

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

MISCELLANEOUS APPLICATION NO 504 OF 2015

ARISING OUT OF CIVIL SUIT NO 497 OF 2012

- 1. ULTRA CELLULAR SERVICES (U) LTD}**
- 2. KIZITO PATRICK}**
- 3. MARLINE TIBAHWA}APPLICANTS**

VERSUS

STANBIC BANK (U) LTD}.....RESPONDENT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

RULING

The Applicants filed this application under **Section 98 of the Civil Procedure Act, Cap. 71** and **Order 52 rules 1, 2 and 3 of the Civil Procedure Rules, S.1 71-1** for an order for the consent judgment entered between the Respondent and the 2nd Applicant in HCCS No. 496 of 2012 to be set aside on the ground that it is based on illegality, duress and mistake. The Applicant also prays for costs of the application to be provided for.

The grounds of the application in the Notice of Motion are that on 14 August 2015, the second Applicant executed a consent judgment with the Respondent where he committed the first Applicant to pay to the Respondent a sum of Uganda shillings 358,674,102/=. The same amount was to carry interest at 15% per annum. Secondly the second Applicant did not have authority to consent on behalf of the first Applicant Company since there was never at any one time a company resolution authorising him to do so. Thirdly the amount consented to by the second Applicant in the judgment was not the amount due and owing to the Respondent and the first Applicant had substantially paid up the loan to almost 80% thereof. Fourthly the Applicants

stand to suffer commercial prejudice in case the application is not granted as the Respondent is in advanced stages of executing the consent judgment sought to be set aside. Finally it is averred that it is in the interest of justice that the application is granted. The application is supported by the affidavit of Marline Tibahwa, a Director of the 1st Applicant and that of Mr Kizito Patrick Mubiru the second Applicant. The evidence in the affidavit of Marline Tibahwa is that in the year 2010, the 1st Applicant obtained an overdraft from the Respondent Company which was also secured by the personal guarantees of the 2nd and 3rd Applicant. In 2012, the Respondent sued the 1st Applicant for recovery of Uganda shillings 358,674,102/=. The 2nd Applicant acting without a company resolution authorizing him to act on behalf of the 1st Applicant executed a consent Judgment with the Respondent wherein he committed the 1st Applicant to pay the sum claimed to the Respondent. The 3rd Applicant deposed that the 2nd Applicant informed her that he had executed the written consent under a lot of duress and intimidation from the Respondent's agents and that the amount consented to is not the amount due to the Respondent as the 1st Applicant had substantially paid the loan up to almost 80% of the outstanding amount. She further deposes that the Applicants will suffer commercial prejudice if the application is not granted as the Respondent is in advanced stages of executing the consent judgment sought to be set aside and that it is in the interest of justice that the consent judgment and decree issued be set aside.

The evidence of Mr Kizito Patrick Mubiru in the supplementary affidavit is that he is the managing director of the first Applicant. He admits that he signed the consent judgment in August 2013 without informing his co-director the third Applicant and without a company resolution. He signed the agreement because there was a lot of pressure and intimidation and he was forced to sign the said consent judgment. Due to the pressure he did not verify the figure that was claimed in the Plaint to confirm whether it was the exact amount due and owing before he signed the consent judgment.

The Respondent, Stanbic Bank Uganda Limited, filed an affidavit in reply sworn by Moses Olico, the Manager Business Solutions and Recoveries of the Respondent. The facts disclosed therein are that the Respondent filed a suit against the Applicants seeking recovery of a sum of Uganda shillings 358,674,102/= which was due and owing to the Respondent by 12 October 2012. The Defendants/Applicants filed a defence that did not specifically deny the amount claimed according to a copy of the pleadings of both parties attached to the affidavit. He agreed

that the Respondent executed a consent judgment agreement with the first Applicant represented by the 2nd Applicant. However, he denied that there was any form of duress or intimidation and instead deposed that the parties executed the consent judgment during mediation and only had negotiations on the commencement date for repayment according to the letter of Katutsi and Lamono Advocates attached to the affidavit in reply. After further negotiations about the commencement date for payment they finally reached an agreement by letter dated 7th of August 2013. The Respondent's advocates forwarded copies of the consent judgment/decreed with an attached repayment schedule to the Defendant's advocates for approval. The affidavit in support of the application is false because the Defendants did not dispute the amount claimed in the suit and they freely consented to the judgment/decreed. The judgment debtors thereafter defaulted on their undertaking to pay pursuant to which the Respondent demanded for payment of the whole judgment debt. The 2nd Applicant expressed his frustration in paying the monthly instalments in e-mail correspondence attached to the affidavit in reply and the parties also consented to an interim order of stay of execution.

M/s. OSH Advocates, Solicitors and Legal Consultants, Counsel for the Applicants filed written submissions in support of the application, while the M/s. J.B Byamugisha Advocates, Counsel for the Respondent filed written submissions in reply and Counsel for the Applicant filed submissions in rejoinder.

The Applicant's submissions address two issues namely:

1. Whether or not the 2nd Applicant had authority, actual or apparent to consent on behalf of the 1st Applicant without the knowledge and/or consent of the board of directors.
2. Whether or not the consent judgment should be set aside.

In resolution of Issue 1, Counsel for the Applicant made use of sections **50 and 55 of the Company Act, 2012**, which provides in section 50 thereof that:

“A company may make a contract by execution under its common seal or on behalf of the company by a person acting under its authority express or implied.”

Secondly under section 55 that:

“A document executed by a director and secretary of a Company or by two directors of a company and expressed to be executed by the company has the same effect as if executed under the common seal of the company.” Counsel relied on the affidavit in support to submit that the facts disclose that the 2nd Applicant had no authority to execute the written consent judgment. In the case of **Smith vs. Butler and Another (2011) EWHC 2301 (Ch)**, it was held that a managing director could not use his position to grant himself powers expressly exercisable by the board. As noted above the Respondents Counsel submitted that for a document to bind the company it had to be executed by at least two directors of the company under section 55 thereof. The consent judgment is only executed by one director namely the second Applicant.

Even if it is argued that the second Applicant had implied or actual authority to sign the consent judgment, he could not purport to usurp the powers of the board. In **Hopkins vs. Dallas Group Ltd (2004) EWHC 1379(Ch)** cited in **LNOC LTD vs. Watford Association Football Club(2013) EWHC 3615** Lightman J held that the grant of actual authority should be implied as being subject to a condition that it is to be exercised honestly and on behalf of the principal. Where the act is not in the best interest of the principal it is not within the scope of the express or implied grant of actual authority.

In the premises the Applicant’s Counsel submitted that the 2nd Applicant as a director was unfit to have consented on behalf of the company without consent of the board of directors and prayed that the consent judgment be declared a nullity for lack of authority from the company and be set aside.

In relation to Issue 2, Counsel for the Applicant relies on Order 9 rule **12 of the Civil Procedure Rules SI 71-1**, for the powers of court to set aside a Consent Judgment where it is just so to do. He further relied on **Hirani vs. Kassam [1952] EA 131** where the East African Court of Appeal held that an order made in the presence and with the consent of Counsel is binding on all parties to the proceedings or action unless obtained by fraud or collusion or by an agreement contrary to the policy of the court or where consent was given without sufficient material facts or for any reason which would enable the court to set aside an agreement between the parties. Counsel submitted that the Applicant’s case is that the consent was entered into without the requisite express or implied authority. In **Attorney General vs. James Mark Kamoga, SCCA No. 8 of**

2004 (unreported) it was held by the Supreme Court that a consent judgment can be set aside if consent was given without sufficient material facts or was induced through an illegality. In **B.M Technical Services vs. Francis X Kibuuka (1997) HCB 75 & 76**, it was held that for the court to set aside a consent judgment for want of authority, there had to be evidence on record proving that the consent was executed without authority.

From the above premises the Applicant's Counsel submitted that the 3rd Applicant in her affidavit in support and paragraphs 5 and 6 thereof deposed that the second Applicant did not have authority and this evidence has not been rebutted. In the premises the consent judgment ought to be set aside.

In reply the Respondent's Counsel objected to the application on the ground that the Application had been served out of time and ought to be dismissed with costs to the Respondent on that ground. The Notice of Motion was issued on the 23rd of July 2015 and should have been served by the 14th of August 2015 but was instead served on the 20th of August 2015 out of time.

Without prejudice the Respondent's Counsel submitted with reference to the grounds for setting aside a consent judgment such as the grounds of illegality, duress and mistake or any ground sufficient to enable court set aside a contract of the parties. These principles are laid out in **Soon Production Ltd vs. Soon Yeon Hong and Another HCMA No 190 of 2008, SCCA No. 1 of 1998; United Assurance Co. Ltd s Attorney General and Attorney General vs. James Mark Kamoga, SCCA No. 8 of 2004**

Each case is considered on the basis of its own facts. The question was whether there was authority and this must be considered from the facts. Under section 50 (2) of the Companies Act 2012 the question is whether the 2nd Applicant had authority express or implied to execute the consent judgment/decreed. Counsel relied on the Judicature (Commercial Court Division) (Mediation Rules 2007) referred to as mediation rules which provides that each party in the mediation agreement shall name the person or persons who would be the lead negotiators with full authority to settle the dispute and professional advisors. Rule 16 (2) provides that the person with full authority will sign the settlement during mediation. The second Applicant was the lead negotiator with full authority while Simon Kakama was the Counsel.

Under the Companies Act and section 50 (3) thereof a contract made according to the section shall be effectual in law and shall bind the company and its successors and all other parties to it. The judgment executed by the 2nd Applicant binds the company. Counsel relied on **Equip Agencies Ltd vs. Credit Bank Ltd [2004] 2 EA 61** at page 67 for the proposition that a solicitor or Counsel would ordinarily have ostensible authority to compromise a suit in so far as the opponent is concerned. The Applicant's have not challenged the authority of the lawyers to bind them.

In relation to duress, Counsel for the Applicant cited the case of **Stephen Seruwagi Kavuma vs. Barclays Bank (U) Ltd (Mic. Appl. No. 634 of 2010**, where the court relied on **Barton vs. Armstrong (1976) A.C. 104, at p.121** on how to determine whether there was coercion. Lord Scarman held that: "...in determining whether there was coercion of the will such that there was no consent, it is material whether the person alleged to have been coerced did or did not protest, that at the time he did or did not have an alternative course open to him such as an adequate legal remedy, whether he was independently advised, and finally, whether after entering the contract he took steps to avoid it."

He submitted that the consent was not executed under duress or intimidation since it was forwarded to the Applicants' advocate for approval and it was filed by them. He averred that they had the opportunity from 14th August 2013 to 30th June, 2015 when they filed this application to challenge the consent judgment which their own advocates filed, however they chose to wait for a year and 10 months to elapse before filing.

In submitting about mistake, Counsel for the Respondent contended that the Applicant's account statement showed the amount due which was neither disputed in the defence nor was it stated that the 1st Applicant had substantially paid the loan up to almost 80%. Even the copies of the receipts of payments which they undertook to avail at the hearing of this application have not been produced and that they simply do not exist and that the Application should be dismissed.

In rejoinder, Counsel for the Applicant on the preliminary objection that they had served the application out of time submitted that the Respondent had chosen to abandon the preliminary point of law as their allegations are lies because the application was filed on 30th June, 2015 and

the date of service onto the Respondent is 20th August, 2015 which is still within the stipulated 21 days and thus there was no need for an application to extend time.

On the grounds for setting aside the consent judgment the Applicant's Counsel submitted that in the case of **Stephen Seruwagi Kavuma vs. Barclays Bank (U) Ltd (Mic. Appl. No. 634 of 2010, wherein** the court cited **AG vs. James Mark Kamoga SCCA No. 8 of 2014** is good law for the proposition that a consent decree is a contract between the parties. The suit is against the Applicants jointly and severally. Judgment was entered against the parties jointly and severally while the consent was only executed by one of the Defendants. There was no consensus ad idem as none of the other Defendants agreed to be bound save for the second Defendant

The essential elements of a valid contract were considered by the Supreme Court in **SCCA No 13 of 1996 Tifu Lukwago vs. Samwiri Mudde Kizza** wherein the court cited therein Halsbury's Laws of England 4th Edition for the essential elements of a contract which include consensus ad idem between the two or more parties.

On Illegality Counsel for the Respondent cited **H.C.M.A. No. 190 of 2008, Soon Production Ltd Vs Soon Yeon Hong & Another**, on the issue of lack of a resolution. The principles in the case apply to actions commenced for and on behalf of a company but are inapplicable in this case. It was held in that case that a resolution is not necessary as proof of authority to bring an action in the name of a company. The matter in this application is whether a director can bind both the company and another director without their knowledge or consent.

Ruling

I have carefully considered the evidence for and against the application, the submissions of Counsel as well as the authorities cited. The Applicants seek to set aside the consent judgment executed or entered into between the Respondent/Plaintiff and the second Applicant/Defendant in High Court Civil Suit Number 496 of 2012. The grounds of the application are that the second Applicant who executed the consent judgment did not have the authority or consent of the first Applicant Company to do so because there was never any resolution of the company authorising

him to act. Secondly the amount consented to in the judgment was not the amount due and owing to the Respondent because the first Applicant had substantially paid up the loan up to about 80% thereof. Lastly that the Applicant stands to suffer and shall prejudice in case the application is not granted because the Respondent is in advanced stages of executing the consent judgment sought to be set aside.

The background of this application is that the Plaintiff bank sued the three Applicants for the sum of 351,115,118/= Ugandan shillings being a loan advanced to the first Applicant and guaranteed by the second and third Applicants. The suit was filed on 23 October 2012. On 14 August 2013 by consent of the Plaintiff and the first Applicant represented by the second Applicant a consent judgment was entered against the Defendants jointly and severally for the sum of Uganda shillings 358,674,102/=. It was also agreed that the amount shall carry interest at the rate of 15% per annum from 31 August 2013 until payment in full. The amount was payable in instalments according to an agreed schedule. The agreement was executed by the head of credit personnel and business banking of the Plaintiff, by Mr Patrick Kizito Mubiru on behalf of the first Applicant/Defendant and on his own behalf. It was also executed by Byamugisha and company advocates Counsel for the Plaintiff as well as Katutsi & Lamunu advocates, Counsel for the Defendants.

The Defendants had filed a joint Written Statement of Defence through Messieurs Katutsi & Lamunu Advocates. In the Written Statement of Defence there was no specific denial of the claim in the Plaint. Paragraphs 3 and 4 of the Plaint were admitted. Paragraph 3 of the Plaint discloses that on or about September 2010 and the special instance and request of the first Defendant, the Plaintiff extended to the first Defendant an overdraft facility of Uganda shillings 500,000,000/=. Paragraph 4 of the Plaint discloses that the facility was guaranteed by the second and third Defendants according to copies of the guarantees annexed to the Plaint.

In paragraph 5 of the Plaint it was averred that the review date for the facility was provided for by clause 10 of the agreement which was to be 7 September 2011 but it was not extended whereupon it became due and payable and the first Defendant failed or neglected to pay off despite numerous reminders. With regard to paragraph 6 it is disclosed in the Plaint that by 18 September 2012 a sum of Uganda shillings 351,115,118/= was due and owing from the first

Defendant to the Plaintiff and a demand for payment was made on the three Defendants who neglected to settle the amount. By October 2012 the amount had accumulated to Uganda shillings 358,674,102.

In the Written Statement of Defence paragraph 5, 6 and 7 of the Plaint are denied and in the reply thereto it is averred that the first Defendant requested for a review of its facility before the date of review as provided for in clause 10 of the facility letter and the Plaintiff did not respond to the request but allowed the first Defendant to continue servicing the facility after expiry of the term of the facility. By 16 March 2012 the first Defendant engaged the Plaintiff in discussions about turning the overdraft facility into a loan payable over a period of time. On 12 October 2012 the second Defendant in his capacity as director of the first Defendant communicated to the Plaintiff the circumstances that caused the delay in satisfying the amounts due to the Plaintiff and had prayed for extension of time within which to pay up the amounts due and was surprised to find that a suit had been filed by the Plaintiff against them.

The pleadings clearly disclose that there was some indirect admission that there was a debt that was due and owing to the Plaintiffs.

The gist of the affidavit in support of the application is that the second Applicant entered into a consent with the Respondent for the first Applicant to pay to the Respondent Uganda shillings 358,674,102/=. However the second Applicant did not have authority to consent on behalf of the first Applicant company and there was no company resolution authorising him to do so. Secondly the Applicant's case is that the second Applicant was coerced into signing the agreement. The second Applicant in a supplementary affidavit attached to the affidavit in support of the application as annexure "D" deposed that it was due to a lot of pressure and intimidation that he was forced to sign the consent agreement. When he signed he never verified the amount that was claimed in the Plaint to confirm whether it was the amount that was due and owing. Secondly he contends that he signed the consent judgment in August 2013 without informing his co-director the third Applicant and without a company resolution.

In the submissions in support of the application the Respondents Counsel objected to the application on the ground that it was served out of time. The Applicants Counsel on the other

hand submitted that it was served on time. This application was filed on 30 June 2015. He submitted that service had to be effected within 21 days from the date of issue except where time is extended. The Notice of Motion was issued on 23 July 2015 and should have been served by 14 August 2015. It was however served on 20 August 2015 without an application for extension of time to serve. He relied on the case of **Rwabuganda vs. Namudu [2014] EA 311** that where summons are not served within 21 days and there is no application for extension of time, the consequence of non compliance with order 5 rule (2) is clear. The suit shall be dismissed without notice. He prayed that the suit is dismissed. In the submissions in rejoinder the Applicants Counsel submitted that the Respondent's Counsel is on record having abandoned the preliminary point of law. The contention that the application was filed on 23 July 2015 and served on 20 August 2015 was a blatant lie. The Notice of Motion was filed on 30 June 2015 and the date of service on the Respondents firm of lawyers is 20 August 2015 within the stipulated time of 21 days.

This is an amazing submission because from 30 June 2015 to 20 August 2015 is more than 30 days. It is further amazing for the Applicants Counsel to submit that there was no need for an application to extend time within which to serve the summons as the Applicants were still within the stipulated time.

While it is true that Order 5 rule 1 of the Civil Procedure Rules prescribes a period of 21 days within which to serve summons, the Applicants Counsel has not deemed it fit to apply for extension of time. As a matter of fact the application was filed on 30 June 2015 but was only issued by the registrar on 23 July 2015. There is agreement that it was served on the Respondents advocates on 20 August 2015. This is still more than 21 days from 23 July 2015 when the application was issued. What does the court do with an Applicant who sits on his or her rights? To make matters even more precarious Order 12 rule 3 (2) of the Civil Procedure Rules provides that service of an interlocutory application to the opposite party shall be made within 15 days from the filing of the application. Order 12 rule 3 generally deals with interlocutory applications.

I have considered the case of **Rwabuganda vs. Namudu [2014] EA 311**. The Court of Appeal of Uganda held that service of summons under Order 5 rule 2 of the Civil Procedure Rules is to be effected within 21 days from the date of issue except that time may be extended on

application to court made within 15 days after the expiry of the 21 days. He noted that after the expiry of time there was no application by the Respondent to extend time within which to serve the summons at all. No application was filed for extension of time within which to serve the summons. They held that the consequence of non-compliance with the provisions of Order 5 rule 2 of the Civil Procedure Rules is clear. Where service has not been effected within 21 days from the date of issue and no application for extension of time has been made within 15 days after expiry of the time limited, the suit shall be dismissed without notice. Subsequently the land tribunal had no jurisdiction to issue fresh summons to the party who has not complied with the provisions of Order 5 rule 2 of the Civil Procedure Rules. The case of *Rwabuganda vs. Namudu* (supra) however proceeded ex parte and the facts are distinguishable from the facts of this application where the matter proceeded inter partes.

While it may be argued that Order 5 deals with Plaints or originating summonses, I wish to refer to the decision of the Supreme Court in the case of **Kanyabwera v Tumwebaze [2005] 2 EA 86** where Oder JSC held that Order 5 Rule 17 of the Civil Procedure Rules which applies to summons equally applies to hearing notices when he held:

“Order 5, rule 17 of the Civil Procedure Rules provides that where summons have been served on the Defendant or his agent or other person on his behalf, the serving officer, shall in all cases, make or annex or cause to be annexed to the original summons an affidavit of service stating the time when and the manner in which the summons was served and name and address of the person, if any, identifying the person served and witnessing the delivery of the tender of the summons. The provisions of this rule are mandatory. It was not complied with in the instant case. What the rule stipulates about service of summons, in my opinion, applies equally to service of hearing notices.”

The decision strongly suggest that Order 5 of the Civil Procedure Rules applies to all court orders of summons to appear in the case inclusive of hearing notices, Chamber Summonses, originating summons, and summons issued with a copy of the Plaint attached. The provisions of Order 5 can probably be restricted to originating Plaints as well as Chamber Summons and notices of motion. I however do not need to determine this suit on the basis of that. The head title of Order 5 is simply the issue and service of summons. Order 5 rule 1 deal with situations where

a suit has been duly instituted. The Respondents Counsel argued that a Notice of Motion is a civil proceeding commenced in any manner prescribed and is therefore a suit as defined by section 2 of the Civil Procedure Act. Section 19 of the Civil Procedure Act provides that every suit shall be instituted in such manner as may be prescribed by rules.

The question is what the effect of late service is? To my mind the first question is whether the Notice of Motion had expired. While Order 5 rule 1 (3) provides that the suit shall be dismissed, this is not an originating summons but an interlocutory application filed to set aside a consent judgment. A summons issued under Order 5 rule 1 normally prescribes that the Defendant shall file a defence within 15 days after receipt or after being served with the Plaint. The Notice of Motion in this matter which is an order of the court provided that the court will be moved on 23 September 2015 at 2:30 pm or soon thereafter as Counsel for the Applicant would be heard moving the court for orders specified in the Notice of Motion. In such circumstances the Notice of Motion could not have expired before 23 September 2015 otherwise it would render the order of the court inoperative. The application was served by 20 August 2015 more than one month before the order for appearance on 23rd of September 2015. Furthermore Order 12 rule 3 (2) of the Civil Procedure Rules which applies to interlocutory applications does not make provision for what happens where service is not effected within 15 days compared to Order 5.

In the premises and considering the effect of the affidavit in reply of the Respondent filed on 31 August 2015 just about 11 days after being served with the Notice of Motion. The deponent to Mr Moses Olico, the manager business solutions and recoveries of the Respondent indicates that he read the affidavit in support of the motion and replied to it in the affidavit in reply.

The question is what prejudice has the Respondent suffered for failure to be served within 21 days or within 15 days, a matter that is not important for the resolution of the question of whether there was any prejudice suffered by the Respondent. What is material is that the Respondent had notice of a matter that had been commenced in the court against it and it also exercised the right to reply to it. Similar issues have come before the courts.

In High Court Civil Suit Number 353 of 2009, **Western Uganda Cotton Company Limited versus Dr George Asaba and three others** Honourable Lady Justice Helen Obura overruled an

objection in a similar matter. In that case an objection was raised by the Plaintiff's Counsel that the counterclaim filed against the Plaintiff and other Counter Defendants was not duly served and should be dismissed with costs. The Plaintiffs Counsel submitted that he had accessed a copy of the counterclaim from the court record and filed a response thereto after he learnt about it during the mediation process. Honourable Lady Justice Helen Obura held that the time within which a Defendant should file a defence is 15 days after service of summons and it was the duty of the counterclaimant to serve the Written Statement of Defence together with the counterclaim on the Plaintiff. With reference to authorities the object of service of summons in whatever way is to enable the Defendant to have notice of the institution of a suit in due time before the date fixed for the hearing. In that case no prejudice or injustice had been occasioned by the Defendant's omission to serve and the omission to serve could be treated as an irregularity which could be cured under article 126 (2) (e) of the Constitution of the Republic of Uganda. The object of service in the case was achieved by Counsel for the Plaintiff's action of helping himself to the counterclaim on the record. In **Mukasa Anthony Harris versus Dr Bayiga Michael Philip Lulume** Election Petition Appeal Number 18 of 2007 Hon Justice Tsekooko JSC delivered the lead judgment of the Supreme Court held that the object of service had been achieved when the appellant had helped himself to a copy of the petition probably within the prescribed time. He had pre-empted the service and did in effect enter appearance unconditionally and article 126 (2) (e) of the Constitution would be applied.

I agree with the above authorities. Whereas the rules prescribe under order 12 rule 3 (2) that service of an interlocutory application to the opposite party shall be made within 15 days from the filing of the application when it was served out of time but before 23rd of September 2015 when it had been fixed the Respondent filed a reply to it. No prejudice has been occasioned to the Respondent and the preliminary objection is overruled.

As far as the merits of the application are concerned, I have already noted that there was no specific denial of the claim in the Plaint and the Defendants through their Counsel and in their Written Statement of Defence had sought a reschedule or different terms of the loan agreement by converting the overdraft to a term loan. Secondly there is no evidence whatsoever of any intimidation or coercion of the second Applicant. There is no evidence of what form of coercion or intimidation occurred. Without evidence the court does not have to consider whether the

second Applicant acted under duress. No names of the agents of the Respondent were given and no description of the time and places where any intimidation took place was given. There is no material for the court to consider whether such an action amounted to duress.

The grounds for setting aside a consent judgment are not contentious and they were summarised in the case of **Hassanali vs. City Motor Accessories Ltd And Others [1972] EA 423** where the Court of Appeal at Nairobi held that the Court cannot interfere with a Consent Judgment except in circumstances that would provide a good ground for varying or rescinding a contract between the parties. In **Brooke Bond (T) Ltd vs. Marlya [1975] E.A 266** and at the hearing of the suit a compromise was entered into signed by both parties, their advocates and the judge. Due to a disagreement, the judge set aside the consent on the ground that the parties had not agreed together. It was held by Law Ag P. at page 269 that:

“the circumstances in which a consent judgment may be interfered with were considered by this court in **Hirani v. Kassam (EACA), 19 E.A.C.A. 131**, where the following passage from Seton of judgments and orders, 7th Edition vol 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 an agreement contrary to the policy of court... or if consent was given without sufficient material facts, or in misapprehension or ignorance of material facts, or in general for any reason which would enable court to set aside an agreement between the parties”

In this case the Applicants Marline Tibahwa who is also the Defendant never challenged her lawyers in signing the consent. She does not question the authority of her lawyers. And there are no grounds advanced to impeach the consent entered on her behalf by the said lawyers. I have duly considered the evidence in the affidavit in reply. Annexure M2 to the affidavit of Moses Olico clearly indicates that there was no specific denial that the first Applicant company is indebted to the Respondent. In fact in paragraph 6 of the Written Statement of Defence it is written that the second Defendant in his capacity as director of the first Defendant communicated

to the Respondent the circumstances that caused the delay in satisfying the amounts due to the Plaintiff and prayed for extension of time within which to pay up the amounts due and was surprised by the suit filed by the Plaintiff against them. On 24 June 2013 the Defendants/Applicants lawyers wrote to the Respondent/Plaintiff's lawyers advising on the draft consent judgment. In paragraph 1 thereof Messrs Katutsi & Lamunu Advocates write that they still represent the Defendants. Paragraphs 3, 4 and 5 of the letter that was received by the Plaintiffs lawyers on 24 June 2013 reads as follows:

"Kindly be advised that our clients are agreeable to all the terms of the consent with the exception to the date of commencement of payment of the sums due.

Further be advised that in consultation with Mr Moses Olico of Stanbic Bank, we have reviewed the date of commencement of payment of 31st of July 2013.

Kindly receive the reviewed and signed consent for your consideration and signing".

This letter is attached to the affidavit in reply as M3. On 7 August 2013 the Respondent's lawyers wrote again to the Defendants lawyers indicating and forwarding 4 sets of the consent judgment/decreed with attached the repayment schedule for approval. That is the consent judgment/decreed that this is the subject matter of this application. It is executed by the second Defendant/Applicant to this application Mr Kizito Patrick Mubiru who signed as a director of the company as well as in his own capacity.

It cannot be true that the consent judgment was executed without authority of the first Applicant. The Notice of Motion does not challenge the authority of the Defendant's advocates to act on behalf of all the three Defendants. I agree with the Respondent's submission and authorities that this was a matter which was proceeding in court. In the affidavit in reply paragraph 5 thereof Mr Moses deposes that during the mediation proceedings, the parties agreed to enter into a consent judgment and proceeded to negotiate its terms. The only sticking point was the commencement date of payment. The correspondence between the lawyers of the parties demonstrates that the sticking point of commencement date of payment was ironed out and another agreement was reached. Furthermore it is the Defendant's lawyers who forwarded the draft consent agreement

which was eventually agreed to by the Plaintiff's Counsel. It cannot be argued in those circumstances that there was no consensus ad idem.

The correspondence and action of the lawyers coupled with failure to contest the action of the lawyers and even the admission of liability except as to the schedule of payment all weigh against the application for setting aside the consent judgment.

Last but not least none of the parties produced the articles of Association of the first Applicant to support the contention that the second Applicant had no authority. The Articles of Association of a company are the primary document to be used to determine what the powers the directors have. The Judicature (Mediation) Rules, 2013 and rules 16 thereof require the parties to sign the mediation agreement. Under regulation 5 the name of the person who has full authority to sign a settlement is supposed to be included in the case summary filed with the mediator. Secondly the name of the person who will be the lead negotiator for the party is also supposed to be included in the case summary filed in court at the time of filing pleadings. I agree that the mediation rules do not necessarily require a board resolution appointing a director to be put in evidence. The mediation summary indicates to the court and to the mediator and the opposite side who is the person with authority to sign any settlement. No affidavit in rejoinder was filed to challenge the depositions of Mr Moses Olico in paragraphs 4, 5, 6 and 7 of his affidavit in reply. He deposed that on the 16th of April 2013 he attended court when the Defendants in the suit were represented by Kizito Patrick Mubiru, the second Applicant and Mr Simon Kakama, their Counsel. The parties agreed to execute a consent judgment and proceeded to negotiate the terms. The settlement that is being challenged here was arrived at by the person represented to court and the opposite party as having authority to settle all matters during negotiations. The authority is also reflected in the correspondence between the parties.

Last but not least the 3rd Applicant has not challenged the application on her own behalf and since there is no pleading to the effect that the second Applicant did not have authority to act on behalf of the 3rd Applicant, and the 3rd Applicant was also duly represented by Counsel, it cannot be submitted at the stage of submissions that the consent judgment against her should be set aside on the ground of want of authority. No evidence can be led to prove a case which is not pleaded.

In the premises the Applicant's application lacks merit and is accordingly dismissed with costs.

Ruling delivered on 8 April 2016

Christopher Madrama Izama

Judge

Ruling delivered in the presence of:

Albert Byamugisha Counsel for the Respondent

The Respondents Counsel Himbaza asked the ruling to be stood over to 12.00 noon but the same request by letter is refused.

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

8 April 2016