THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL COURT DIVISION)

HCT-00-CC-MA-514 -2013

(*Arising from CIVIL SUIT NO. 433 OF 2012)*

RONALD NDAWULA::APPLICANT

VERSUS

UGAFIN LIMITED::RESPONDENT

BEFORE HON. LADY JUSTICE HELLEN OBURA

RULING

This is an application brought under Order 46 rule 1(b) and 8 of the Civil Procedure Rules (CPR) and Section 98 of the Civil Procedure Act (CPA) seeking for Orders that:

1. The consent judgment dated 16th October 2012 entered into between the parties be reviewed and or set aside.

2. Execution of the said consent judgment be stayed.

3. The suit be heard and determined on its merit.

4. Costs of the application be provided for.

The application is supported by the grounds contained in the affidavit of Mr. Ronald Ndawula, the applicant. The gist of the grounds is that the respondent's accounts were frozen by Court on 8th November 2012 up to date which has made it difficult for the applicant to access the accounts and managers of the respondent to pay as per the agreed installment payment schedule. The deponent averred that it is not known how the consent can be implemented as the respondent is still in abeyance. Furthermore, that in the circumstances the

respondent could not invoke clause 3 of the consent judgment to commence execution proceedings as the applicant had not failed to pay the 1st nor 2nd installment but the consent agreement was frustrated by the freezing of the respondent's account.

The applicant further averred that it would be in the interest of substantive justice if this Court halts the execution until the respondent's accounts/assets are unfrozen and managers unblocked and/or consent judgment reviewed. It is also averred that the consent judgment included accumulated compound interest which is illegal.

In response to the application, an affidavit deposed by Mr. Henry Muhebwa Owanzoire, the respondent's Chief Executive Officer was filed wherein he stated that the respondent's offices are still in operation and the loan agreement and consent settlement between the applicant and the respondent did not state that the applicant must pay on the respondent's bank account. The respondent's case is that the freezing of its accounts did not stop the applicant from fulfilling his loan obligation and in any case, the freezing order is no longer valid as it was in force for a period of only three months with effect from 7th March 2013.

When this application came up for hearing on 2nd September 2013 Mr. Abaine together with Mr. Wycliff Birungyi appeared for the applicant while Mr. Ochieng Evans represented the respondent. Counsel for both parties filed written submission on the basis of the affidavits sworn by their respective clients all of which I have considered in this ruling.

The facts of this matter are that the applicant obtained a loan from the respondent and pledged his property comprised in Bulemezi Block 652 Plot 835 and Plot 836 land at Kavule, Luwero. A consent settlement was entered on the 15th day of October 2012 upon which the applicant admitted indebtednesses to the tune of Ug Shs 298,590,126/= and agreed to pay it in four installments. Having defaulted on making the required payments, the applicant claims that the consent judgment was frustrated by the freezing of the respondent's account and is seeking that it be reviewed or set aside.

Counsel for the applicant submitted that due to factors beyond the applicant's control, the payments according to the prior agreed schedule of payments were

not effected owing to the fact that by the time the 1st and 2nd installments were due the respondent's account had been frozen and the company managers barred from running the affairs of the company. It was argued for the applicant that the 1st installment of Ug. Shs. 160,000,000/= was to be effected on or before the 30th February 2013 but the respondent's accounts were frozen barely one month after the consent. Counsel for the applicant contended that on 26th February 2013 the applicant tried to seek guidance from the respondent as to where to pay when the payment was to be effected on 30th February 2013 but there was no reply.

He submitted that the consent judgment became inoperative and frustrated because the freezing order was confirmed by the High Court on 7th March 2013 to continue up to 7th June 2013 yet the 2nd installment was to be paid on 15th May 2013. According to the applicant, it was not envisaged that the respondent would get problems which led to the freezing of its accounts and thus this fits well with the grounds for setting aside or reviewing the consent judgment as per the case of ***Attorney General and Anor vs James Kamoga and Anor SCCA No. 8 of 2004.*** The applicant also referred this Court to the doctrine of frustration as discussed in ***Chitty on Contracts Vo.l 1, 24TH Edition at Page 656***.

The other argument made by counsel for the applicant is that the said impugned consent judgment contained compound interest which is illegal for being unconscionable and excess. It is the applicant's submission that the actual amount advanced to the applicant was Ug. Shs. 250,000,000 but due to the accumulated and illegal compound interest, it was wrongly put to Ug. Shs 298,590,125/=.

On the other hand, counsel for the respondent submitted that a consent judgment cannot be interfered with by the court unless the complaint would justify the setting aside of a contract but from the current application there is no misrepresentation or duress alleged that would merit grant of the application for review. The respondent's counsel argued that the state of mind of the parties is not in anyway in issue as they were at consensus ad idem and there was no misrepresentation or even duress used in the execution of the consent. For that position the respondent's counsel cited the case of ***Nsubuga vs Animo Misc. Application No. 357 of 2012*** wherein Murangira, J. in dismissing an application for review of a consent judgment cited with approval the case of ***Eleko Balume***

& 2 Others vs Goodman Agencies Ltd & 2 Others HCMA No. 12 of 2012 where court observed:

> *"The misapprehension or facts that may form the basis for setting aside a consent judgment must relate to the state of mind of the parties to the consent judgment by which state of mind informed by the facts before them they were misguided into executing the consent judgment."*

Counsel for the respondent also referred to the grounds for setting aside consent judgments as laid out in the case of ***Goodman Agencies Ltd vs Attorney General and Anor HCMA 34 f 2011; Brooke Bond Liebig (T) Ltd vs Mallya [1975] E.A 266 and Mohamed Allibhai vs W.E Bukenya Mukasa, Departed Asians Properrty Custodian Board S.C.C.A 56 of 1996.*** It was the contention of the respondent's counsel that the instant application raises no plausible ground for review of the consent judgment

He challenged the applicant's contention that the respondent's accounts were frozen by court on 8th November to date making the consent judgment inoperative as misleading since paragraph 4 of the Court Order, annexture "A" to the affidavit in support is to the effect that the Order was valid for a period of three months from 7th March 2013. He argued that even if the accounts were frozen, the respondent is represented by counsel and the law allows payment to be made to a client through counsel. Counsel contended that the applicant has not demonstrated that they attempted to forward payments through counsel on record or deposit the same money in court or sought direction of court as to where the money should be deposited. For those reasons, counsel argued that the applicant cannot claim to have failed to pay the respondent due to the freezing of its (respondent's) accounts.

Without prejudice to the above arguments, the respondent's counsel prayed that in the event that this Court stays execution of the consent judgment, the applicant be ordered to deposit security in court sufficient to cover the subject matter of the main suit as provided for under Order 26 rule 1of the CPR. To support that position, he cited the case of ***Namboro & Waburoko vs Kaala [1975] HCB 318***

which was cited with approval in the case of ***Stanbic Bank (U) Ltd vs Millennium Stones Supplies Ltd HCMA 214 of 2012.***

I have critically read and analyzed the application, its supporting affidavit and attachments as well as the affidavit in reply. I have also considered the submissions of both counsels in the matter. In a nutshell, the applicant contends that the consent judgment should be reviewed or set aside for having been rendered inoperative by the freezing of the respondent's accounts. He also contends that the consent judgment is illegal because the decretal amount included accumulated compound interest. Meanwhile it is the respondent's case that the application raises no plausible grounds to warrant review or setting aside of the consent judgment.

Order 46 rule 1(b) of the CPR under which this application was brought provides;

> *(1) Any person considering himself or herself aggrieved—*
>
> *(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.*

The law is now settled on the conditions for reviewing and or setting aside a consent judgment. In the case of ***Attorney General & Another vs James Mark Kamoga & Another (Supra)*** the Supreme Court of Uganda laid down the principles upon which the court may interfere with a consent judgment as stated by the Court of Appeal for East Africa in ***Hirani vs Kassam (1952) EA 131*** which approved and adopted the following passage from ***Seaton on Judgments and Orders,*** 7th Ed., Vol. 1 p. 124:

> *"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."*

Subsequently, that same Court reiterated the principle in ***Brooke Bond Liebig (T) Ltd vs Mallya (supra)*** and the Supreme Court of Uganda followed it in ***Mohamed Allibhai vs W.E. Bukenya and Another Civil Appeal No.56 of 1996*** (unreported). Therefore, it is a well settled principle that a consent decree has to be upheld unless it is vitiated by a reason that would enable a court to set aside an agreement, such as fraud, mistake, misapprehension or contravention of court policy.

In light of the above authorities, in the instant case I have to consider whether there is any fraud, mistake, misapprehension or contravention of court policy to warrant the setting aside of the consent judgment in the instant case. Much as the applicant's counsel generally relied on the grounds for setting aside a consent judgment as stated in the case of ***Attorney General & Another vs James Mark Kamoga & Another (Supra)***, the applicant did not specifically state any of those grounds in his affidavit in support just like his counsel did not also single out any of them in his submission. The only spirited argument made is that because the respondent's accounts were frozen, the consent judgment was rendered inoperative and so the applicant could not fulfill his obligations under it.

Of course this court is not impressed by that argument. This is because there was no clause in the consent judgment that specifically required the applicant to make payments to the respondent's bank accounts. It is therefore inconceivable that the

freezing order could have prevented the applicant from effecting payments in accordance with the terms of the consent judgment. The applicant had many options to explore, including; (1) issuing a bank draft or a cheque to the respondent since the applicant did not have to concern himself with where it would be banked, (2) making payment to the respondent's counsel, (3) seeking direction from court as to whether the money could be deposited in court or paid using other modes. The applicant did not explore any of those options but merely sat back and convinced himself that the consent judgment had become inoperative and not executable.

For the above reason, this court is not at all convinced by the grounds upon which this application is premised and in any event they do not fall under the above legally known grounds for setting aside a consent judgment. I also find the allegation of compound interest merely a fishing episode intended to bring in the issue of illegality with the hope of attracting court's attention when indeed there is nothing to substantiate it as seen from the affidavit in support and counsel's submission.

On the whole, I do not find any satisfactory ground that would merit reviewing or setting aside the consent judgment which the parties freely executed and the court sealed on 16th October 2012.

Finally, I wish to observe that this is one of the classical cases of abuse of the court process. Counsel for the applicant ought to have properly advised his client on the appropriate course of action to take before the agreed time for payment expired. He could have still advised against filing this application which in my view is frivolous and only served to clog the court system and wasted courts limited and precious time let alone escalating the costs of litigation for the client.

This conduct must be strongly discouraged in the spirit of reducing case load and litigation costs.

In the result, this application fails and it is accordingly dismissed with costs to be paid by counsel for the applicant.

I so order.

Dated this 23rd day of January 2014.

Hellen Obura

JUDGE

Ruling read in chambers at 3.30 pm in the presence of Mr. Abaine and Ms. Samalie Kidde who was holding brief for Mr. Wycliffe Birungyi for the applicant and Ms. Ainembabazi who was holding brief for Mr. Evans Ochieng for the respondent.

Leave to appeal applied for and denied.

JUDGE

23/01/14