Mulira versus Mitchell Cotts Court of Appeal civil appeal number 15 of 2002** and **Hirani vs. Kassam (1952)**

19 EACA 131. He contended that Consent Judgments may only be set aside on limited grounds. Furthermore grounds for setting aside Consent Judgments are the same as the grounds for setting aside a contract between the parties as held in the case of **Attorney General versus James Mark Kamoga Supreme Court Civil appeal number 8 of 2004.** Lastly learned Counsel submitted that under section 82 (b) of the Civil Procedure Act a person considering himself or herself aggrieved by a decree or order from which an appeal is allowed may apply for review of the judgment to the court which passed the decree or made the order. This is qualified by order 46 rule 1 of the Civil Procedure Rules which provides that a party may apply to review upon the discovery of new and important piece of evidence which after the exercise of due diligence was not within the knowledge of the Applicant nor could have been procured when the decree was passed. Secondly an Applicant for review can bring an application on account of some mistake or error apparent to the face of the record or thirdly for any other sufficient reason. He contended that the Applicant did not raise any grounds for review of the Consent Judgment which within the ambit of order 46 rules 1 referred to above.

Counsel further submitted on the independence of the appointed auditors.

I have however not considered these other grounds because the independence of auditors can only relate to the contract between auditors and both parties to the Consent Judgment. It cannot give grounds for setting aside the Consent Judgment.

As far as knowledge of material facts is concerned learned Counsel reiterated his submission that the Applicant was represented by a firm of lawyers who read through the Consent Judgment before the Applicant signed. When the audit report came out only one issue came for clarification. The clarification was sought before the Registrar and referred back to the auditors would dealt with it. The Applicant has not pleaded any fraud or collusion. Counsel further contended that the application for setting aside the consent was made after an unreasonable delay. In the case of **Muyodi versus industrial and commercial development and another [2006] EA 243** the Court of Appeal of Kenya considered what unreasonable delay was and held that eight months was unreasonable delay. The Kenyan case was cited with approval by Justice Kiryabwire in **Combined Services Ltd versus Attorney General High Court civil suit number 200 of 2009** where he held that the time taken to lodge an application for review is an important factor to consider when determining an application for review. Counsel contended that in the instant matter the Applicant waited for two years and seven months after the alleged discovery of new facts, to apply to set aside the Consent Judgment. He prayed that the application is dismissed with costs.

Ruling

I have duly considered the submissions of learned Counsels of the Parties. I have further considered the pleadings and affidavit evidence on record and authorities relied upon.

The Applicant seeks one primary order from this court which is that **the Consent Judgment between the Applicant and the Respondent dated 29th of February 2008 be reviewed and set aside.** The second order sought is consequential in that the Applicant prays for costs of the application as well.

The traditional grounds for setting aside a Consent Judgment are not in dispute. These grounds for setting aside Consent Judgments were set out by the Court of Appeal in the case of **Hirani vs. Kassam (1952) EACA 131**. The Court of Appeal held that a Consent Judgment cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of court or if the consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for any reason which would enable the court to set aside an agreement.

The Applicant dwelt at length on misapprehension or ignorance of material facts by Edward Kigongo the Managing Director of the Applicant who endorsed the Consent Judgment. For purposes of this ruling it is of importance to set out the Consent Judgment. The Consent Judgment is annexure "B" to the affidavit of Edward Kigongo in support of the application and its terms are quoted below: "...

1. The parties shall appoint an independent auditor within seven days from the date of this consent to reconcile all the entries on the accounts which are now subject of this suit above on which funds and the facility number 1 and number 2 were drawn down and repaid so as to verify the balance owing under the facilities.
2. Any balance owing shall be broken down to show the components i.e. the principal amount, interest, bank charges, legal fees and insurance charges.
3. The auditor should clearly indicate the facility under which each drawing, entry or charge was made/arises, and against which the payments to service the indebtedness was made/effectuated.
4. The auditors finding shall particularly spell out the level of indebtedness if any of Ken Group of Companies Ltd to the bank and such report shall subject to clauses 7 and 8 below be final and binding on the parties hereto.
5. The auditors shall also ascertain the balances due to/from either party or the indebtedness of any other persons and the two facilities referred to in clause 1 above.
6. The costs of the auditors exercise shall be borne by Standard Chartered Bank (U) Ltd.
7. The auditors shall issue a draft report to each party for his own verification and reconciliation of the preliminary findings before issuing a final report. The auditors shall endeavour to produce the draft report within 14 days from the date of the appointment or within such further time as they may justifiably require.
8. The final report which shall be binding on the parties shall be issued by the auditor after affording each party seven days to comment on, and make any clarifications or queries arising in the draft report and upon consideration of the same.
9. Upon execution of this Consent Judgment and appointment of an Auditor, the Standard Chartered bank (U) Ltd shall if the Receivership and also return/handover two certificates of title to the Plaintiff Company.
10. Pending the issuance of the auditors final report referred to in clause 8 above, Standard Chartered bank shall continue to hold the remaining two certificates of title and any other securities (in the terms under which such securities were created) as security for any indebtedness and the consideration by the auditor."

Examination of the Consent Judgment terms is crucial for determination of some of the grounds set out by the Applicant. It is not in dispute that pursuant to clause 1 of the Consent Judgment an

independent auditor was appointed. The auditor was supposed to reconcile all entries in the accounts and the subject of the suit under facility number 1 and 2. The auditor's report should show how much money was drawn down and repaid so as to verify the balance owing under the facilities. Clauses 2, 3, 4 and 5 are directives to the auditors on what to include in the report and what to ascertain to make the report. The first instruction to the auditors is that any balance owing shall be broken down to show the components in terms of the principal amount, interest, bank charges, legal fees and insurance charges. Secondly the auditors were supposed spell out the level of indebtedness if any of Ken Group of Companies Ltd to the Bank. They were also supposed to ascertain any balances due to/from either party or the indebtedness of any other persons under the two facilities referred to. Specifically paragraph 4 of the Consent Judgment provides that subject to clauses 7 and 8 of the Consent Judgment, the auditors findings shall be binding on the parties to the consent agreement. Clauses 7 and 8 provided that the auditor shall issue a draft report to each party for their verification and reconciliation of preliminary findings before issuing a final report. The final report was supposed to be issued by the auditors after affording each party seven days within which to comment on and make any clarification or raise questions on the draft report that had been submitted to the parties for consideration under clause 7 of the Consent Judgment. Last but not least clause 8 provides that the final report shall be binding on the parties.

It is a cardinal rule of pleading that each party is bound by his or her pleadings. The case of the Applicant is specified in the grounds advanced in the notice of motion itself. It would be necessary to set out the grounds upon which the Applicant relies for the reliefs claimed in the notice of motion. Specifically the Applicant seeks to set aside the consent order quoted above. The prayer is that the consent order should be reviewed and set aside. It is additionally necessary to establish whether the grounds fall within the provisions of the Civil Procedure Rules before specifically addressing the grounds of the application in light of the import of the submissions of the Respondents advocate that the Applicant's application does not fall within the ambit of order 46 rules 1 of the Civil Procedure Rules. Such an issue is preliminary.

The Applicant's notice of motion for review cites section 82 of the Civil Procedure Act and order 46 rules 1, 2 and 8 of the Civil Procedure Rules. Learned Counsel for the Applicant submitted that order 46 rules 1 and 2 of the Civil Procedure Rules are not available to the Applicant. He based his submission on the wording of the said rules wherein a person aggrieved by any judgment or order from which no appeal has been preferred may apply for a review thereof where there is "an error apparent on the face of the record" and secondly "for the discovery of a new and important piece of evidence" which could not have been procured at the time of the judgment through the exercise of reasonable diligence.

I have carefully considered the wording of order 46 rules 1 of the Civil Procedure Rules. Sub rule 1 thereof defines who an aggrieved person is. It provides that ***a person considering himself or herself aggrieved by a decree or order from which an appeal is allowed but from which no appeal has been preferred, or by a decree or order from which no appeal is hereby allowed may apply for review of the order or decree.*** The first part of the rule deals with decrees or orders from which an appeal is allowed by court but from which no appeal has been preferred. A consent order is not appealable under section 67 (2) of the Civil Procedure Act which provides that: "***no appeal shall lie***

from a decree passed by the court with the consent of parties." Consequently sub rule 1 (a) is inapplicable to the Applicants application because there is no right of appeal from the consent decree. Sub rule 1 (b) applies to a decree or order from which no appeal is allowed by the rules. Possibly this sub-rule applies to the Applicant who has no right of appeal from the consent decree. The grounds for review are the discovery of new and important matter of evidence which, after the exercise of due diligence, was not within the Applicants knowledge or could not be produced by the Applicant at the time when the decree was passed or the order made.

The part of the rule dealing with the discovery of a new and important piece of evidence is inapplicable. Possibly one of the grounds for setting aside the Consent Judgment namely mistake of fact or misapprehension of facts could have proceeded under this ground of order 46 rule 1 (1) upon the discovery of new and important matters of evidence. The Applicant however does not aver or submit that there has been a discovery of new and important matters of evidence. The Applicant's contention is based on an alleged misapprehension of its Managing Director. The misapprehension relates to whether the consent order was supposed to finally resolve the suit or not. Consequently, the question of the effect of the consent order on the suit is a matter of interpretation thereof and does not arise from a misapprehension of facts. In case I am wrong, misapprehension of facts must relate to a misapprehension of facts which are stipulated in the consent or which are necessary for the execution of the consent agreement. This is because the grounds for setting aside the Consent Judgment relate to a consent obtained by fraud, collusion or an agreement contrary to the policy of court/public policy or due to ignorance or misapprehension of material facts. Such factors or facts must relate to the procurement of the consent agreement. It must be such factors or facts which induced the party to execute the agreement. Or it must be ignorance of such facts which are so material that had the party who pleads ignorance of material facts known the facts earlier they/he/she would not have executed the Consent Judgment. Or they would not have executed some term of the consent agreement. Qualitatively therefore the factors relate to the decision to enter into an agreement. I would not conclude this point at this stage that some other factors that arose after the Consent Judgment was executed cannot be material grounds for setting aside the Consent Judgment. The Consent Judgment can be set aside for being funded on an agreement contrary to the policy of court. It may also be set aside on grounds of ignorance or misapprehension of facts or law which may emerge after execution of the agreement. I restrict my comments to the facts of this case and in the conclusions made here after. I would first deal with the other aspects of order 46 rule 1 (1) of the Civil Procedure Rules before concluding on the issue. Under the said rules the second possible ground for review is where there is a mistake or error apparent on the face of the record.

As far as mistake or error apparent on the face of the record is concerned, it cannot be said that there is an error apparent on the face of the Consent Judgment which reflects an agreement between the parties. Secondly it cannot be asserted and it has not been asserted that there is an error or mistake of fact apparent on the face of the record. The terms of the consent are explicit and speak for themselves. Consequently it cannot be said that there is an error apparent on the face of the record. The last part of the rule deals with the ground of review for any other sufficient reason. It has been held that the words "any other sufficient reason" should be read *ejusdem generis* with the previous grounds for review. "Any other sufficient reason" has to be analogous to the first two grounds for review (See **Uganda Commercial Bank versus Mukoome Agencies [1982] HCB 22**). Last but not

least the application for review has to be of a decree or order *made against the Applicant*. In the wording of order 46 rules 1, it cannot be asserted that there is any decree or order which has been made *against the Applicant*. The consent order was an agreement between the parties and order 46 rule 1 of the Civil Procedure Rules is inapplicable insofar as the rule deals with orders made against the Applicant. As submitted by the Applicants Counsel the substance of the Consent Judgment is the ascertainment of the level of indebtedness of the Applicant to the Respondent bank, the lifting of Receivership and handing over of certain certificates of title. On the face of the Consent Judgment, it cannot be held that it was a judgment against the Applicant. What could possibly have been against the Applicant was supposed to be the outcome of the audit exercise agreed upon.

Secondly order 46 rule 1 (2) of the Civil Procedure Rules seems to deal with an appealable decree or order. It provides that: "***A party who is not appealing from a decree or order may apply for a review of the 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 a Respondent, he or she can present to the appellate court the case on which he or she applies for the review.***" The rule specifically presumes the pendency of an appeal between the parties. It allows one of the parties to the pending appeal to apply for review on some other ground other than that which would be dealt with in the appeal. Because there is no right of appeal from a consent order or Decree, and therefore there can be no pending an appeal, order 46 rules 1 (2) is inapplicable to the Applicants situation.

In the premises it is my conclusion that the Applicant's application could only have proceeded under section 82 of the Civil Procedure Act, a provision which is wider in application than the provisions of order 46 rules 1 (1) and (2) of the Civil Procedure Rules. In the case of **Uganda Commercial Bank versus Mukoome Agencies [1982] HCB 22** the Court of Appeal of Uganda which was the highest court in Uganda at that time held that section 83 (82 revised edition) of the Civil Procedure Act must be read without any limitations imposed by order 42 (now order 46) rule 1 of the Civil Procedure Rules. The above quoted rules do not apply to applications to set aside consent decrees as they envisage a judgment or order of the court other than an endorsement of a consent agreement as an order of the court by the judge/Registrar/magistrate. This may not apply to interlocutory orders. The parties however executed a consent agreement whose effect was to achieve binding results affecting the outcome of the main suit and which resulted in a decree and not an order because of its final adjudicatory effect (See definition of a decree under section 2 of the Civil Procedure Act). In this case the application for review is an application to set aside the Consent Judgment on the traditional grounds for setting aside a Consent Judgment or order set out above. These are; fraud or collusion, mistake of fact or law common to both parties, an agreement contrary to the policy of the court/illegality brought to the attention of the court, or any ground that would invalidate/vitiate a contract between the parties. The applications for review of a Consent Judgment or order are not founded on the grounds laid out under order 46 rules 1 and 2 of the Civil Procedure Rules because the said rules are inapplicable. Before I take leave of this matter, an application to set aside the Consent Judgment need not be made by an application for review. It may be commenced by plaint. This was considered by the court of appeal sitting at Dar es Salaam, Tanzania in the case of **Brooke Bond Liebig (T) Ltd v Mallya [1975] 1 EA 266 (CAD) by Law Ag P**, at page 268 when

responding to the issue of whether proceeding by a plaint and not by an application for review was the proper procedure to set aside a Consent Judgment. He said:

Even if procedure by separate suit is the proper procedure, and I am not convinced as to this, a court is not precluded from giving effect to its decisions under its inherent powers, especially where time and expense can be saved, see *Mawji v. Arusha General Store*, [1970] E.A. 137, where the judgment should, and could, have been the subject of appeal, but was corrected by the judge on the purported exercise of his powers under O. 39, r. 33. I would repeat, and respectfully adopt, the following passage from the judgment of Newbold, P. in *Mawji's* case at p. 138:

***“We have repeatedly said that the rules of procedure are designed to give effect to the rights of the parties and that once the parties are brought before the courts in such a way that no possible injustice is caused to either, then a mere irregularity in relation to the rules of procedure would not result in vitiation of the proceedings. I should like to make it quite clear that this does not mean that the rules of procedure should not be complied with – indeed they should be. But non-compliance with the rules of procedure of the court, which are directory and not mandatory rules, would not normally result in the proceedings being vitiated if, in fact, no injustice has been done to the parties.*”**

He noted that there were a string of authorities where it was held that the proper procedure was an application for review as well as a string of authorities where the proper procedure was held to be by ordinary plaint. In any case the court has inherent powers to save the proceedings provided no injustice has been occasioned to the parties. It can be concluded that an application for review of a Consent Judgment is different in quality from an application for review of a judgment or ruling which in effect is to review the judge's decision. The subsequent rules to order 46 rules 1 and 2 make this a very clear. For instance the application is ordinarily made before the same judge except in exceptional circumstances. An application for review based on the existence of a clerical or arithmetical mistake or error apparent on the face of the Decree shall only be made to the judge who passed the Decree or made the order sought to be reviewed under order 46 rules 2. Under order 46 rules 4 application for review may only be made before another judge, if the judge who passed the order was absent or unavailable for more than six months after the Decree or order was passed. These rules presuppose that there was a ruling or judgment or a decision made by the judge before whom the application should be made. A Consent Judgment on the other hand is a non – contentious matter and the order of the court is endorsed by the Registrar. In my opinion, where there has been no hearing, an application for review of a consent order or Decree duly executed by the parties and endorsed by the Registrar need not be made before the same judge. Lastly in case of arithmetical or clerical mistakes the parties may by consent vary their own consent agreement/order/decree as contra – distinguished from rulings or judgments of a judge.

I would therefore consider the grounds in the notice of motion with the objective of establishing whether the grounds and evidence in support of it disclose any grounds for setting aside a Consent Judgment or an agreement between the parties.

Ground 1 of the application is that by the time the Consent Judgment was executed the Applicant's representative who signed it was not aware that it was meant to be used as a final judgment in the suit. The misapprehension is said to have arisen due to the honest belief upon receiving confirmation from the lawyers of the Respondents that the consent was only meant to determine the level of indebtedness of the Applicant and for purposes of lifting the Receivership and release of the two of four certificates in the custody of the Respondent bank. I have carefully considered this ground and affidavit evidence in support of it. The Managing Director of the Applicant Mr Edward Kigongo avers that he received advice from the Respondents Counsel that for purposes of lifting the Receivership, an independent audit had to be conducted to reconcile all entries on the accounts, the subject matter of the suit.

The evidence is that the Consent Judgment was drafted by Barnabas Tumusingize, Counsel for the Respondent. He further consulted Nicholas Ecimu the second Respondent who assured him that the Consent Judgment was meant for reconciliation of the indebtedness of the parties inter se and was not meant to settle the entire suit as reflected in the plaint. He contends that the spirit of entering into a Consent Judgment was for purposes of verifying the balance owing under the facilities and to enable the lifting of the Receivership and the release of two of the four certificates of title held by the Respondent bank. He further avers that he consulted Mr Nicholas Ecimu in the presence of his Counsel Mr Mpanga Fred. He further expressed his fears to Mpanga David who called Barnabas Tumusingize in his presence and Barnabas confirmed that the Consent Judgment was meant to lift the Receivership and allow the release of the said two certificates of title and to determine the level of indebtedness of either party to each other if any but not for a final resolution of the main suit.

In opposition to this assertion Barnabas Tumusingize's affidavit in reply asserts the following facts. The Applicant Company was indebted to the bank and this is confirmed by the Applicant's own letters. It additionally made payments to the bank subsequent to the institution of the suit. Thirdly the issue of appointment of an auditor and the lifting of Receivership are contained in proposals in the Applicant's letter dated 13th of February, 2008 and commenced at the Applicants requests that the certificates of title be returned to the Applicant to enable it obtain funds from other commercial banks to retire the facility in the Respondent bank. The letter dated 22nd of February, 2007 reads as follows:

“Return of two land titles Plot 598 and Plot 743

We of the abovementioned Company hereby request you to return the two land titles for the purpose of raising funds faster for Standard Chartered Bank.

We have negotiated with one commercial body for funds and they are ready to release it to continue operating and by doing so we wish to assure you that within the period of 3 to 4 weeks, we shall be able to pay between 250,000,000/= and 300,000,000/= to Standard Chartered Bank.

Thanks for your cooperation”

The letter is signed by the Managing Director of the Applicant Company Mr Edward Kigongo. There were several meetings and correspondence between the parties before the Consent Judgment was

executed. Counsel Barnabas Tumusingize further avers that he agreed to draft the draft consent which was to have an input by the parties. He contends that the spirit of the consent was for the final determination of the case and that is how they understood it as Counsel for the Respondent. He avers that this was confirmed by the Applicants Counsel in a letter dated 4th of April, 2007. Annexure "E" to the affidavit of Barnabas Tumusingize is written to Sebalu and Lule Advocates by A.F. Mpanga and Company Advocates, which letter in part reads as follows:

"PROPOSAL FOR COMPREHENSIVE SETTLEMENT BETWEEN STANDARD CHARTERED BANK UGANDA LTD AND KEN GROUP OF COMPANIES LTD

We refer to the above captioned matter.

After a comprehensive review of the statements of account provided by Standard Chartered Bank Uganda Limited ("the Bank") to our Client, we have instructions to make the following proposal for a comprehensive settlement of all matters arising between the bank and our Client.

The principal outstanding amount on all import loans as of 24 March 2007 was Uganda shillings 707,933,294/=...

Between 24 March 2007 and the 2 February 2007, our client effected payment of Uganda shillings 408,562,039/=... This was an aggregate payment in respect of imports loan references...

The outstanding amount is therefore Uganda shillings 299,371,255/=... In respect of...

Our client proposes that the balance be paid within 120 (One Hundred And Twenty) days of the acceptance of this proposal in writing.

The payment of the balance shall be in full and final settlement of all claims by the Bank against Ken Group of Companies Ltd ("The Company") and all claims by The Company against the Bank.

However, our client would also like to be assured that all the payment of the balance would extinguish all claims of the Company against the Bank, it will not preclude further discussion and resolution between the Bank and the Company in respect to individual members of staff of the Bank, or may have caused the unwarranted and unnecessary strain on the long-standing and mutually beneficial relationship between the Bank and the Company.

Since the Bank is secured by four pieces of land, the value of which is over 200% of the balance, our Client further proposes that Receivership be lifted. In the alternative, our Client proposes that the Bank release two of the certificate of title to the land offered as security to us. The said release shall be subject to a written undertaking by ourselves given to the Bank to the effect that we shall not release the certificate of title to our Client until and unless further finance has been raised towards payment of the balance. The release of the said title would serve as a means of raising finance and as a confidence building mechanism in the settlement process.

With regard to the lawyers and the Receivership fees, our Client proposes in this period of settlement and promoting mutual understanding this costs be borne by the Bank.

Our client further proposes that in the event that this proposal is accepted, it be reduced into a written and comprehensive agreement.

Yours faithfully,..."

In a letter dated 17th of April 2007 the Respondents Counsel Sebalu and Lule Advocates responded to be proposal for a comprehensive settlement between Standard Chartered Bank Uganda Ltd and Ken Group of Companies Ltd (In Receivership) as follows:

"... We have been instructed to respond thereto as follows:

- 1. As of 3rd of February 2007, (see attached from our clients and copied to your client in respect of which no objections were received, shillings 771,190,026/= was outstanding.*
- 2. Since then payments amounting to shillings 402,282,039/= have been received by the Receiver Manager.*
- 3. The balance due and owing is now shillings 368,907,987/= and not as indicated in your letter. This amount continues to attract interest.*
- 4. The total amount received so far is shillings 402,282,039/= and not as indicated in the third paragraph of your letter.*

Please be advised that some Receivership expenses have been applied details of which will be availed to you.

- The suggestion that legal and Receivership costs be borne by the bank is unacceptable to our client.*
- The Receivership will not be lifted until all the outstanding have been fully paid together with the Receivership costs and legal fees.*
- The proposal to pay the debt in 120 (one hundred and twenty) days is equally not acceptable.*

Where do realise that in order to finalise this matter and written agreement, it is necessary to hold a meeting. We would therefore suggest that we hold one at which our respective clients should be present and finalise this matter.

Yours faithfully,..."

On 20 April 2007 A.F. Mpanga Advocates wrote another letter suggesting a meeting between the Applicant Company and the Respondent Bank to discuss a settlement proposal on the 24th day of April 27 at 3 PM. The subsequent correspondence attached to the affidavit of Barnabas Tumusingize does not indicate whether such a meeting was held or not. He however avers generally that several meetings and discussions were held between the parties. Additionally he avers that he never had a telephone conversation with David Mpanga as alleged by the Applicant's Managing Director in his affidavit in support of the notice of motion. In any case he asserts that the Applicant's Managing Director did not need his advice as he had Barrister David Mpanga, a distinguished and

accomplished lawyer who did not require him to interpret the document his client was proceeding to sign.

Secondly Nicholas Ecimu in this affidavit in reply denies having a telephone discussion with Mr Fred Mpanga Counsel for the Applicant as to the meaning of the Consent Judgment. He further repeats the assertion that he did not owe a duty to the Applicant's Managing Director as Counsel as the Managing Director had his own lawyers capable on their own right and whose advice he should have relied upon instead of shifting blame on third parties.

In response Mr Edward Kigongo's affidavit in rejoinder repeats that Nicholas Ecimu assured him that the Consent Judgment was not meant to be a final determination of the main suit. He further asserts that Mr Barnabas Tumusingize also came to the office of Mr Nicholas Ecimu and reassured him that the consent was meant to determine the level of indebtedness and not to resolve finally the main suit.

I have taken note of the affidavit of Frederick Mpanga in support of the application and read it carefully to establish the alleged misapprehension of the client Mr Edward Kigongo. This affidavit was filed subsequent to the rest of the affidavits on 13 June 2012. In as much as it does not comply with the rules of pleading in that it was filed without leave of court out of time, it's a useful tool for resolution of the controversy as to fact about the advice allegedly given to Mr Edward Kigongo about the finality of the Consent Judgment. Learned Counsel Frederick Mpanga avers that subsequent to the filing of this suit the parties and their representatives attended several mediation sessions before the mediator in the Commercial Division of the High Court at Kampala in efforts to find an amicable resolution of the matters in dispute. The parties did meet in the Chambers of Sebalu and Lule advocates again for purposes of exploring an amicable solution to the dispute. Attempts to find an amicable solution were in vain as the parties could not agree on the sum that was due from the Applicant to the Respondent. During one of the sessions before the mediator it was proposed and agreed that an independent auditor be appointed to ascertain the sums that were due from the Applicant and payable to the first Respondent. The parties and respective Counsels agreed on the terms of reference for the appointment of an independent auditor to conduct the exercise. Counsel Frederick Mpanga further avers that subsequent to an agreement on the terms of reference of the independent auditor, a Consent Judgment was prepared and signed by a representative of the Applicant, himself as Counsel for the Applicant and Counsel for the first Respondent on Saturday 1st of March 2008 in the offices of Messieurs Sebalu and Lule advocates. He further asserts that it was always known to the parties and their legal representatives that the purpose of the audit exercise was to ascertain the amount due from the Applicant and payable to the first Respondent and the various loan facilities between the parties. He further asserts that the findings of the auditor did not extinguish the Applicants claim in the suit which was a challenge on the propriety of the Receivership. He asserts that the parties agreed to leave out the question of the impropriety of the Receivership from the Consent Judgment. Lastly he asserts that the letter of Messieurs A.F. Mpanga advocates seeking a comprehensive settlement was made in early 2007 and was not in respect of the Consent Judgment which was executed on the 29 of February 2008.

Counsel Frederick Mpanga in his affidavit does not support the averment of Mr Edward Kigongo that he had a discussion with the Respondents Counsel on the question of whether the Consent

Judgment was meant to be a final resolution of the suit of the Applicant. Secondly he does not contradict the averments of Nicholas Eciimu and Barnabas Tumusingize. Thirdly he does not dispute the fact that consent was reached for the appointment of an auditor and the filing of the Consent Judgment which he endorsed. He does not in substance suggest that there was a mistake or misapprehension of any party. The affidavit in substance asserts the contrary. This is by the averment Counsel Frederick Mpanga makes that it was always known that the consent was for the appointment of an auditor to establish the level of indebtedness of the Applicant to the bank. There was conceivably no misconception depending on what the consent terms actually spell out. It is not suggested that learned Counsel made a mistake or error in interpretation of the relevant terms of the Consent Judgment.

The parties are in full agreement that both the Applicant and the Respondent were represented by lawyers at the time of execution of the Consent Judgment. The Consent Judgment was executed by a representative of Ken Group of Companies Ltd and Standard Chartered Bank Uganda Limited. It was also executed by their respective Counsel namely Mr Frederick J Mpanga of A.F. Mpanga Advocates Counsel for the plaintiff/Applicant and the Barnabas Tumusingize of Sebalu and Lule Advocates Counsel for the defendants/Respondent. It was finally entered by the court on 3 March 2008 as a judgment of the court. The line endorsed by the court reads: "Given this 3rd day of March 2008 under the hand and seal of this honourable court". Judgment was entered under the hand of the Registrar of the court. The terms of reference of the auditors was also agreed upon by the parties and endorsed by their respective Counsels and representatives of the parties. The terms of reference is dated 19th of May 2008 and was also endorsed by the Registrar on the 20th of May 2008. The terms of reference is annexure "C" to the affidavit of Edward Kigongo filed in support of the Applicant's application.

The question of misapprehension of the Consent Judgment is a strange question for consideration in that the Consent Judgment speaks for itself. There seems to be a variance in the interpretation of the Consent Judgment as to what its effect is on the final resolution of the main suit between the parties. Under paragraph 4 of the Consent Judgment the auditors were to spell out the level of indebtedness if any of Ken group of companies Ltd to the Respondent bank. Subject to paragraphs 7 and paragraph 8 of the Consent Judgment, the report of the auditors on the level of indebtedness of the Applicant shall be final and binding on the parties. The Consent Judgment is very explicit about the finality of the audit report. It doesn't refer to the finality of a suit between the parties. It does not say that the Consent Judgment is a final settlement of the suit between the parties. It follows that the controversy as to whether the Consent Judgment finally resolved the suit is a matter of interpretation of the effect of the Consent Judgment as it was not expressly provided for in the Consent Judgment itself.

The second aspect of the consent was that the parties were required to comment on a draft copy of the auditor's report before a final report is issued. A final report was however issued. If the Applicant had not been given a chance to comment on the draft report as agreed in the Consent Judgment, the remedy would be to obtain an order to make the necessary comments before the auditors issue the final report. However as indicated above the final report was issued. Indeed the auditors were requested to clarify on some queries of the Applicant. On 29 April 2009 the parties appeared before the Registrar of the commercial court division and the submission of Counsel Frederick Mpanga

before the Registrar was that they intended the auditors to establish the amount due to the Applicant. The controversy was whether the amount was owed under facility 1. Counsel submitted before the Registrar that the auditor's report indicated that facility 1 was fully settled. There was also question about the outstanding amount. The proceeding before the Registrar is attached as annexure "F" to the affidavit of Barnabas Tumusingize. Thereafter the auditors wrote their clarification in their letter dated 29th of May 2009 and addressed to the Registrar Mediation High Court Commercial Division and copied to Counsel for the Applicant and the Respondent. In that letter the auditors write as follows:

"We make reference to your letter to us dated 7th of May 2009 and to our subsequent letter to you dated 13th of May 2009.

We would like to clarify that the amount due to the bank by Ken Group of Companies Ltd is shillings 264,544,806/=. In addition, there is no related third-party indebted to the bank. This position was highlighted in section 1.13 of our report dated 14th of January 2009.

Yours faithfully, ..."

Additionally the auditors wrote to the Registrar/mediation High Court Commercial Division in a letter dated 13th of May 2009 in which they give a table breakdown of the total amount due to the bank of **Uganda shillings 264,544,806/=** the letter was intended to clarify on an "anomaly" in the words of the auditors. This letter was also copied to the Applicants Counsel and the Respondents Counsel. The letter is annexure "G" to the affidavit of Barnabas Tumusingize.

Last but not least upon execution of the Consent Judgment and appointment of an auditor, Standard Chartered bank Uganda limited was supposed to lift the Receivership and return/handover two certificates of title to the plaintiff Company. Standard Chartered bank was however supposed to continue holding the remaining two certificates of title and any other securities for any indebtedness under consideration by the auditor. The two certificates of title were handed over to the plaintiff Company/the Applicant in this application.

It is my conclusion that there was no misapprehension of facts relating to the execution of the Consent Judgment. The terms of the Consent Judgment are explicit. Both parties were represented by Counsel who had opportunity to peruse the draft Consent Judgment and this was done before execution by appending of the signatures of the various parties to the agreement. The decision to appoint an auditor arose from the mediation effort before the Registrar Mediation. The terms for appointment of an auditor and its effect on this suit are stipulated in the Consent Judgment itself.

I have additionally considered ground two of the notice of motion which is an assertion that the Respondent is treating the Consent Judgment as a final resolution of the suit to the prejudice of the interest of the Applicant in that it does not address the rest of the reliefs sought in the plaint. This is not a ground for setting aside any Consent Judgment. If the suit has some surviving part it can be fixed for hearing. Ground three of the notice of motion asserts that besides the failure of the Consent Judgment to fully settle the Applicants claim against the Respondent bank, it does not at all settle the Applicant's complaint against the second and third Respondents. Ground four asserts that the designation of the Consent Judgment as it stands without the first determining the legality and/or

appropriateness of the drawdown facility number 2 and consideration of the 2 facilities which are pertinent issues in this matter are prejudicial to the interests of the Applicant. All the above grounds do not disclose any ground for setting aside any Consent Judgment. If the Consent Judgment has not fully settled the Applicants claim against the Respondent bank in the plaint, why doesn't the Applicant set the suit for hearing? In this suit itself, the question of whether the Consent Judgment resolves the entire suit or not can be determined. It is simply not a ground for setting aside a Consent Judgment.

Ground five asserts that the audit report arising out of the Consent Judgment and upon which execution is likely to be based does not conform to the terms of the Consent Judgment and the terms of reference given to the auditors. As we have established above, the auditors were appointed by the parties and their findings are binding. Any complaint with the auditors has nothing to do with the Consent Judgment. Such a complaint would arise from their written and agreed terms of reference for appointment of the auditors. The auditors can be made to account under their own terms of reference/appointment. That does not affect the Consent Judgment. If the Applicant asserts that the suit has not been finally resolved, the solution is not to seek to set aside the Consent Judgment but to fix the case for hearing. The Respondent will therein have a chance to either raise the question of res judicata which it has done in its submissions or show the extent to which the Consent Judgment has resolved the suit. It is an obvious fact and a point of law that the Consent Judgment does not refer to the appointment of Receivers other than that the Receivership shall be lifted. Secondly it is the first Respondent who appointed the Receivers. The Receivership was accordingly lifted and two title deeds were handed over to the Applicant. Generally the law is that a consent order cannot be set aside. In the case of **Purcell v F C Trigell Ltd (trading as Southern Window and General Cleaning Co) and another** [1970] 3 All ER 671 the parties entered into an interlocutory consent order and Lord Denning considered the effect of the order at 675:

“But there is no ground here so far as I can see setting aside this consent order. It was deliberately made, with full knowledge, with the full agreement of the solicitors on both sides. It cannot be set aside. But, even though the order cannot be set aside, there is still a question whether it should be enforced.”

The question of whether a consent interlocutory order should be enforced arose in the context of the wide powers of courts in the enforcement and supervision of interlocutory orders. It may vary or set aside interlocutory orders even if made by consent of the parties. This however does not affect final orders made by consent of the parties. The contractual effect of a Consent Judgment was considered by Buckley LJ in **Purcell v F C Trigell Ltd** (supra) at page 677 when he held:

“In my judgment, this order should be regarded as having a binding contractual effect on which the plaintiff was perfectly entitled to insist.”

A consent order also operates as estoppels against someone trying to assert a different position from that stipulated in the agreement of the parties. See Lindley L.J. in **Huddersfield Banking Co. Ltd vs. Henry Lister & Son Ltd (1895) 2 Ch. D** pages 273 at page 280 when he said:

A Consent Order I agree is an order and so long as it stands it must be treated as such, and so long as it stands it is as good an estoppels as any other order.

The doctrine of estoppels acts as a shield against a party trying to assert a different position from that stipulated or represented. The doctrine of estoppels is incorporated by section 114 of the Evidence Act cap 6 laws of Uganda (revised edition). In the absence of any grounds for setting aside the Consent Judgment order/contract between the parties, the Consent Judgment can only be varied or set aside by another agreement of the parties.

Having held that the Applicant has not established any grounds for setting aside the Consent Judgment, it is not necessary for me to resolve the question of whether the suit against the Receivers/Managers appointed by the Respondent bank was resolved by the Consent Judgment. Secondly the question of the propriety of the Receivership cannot be handled. It can only be noted that the Consent Judgment set aside in the execution of its terms, the Receivership. Whether the suit as contained in the plaint is *res judicata* or not pursuant to the execution and implementation of the terms of the Consent Judgment cannot be handled in this application. The Applicant is at liberty to fix the suit for hearing where the question of whether implementation of the terms of the Consent Judgment rendered the remainder of this suit *res judicata* would be considered on its merits. The assertion that other reliefs sought have survived the Consent Judgment can only be handled in the main suit. Furthermore, the complaint against the auditors is not a ground for setting aside the Consent Judgment and cannot be handled in this application. In the premises, the Applicant's prayer that the Consent Judgment between the Applicant and the Respondent dated 29th of February 2008 be reviewed and set aside is untenable there being no grounds for setting aside the Consent Judgment.

The Applicant's application is accordingly dismissed with costs.

Ruling delivered in open court this 21st day of September 2012

Christopher Madrama

JUDGE

Ruling delivered in the presence of:

Chrysostom Katumba for the Applicant,

Alice Nalwoga for the Respondent

Applicant's Legal manager Akia Jane in Court

Charles Okuni Court Clerk

Sheila Catherine Abamu: Research Assistant

Hon. Justice Christopher Madrama

21st of September 2012