THE REPUBLIC OF UGANDA

THE HIGH COURT OF UGANDA AT KAMPALA

COMMERCIAL DIVISION

HCT - 00 - CC - MA - 344 - 2012

(ARISING FROM HCCS No. 446 of 2009)

LENINA KEMIGISHA MBABAZI

STAR FISH LIMITED .....APPLICANT

VERSUS

JING CHENG INTERNATIONAL TRADING LTD.....RESPONDENT

BEFORE: THE HON. JUSTICE GEOFFREY KIRYABWIRE

Ruling

This application is brought by Notice of Motion under Sections 82 and 98 of the Civil Procedure Act (Cap 71), Section 33 of the Judicature Act (Cap 13) and Order 52 r 1 of the Civil Procedure Rules (S.I 71-1) for orders that execution of the consent decree in HCCS No. 446 of 2009 dated 6th December 2010 be stayed or set aside, the consent judgment/decree be reviewed and/or set aside, and that HCCS No. 446 of 2009 be heard inter parties and costs.

The application is supported by the affidavit of Lenina Kemigisha Mbabazi the applicant/1st defendant.

The brief background to this application is that the respondent filed a summary suit vide HCCS No. 466 of 2009 (**JINGCENG INTERNATIONAL TRADING LIMITED V LENINA KEMIGISHA & STAR FISH LIMITED**) for recovery of the sum of Ushs 233,692,000/= being the cost of motorcycles allegedly supplied to the first and second defendants and costs. Leave to defend the suit was granted and the defendants jointly filed a written statement of defence in which they denied the plaintiff's claim. Subsequently on 6th December 2010, counsels for the parties recorded a consent judgment before the court in which the defendants were ordered to pay the sum of Ushs 207,492,000/= in full and final settlement of the case, in 9 equal monthly installments of Shs. 23,055,000/= beginning 31st January 2011. After some time an application for execution of the decree by way of arrest was made on 9th

February 2012 and the warrant of arrest was issued by the court on 18th April 2012. The applicant being dissatisfied with the execution filed this application.

The case for the applicant as stated in the affidavit of Ms. Mbabazi is that her attention was drawn to a consent judgment, decree and a warrant of attachment in execution of the decree against her which is illegal.

As to the consent judgment Ms. Mbabazi deponed that it was entered in error in so far as it relates to her as an individual because she has never personally entered into any transaction with the respondent, but at all times acted as an agent of Star Fish Limited (hereinafter referred to as the second defendant) who is a disclosed principal and has a separate legal existence. Ms. Mbabazi deponed that she neither admitted liability nor took over the 2nd defendant's company debts.

Furthermore, that she neither personally executed the consent judgment nor authorised her lawyers to do so. Ms. Mbabazi deponed that she has never unequivocally admitted the claim and that the respondent has not applied to lift the veil of incorporation so as to be authorised to hold her personally liable for the second defendant's debts.

Ms. Mbabazi further deponed that the sum of Ushs 233,692,000/= contained in the consent judgment is grossly exaggerated and the amount due and owed by the second defendant is only Ushs 207,492,000/=. Furthermore, that the instalments amounting to Ushs 69,165,000/= which have been paid by her personally were in the names of and for the benefit of the second defendant.

As to the warrant of arrest against her, Ms. Mbabazi deponed that the execution of the decree in HCCS No. 446 of 2009 is illegal because she has never been served with a mandatory notice to show cause why execution should not issue, whereas it is a pre-requisite in case of execution by way of arrest and committal to civil prison. Furthermore, that the said notice is a mandatory pre-requisite because the execution was conducted after the lapse of 12 months from the date of the decree.

Ms. Mbabazi further deponed that the consent judgment raises new and important matters of evidence which could not be diligently obtained at the time it was concluded, that she has a formidable defence to the respondent's claim in the main suit, and therefore it is in the interest of justice that the suit is heard on its merits by way of a full hearing.

In reply, Mr. Simon Ding Tao the General Manager of the respondent in his affidavit deponed that the consent decree was validly executed with the consent of both parties. Furthermore, that all corresponding documents including warning letters and the notice to show cause were served onto the applicant's previous lawyers M/s Mugarura, Kwarisima & Co. Advocates but the same were ignored. Mr. Ding Tao

deponed that on several occasions, Mr. Henry Kyarimpa who appeared for the applicant as her counsel informed the respondent's advocates that the applicant was in Germany and all effort to reach her were futile.

Furthermore, that the applicant gained state security and was therefore inaccessible for purposes of service. Mr. Ding Tao deponed that the failure by the applicant to receive a notice to show cause can not be a ground for setting aside the consent judgment.

Mr. Ding Tao further deponed that the applicant was aware of the consent judgment and decree and even paid to the respondent part of the decretal sum without any coercion. Furthermore, that the consent judgment was executed in accordance with the law and there are no new matters arising under it.

In rejoinder, Ms. Mbabazi in her further affidavit denied having been inaccessible for service of the notice to show cause. She further deponed that the payments made by her personally to the respondent under the consent decree was paid on the directions of the second defendant to offset a debt she owed to it.

Ms. Mbabazi further deponed that the respondent did not honour its undertaking under the contract to transfer all the log books and title to the second defendant and that the respondent has refused to transfer 98 out of 438 books and title of 135 logbooks of the 340 logbooks that it surrendered. Ms. Mbabazi deponed that no consent judgment could have been entered into before this undertaking could be fulfilled by the respondent.

In further rejoinder, Mr. Henry Kyarimpa of M/S Mugarura, Kwarisima & Co. Advocates who formerly represented the applicant deponed that he ceased to represent the applicant on 8th June 2012 upon receiving a Notice of change of advocates. He deponed that he was not instructed to enter into any consent judgment between the applicant and the respondent. Furthermore, that he categorically stated that the applicant had been irregularly sued because at all times, she was acting as an agent of a disclosed principal, the 2nd defendant who is duly registered with business premises at Plot 50 Bukoto Street. Mr. Kyarimpa further deponed that it was a condition precedent to the contract that the respondent would effect transfer and hand over all the log books for the motor cycles. Furthermore, that following a breakdown in communication, no agreement was reached and no consent judgment was executed by the parties.

Mr. Kyarimpa deponed that he perused the typed court record of proceedings and there was a misreporting of what transpired on the day of the purported consent judgment and that the applicant's current lawyers have not succeeded in securing the recorded tapes of the proceedings. Mr Kyarimpa deponed that the applicant has never been a party to the consent judgment and the same should be set aside. Furthermore,

that his firm has never been served with the warning letters or notice to show cause and that the applicant has always been available and accessible for service.

At the hearing of the application, the applicant was represented by Mr. J.M. Mugisha and Mr. Twinobusingye while the respondent was represented by Mr. C. Kitumba and Mr. Kiwanuka. The parties made oral submissions.

I will proceed to consider the legal arguments as to whether the applicant is entitled to the remedies sought in this application.

That the Consent Judgment/Consent Decree entered on the 6th December 2011 be reviewed and / or set aside.

Legal arguments for the Applicant

With regard to the grounds for reviewing or setting aside the consent judgment, counsel for the applicant submitted that the court cannot interfere with a consent judgment except in circumstances which would afford good ground for varying or rescinding a contract between the parties. He referred to the cases of **HASSANALI V CITY MOTOR ACCESSORIES LTD & OTHERS** (1972) EA 423, **HIRANI V KASSAM** (1952) 19 EACA 131, **ATTORNEY GENERAL AND UGANDA LAND COMMISSION V JAMES KAMOGA & ANOTHER** (SCCA No. 08 of 2004) among others for this submission.

Counsel for the applicant further submitted that in this case there was a misconception or misunderstanding or an erroneous belief on the part of the applicant or her lawyer that the consent judgment was concluded in respect of the second defendant company which according to the facts of the claim was the actual party to the transaction giving raise to the claim. Consequently there was no consensus ad idem among them and therefore this is a ground for setting aside the consent.

Counsel for the applicant further submitted that the ignorance of the applicant's former counsel goes to the root of the merits of the case in which case the decision of **Kamoga** (supra) would be applicable here too.

Legal arguments for the respondent

Counsel for the respondent objected to the application to set aside or review the consent judgment. Counsel for the respondent further submitted that parties to a suit are free to consent and may do so in writing and affix their signatures on the consent, or orally before a Judge who records the consent. Furthermore that a consent judgment by case law made in the presence of and with the consent of counsel is binding on all parties to the proceedings or actions and cannot be varied or discharged unless it is obtained by fraud, collusion or by an agreement contrary to the policy of the court.

Counsel for the respondent submitted that the grounds for setting aside a consent judgment are analogous to those for setting aside a contract.

Counsel for the respondent submitted that everything was done in the presence of the court and the parties had ample time to discuss and report on what had been agreed upon.

Counsel for the respondent submitted that the consent judgment was entered against the two defendants in the head suit, in the presence of the applicant and their counsel and therefore execution can be levied against any of the two defendants.

Furthermore, counsel for the respondent submitted that the consent judgment was entered in December 2010, and the applicant has filed this application in June 2012, after one and a half years from the date of the consent decree and therefore, the applicant is guilty of laches and cannot be accommodated in that regard. He referred to the case of **MUYODI V INDUSTRIAL AND COMMERCIAL DEVELOPMENT CORPORATION & ANOTHER** [2006] EA 243 and **COMBINED SERVICES LTD** V **ATTORNEY GENERAL** (HCMA 200 of 2009) for this submission.

All in all he submitted that there are no grounds for setting aside the consent judgment.

Findings and decision of the Court

Counsels for both parties have correctly exposed the law on this issue albeit with different conclusions on the facts. I shall refer to the law a little later in this ruling. Suffice it to say that the burden of proof in this regard lies with the applicant.

The applicant contends that she did not instruct her counsel to enter a consent judgment. This is because there was no consensus ad idem between the parties. Counsel for the applicant submitted that the consent judgment that resulted from a misconception and/or misunderstanding or erroneous belief that it was concluded in respect of the second defendant only and that is sufficient reason to review it and or set it aside.

I have perused the affidavits of the applicant to establish how this error came about. It seems she provides an explanation in Para 9 of her affidavit dated 22nd June 2012. She basically states that she did not sign the consent judgment nor authorize her lawyers to do so as she did not admit the claim. It is a given that the applicant did not sign the consent judgment. Actually none of the parties, could have signed the said consent judgment because it was recorded before me as the Presiding Judge.

Her former lawyer Mr Kyarimpa in his affidavit of the 27th August 2012 depones at Para 10 that

"…no consent was entered into involving the respondent herein and the second defendant… (Emphasis mine)"

It must be remembered that the second defendant is Star fish Limited and not the applicant in this present case Ms Mbabazi.

He further depones

> *"**11. That I have perused the court record of the proceedings herein and I wish to categorically state that there was a misrecording of what transpired on the day of the purported consent judgment…***
>
> ***12. That I have been informed by the applicant's current lawyers and I verily believe the same to be true and correct that they have not succeeded in securing the recorded tapes of what I stated or what transpired on that day…"***

I must say that Mr Kyarimpa's affidavit as counsel on record during the proceedings is all muddled up. In paragraph 10 he suggests that the consent Judgment indeed involved the first defendant (the current applicant) and not the second defendant and then he goes on to state in Para 11 and 12 that what he read on the court record is a misrecording of what transpired on that day! Furthermore the recording of the consent judgment as I recall it the record shows was a brief affair which was not recorded so I am at a loss why he wants to look for taped recordings that were not made.

That notwithstanding I have carefully considered the typed court record of the proceedings in which the consent judgment was entered and I am unable to see how Mr. Kyarimpa was misquoted. On 6th September 2010 when the parties appeared before court, Mr. Katumba, counsel for the plaintiff informed court that the parties had reached a position for settlement but they had a difference of about Ushs. 26,000,000/= to resolve. The parties were given up to 6th December 2010 (a period exceeding two and half months) to reconcile their positions or prepare the suit for trial. On 6th December 2012 the parties again appeared before court. It is important to observe that on this day the applicant as first defendant and Mr. Simon Ding Tao representing the plaintiff were present in Court. On record was Mr. Katumba Counsel for the plaintiff while Mr Kyarimpa was counsel for both defendants. Proceedings commenced at 9:58am and counsel for both defendants Mr. Kyarimpa then informed court that they were proposing to pay a sum of Ushs. 207,292,000/= payable in equal installments. Mr. Katumba prayed for a short adjournment to consider the proposal with his client. The matter was stood over and when the parties returned at 10:44am, Mr. Katumba informed court as follows;

*"**We have reached consent on this matter. The parties agree that:***

a) ***The Defendants pay the Plaintiff the sum of Shs. 207,492,000/= in full and final settlement of this case.***
a) ***That the said amount be paid in 9 equal monthly installments of Shs. 23,055,000/= beginning 31st January 2011.***
b) ***That each party bears its own costs."***

Mr. Kyarimpa replied as follows;

"***That is the position My Lord."***

On that basis, a consent judgment was entered on court record, in the terms spelt out by Mr. Katumba (quoted above). The applicant was present in court throughout the proceedings and did not object to the recording of the consent Judgment before me.

In the case of **BM TECHNICAL SERVICES V FRANCIS X RUGUNDA (1999) KALR 821**, Kibuuka Musoke J found that, the court can not set aside a consent judgment when there is nothing to show that counsel for the applicant has not entered into it without instructions. Furthermore, that even in cases where an advocate has no specific instructions to enter a consent judgment but has general instructions to defend a suit, the position would not change so long as counsel is acting for a party in a case and his instructions have not been terminated, he has full control over the conduct of the trial and apparent authority to compromise all matters connected with the action. This position is also stated by Hon Justice Lameck Mukasa in the case of **BETUCO (U) LTD & ANOR V BARCLAYS BANK (U) LTD & ANOR** (HCMA No. 0507 of 2009) and Duffus (JA) in the case of **HANSRAJ RANMAL SHAH V WESTLANDS GENERAL STORES PROPERTIES LTD & ANOR** [1965] EA 642.

In this case, both party and counsel were in Court and there was no evidence to negative the recording of the consent judgment as it was recorded. It is therefore incorrect to state that the applicant only became aware of the consent judgment when she was served with a warrant of arrest, as deponed in her affidavit. The applicant was present when the consent judgment was recorded and she does not strike me as someone incapable to understand what was going on in Court. Indeed there is evidence that three installments under the consent Judgment were even subsequently paid one being from the account of the applicant herself on the 12th April 2011 to the lawyers of the respondent. She has also not taken out a professional compliant against her former lawyer Mr. Kyarimpa though from time to time he is accused of acting contrary to her instructions. In other jurisdictions counsel is made to account for such violations of instruction and indeed have to take out professional indemnity insurance for that purpose. This we do not see in Uganda but time has come for such accountability to take place and counsel to take out insurance to cover it.

A consent judgment may be made formally, and signed by the parties, or may be recorded by the court and a consent judgment entered on court record is binding upon the parties to the consent judgment (**See PETER MULIIRA V MITCHELL COTTS LTD (CACA No. 15 of 2007**).

The grounds for setting aside a consent judgment are settled. In the case of **Attorney General & ULC V James Mark Kamoga** (SCCA No. 8 of 2004) , the Supreme Court of Uganda cited with approval the principle upon which the court may interfere with a consent judgment outlined by the Court of Appeal for East Africa in **HIRANI V KASSAM** (1952) 19 EACA 131 as follows,

> ***"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." (*Also see the cases of BROOKE BOND LIEBIG (T) LTD. V MALLYA** [1975] EA 266, **MOHAMED ALLIBHAI V W.E. BUKENYA AND ANOTHER** SCCA No.56 of 1996).

In this case I am unable to find material that would enable to set aside this consent judgment if it were an agreement. What I find is evidence of "buyer's remorse" or second thoughts on the consent Judgment and that is not reason to set it aside.

Based on the above findings I am also unable to see anything new upon which to ground a review of the said consent. The issues raised by the applicant's motion and affidavit and the submissions of her counsel are basically the same matters raised in the joint written statement of defence that was compromised by the consent Judgment. How the parties decide to compromise or resolve a dispute is their prerogative and an act of reconciliation. A consent Judgment is not necessarily based on the legal merits of a case.

Lastly, I agree with counsel for the respondent that this application on the point of setting aside the consent judgment being made over one and half years later is caught up by the doctrine of laches.

It follows that there are no grounds for setting aside or reviewing the consent judgment.

That the execution of the consent Decree be stayed / set aside

In respect of the warrant for arrest, Counsel for the applicant submitted that the execution of the consent decree took place after 12 months from the date of the decree and therefore, it was mandatory for the respondent to serve the applicant with a notice to show cause as provided under Order 22 r 19 of the Civil Procedure Rules. Furthermore, that it is mandatory to issue a notice to show cause in cases where execution is by way of arrest and committal to Civil Prison. Counsel for the applicant submitted that the failure to issue a notice to notice to show cause renders the execution illegal. He referred to the authorities of **ODHAJI GOKALDAS V NAGJI KANJI** [1934] EA 10, MULLA ON THE CODE OF CIVIL PROCEDURE 13th Edition pg 1041, **HAJJI HASSANI BIN ABUDUL AZIZI V RAMAZANI BIN RAJABO** [1977] HCB 39 and **SEWANKAMBO DICKSON V ZZIWA ABBY** (HCMA 498 of 2002) for this submission.

Counsel for the applicant further submitted that the respondent has not proved that the applicant has no property which can be attached, and that the applicant as a lactating mother would suffer irreparably if the execution is not set aside. Counsel for the applicant further submitted that it was incumbent upon the respondent to lift the veil of incorporation if it wanted to proceed against a shareholder of a company because the 2nd defendant has separate legal existence and is not a mask, a sham, an adduct, a device or a stratagem intended to defraud the respondent. Counsel referred to the authorities of **NSANGIRANABO ERASMUS T/A NSANGIRA AUCTIONEERS AND COURT BAILLIFFS V M/S ASSOCIATED PROPERTIES LTD & ORS** (HCMA 953 of 2007), **SALOMON V SALOMON** (1897) AC 22, **SENTAMU V UCB** [1983] HCB 59, and GOWER'S PRINCIPALS OF MODERN COMPANY LAW 4th Ed pg 100 for this submission.

In reply, counsel for the respondent submitted that the applicant has state security which makes her inaccessible for purposes of service. Furthermore, that the notice to show cause is not mandatory because there are no sanctions for failure to serve the same. Counsel for the respondent submitted that the applicant paid Ushs 23,000,000/= under the consent judgment in her personal capacity.

Furthermore, that a person cannot take advantage of a judgment and then seek to challenge it. Counsel relied on the case of **STEVEN SERWAGI KAVUMA V BARCLAYS BANK LTD** (HCMA No. 63 of 2010) for this submission.

In rejoinder, learned counsel for the applicant submitted that service of a notice to show cause is mandatory. Furthermore, that for a provision to be mandatory, it is not a requirement that there should be a sanction, but the court has to look at the intention of the legislature. He relied on the case of **SITENDA SEBALU V NJUBA** (Election Petition Appeal No 26 of 2007) for this submission. Counsel for the applicant submitted that the Ushs. 23,000,000/= paid by the applicant under the consent, the money was paid to clear her indebtedness to the second defendant and therefore, there was no approbation and reprobation. Furthermore, he submitted that if counsel

through inadvertence or in his own ineptitude, does something which hurts the client, the client should not be held culpable. Counsel relied on the case of **GODFREY MAGEZI V SUDIR RUPARELIA** (SCCA No. 1 of 2002) for this submission.

I have carefully considered the evidence, the submissions of both counsels and the authorities referred to for which I am grateful.

Counsel for the applicant submitted that the execution was illegal because the respondent did not serve the applicant with a notice to show cause which is mandatory in cases where execution takes place after a year from the date of the decree.

Order 22 r 19 of the Civil Procedure Rules provides that,

> *"**Notice to show cause against execution in certain cases.***
>
> ***(1) Where an application for execution is made—***
>
> ***(a) more than one year after the date of the decree; or***
> ***(b) against the legal representative of a party to the decree, the court executing the decree shall issue a notice to the person against whom execution is applied for requiring him or her to show cause, on a date to be fixed, why the decree should not be executed against him or her; except that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution if the application is made within one year from the date of the last order against the party against whom the execution is applied for, made on any previous application for execution, or in consequence of the application being made against the legal representative of the judgment debtor, if upon a previous application for execution against the same person the court has ordered execution to issue against him or her.***
>
> *(2) **Nothing in sub rule (1) of this rule shall be deemed to preclude the court from issuing any process in execution of a decree without issuing the notice prescribed in that sub rule if, for reasons to be recorded, it considers that the issue of the notice would cause unreasonable delay or would defeat the ends of justice."***

It is agreed in the affidavit in reply deponed by Mr. Ding Tao that no notice to show cause was issued. Mr. Ding Tao deponed that the said notice was not served on the applicant because she was inaccessible for purposes of service.

In this case, the decree was made on 6th December 2010. The application for execution was made on 10th February 2012 and therefore, at the time of making the application,

more than 12 months had lapsed from the date of the decree. There were no grounds recorded for failure by the court to issue a notice to show cause and therefore, the respondent does not fall within the exceptions provided under Order 22 r 19 above. In the case of **ODHAVJI GOKALDAS V NAGJI KANJI** [1934] 1 EACA 10 referred to by counsel for the applicant, Sir Joseph Sheridan CJ (as he then was) in interpreting the provisions of Order 19 r 19 of the Civil Procedure Rules (now Order 22 r 19) found that the notice to show cause must be issued prior to the issue of an order for execution.

Counsel for the applicant further submitted that the service of a notice to show cause is mandatory in cases where execution takes place by way of arrest. Order 22 r 34 (1) of the Civil Procedure Rules provides that,

> *"**Discretionary power to permit judgment debtor to show cause against detention in prison.***
>
> ***(1) Notwithstanding anything in these Rules, where an application is for the execution of a decree for the payment of money by the arrest and detention in a civil prison of a judgment debtor who is liable to be arrested in pursuance of the application, the court may, instead of issuing a warrant for his or her arrest, issue a notice calling upon him or her to appear before the court on a day to be specified in the notice and show cause why he or she should not be committed to a civil prison.***
>
> ***(2) Where appearance is not made in obedience to the notice, the court shall, if the decree holder so requires, issue a warrant for the arrest of the judgment debtor."***

I agree with the authorities referred to by learned counsel for the applicant, to the effect that before a judgment debtor is arrested he should as a condition precedent under Order 22 r 34(1) of the Civil Procedure Rules be served with a notice to show cause why he/she should not be committed to Civil prison, and that the warrant of arrest under Order 22 r 34(2) is issued where a judgment debtor has failed to appear in obedience to the notice to show cause under Order 22 r 34(1) above (See **FEDERICO SEBIRUMBI V JOSEPH KONDE** (1994) IV KALR 44 and **HAJJI HASSANI BIN ABUDUL AZIZI V RAMAZANI BIN RAJABO** [1977] HCB 39).

The execution by way of arrest in this case is therefore irregular for failure by the respondent to cause to issue and serve a notice to show cause, contrary to the provisions of Order 22 r 19 and 34 of the Civil Procedure Rules.

In the premises, the applicant's application to review or set aside the consent judgment fails. The execution is however irregular and is accordingly set aside. The applicant being partly successful I award her half of the costs of the application.

……..
Justice Geoffrey Kiryabwire
JUDGE

Date: 17/10/2012

17/10/12

9: 36 a.m.

Ruling read and signed in open court in the presence of;

- J. M. Mugisha plus Severino Twinobusingye for Applicant
- R. Mugisha h/b for Kiwanuka Respondent

In Court

- MD of Respondent
- Rose Emeru – Court Clerk

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Geoffrey Kiryabwire

JUDGE

Date: 17/10/2012