

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
MISC. APPLICATION NO. 1389 OF 2017
(ARISING FROM MISC. APPLICATION NO. 904 OF 2015)
(ARISING FROM HCCS NO. 467 OF 2013)

- 1. CTM UGANDA LIMITED**
- 2. PRIME HOLDINGS LIMITED**
- 3. JOSEPH MAGEZI:.....:APPLICANTS**

VERSUS

- 1. ALLMUSS PROPERTIES UGANDA LTD**
- 2. ITALTILE CERAMIC LTD**
- 3. ITALTILE LIMITED**
- 4. GREGORY MAGEZI:.....:RESPONDENTS**

BEFORE: THE HON. JUSTICE DAVID WANGUTUSI

R U L I N G:

This is an Application for leave to appeal to the Court of Appeal against the decision of this court. It is grounded on the following;

1. That the Applicants CTM Uganda Limited, Prime Holdings Limited and Joseph Magezi are dissatisfied with the High Court decision in Misc. Application No. 904 of 2015.
2. That the intended Appeal raises various points of law and fact and have very high chances of success.

This Application is supported by the affidavit of the 3rd Applicant Joseph Magezi who states in the first paragraph of the affidavit that he swears it on his own behalf and on behalf of his brothers Timothy Magezi and Paul Magezi who are shareholders in the 1st Applicant.

The background of this Application is Civil Suit No. 467 of 2013. The 1st and 2nd Applicants who were dealers in floor tiles entered into an arrangement with the 1st Respondent whose purpose was to expand their business. In this the 1st Respondent was to inject capital into the business but as time went by disagreement arose wherein the parties found themselves in court. A Consent Judgment was entered wherein the 4th Respondent signed on behalf of the Applicants.

This Consent Judgment filed on the 20th of February 2015 signed by the Registrar on the 2nd March 2015 was in the following terms;

“BY CONSENT of the parties, it is hereby agreed that Judgment be and is hereby entered in the following terms;

1. *CTM Uganda shall pay to Italtile Limited, Italtile Ceramics (Pty) Ltd, Italtile Mauritius Limited and Italtile Franchising (Pty) Ltd (“the Italtile Group”) ,the amount of USD 1,650,000.00(One million six hundred and fifty thousand, United States Dollars), on or before 17 October 2015;*
2. *CTM Uganda is to make payment in 1 above , into the following bank account:*

Webber Wentzel

First National Bank

Main Street Johannesburg

Branch code: 251705

Account No: 505 100 292 30

Reference: 2437845/ I Gouws

3. *CTM Uganda shall within 6 (six) calendar months from 16 January 2015, withdraw its opposition to all of the Italtile Group's trademark applications and will not oppose any new applications to register its intellectual property in Uganda;*
4. *CTM Uganda shall within 6(six) calendar months from 16 January 2015 provide the Italtile Group with a copy of the notice to the Uganda Registration Services Bureau of its withdrawal of the opposition in 3 above;*
5. *CTM Uganda shall within 6 (six) months from 16 January phase out the use of all the Italtile Group's intellectual property, including inter alia, undertaking a name change and removing all references to and association with the Italtile Group, with the name CTM and with the name " Allmuss";*
6. *CTM Uganda shall change the name " CTM Uganda" within 6 (six) calendar months from 16 January 2015 and the name " Allmuss" upon the transfer of Italtile Ceramics 55% shareholding in Allmuss as per 7(b) below;*
7. *CTM Uganda will not enforce the order in terms of Miscellaneous Application No. 637/2014; Should CTM Uganda comply with the terms above;*

- a. *The Italtile Group shall not trade in Uganda for 2 (two) years from 16 January 2015;*
 - b. *Italtile Ceramics will transfer its 55% shareholding held in Allmuss to CTM Uganda or its appointed nominee;*
8. *In the event that CTM Uganda fails to meet its obligations above the Italtile Group shall be entitled to execute against CTM Uganda for the amount of US \$ 1,650,000.00 by doing the following;*
 - a. *Transferring LRV 4293, Folio 9, Plot 26-28 Kibuli Road, Nsambya into the name of Italtile Ceramics or its nominated beneficiary; and*
 - b. *Transferring CTM Uganda's 45% shareholding in Allmuss into the name of the Italtile Ceramics or its nominated beneficiary;*
9. *Upon execution of this consent, there shall be no further claim by Italtile Ceramics Limited, Italtile Limited or any company in the Italtile Group against CTM (U) Limited.*
10. *Pursuant to paragraph 9 above, Italtile Ceramics which owns 100% shares in Italtile Mauritius Limited shall cause Italtile Mauritius Limited to withdraw Civil Suit No. 800 of 2014 in the High Court of Uganda Kampala (Commercial Division) with each party meeting its own costs.*
11. *Each party shall bear its own costs of Civil Suit 467 of 2013(High Court Commercial Division)*

Sometime later the Applicants filed Misc. Application No. 904 of 2015 seeking court to set aside the Consent Judgment. It also asked the court to set aside the consequential order that had resulted from the consent judgment. The ground was that the consent had been entered into by the 4th Respondent on behalf of the 1st Applicant without authority, instructions or resolutions.

Furthermore, that the Consent Judgment encompassed legal issues in Civil Suit 467 of 2013 and included other persons who were not parties. More so that there was collusion and connivance between the 4th Respondent and the 1st, 2nd and 3rd Respondents.

The court found that the 4th Respondent and the 1st Applicant participated in the negotiations that led to the Consent Judgment. It also found that a resolution was passed appointing the 4th Respondent and empowering him to handle the liabilities of the 1st Applicant. The resolution empowered him to deal with the 1st Applicant's shares and assets namely to ***“sell, execute documents and perform all things.”*** It is against these findings that the Applicants seek leave to appeal against.

When the Application for leave to appeal came up for hearing on the 21st February 2018 Mr Idoot for the Respondents sought leave to cross examine the 3rd Applicant Joseph Magezi because his affidavit contradicted his past activities in the matter.

Court granted this Application based on the findings in the Ruling of Misc. Application No. 904 of 2015. In that Application the court found that the 1st Applicant's advocate was party to the negotiations that led to the consent relying on the resolutions that had appointed the 4th Respondent and empowered him to deal with the properties of the 1st and 2nd Applicants in as far as their liabilities were concerned.

The court also found that the resolution which was not challenged was within the knowledge of the 3rd Applicant. This position meets with a lot of contradiction from the affidavit in support deponed by the 3rd Applicant. In paragraph 14 (c) the 3rd Applicant depones that;

“The consent was entered into by and between the 4th Respondent purportedly on behalf of the 1st Applicant and the 1st - 3rd Respondents without the authority, instructions or resolutions to do so by the shareholders of the 1st Applicant Company.”

This in my view is a contradiction to the copy of resolution dated 12th November 2005 which empowered the 4th Respondent. It is also a contradiction because of the fact that the 3rd Applicant was party to this resolution. Taking into consideration this case, it is with no doubt based on whether the 4th Respondent was empowered to enter into the consent judgment.

That contradiction is what the Respondents sought to clear by asking the 3rd Applicant to be cross examined.

What I have noticed in this affidavit is that the 3rd Applicant also deposes that he is swearing on behalf of his brothers Paul and Timothy Magezi. The unanswered question is where he got that authority to answer on their behalf. This could have been answered by a document or established under cross examination. It could not be established because the deponent did not attend.

Going through the affidavit the majority of the relevant paragraphs in the affidavit in support hinge on what has been referred to as the impugned Consent Judgment obtained without authority to do so.

The issue of authority which the 3rd Applicant disputes is key in these proceedings. In fact without authority the 4th Respondent would not have bound the Applicants. Since there is a

contradiction it was necessary to have the 3rd Applicant cross examined. Counsel for the Applicants submitted relying on *Col. (Rtd) Dr. Kizza Besigye vs Museveni Yoweri Kaguta & Electoral Commission, Election Petition No. 01 of 2001* that while the Applicant's affidavit could be faulty those other paragraphs that were not found faulty be reserved by severing off those which were contradictory leaving those that were not affected by the contradictions complained of.

I do agree with this position but in this case the whole case depends on whether the 4th Respondent had authority.

Since almost the whole affidavit has its roots in the absence or presence of authority, there is little if any that would survive the severance. For those reasons the failure of the deponent to appear for cross examination can only lead to the striking out of the affidavit which I hereby do.

This leaves this Application by Notice of Motion without evidence to support it. That being the case the Application is dismissed with costs.

Dated at Kampala this 17th day of September 2018

**HON. JUSTICE DAVID WANGUTUSI
JUDGE.**