THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

MISC. APPLICATION NO. 140 OF 2018

(ARISING FROM CIVIL SUIT NO. 164 OF 2017)

MOTHER KEVIN WOMEN OPEN UNIVERSITY LTD

KIWANUKA ANTHONY

OCHIENG S.C PETER::APPLICANTS

VERSUS

DAMANICO PROPERTIES LTD ::::::::::::::::::::::::::::::::::::::RESPONDENT

BEFORE: <u>THE HON. JUSTICE DAVID WANGUTUSI</u>

<u>R U L I N G:</u>

In a suit No.164 of 2017 the Damanico Properties Ltd now Respondents sued Mother Keven Women Open University Ltd, Kiwanuka Anthony and Ochieng S.C. Peter seeking General damages for breach of contract, special damages, mesne profits, interest, vacant possession of premises and costs.

The background to the suit was that the Defendants now Applicants entered into a tenancy agreement and occupied the Plaintiff/Respondent's premises at Plot 40, Kampala Road. They defaulted in rent and the Plaintiff/Respondent sued.

The matter went for Mediation commencing 19th April 2017.
At the fourth mediation meeting the parties reached a settlement on 9th May 2017.
I reproduce the settlement as agreed.

> "*CONSENT JUDGMENT/DECREE*
> *This matter coming up for Mediation this 9th day of May 2017before Mr. Eric Byenkya, the Mediator of this Honourable Court in the presence of all Parties and their respective*

Counsel, it is hereby Agreed that a CONSENT JUDGMENT/DEGREE be entered on the following terms:-

1. *That the Defendants pay a sum of Ug. Shs. 84,200,000/= (Uganda Shillings Eighty Four Million, Two Hundred Thousand only) as rent arrears inclusive of VAT for the suit premises situated at Plot 40, Kampala Road, Vimto House, Kampala for the period between 1st August, 2015 and 30th June, 2017 to the Plaintiff.*
2. *That the Defendants pay a sum of Ug. Shs. 1, 763,100/= (Uganda Shillings One Million, Seven Hundred Sixty Three Thousand, One Hundred only) as water and electricity bills in arrears for the period between 5th August, 2016 and 1st February, 2017 and Ug. Shs. 1,558,800/= (Uganda Shillings One Million, Five Hundred Fifty Eight Thousand, Eight Hundred only) as water and electricity bills in arrears for the period between 2nd February 2017 and 30th June, 2017 to the Plaintiff.*
3. *That the Defendants pay the sum of Ug. Shs. 87,521,900/= (Uganda Shillings Eighty Seven Million, Five Hundred Twenty One Thousand, Nine Hundred only) in paragraphs 1 and 2 above as follows:*
    (a) *Ug. Shs. 57,949,000/= (Uganda Shillings Fifty Seven Million, Nine Hundred Forty Nine Thousand only) shall be paid on or by the 15th day of June, 2017; and*
    (b) *Ug. Shs. 29,572,900/= (Uganda Shillings Twenty Nine Million, Five Hundred Seventy Two Thousand, Nine Hundred only) shall be paid on or by the 15th day of July, 2017.*
4. *That that the Defendants shall pay rent and utility bills for the period commencing the 1st day of July, 2017 in accordance with the Tenancy Agreement between the Plaintiff and the Defendant for the Suit Premises but in any case, not later than the 31st day of July, 2017.*
5. *That in the event that the Defendants default on any of the terms in paragraphs 3 and 4 above, Execution Proceedings Shall Commence.*
6. *That the Plaintiff retains the Certificate of Title to land comprised in Bulemezi Block 96, Plot 23 at Wabutungulu as security for the due performance of the terms in paragraphs 3 and 4 above. In the event that the Defendants default on the terms in paragraphs 3 and 4 above, the Plaintiff shall be free to auction the Second*

Defendant's Fifty Percent (50%) Share of the said land comprised in Bulemezi Block 96, Plot 23 at Wabutungulu to recover all its unpaid monies.

7. *That in the event that the Defendants comply with the terms in paragraphs 3 and 4 above i.e. pays the sums mentioned therein accordingly, the Defendants shall deposit a sum of USD 4,800 (United States Dollars four Thousand, eight Hundred only) as security deposit. The said amount shall be retained by the Plaintiff as security for the due performance of the terms of the tenancy agreement between the Plaintiff and the Defendants for the Suit premises situated at Plot 40, Kampala Road, Vimto house, Kampala.*
8. *That subject to the terms in paragraphs 3, 4, 5, 6, and 7 above, the Plaintiff shall retain the Certificate of Title to land comprised in Bulemezi Block 96, Plot 23 at Wabutungulu as security for the due performance of the terms of the tenancy agreement between the Plaintiff and the first Defendant for the Suit Premises situated at Plot 40, Kampala Road, Vimto House, Kampala until the Defendants deposit the security of USD 4,800 (United States Dollars Four Thousand, Eight Hundred only) mentioned in paragraph 7 above with the Plaintiff.*

   For the avoidance of doubt, such security shall not constitute rent, but security for the due performance of the terms of the tenancy agreement by the First Defendant.
9. *HCCS No. 172 of 2017 has been settled finally in the above terms.*
10. *Each party shall bear its own costs for the HCCS No. 172 of 2017.*

Dated at Kampala this 9th day of May 2017.

WE CONSENT:

M/S DAMANICO PROPERTIES LIMITED
(PLAINTIFF)

M/S MATOVU & MATOVU ADVOCATES
(COUNSEL FOR THE PLAINTIFF)

MOTHER KEVIN WOMEN OPEN UNIVERSITY LIMITED
(FIRST DEFENDANT)

KIWANUKA ANTHONY
(SECOND DEFENDANT)

OCHIENG S.C. PETER
(THIRD DEFENDANT)

M/S SENKEEZI-SSALI ADVOCATES & LEGAL CONSULTANTS
(COUNSEL FOR THE DEFENDANTS

MR ERIC BYENKYA
(MEDIATOR)

Given under my Hand and Seal of this Honourable Court this 10th day of May 2017.

DEPUTY REGISTRAR

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As clearly stated execution was provided for in paragraph 5 and the events that would trigger it off were clearly spelt out.

As paragraph 3(a) shows the Applicants were to pay 57,949,000/= by 15th June 2017 and a further 29,572,900/= by 15th July 2017.

In paragraph 4 the Defendants were to pay rent and utility bills from 1st July 2017 by the 31st July 2017.

The Defendant/Applicant defaulted and instead filed this Application on 26th February 2018 seeking the orders that;

1. The Consent Judgment in HCCS No. 164 of 2017 be reviewed and set aside.
2. The Decree arising from HCCS No. 164 of 2017 be vacated and/or cancelled.
3. Costs for this Application be provided for.

The Application is grounded on the following;
That the decree of shs. 84,200,000/= as rent was erroneously calculated to the prejudice of the Applicant because it was in respect of 3 floors yet one of the floors was inhabitable due to leakages.

The Applicants admitted that they owed only USD 15,104 as 28th February 2018.
The Application was supported by the affidavit of Ochieng S.C. Peter. Ochieng Peter is also one of the witnesses to the Tenancy Agreement. The same Ochieng Peter was a Defendant in Civil Suit No.164 of 2017. He was well versed with the Tenancy Agreement. In fact he does not contest the agreements referred to in paragraph 5(a) and (c) of the plaint. In the paragraph 4 of the Written Statement of Defence the 3rd Defendant Peter Ochieng writes and his co-defendants write,

> "*4. The Defendants deny the contents of paragraph 4, 5, 6, 7, 8, 9 and 10 of the plaint save for paragraph 5(a), (c) and (d) the contents of which are admitted*."

By admitting paragraph 5(c), Peter Ochieng agrees that "on the 16th May 2016 the 1st Defendant undertook to pay the said rental arrears by and not later than 30th day of June 2016" and that he and the 2nd Defendant "guaranteed the payment by the 1st Defendant as Guarantors jointly and/or severally."

Reading the Written Statement of Defence shows that the issue of non-repair of the third floor was known to the parties.

It reads in paragraph 12;

> "*The Defendants shall also aver and contend that the Plaintiff has also breached the Tenancy Agreement for having failed to carry out repairs on the third floor that forms part of the premises being rented by the Defendants*."

The foregoing paragraph shows that at the time the mediation took place it was one of the things discussedor known to the parties and ought to have been taken into consideration.

That notwithstanding, whatever repairs were required, was something known to the partiesby the 16th May 2016 when the 1st Defendant and the 2nd and 3rd Defendants as Guarantors undertook to pay the rent arrears.

The 3rd Applicant was well aware of the situation when he signed the consent.

In a mediation proceeding it is the parties who dominate the proceedings. The Mediator simply facilitates and creates a discussion enabling environment wherein the parties meet and then assists them to come up with a settlement. In mediation the parties are free and many times do move away from the pleadings to reach a settlement.The position they reach whether originally specifically pleaded or not becomes the new position and once endorsed by all becomes an enforceable judgment.

In this case the parties met four times before reaching a settlement. The settlement was endorsed on 10th May 2017. The Application to set aside was filed 26th February 2018 close to 9 months later.

Having admitted the tenancy agreement, I see nothing erroneous. I also see no mistake in as much as the calculations are based on the tenancy agreement.

The Written Statement of Defendant does not even have a counterclaim in respect of losses occasioned by a leaking third floor.

No fraud or misrepresentation has been proved by the Applicants.

All the material facts were present and clear when the Applicants consented after mediation.

It is a settled position of the law that a court cannot interfere with a Consent Judgment except in such circumstances that would afford a good ground for varying or rescinding a contract between parties**; Hirani vs Kassam (1952) 19EACA131**.

Flora Wakise vs Wamboko [1988] KLR 429 [982-88] KAR 625 sets out grounds on which a Consent Judgment may be set aside. These include; fraud, mistake, misapprehension, collusion, agreement contrary to public policy, absence of sufficient material facts, ignorance of material facts and any general reason which may enable court to set aside an agreement.
The Consent Judgment arising from mediation is governed by the Judicature (Mediation) Rules 2013. Rule 17 clearly states that no appeals can be made from orders under these rules.

Since parties during mediation are represented by counsel and guided on communication and negotiation to convey their interests and explore settlement of the dispute it would seem that any likelihood of change of circumstances ought to have been dealt with during mediation.
By this I am fortified by the decision in**Khantibhai Patel vs Gulamhussein Bros Dar-es-salaam HCCA No. 12 of 1968 [1968] THCD** that an order made by consent should rarely be reviewed or varied where both parties are represented by counsel at the hearing. There must be a change of circumstances, which could not have been envisaged at the time of the making of the original order.

The Applicants in my view have failed to fault the consent judgment entered into freely.

Paragraph 5 of the consent provides for remedies in case of default.

For those reasons above, I find the Application devoid of merit and it is hereby dismissed with costs.

Dated at Kampala this 17th day of August 2018.

HON. JUSTICE DAVID WANGUTUSI

JUDGE.