THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

HCT - 00 - CC - MA - 763 - 2013

(Arising out of Civil Suit No. 90 of 2008)

KANANURA ANDREW KANSIIME ::::::::::::::::

APPLICANT/DEFENDANT

VERSUS

RICHARD HENRY KAIJUKA ::::::::::::::::::
RESPONDENT/PLAINTIFF

BEFORE: THE HON. JUSTICE DAVID WANGUTUSI

R U L I N G:

In this application, Kananura Andrew Kansiime, referred to in these proceedings as the Applicant seeks a variation of a Consent Judgment dated 8th July 2009, entered between him and Richard Henry Kaijuka, the Respondent varied.

The brief background to the application is that Uganda, a member of the Commonwealth. In 2007, was the venue of the Commonwealth General Meeting and as is expected all sorts of services were sourced by the government. These included services like; transport, hospitality, beatification of the city, communication electronic and many others that could put money in the hands of business minded.

One of the biggest service required was transport and the Applicant, and the Respondent went in for that. They bought and put in place several motor vehicles amongst which were those registered UAH 888R, UAH 800U and UAH 800R.

The parties however, failed to win the award for the transport services and thus had to share the vehicles and a piece of land which formed part of the whole transaction.

The sharing of the spoils encountered problems and the parties ended in court in Civil Suit No. 90 of 2008. On the 2nd October 2008, they entered a Consent Judgment in which amongst others were the following terms;

1- That the Respondent would take the property comprised in Kyaggwe Block 121 Plot 3 Senyi.

2- The Applicant would in turn take log books of the UAH 888R, UAH 800U, UAH 800R and two post dated cheques.

All matters seemed to have been settled, but this was overturned when the Respondents name was struck off the land title on instigation of a third party. The Respondent contending that the title that had been passed to him was not clean, sought a replacement from the Applicant. On 8th July 2009, the Consent Judgment dated 2nd October 2008 was varied upon the following terms;

1- The Defendant/plaintiff by counterclaim shall pay to the plaintiff/defendant by claim the sum of Shs. 200,000,000/= as full and final settlement of the claim.

2- The sum of Shs. 200,000,000/= be paid to the plaintiff/defendant by counterclaim by the defendant/plaintiff by counterclaim in the following installments;

a) Shs. 50,000,000/= within thirty (30) days from the date of execution of this variation.

b) Shs. 150,000,000/= be paid in fifteen (15) equal monthly installments of Shs. 10,000,000/= each payable every thirty (30) days with effect from the date of execution of 2(a) above.

3- In the event that the defendant/plaintiff by counterclaim is in default in payment of three consecutive installments within ninety (90) days period reserved for payment of such installments the whole of the unpaid judgment debt shall immediately become due and recoverable upon the 90th day of default.

4- The defendant/plaintiff counterclaim takes the logbooks of and Motor Vehicle Registration No. UAH 88R, UAH 800U and UAH 800R as well as the 2 cheques for Shs. 90,000,000/= and one for Shs. 250,000,000/= in full and final settlement of the counterclaim against the plaintiff/defendant by counterclaim.

Still as a result of HCCS No. 90 of 2008, the Court held on the 3rd November 2011 that the parties were bound by the Consent Judgment of 8th July 2009. He wrote;

> *"The remedies open to the parties are those in the Consent Judgment as varied on the 8th July 2009. By his terms the Defendant is in default of paying the plaintiff the sum of Shs. 200,000,000/= as at 8th October 2009, and therefore this amount is due and owing immediately. Since this was the bargain of the parties, I cannot make further orders there under.*

The foregoing brought them back to the Consent Judgment whose terms I have enlisted above.

It is now clear that some of these terms were never fulfilled. The Applicant did not fulfill his part because he failed to pay to the Respondent the Shs. 200,000,000/= and the Respondent did not hand over to the Applicant Motor Vehicle UAH 800R.

The Respondent still wants the Shs. 200,000,000/=.
The Applicant contending that the Motor Vehicle UAH 800R has depreciated so much filed this application seeking order that

> *" 1- The order for return of Motor Vehicle Registration No. UAH 800R to the Applicant as decreed under the terms of the Consent Judgment dated 8th July 2009 be reviewed or varied by way of valuation of the same said Motor Vehicle and the value thereof be paid to the Applicant.*

2- *The value of Motor Vehicle Registration No. UAH 800R be settled by way of set off against the decretal sum owing to the Respondent as per the said Consent Judgment and or any part thereof and the balance falls where it is due."*

There is no dispute that the operating terms were those of the Consent Judgment. The honourable Judge was clear when he said that the *"remedies open to the parties are those in the Consent Judgment of 8th July 2009."*

Although emphasis was put on the Shs. 200,000,000/= million, he did not exclude the fact that the Respondent would have to handover Motor Vehicle No. UAH 800R.

The Applicant submitted that since the value of the Motor Vehicle was Shs. 200,000,000/=, the same be set off as a settlement leaving no debt on either side.
He said he took that position because the Motor Vehicle had these last four years been in use and had depreciated to such an extent that it was no longer the vehicle envisaged in the Consent Judgment. He relied on the authorities of **Christine Butarabeho V Edward Kakonge** SCCA 4 of 2000, **Yoka Rubber Industries Ltd V The Diamond Trust Properties Ltd** HCCS 685 of 2006 and **Suresh Chandra A Ghelani V Chandrakant Patel** CACA 56 of 2004 wherein the courts described the function of restitutional remedies as to restore to the aggrieved the value of the thing itself, or its substitute which was lost.

It is imperative to note that this matter is riddled with a checkered history. This application invites court to vary a Consent Judgment that has already been varied once.

A Consent Judgment derives its legal effect from the agreement of the parties. It may only be set aside for fraud, collusion or for any reason that which would enable the court to set aside an agreement. **Brooke Bond Liebig V Mallya** [1975] EA 266.

The circumstances in which a Consent Judgment may be interfered with were considered in **Hirani V Kassam** [1952] 19 EACA where the following passage from Seton of Judgment and Orders, 7th Edition Volume 1 page 124 was approved:

> *"Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them ... and cannot be varied or discharged unless obtained by fraud or collusion, or by agreement contrary to the policy of the court ... or if 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 the court to set aside an agreement."*

As **Windham J**, (as he then was) said, in the introduction to the passage quoted above from **Hiran's case**, a court cannot interfere with a consent judgment except in such circumstances as would afford a good ground for varying or rescinding a contract between the parties.

The Supreme Court of Uganda followed these principles in **Mohamed Allibhai V W. E. Bukenya and Another** Civil Appeal No. 56 of 1996.

It was held in **Attorney General V James Mark Kamoga** SCCA 8/2004 that discretion in setting aside consent judgment is more restricted and is exercised upon well established principles.

The Applicant seeks that the order for the return of Motor Vehicle Registration No. UAH 800R to the Applicant as decreed under the terms of the consent judgment dated 8th July 2009 be reviewed or varied by way of valuation of the same said Motor Vehicle and the value thereof be paid to the Applicant.

Section 82 of the Civil Procedure Act provides that:

"Any person considering himself or herself aggrieved –

a) by a decree or order from which an appeal is allowed is allowed by this Act, but from which no appeal has been preferred ; or

b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order on the decree or order as it thinks fit.

Then Order 46 of the Civil Procedure Rules provides; that-

1. Any person considering himself or herself aggrieved-

a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter of evidence which, after the exercise of due diligence, was not within his or her knowledge or could not be produced by him or her at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him or her, may apply for a review of judgment to the Court which passed the decree or made the order.

2. A party who is not appealing from a decree or order may apply for a review of 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 Respondent, he or she can present to the appellate Court the case on which he or she applied for the review.

It seems well settled that the expression “any person considering himself aggrieved” means a person who has suffered a legal grievance. **Re Nakivubo Chemists (U) Ltd** (1971) HCB 12; **Yusufu V Nokrach** (1971) HCB 12.

A judgment may be reviewed for any sufficient reason. In **Attorney General V James Mark Kamoga SCCA 8/2004 (supra) the AG**

sought to have a consent order set aside on grounds of mistake. In dismissing the appeal, it was held inter alia that the principle that would vitiate consent as envisaged under the principle must be ignorance of a fact that is material to the case. In the instant case, the trial Judge Justice Kiryabwire (as he then was), reinstated the varied consent judgment. He did not pronounce himself on the issue of the contentious Motor Vehicle. The value of the Motor Vehicle now is a fact that is material to the case. This would amount to sufficient reason to review the judgment as the Motor Vehicle in question is the sole bone of contention.

My interpretation is that if he reinstated the varied consent judgment then he did so in its entirety. That is, all the terms incorporated therein were reinstated. The terms of the varied consent agreement stipulate that the Respondent be paid Shs. 200,000,000/= in paragraph 2 and in paragraph 4 that the Applicant takes the log books of the Motor Vehicle Registration No. UAH 888R, UAH 800U and UAH 800R as well as the 2 cheques; one for Shs. 90,000,000/= and the other for Shs. 250,000,000/=. This has all been done save for the question of Shs. 200,000,000/= and the Motor Vehicle UAH 800R.

The Applicant contends that he no longer wants the Motor Vehicle as it has depreciated and seeks to offset the Motor Vehicle against the Shs. 200,000,000/= the balance falling where it is due.

Section 92 of the Civil Procedure Act provides that where in so far as a decree is varied or reversed, the court of first instance shall, on application of the party entitled to any benefit by way of restitution of otherwise, cause such restitution to be made as will, so far as may be

place the parties in the position they would have occupied but for such a decree or such part of it as has been varied or reversed, and for this purpose, the court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on the variation of reversal.

The Judge is the trier of fact. The fact is that the Applicant was to pay Shs. 200,000,000/= to the Respondent who was in turn supposed to hand over various items in his possession. This Shs. 200,000,000/= was to be in full and final determination of the matter. In **Christine Bitarabeho V Edward Kakonge (supra)** it was held; inter alia, that the Respondent is entitled to general damages for depreciation of the suit vehicle during the period it was detained by the Appellant.

The Applicant would therefore been entitled to general damages for depreciation of Motor Vehicle UAH 800R from 8th July 2009 to date. He would also have been entitled to the hire cost of the Motor Vehicle for the same period. These he would only get if he asked for them in his pleadings. Since he did not ask for them, he can only get what is available.

As I said above in this ruling, the Applicant owes the Respondent Shs. 200,000,000/=. It is without dispute that a Motor Vehicle in use for 6 years has depreciated greatly.

The Applicant was supposed under the Consent Judgment to get the Motor Vehicle. Its purchase price at that time was known to the parties. If it was more than Ushs. 200,000,000/=, the same be

treated as a set off because that is what the Applicant intimately prayed for. If however, its then cost price was less than Ushs. 200,000,000/=, the Applicant should pay the difference thereof to the Respondent.

Turning to costs, its noted that both the parties failed in one way or another to fully adhere to the terms of the consent judgment which led to this application. In the premises, each shall bear his own costs of the application.

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David K. Wangutusi

JUDGE

Date: 12 – 11 – 2013