THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

[COMMERCIAL DIVISION]

MISC. APPL No. 783 OF 2016

(Arising from Misc. Cause No. 13 of 2016)

IN CARGO FREIGHTERS AGENTS LTD :::::::::::::::::::::::::::::::: APPLICANT

VERSUS

1. **GUANGZHOU TIGER HEAD GROUP CO. LTD**
2. **WHITE SHOWMANS LIMITED ::::::::::: RESPONDENTS**
3. **THE ATTORNEY GENERAL**

BEFORE: HON. MR. JUSTICE B. KAINAMURA

RULING

This is an application for review of the consent order in Misc. Cause No. 13 of 2016 which was between ***Guangzhou Tiger Head Group Co. Ltd and Whit Showman's Limited Vs the Attorney General***. Under the consent order, it was ordered that;

1. The respondent and the relevant government agencies including Uganda Revenue authority and Uganda National Bureau of Standards shall, prior to the importation verify that imports of the Tiger Head Batteries by all licensed importers are manufactured by the 1st respondent.
2. The respondent and the relevant government agencies including Uganda Revenue Authority and Uganda National Bureau of standards shall prior to customs clearance require documentary proof issued by the manufacturer Guangzhou Tiger Battery Group Co. Ltd confirming that each Tiger Head Battery consignment being imported is Manufactured by Guangzhou Tiger Head Battery Group Company.
3. All imports by Tiger Head Batteries shall bear the Uganda National Bureau of standards quality mark issued to it by the manufacturer Guangzhou Tiger Head Group Company
4. The applicant shall waive their claim for damages
5. Each party shall bear its own costs.

In its application, the applicant contends that by the consent above, the parties sought to wrongfully vary, frustrate and / or defeat the judgment and orders of the High Court, Court of Appeal and Supreme Court in an earlier case instituted by the 1st respondent against Uganda Revenue Authority and the applicant. In that case, the 1st respondent herein (plaintiff in the HCCS No. 333 of 2012) had sued the applicant (1st defendant in that case) for infringement of its Trade Mark by wrongfully importing into the country Tiger Head Batteries not being of the recognized manufacturers (plaintiff). They had sought for a permanent injunction restraining the defendant from importing, manufacturing, selling and offering for sale Tiger Head Batteries. The High Court made a finding that the Tiger Head Batteries were imported by the applicant (1st defendant) pursuant to a license granted to it by the Minister of Tourism, Trade and Industry under The External Trade Act (Import License) (Tiger Head Brand Batteries) Order 2011 Statutory Instrument No. 23 of 2011 which provided that-:

> *"In Cargo Freighters and Agents Ltd is granted a license to Import Tiger Head Brand Batteries manufactured by Guangzhou Tiger Head Group Company Ltd China"*.

In light of the above the High Court dismissed the suit. On appeal to the Court of Appeal (Civil Appeal No. 126 of 2013), the Court of Appeal made a finding that the appellant (1st respondent herein) had failed to adduce evidence to show that the people in Uganda market had confused the batteries imported and therefore had been deceived that they were manufactured by the appellant (1st respondent) whereas not. Further that the act of importing *perse* could not be taken to be an infringement. The Court of Appeal accordingly dismissed the appeal. The appellant (1st respondent herein) then appealed the decision of the Court of Appeal to the Supreme Court. The Supreme Court agreed with the two courts below that the appellant (1st respondent herein) had failed to prove that the batteries imported by the respondent (applicant herein) had not been manufactured by the appellant (1st respondent herein) thereby failing to prove its case of infringement and also dismissed the appeal. What is pertinent to note is that the case was on infringement of trademark and passing off and nothing else.

In his submission, Learned Counsel for the applicant contend that the consent order was entered into by fraud, collusion, misapprehension of facts or mistake. Counsel relied on a passage in ***Hirani Vs Kassan 1962 EA at 131*** where Court of Appeal for East Africa held that-:

"A consent judgment cannot be varied or discharged unless obtained by fraud, collusion, or any agreement contrary to the policy of court or if the consent is given without sufficient material facts or misapprehension or ignorance of material facts or several facts or in general for any reason which would enable the court set aside the agreement".

5 For the proposition that a third party who is affected by an order of court can under inherent powers of court apply for review, Counsel cited the case of ***Mohammad Allibhai Vs W.E Bukenya Musa and another. SCCA No. 56 of 1996.*** In the ***Alliblai*** case, the Supreme Court while dealing with the question whether or not the appellant, not having been a party in the original proceedings which resulted in the consent judgment sought to be reviewed, has a right to
10 present an application for review under **Section 83** and **101 CPA** and **0. 42 r.1 of CPR** (now O.46, r1) held that any party who is aggrieved by the consent Judgment may bring the application for review. It further stated that an aggrieved party includes any party who has been deprived of his property or a person who has suffered legal grievance (see ***Re. Nakivubo Chemist (U) Ltd and in the Matter of the Companies Act (1979) HCB 12)***

15 In my view, it is now settled that a third party who considers himself or herself aggrieved by the decree or order from which an appeal is allowed but from which no appeal has been preferred, may apply for a review of the judgment. However for a third party to qualify to be called an aggrieved party he or she must either have an interest in the subject matter or demonstrate that he or she has suffered legal grievance.

20 Applying this principle to the present application, it is acknowledged by all parties that the applicant has a license to import Tiger Head Batteries from the 1st respondent issued to it by the Minister. Further the applicant's affidavit in support of the application deponed by Fred Byamukama stated to be the proprietor of the applicant, in paragraph 10 and 11 thereof be stated that :-

25 *10. That I have been informed by my lawyers M/S Mushabe, Munungu & Co. Advocates which information is verily believed to be truthful that to require all imports of Tiger Head Batteries to bear the Uganda National Bureau of Standards quality mark issued to the manufacturers Guangzhou Tiger Head Group Company is oppressive and discriminatory because the 3rd*

respondent has neither imposed the same conditions on all imports into Uganda nor justified why Tiger Head Batteries deserves such a stringent condition.

11. *That i believe that my trading in Tiger Head Batteries will not be possible unless the consent is reviewed.*

Based on the above, I am persuaded that the applicant has ably demonstrated that it is an aggrieved party by the decree and order in Misc. Cause No. 13 of 2016 and may therefore bring the application for review of the consent decree or order.

I will now determine whether the applicant has demonstrated sufficient cause for court to interfere with a consent judgment.

In ***Mohamed Allibhai Vs W.E Bukenya & Another Civil Appeal No. 56 OF 1996***, the Supreme Court reiterated the now settled principle that a consent judgment may be set aside for fraud, collusion or for any reason which would enable the court to set aside an agreement. This principle was first outlined in ***Hirari Vs Kassan (1959) 19 EACA 131***, where the Court of Appeal for East Africa quoted the following passage with approval from **Seaton on Judgments and orders 7th Edition Vol. 1** at page 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 on those claiming under them……..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 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 court to set aside the agreement.*

Based on the above, it is my view that the above conditions for reviewing and or setting aside a consent judgment have to be met before this application is allowed to succeed.

It was Counsel for the applicant's submission that the consent decree or order was obtained through fraud and collusion. To back the proposition, Counsel submitted that the 1st and 2nd respondent, well aware that they had lost to the applicant, HCCS No. 333 of 2012 in the High Court and Civil Appeals No. 126 of the 2013 and 15 of 2014 in the Court of Appeal and

Supreme Court respectively filed Misc. Cause No. 13 of 2016 to defeat the said judgments. According to Learned Counsel for the applicant the decisions were to the effect that the Trade Mark of the plaintiff (the 1st respondent in the matter) had not been infringed by the 1st defendant (the applicant in this matter) and that the plaintiff (1st respondent in this matter) did not have exclusive rights to import the batteries.

In answer to this allegation, Counsel for the 1st and 2nd respondents argued that the applicant cannot rely on this ground since it had not pleaded fraud in the Notice of Motion or the affidavit in support. Further Counsel for the 3rd respondent submitted that fraud is a serious allegation which must be pleaded specifically and proved and that the standard of proof is higher than the usual balance of probabilities required in civil matters.

I am inclined to agree with both Counsel for the respondents that fraud must not only be specifically pleaded but must also be proved to the satisfaction of court. It is trite that a decree obtained by fraud or collusion is a *nullity* and cannot be allowed to stand.

Fraud has been defined to mean;-

> *"A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment"*

The applicant does not state in its pleadings who was the subject of fraud in the case now before me for review. Further in the affidavit in reply of the 3rd respondent, Ambassador Julius Onen the Permanent Secretary in the Ministry of Trade, Industry and co-operatives clearly states in paragraph 7 thereof that;-

> *7. It is not true that the 3rd respondent connived with the 1st or 2nd respondent to frustrate or defeat the applicants business interest or to vary or defeat any court judgment by entering into the consent order which reflected the Ministry's directive and aims in paragraphs 4, 5 and 6 above.*

In the result based on the above I am not persuaded that the applicant has made out a case of fraud or collusion to merit review of the consent decree or order on this score.

Learned Counsel for the applicant further submitted that the consent decree/order was contrary to the policy of court. To support this, Counsel submitted that the respondents fully aware of judgments in HCCS No. 333 of 2012, Civil Appeal No. 126 of 2013 and Civil Appeal No. 15 of 2014 of the High Court, Court of Appeal and Supreme Court respectively, sought to contravene and overturn the court's decision by entering into the consent judgment. According to Counsel, the consent judgment has the legal effect of varying the Supreme Court decision contrary to the policy of the court.

In answer, Counsel for the 1st and 2nd respondents submitted that the contravention of court policy would point to illegality which is not the case in this matter. On her part Counsel for the 3rd respondent submitted that the applicant had not stated or shown exactly how any specific provision of the consent judgment overturned the Supreme Court judgment or any other judgment.

Counsel further submitted that the actions of the Minister under the External Trade Act Cap 88 of restricting the importation of Tiger Head Batteries by licensed importers (the applicant being one of them) to Tiger Head Batteries only manufactured by the 1st respondent was to ensure that the Tiger Head Batteries imported are genuine batteries. And further that the impugned consent judgment in Msc. Cause No. 13 of 2016 was meant to ensure that all companies licensed to import batteries actually import genuine batteries from the 1st respondent as stated in the license. It was Counsel's submission that accordingly the consent judgment could not be said to vary the cited court judgments as claimed by the applicant and as such the consent judgment is not contrary to any public policy.

The term "Public Policy" has been defined to mean principals and standards regarded by the court as being of fundamental concern to the state and the whole of society. (see **Black Laws Dictionary 9th Edition pg 1351).**

The applicant contends that it is against public policy for a consent entered before a registrar to overturn the decisions of the High Court, Court of Appeal and the Supreme Court. That the said consent order was meant to stealthily and wrongfully vary, frustrate and or defeat the judgments above and amounts to an abuse of court process and is against public policy. With due respect to Counsel for the applicant, it appears he is trying to fit "*a square peg in a round hole.*" The

"*principles*" and "*standards*" envisaged above as being of fundamental concern to the state and society have no bearing whatsoever to abuse court process. As is now settled, any result obtained through an abuse of court process, is unlawful. ***In Attorney General Vs Jemica Mark Kamoga and Anor. SCCA NO 8 OF 2004,*** Mulenga JSC (RIP) held that;-

5 *"Abuse of court process involves the use of the process for an improper purpose or a purpose for which the process was not established"* and further that:-

"A malicious abuse of legal process occurs when a party employs it for some unlawful object not the purpose which it is intended by law to effect, in other words a perversion of it".

10 Clearly, whereas "abuse of court process" is a proscribed, I do not see how the terms of the consent decree or order are unlawful or improper or meant to unlawfully and improperly overturn the judgments of the courts mentioned above. As submitted by Counsel for the 3rd respondent, and I agree with her, it is not true that the provisions of the consent order varied the said court judgments. I am therefore of the view, and hold so, that the consent decree/ order was
15 not contrary to the policy of the court.

Counsel for the applicant further submitted that the consent order arose out of insufficient material facts or misapprehension or ignorance of material facts. Counsel relied on ***Eleko Balume and 2 others Vs Goodman Agencies Ltd and 2 others HCMA NO 12 of 2012*** where court stated that;-

20 *"The misapprehension of 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 submitted that the 3rd respondent and court must have been laboring under the common
25 mistake when they entered into the consent judgment. Counsel further stated that had the Registrar of Court been aware that the same subject matter and issues had already been addressed in the earlier cases, then the Registrar would not have allowed Misc. Cause No. 13 of 2016 to be compromised. With due respect to Counsel, court or the Registrar for that matter were

not partly to the case and the resulting consent judgment. As such I am of the view that the principle set out in the ***Balume*** Case (supra) is not applicable to this application.

I am therefore in agreement with Counsel for the 3rd respondent that in order for the mistake/ misapprehension of facts to form the basis for setting aside the consent judgment, it must relate to the state of mind of the parties. Accordingly, this ground is not available to the applicant as a basis to set aside the consent judgment.

In the result the applicant has not established any ground warranting court to vary or set aside the consent order in Misc. Cause No. 13 of 2016 and accordingly this application is dismissed with costs.

B. Kainamura
Judge
07.12.2016