

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
[COMMERCIAL DIVISION]

MISCELLANEOUS APPLICATION No. 81 OF 2015

5 *[ARISING OUT OF CIVIL SUIT NO. 542 OF 2014]*

1. ANNET NANSUBUGA }
2. JANE NAKAWUKI } ::::::::::::::: APPLICANTS/ DEFENDANTS
3. SYLVIA NABASUMBA }

10 **VERSUS**

RYAN LUKYAMUZI KATONGOLE THRU

HIS NEXT FRIEND HENRY KATONGOLE ::::::::::::::: RESPONDENT/PLAINTIFF

BEFORE: HON. MR. JUSTICE B. KAINAMURA

15 **RULING**

The applicants brought this application by Notice of Motion under Order 36 rule 11 & Order 52 rule 3 of the CPR. The applicant seeks orders for; a) setting aside a decree passed against the applicants/defendants vide Civil Suit No. 542/2014 by this honourable court, b) setting aside execution of the said decree, c) leave to the defendants/applicants to appear and to defend the
20 suit, d) costs of the application be provided for.

The grounds of the application are set out in the affidavit sworn by Annet Nansubuga; the 1st applicant and are that;

The honourable court entered a judgment and decree against the applicants in Civil Suit No. 542/2014 upon an alleged default to file an application for leave to appear and defend the suit.

25 The service was not effective as none of the applicants was served on the purported date of 12th August 2014 with the summons in summary suit and Plaint in the said suit.

The applicants severally learnt about the said suit after the 3rd applicant was arrested and committed to civil prison pursuant to a warrant of arrest in execution issued against the applicants by the Execution and Bailiffs Division of this honourable court.

5 The applicants as the indefeasible registered proprietors did yield effective ownership and vacant possession of the suit land comprised in a certificate of title for Freehold Register Volume 1264 Folio 7, Block 498, Plot 9 and 10, Land at Kisalizi, Ssingu County, Mubende district.

The applicants on four diverse occasions prior to the execution of the sale agreement took the respondent to the land to confirm that it had no squatters before parting with the consideration of UGX 71,146,500/=.

10 The interest rate of 23% per month claimed on the consideration sum aforesaid is too harsh and unconscionable as the same was never agreed upon by the applicants in the sale agreement.

The applicants honestly believe they have a formidable and plausible defence to the respondent's claim.

It is just and equitable that the orders sought by the applicants in the application be granted.

15 The respondent filed an affidavit in reply through his next friend Henry Katongole who deposed that;

He instituted a suit against the applicants in this Honourable Court vide Civil Suit 542 of 2014 for a refund of UGX 71,146,500/= being money had and received arising from a failed land transaction to purchase land comprised in Block 498, Plot 9 and 10, Freehold Register Volume
20 1264 Folio 7 Land at Kisalizi, Ssingu county, Mubende district measuring 47.431 hectares.

The defendants were duly served with summons and therefore the allegations that the 2nd and 3rd applicants were not served is hearsay.

The said applicants/defendants made no attempt to defend the suit despite being served with summons and a default judgement was entered by the Honourable Court on the 8th day of
25 September 2014.

By decree of the High Court, the applicants/ defendants were ordered to pay the sum of UGX 71,146,500/= plus the costs of the suit of 6,368,147/= bringing the total amount payable by the defendants UGX 77,514,647/=.

5 The execution proceedings were commenced to recover the decretal sum, whereupon the defendants/ applicants and the respondent entered into a consent settlement dated 10-10-2014 to pay the decretal amount in instalments.

The applicants executed the consent settlement on their own volition and free will, without duress or coercion whatsoever and in the presence of their lawyer Tyaba M. Isaac.

10 All the three applicants even provided guarantors to personally guarantee fulfilment of their obligations under the consent settlement, to wit, Emmanuel Ssempala, Charles Kijjambu and Stanley Kinene, all of whom signed the settlement as guarantors.

The duly executed consent was filed in court and signed by the Registrar who appended the seal of the court.

15 After the execution of the consent the applicants partly satisfied the terms of the settlement and made payments towards satisfaction of the decree but later defaulted on a balance of UGX 43,139,647/= which was due by 31-1-2015.

The applicants are seeking to move court to set aside the decree passed vide Civil Suit No. 542 of 2014 because they fraudulently sold land which had encumbrances and failed or refused to refund the purchase price in breach of the terms of the sale agreement.

20 The application is calculated to delay the course of justice by avoiding full satisfaction of the decree of court.

In rejoinder, Jane Nakawuki deposed that;

She will aver and contend that the applicants were never served with summons in the original suit.

An order of stay of execution of a decree in Civil Suit No. 542/2014 was granted to the applicants by Hon. Mr. Justice Owiny Dollo of the High Court vide Misc App. No. 308/2015, on the 21st day of August 2015.

There are a number of triable issues raised by both parties which would require a fair and proper
5 investigation by the honorable court.

The instant application is brought in good faith on ground that service was not effective.

It is just and equitable that the orders sought by the applicants in the instant application be granted.

Applicants' Submissions

10 Counsel for the applicants submitted that under **Order 36 rule 11** of the **CPR** the Court is seized with wide discretionary powers to set aside the decree, stay or set aside execution, and give leave to the defendant to appear and defend the suit if satisfied that the service of the summons was not effective, or for any other good cause. Counsel in addition stated that the affidavit evidence in support of the application avers that service of summons was not effective as the applicants were
15 not served with the plaint nor summons in the summary suit.

Counsel relying on the case of **Maluku Interglobal Trade Agency Ltd Vs Bank of Uganda [1985] HCB 65** submitted that the applicants have a triable issue that they are the indefeasible registered proprietors of the suit land which they yielded effective ownership and vacant possession to the respondent. In conclusion, Counsel prayed that court grants the orders sought.

20 Respondent's Submissions

Counsel for the respondent in his submissions raised two issues for determination which were;

- 1) *Whether the applicants are entitled to an order setting aside the decree passed against them on the 8th day of September 2014 and setting aside execution of the said decree*
 - 2) *Whether the applicants are entitled to an order setting aside the consent judgment dated 10th October 2014*
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Regarding the issue whether the applicants are entitled to an order setting aside the decree passed against them on the 8th day of September 2014 and setting aside execution of the said decree, Counsel submitted that a summary suit was instituted against the applicants who did not make an effort to apply for leave to appear and defend. Counsel added that a default judgment was entered which the applicants now seek to set aside. Counsel argued however that the applicants on their own volition after execution proceedings commenced entered into a consent settlement on the 10th day of October 2014 after which the applicants paid UGX 41,131,853 in four installments.

Counsel also submitted that the order that was granted to the applicants to stay the execution was only granted pending the hearing and disposal of Misc. Application No.81/2015. Counsel argued that the applicants have no defence to the suit.

Regarding the issue whether the applicants are entitled to an order setting aside the consent judgment dated 10th October 2014, Counsel argued that consent judgments are treated as fresh judgments and may only be interfered with on limited grounds such as illegality, fraud or mistake. Counsel argued that there is no single ground on which the consent judgment can be interfered with by this Honorable Court. Counsel relying on the case of **Brooke Bond Liebig (T) Ltd Vs Mallya** cited in the Supreme Court decision of **AG Vs James Mark Kamoga & Anor, Civil Appeal No. 8/2004** stated that a consent decree is passed on terms of a new contract between the parties to the consent judgment. Counsel prayed that this court considers the consent judgment as a new contract, the terms of which are binding on all parties and the application be dismissed with costs to the respondent.

Applicant's Submissions in Rejoinder

Counsel submitted that the applicants entered a consent with knowledge that a default judgment had been entered against them. Counsel further argued that he demurred that the affidavit evidence of the applicants be construed unreliable according to **Order 19 rule 3(1) CPR** as argued by Counsel for the respondent. In conclusion, Counsel reiterated the earlier prayers for the orders sought in the instant application.

Decision of Court

I have carefully considered the application as well as affidavits by all parties and the submissions of Counsel.

The application has been made under **Order 36 rule 11 of the Civil Procedure Rules** which provides that;

5 “After the decree the Court may, if satisfied that the service of summons was not effective, or for any other good cause, which shall be recorded, set aside the decree, and if necessary stay or set aside execution, and may give leave to the defendant to appear to the summons and defend the suit, if it seems reasonable to the Court to do so, and on such terms as the
10 Court thinks fit.”

The provision allows the Court to set aside the decree on the ground that the service of summons was not effective or any other good cause.

The facts as set out by the applicants are that they were not served with summons as alleged by the respondent. In the affidavit in support of the Notice of Motion, the 1st respondent stated that:-

15 “THAT the Applicants severally learnt about the said suit after the 3rd Applicant was arrested and committed to civil prison pursuant to Warrant of arrest in execution issued against us by the Execution and Bailiffs Division of this honourable court.”

Counsel for the respondent on the other hand submitted that the applicants were served but did
20 not apply for leave to appear and defend the suit hence the default judgement which was entered against them. It is my considered opinion that this is a matter of fact which is in contention because clearly the 1st applicant alleges non-service not only on her but also on the other applicants. She alleges being resident in another place other than where the alleged service was done. I however take note of the fact that apart from what the 1st applicant alleges, there is no
25 evidence testifying to that effect apart from the allegations. However for the respondent there is an affidavit of service which court relied on and entered a default judgement. Furthermore, it is also a fact that, the applicants and respondent entered into a consent agreement to have the

amounts owed cleared which according to the affidavit in reply, four instalments were made by the applicants leaving an outstanding balance.

I have addressed my mind to a number of decisions relating to similar facts to this one. However its uniqueness is that the applicants agreed to settle the amount demanded according to the decree but now claim non-service of summons. It is my view that the applicants' payment of the instalments is a waiver of sorts by virtue of the fact that they agreed to make payments in a consent settlement arrived at in court which was witnessed by their lawyer.

In the case of **Hirani Vs Kassam (1952) 19 EACA 131** Court held that;

10 *“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, collusion or by agreement contrary to the policy of court---or if consent was given without sufficient material facts or misapprehension or in ignorance of material facts or in general for a*
15 *reason which would enable the court to set aside an agreement”*

Now turning to the facts in this case, it is clear that the applicants do not deny that the agreement was made in court in the presence of the applicant's Counsel as stated by Counsel for the respondent. The applicants in their application for setting aside the consent settlement did not raise any of the elements of fraud, collusion or ignorance of material facts to guarantee the setting aside of the consent settlement.

Accordingly I find no just cause to set aside the consent agreement and grant leave to appear and defend the suit.

In the result i dismiss application with costs.

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B. Kainamura

Judge
01.09.2016

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