THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLANEOUS APPLICATION NO. 306 OF 2019

ARISING FROM HCCS NO. 365 OF 2015

KRONE UGANDA LIMITED :: APPLICANT

VERSUS

KERILEE INVESTMENTS LIMITED :::::::::::::::::::::::::::::::::: RESPONDENT

BEFORE: HON. MR. JUSTICE BONIFACE WAMALA

RULING

Introduction

The Applicant brought this application by Notice of Motion under Section 98 of the Civil Procedure Act (CPA), Order 9 Rule 12, Order 52 and Order 6 Rules 19 & 20 of the Civil Procedure Rules (CPR) SI 71-1 seeking orders that:

1. The consent Judgement and Decree entered on the 16th day of November 2015 by this Honourable Court be set aside.
2. The suit be set down for hearing on the merits inter parties.
3. In the alternative without prejudice to the above, the suit be dismissed with costs to the Applicant.
4. The costs of the application be provided for.

The grounds of the application as set out in the Notice of Motion (amended) are as follows:

1. The Applicant and the Respondent illegally, fraudulently and erroneously entered into the consent judgement in the ignorance of all material particulars relating to the suit.
2. The Applicant's Company Director was ignorant of the material facts at the time of signing the consent.

3. It is in the interest of justice that an order for setting aside of the consent judgement in HCCS No. 365 of 2015 be granted by this court and the suit be heard on merits.
4. It is fair and equitable that the contents of HCCS No. 365 of 2015 be heard on its merits.

The application was supported by an affidavit deposed by **Isingoma Kakiiza Amooti**, one of the Directors of the Applicant Company, in which he set out the background to this application and elaborated the grounds of the application. The deponent stated that in the original suit, the Respondent sued the Applicant vide HCCS No. 365 of 2015 for an order of specific performance requiring the Applicant to furnish all relevant export documents, a declaration that the Applicant's failure to get an export permit to the Respondent infringed its economic rights, an order to the Applicant to acquire and avail the export permit, for damages and costs of the suit. The Applicant's then lawyers applied for a third party notice to be issued against the Attorney General and the Commissioner of Geological Surveys and Mines Department in the Ministry of Energy and Mineral Development; which notice was issued by the court.

When the Attorney General and the Commissioner of the Geological Surveys and Mines Department failed to respond to the third party notice, judgment in default was entered against them. On 12th November 2015, the deponent while bedridden at Kabowa and was due to travel for an operation in Durban, South Africa, was approached by one Roland Kwesiga and without being appraised of the full facts pertaining to HCCS No. 365 of 2015, was made to sign a consent judgement on grounds that liability would be met by the Attorney General. The deponent states that given his then state of mind, he did not fully appreciate the contents of the consent judgement and neither did a one Roland Kwesiga from Muganwa, Nanteza & Co. Advocates, labour to explain the same to him prior to signing. The Applicant's lawyers too did not brief him of the contents of

the consent judgement despite the lawyers signing the same. The deponent also did not meet with the Respondent's directors and neither did he appear before the Registrar, Commercial Court who endorsed the impugned consent judgement.

Pursuant to the consent, the Respondent's Counsel sought and issued two certificates of order against the Attorney General for payment of the decretal sum of USD 975,750. Vide Miscellaneous Application No. 571 of 2018, the Attorney General sought to set aside the default judgement in HCCS No. 365 of 2015 for want of service of the third-party notice. By consent under M.A No. 571 of 2018, the Attorney General was removed as a party to HCCS No. 365 of 2015.

The deponent further averred that the consent judgement in HCCS No. 365 of 2015 was arrived at as a result of manipulation by the Applicant's lawyers who prevailed over him to consent without full disclosure of the facts of the consent judgement. According to the advice of the Applicant's present lawyers, the Respondent had no legal capacity to enter into a consent judgement as it did on 12th November 2015. The deponent was also aware that the Respondent's representative, a one Innocent Mutangana, did not have capacity to sign the consent at the time he did so.

The deponent was further advised by the Applicant's lawyers that the consent judgement was procured through fraud, illegality, ignorance, misapprehension of facts and without disclosure of full facts to the Applicant company. If the said consent judgement is not set aside, the Applicant company shall suffer irreparable damages. It is therefore in the interest of justice that the said consent judgement be set aside.

The Respondent opposed the application vide an affidavit in reply deponed to by **John Wambi**, the General Manager of the Respondent Company, in which he stated that the application was incurably defective and ought to be struck out as the same facts and issues are directly and substantially in issue in the Court of Appeal vide M.A No. 66 and 67 of 2020 arising out of Civil Application No. 63 of 2020. He stated that the consent judgment sought to be set aside was properly executed as it was entered into by both parties and their Counsel and subsequently endorsed by the court.

The deponent further stated that it was the Applicant that applied for the third party proceedings against the Attorney General and the same Applicant that withdrew its claim against the Attorney General leaving the Respondent with no other option but to commence execution proceedings against the Applicant itself. The Respondent stated that the alleged manipulation of the Applicant's Director by their lawyers was just an afterthought meant to frustrate the Respondent which is evidenced by the fact that no complaint exists by the Applicant against the said lawyers for the alleged misconduct; which alleged misconduct in fact has nothing to do with the Respondent.

It was further stated for the Respondent that at the time of execution of the consent judgement, the Respondent Company was registered and Innocent Mutangana was its General Manager in Africa and was authorized to sign on its behalf. The Applicant is only being evasive and unwilling to pay the decretal sum and this application was an afterthought lodged long after the execution proceedings were commenced. The application is therefore an abuse of the court process, is frivolous and vexatious, offends the *lis pendens* rule and ought to be dismissed with costs.

The deponent also averred that the Applicant had shown no evidence of fraud, illegality, ignorance or misrepresentation of facts committed by the Respondent

as against the Applicant and the application was simply a ploy to avoid payment. This was evidenced by the dilatory conduct on the part of the Applicant in bringing this application.

The Applicant filed an affidavit in rejoinder whose contents I have also taken into consideration.

Representation and Hearing

At the hearing, the Applicant was represented by Mr. Bazira Anthony while the Respondent was represented by Mr. Wilfred Niwagaba. The hearing proceeded by way of written submissions which were duly filed. I have considered the able submissions of both Counsel in the course of resolution of the issues that are before the Court for determination. In their submissions, Counsel for the Respondent raised a preliminary point of law to the effect that the present application is barred under the *lis pendens* rule. I have opted to frame this objection as one of the issues for determination.

Issues for Determination by the Court

1. Whether the application is barred by law on account of the *lis pendens* rule.
2. Whether the consent judgement in HCCS No .365 of 2015 is illegal and against court policy.
3. Whether the consent judgement in HCCS No. 365 of 2015 was entered as a result of misrepresentation and misapprehension of facts.
4. What remedies are available to the parties?

Resolution of the Issues

Issue 1: Whether the application is barred by law on account of the *lis pendens* rule.

It was submitted by Counsel for the Respondent that when the Respondent took out execution proceedings against the Applicant, the Applicant filed Miscellaneous Applications 66 and 67 of 2020 (for stay of execution) arising out of Civil Application No. 63 of 2020 (for leave to appeal to the Court of Appeal). Counsel argued that the said applications which were part heard raise similar issues as are directly and substantially in issue in the present application and the court should rely on the provision under Section 6 of the CPA to strike out this application.

In reply, Counsel for the Applicant submitted that the *lis pendens* rule is not applicable to this application that is seeking to set aside a consent on grounds of illegality. Counsel submitted that the applications in the Court of Appeal alluded to by the Respondent were not only different from the present application but had also since been disposed of; they were therefore not pending proceedings. Counsel submitted that the facts before the Court do not support a plea of *lis pendens*. Counsel relied on the decisions in ***Springs International Hotel Ltd versus Hotel Diplomate Ltd & Another, Civil Suit No. 227 of 2011****;* and ***Equity Bank (U) Limited versus Buyinza John, HC Miscellaneous Cause No. 33 of 2018*** which laid out the elements of *lis pendens*.

The law, as correctly set out by Counsel for the Applicant, is that for the plea of *lis pendens* to be available, the party relying on it has to show that:

a) The matter in issue in the present application is also directly and substantially in issue in a previously instituted suit or proceeding;
b) The previously instituted suit or proceeding is between the same parties or parties under whom they or any of them claim; and

c) The suit or proceeding is pending in the same or any other court having jurisdiction to grant the reliefs claimed.

See: ***Section 6 of the CPA*** and the decisions in ***Springs International Hotel Ltd versus Hotel Diplomate Ltd & Another (supra)***; and ***Equity Bank (U) Limited versus Buyinza John (supra)***.

On the facts before the Court, the present application seeks to set aside a consent judgment reached between the parties and sought to be enforced by the Respondent against the Applicant. The consent is sought to be set aside on grounds, among others, of illegality, misrepresentation and misapprehension of facts. On the other hand, the matters alleged to be pending in the Court of Appeal are two Miscellaneous Applications (No. 66 and 67 of 2020) for an interim and substantive orders of stay of execution. The decree whose execution is sought to be stayed is the one that was entered pursuant to the impugned consent judgment. The stay of execution sought in the Court of Appeal is pending the hearing of an application for leave to appeal to the Court of Appeal against a decision of the High Court Execution and Bailiffs Division which had granted a conditional order of stay of execution to the Applicant/ Judgement Debtor.

To put the matter in the correct perspective, it is necessary to set out some brief background around these orders. When the present Applicant opted to withdraw the third party proceedings against the Attorney General, the Respondent (judgment creditor) decided to proceed with execution of the consent decree against the Applicant (judgment debtor). The Applicant, who by then had filed the application seeking to set aside the impugned consent, filed M.A No. 427 of 2020 in the Execution and Bailiffs Division, seeking to stay execution of the consent decree pending determination of the application to set aside the consent. Upon determination of M.A No. 427 of 2020, the trial Judge granted to the Applicant an order of stay of execution on condition that the

Applicant furnishes an unconditional bank guarantee covering 60% of the decretal sum within two weeks from the date of the order. The Applicant sought to appeal against that order and filed an application for leave to appeal to the Court of Appeal (that is M.A No. 63 of 2020). Pending the said application, the Applicant filed Miscellaneous Applications No. 66 and 67 of 2020 for stay of execution pending disposal of M.A No. 63 of 2020. It is these applications that are alleged by the Respondent's Counsel to be *lis pendens*.

In light of the legal position set out herein above, I do not find any ground for applicability of the plea of *lis pendens*. The Applicant has shown that the two applications (No. 66 and 67 of 2020) were already disposed of by the Court of Appeal. The Applicant attached to their affidavit in rejoinder (as Annexture Q) an order of the Court of Appeal dated 30th July 2020 (extracted on 24th September 2020) under which the said applications were disposed of to the effect that execution of the orders of the High Court vide M.A No 427 of 2019 (the conditional bank guarantee) was stayed pending determination of the application for leave to appeal to the Court of Appeal (M.A No. 63 of 2020). The existence or authenticity of the Court of Appeal Order was not challenged by the Respondent. It is therefore conclusive evidence that the two named applications were disposed of and are not pending. Without existence of another pending matter, the *lis pendens rule* cannot apply. It therefore becomes futile to consider the other elements of the doctrine.

Although M.A No. 63 of 2020 is still pending, it was not alleged that it was also *lis pendens*. But even if it had been so alleged, the plea would still not apply upon the facts and position of the law already set out above. In the circumstances therefore, the preliminary objection raised by Counsel for the Respondent is devoid of merit and is rejected. The first issue is therefore answered in the negative.

I have opted to handle the next two issues jointly, namely;

Issue 2: Whether the consent judgement in HCCS No. 365 of 2015 is illegal and against court policy; and

Issue 3: Whether the consent judgement in HCCS No. 365 of 2015 was entered as a result of misrepresentation and misapprehension of facts.

Applicant's Submissions

It was submitted by Counsel for the Applicant that the impugned consent judgment is illegal and against court policy because at the time of instituting HCCS No. 365 of 2015, the Respondent was a non-existent company with no capacity to sue or be sued. Counsel submitted that a consent judgement can be vitiated when it is proved that it was entered into without sufficient material facts or in misapprehension or in ignorance of material facts, or it was actuated by illegality, fraud, mistake, contravention of court policy or any reason which would enable court set aside an agreement. Counsel relied on the decisions in ***Hirani versus Kassam [1952] EA 131;*** and ***Attorney General & Uganda Land Commission versus James Mark Kamoga & James Kamala, SCCA No. 8 of 2004***.

Counsel submitted that in the instant case, there are a number of anomalies in the proceedings leading up to and including the consent judgment in issue. Firstly, the law under **Section 2 of the Companies Act, No. 1 of 2012**, requires that for a company to have legal existence, it should be registered and the procedures for registration are provided for in the Act. Counsel referred the Court to the decisions in ***Real Market Property Owner versus Kampala City Authority, Civil Suit No. 248 of 2008*** and ***Sabric Building & Decorating Contractors Ltd versus The Attorney General, CA No. 21 of 2015*** for the argument that for a company to exist legally, it must conform, as of law, to the Companies Act, No. 1 of 2012, as regards its incorporation and mode of operation. The basic feature of a company is a certificate of incorporation

issued under **Section 22 of the Companies Act**. As such, Counsel argued, an unincorporated organisation is not a legal entity capable if suing or being sued; and a suit by an unincorporated body is a nullity. Counsel also relied on the decision in ***Abdulrahaman Elaiman verus Dhabi Group & 2 Others, Court of Appeal Civil Appeal No. 215 of 2013***.

Counsel submitted that the Respondent while instituting HCCS No. 365 of 2015 represented itself as a company duly registered under the laws of Uganda with powers to sue and be sued in its capacity. A search in the Company Registry, however, revealed to the Applicant that the Respondent Company was not established in 2015 when it instituted the said civil proceedings. According to the certificate of incorporation obtained from the Uganda Registration Services Bureau (URSB), the Respondent Company was registered on the 4th day of July 2017 and is a foreign company. Counsel contended that the Respondent did not have the locus standi and could not maintain an action against the Applicant in 2015 when it was not registered in Uganda. Counsel submitted that the consent judgment was therefore illegal and in contravention of the court policy since it was entered into under a mistake of law. Counsel submitted that under Section 18 of the Contracts Act, No. 7 of 2010, where a contract is entered into under a mistake of law, the contract is void.

The Applicant's Counsel further submitted that on account of the above illegality, the impugned consent is also in contravention of court policy. Counsel submitted that policy of court is a question of jurisdiction which must exist at the time of filing the suit or latest at commencement of hearing. Jurisdiction cannot be conferred on court by consent of parties. Counsel contended that the Registrar had no jurisdiction to endorse a consent judgement where the Respondent was a non-existent company as that amounted to an illegality. Counsel cited the case of ***Makula International Ltd versus Eminence Cardinal Nsubuga & Another [1982] HCB page 15*** on the

subject. Counsel further submitted that jurisdiction cannot be conferred on court by consent of the parties and any waiver on the part of the parties cannot make up for the lack of jurisdiction. Counsel cited the decision in ***Koboko District Local Government versus Okujju Swali M.A No. 1 of 2016*** **(Justice Steven Mubiru**).

Counsel concluded that a consent judgment entered into by a non-existent party is a nullity and should be expunged from the court record with costs to the Applicant. The proceedings leading to the Consent were void ab initio. No substantial pleadings can sustain it. The Resultant consent would be a nullity and of no effect thus the need to dismiss the main suit. Counsel referred the Court to the case of ***Democratic Party versus Ssenkubuge Rajab & 12 Others, Miscellaneous Application No. 167 of 2020*** **(Justice Ssekaana Musa)** and ***The Kyabazinga of Busoga versus Ligwero Richard & 9 Others Miscellaneous Application No. 215 of 2013*** **(Justice Eva Luswata)**.

On the question as to whether the impugned consent judgement was entered into as a result of misrepresentation and misapprehension of facts, Counsel submitted that misrepresentation can be deduced from that the fact that the Applicant thought that it was dealing with a registered company whereas not. Even a one ***Innocent Mutagana*** had no authority to sign on the Consent since the company was not in existence hence any purported representation was a nullity. The Applicant was not fully briefed with the facts of the consent and neither did it appear before the Registrar before endorsement of the same. Counsel relied on the decisions in ***Francis Paul versus Namwandu Muteranwa, Court of Appeal Civil Appeal No. 20, of 2014*** and ***MHK Engineering Services (U) Ltd versus Macdowell Limited, Miscellaneous Application No. 825 of 2018*** **(Justice Boniface Wamala)**.

Respondent's Submissions in reply

In response, Counsel for the Respondent opted to address the court generally on the inapplicability of the principles and the case law cited by the Applicant's Counsel to matters relating to setting aside of consent judgements and as far as the facts of the present case are concerned. Counsel submitted that the impugned consent judgment/decree was passed by consent and was properly executed as it was entered into by both parties and their Counsel; the same was subsequently endorsed by the court in accordance with the provisions of Order 25 Rule 6 of the CPR. Counsel referred the Court to the decisions in ***Betuco (U) Ltd & Another Vs Barclays Bank & Others, HC M.A No. 243 of 2009 (Commercial Court)***. Counsel further relied on the case of ***Kahumba Vs National Bank of Kenya Civil Suit No. 1336 of 2001*** to submit that a court order is valid and binding unless and until it is appealed, amended or set aside.

Counsel relied on the decision in ***BM Technical Services Vs Francis X Rugunda 1999 KALR 821*** to discount the Applicant's claim that they were not fully briefed by their lawyers with the facts of the consent since the said lawyers had instructions to represent them in the suit and continued to represent them in other applications that arose after execution of the consent. Counsel submitted that the Applicant's allegation of having been manipulated by their lawyers is just an afterthought meant to frustrate the Respondent which is corroborated by the fact that the applicant had made no complaint against the said lawyers for the alleged misconduct.

Counsel for the Respondent further submitted that a consent judgment can only be set aside if it was actuated by illegality, fraud or mistake. Counsel relied on the decisions in ***Harrani vs Kassam (1952) EACA 131*** and ***Uganda Air Cargo Corporation Ltd Vs Moses Kirunda & 5 Others, HC M.A No. 385 of 2013***. Counsel submitted that in the instant case, the Applicant has not

proved that the impugned consent was entered through fraud, illegality, misapprehension or ignorance of facts, or mistake. Both parties were aware of the facts of the matter having given instructions to their Counsel to represent them in the suit.

On the argument that the Respondent was a non-existent company at the time of instituting the suit, Counsel for the Respondent submitted that the Respondent was a registered company at the material time and its General Manager in Africa was Innocent Mutangana who was authorized to sign on its behalf. Counsel relied on the case of ***Leah Associates Ltd Vs Bunga Hill House Ltd, HCMA No. 348 of 2008*** to submit that from the date of incorporation, a company becomes a body corporate and can sue and be sued in its names. Counsel submitted that the Respondent Company was incorporated on 10th September 2010 and a certificate of incorporation to that effect was attached in evidence.

Counsel submitted that it is nowhere stated in the Companies Act 2012 that a foreign company needs to register in Uganda in order for it to institute legal proceedings in Uganda. As a matter of fact, Counsel submitted, any personal whether natural or corporate, can file a suit in Uganda regardless of citizenship as long as they have a cause of action. Counsel further submitted that the Applicant had not met the legal criteria for setting aside a consent judgement and the application is not only evasive but was also brought long after execution proceedings were commenced. Counsel invited the Court to find that the application lacks merit, is an abuse of the court process, frivolous, vexatious and ought to be dismissed with costs.

Counsel for the Applicant made submissions in rejoinder which I have also taken into consideration and I will refer to where appropriate.

Resolution by the Court

The law on consent judgments/decrees is now well settled. Parties to civil proceedings are free to amicably settle a dispute and consent to a judgment being entered. The parties may do so orally before a judicial officer who then records the consent or they may do so in writing, affix their signatures and place the same for endorsement by the court. See: **Order 25 Rule 6 of the CPR** and the case of ***Betuco (U) Ltd & Another Vs Barclays Bank & Others, HC M.A No. 243 of 2009 (Commercial Court)***.

The law, however, provides that after a consent judgment has been entered, it may be vitiated, varied and/or set aside where it is proved that it was entered into without sufficient material facts or in misapprehension or in ignorance of material facts, or it was actuated by illegality, fraud, mistake, contravention of court policy or any reason that would enable court to set aside an agreement. See: ***Ismail Sunderji Hirani versus Noorali Esmail Kassam [1952] EA 131;*** and ***Attorney General & Uganda Land Commission versus James Mark Kamoga & James Kamala, SCCA No. 8 of 2004***.

The above two decisions cited with approval the following passage from **Seton on Judgements and Orders, 7th Edition, Vol. 1, page 124**, thus:

> ***"Prima facie, any order made in the presence and with consent of counsel is binding on all parties to the proceedings or action, 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 the 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 a court to set aside an agreement."***

It has also been held that a consent judgement/decree is passed on terms of a new contract between the parties to the consent judgement. See: ***Brooke Bond Liebig (T) Ltd vs. Mallya (1975) EA 266*** and ***Mohamed Allibhai vs. W.E. Bukenya & Another, SCCA No. 56 of 1996***.

In the instant case, the allegation by the Applicant is that the impugned consent judgment was entered into through illegality, contravention of court policy, misrepresentation and misapprehension of facts. According to the affidavit evidence and submissions of Counsel for the Applicant, the main reason advanced for the argument that the consent judgement was illegal and in contravention of the court policy is that when the same was executed, the Respondent, then Plaintiff, had no capacity to enter into such an agreement. This is because the Respondent company was not registered in Uganda as a body corporate and was, as such, a non-existent entity that could not sue or be sued under the law. Counsel argued that for that reason, the suit was null and void and no consent could lawfully be based upon such a suit. The consent was therefore illegally entered and ought to be set aside. Counsel further argued that in those circumstances, the Registrar had no jurisdiction to endorse such an illegal consent and, as such, the consent judgment was entered in contravention of the court policy.

In response, it was argued by Counsel for the Respondent that the Respondent Company was a duly incorporated entity and had capacity to sue and be sued. Counsel contended that the Applicant had not raised any ground that can vitiate a consent judgement that was lawfully entered with the agreement of the parties and their Counsel.

I need to point out that, as highlighted in the legal position set out above, the ground for vitiation of a consent judgment must relate to conduct of the parties at the time of execution of the consent. This is because a consent is a different

agreement and a consent judgement/decree is passed on terms of the new contract between the parties to the consent judgement. See: ***Brooke Bond Liebig (T) Ltd vs. Mallya (supra)*** and ***Mohamed Allibhai vs. W.E. Bukenya & Another (supra).*** As such, a defect in the original agreement or dealings between the parties that led to the filing of the suit will not vitiate a consent judgement that is properly entered upon the agreement of the parties. The vitiating factor alleged must relate to the execution of the consent.

Be that as it may, the Applicant herein attacks the competence of the suit on the basis of illegality and contends that a consent judgment cannot be lawfully based on a suit that is null and void. Counsel relied on the decision of ***Makula International Ltd versus Eminence Cardinal Nsubuga & Another (supra)***. For that reason, I will first deal with the question as to whether, at the time of instituting the main suit herein, the Respondent Company was a non-existent entity which could not bring and/ or maintain a court action in Uganda.

I must say that the law is now well settled that a non-existent entity cannot sue or be sued under the law. Counsel cited a plethora of authorities to this effect for which I am grateful. The real question, however, is whether the Respondent Company was a non-existent entity at the time of institution of the suit. The basis of this argument on the part of the Applicant is that by 2015, when the suit was instituted, the Respondent Company was not registered in Uganda. The Applicant adduced evidence that the Respondent Company was indeed registered in Uganda in 2017 and a certificate of registration was adduced to that effect. Counsel therefore concluded that there was no way the Respondent Company would have lawfully brought and maintained a court action in Uganda in 2015 when it was a non-existent entity in Uganda.

Let me point out that there is a difference between incorporation of a company and registration of a company for purpose of foreign presence. Under the law,

once a company is incorporated, it obtains legal personality as against the whole world. The legal personality is not diminished by legal boundaries. Like natural citizenship, it is only restricted to what it can do outside its geographical boundaries. It is therefore the true position that a company incorporated in the United Kingdom can transact business in Uganda without having to go through any form of registration. Counsel for the Applicant appeared to agree with this position. If such a company can transact business in Uganda without first having to register, then it follows that it has capacity to enforce its rights if they are affected in the course of doing business. Bringing and maintaining a court action is one major way of enforcing such rights. It is therefore not true that a company incorporated in the United Kingdom is a non-existent entity that cannot bring and maintain an action in Uganda.

I am fortified in the above view by the provisions of the Companies Act No. 1 of 2012. Part VI of the Companies Act makes provision for treatment of companies incorporated outside Uganda. The sub-title to the Part reads – *"Provisions as to establishment of place of business in Uganda"*. Section 251 of the Act provides that the provisions under this part of the Act *"shall apply to all foreign companies, being companies incorporated outside Uganda which, establish a place of business in Uganda and companies incorporated outside Uganda which have, established a place of business in Uganda and continue to have a place of business in Uganda"*.

Section 252 of the Act provides for documents to be delivered to the Registrar for purpose of registration by a foreign company that establishes or wishes to establish a place of business in Uganda. Under *Section 253 (1) of the Act*, upon registration of the documents specified in *Section 252*, the Registrar shall issue a certificate signed by him or her that the company has complied with that section, and that certificate shall be conclusive evidence that the company is registered as a foreign company under this Act.

It is clear from the above provisions that the registration envisaged under the cited provisions of the Companies Act is not for purpose of creating legal personality but for purpose of **establishing a place of business in Uganda**. The Companies Act acknowledge that the company in issue is already incorporated but because it wishes to establish a place of business in Uganda, it has to be registered as a foreign company. Most importantly, the cited provisions do not say, either expressly or by necessary implication, that every company that wishes to transact in Uganda must undertake the said registration; all it says is, if the company wishes to establish a place of business, then it must register. As such, non-registration under the said provisions does not disempower a duly incorporated company from transacting business in Uganda and from bringing or maintaining a court action in Uganda. Finding otherwise would be most absurd in light of the demands of international trade.

It follows therefore that although the authorities relied on by Counsel for the Applicant (on the position of the law on suits by a non-existent entity) set out the correct position of the law, the same are not applicable to the facts and circumstances of the present case. I will make particular reference to the decision in ***Abdulrahm Elamin vs Dhabi Group & 2 Others, HCCS No. 432 of 2012*** wherein **Justice Masalu Musene** held that Dhabi Group, a United Arab Emirates based conglomerate could not sustain a cause of action since it was a foreign company that was not registered in Uganda. On appeal, the Court of Appeal, in ***Abdulrahman Elamin versus Dhabi Group & 2 Others, Civil Appeal No. 215 of 2013, at page 8*****,** upheld the above finding by the trial Judge, stating thus;

> ***"Regarding the legal personality of the 1st respondent, the trial judge held that Dhabi Group which is described as a United Arab Emirates based conglomerate lies outside the territorial***

jurisdiction of the Uganda High Court. The judge further held that the company is not registered under the laws of Uganda and so it will be difficult to find it in the event of the case being decided against it ... The question of whether the 1st Respondent exists can be considered from the pleadings and its' annexures. However, the 1st respondent's legal existence in Uganda is not shown. We therefore, uphold the trial court's finding that the respondent does not exist within the court's jurisdiction."

In my view, although the Court of Appeal upheld the finding of the trial court on the non-existence of Dhabi Group in Uganda, it appears to me that the finding of the Court of Appeal was based on the particular facts of that case. This can be seen from the earlier finding of the court upon evaluation of evidence. At page 6 of the Court of Appeal judgment, the Court stated:

"To our mind, the language of the contract makes Warid Telecom International LLC the disclosed principal of Dhabi Group. The correct party to be sued would then be Warid Telecom International LLC as the trial Judge rightly held ... If a party is not a party to the contract, we do not see how such a party can terminate or breach the contract ..."

To my mind, the reason for the finding on absence of liability on the part of Dhabi Group had more to do with privity of contract than its legal existence or capacity to sue and be sued. This can be ascertained from the finding of the Court that Warid Telecom International LLC was the correct party to be sued. Warid Telecom International LLC was not a registered company in Uganda but it could be sued in the matter because it was the correct party according to the contract. Secondly, there is no finding by the Court of Appeal in the cited decision to the effect that legal existence of a company incorporated elsewhere depends upon its being registered under Part VI of the Companies Act; or that

the registration under Part VI of the Companies Act bestows legal personality upon a company. In my view, therefore, the decision in ***Abdulrahman Elamin versus Dhabi Group & 2 Others (supra)*** cannot be a basis for misconceiving the clear provisions of Part VI of the Companies Act or for reading into the said provisions incidence that is not created by that part of the law.

On the facts before me, the Respondent Company was incorporated in the United Kingdom in 2010 and the certificate of incorporation is on record. By 2015 when the main suit was instituted, it was a duly incorporated entity with capacity to do business in Uganda and to sue and be sued. When the company eventually registered in 2017, it was for purpose of complying with the provisions of Part VI of the Companies Act and being able to establish a place of business in Uganda. This registration did not change the legal personality of the Company. It only bestowed upon the company capacity to have an office in Uganda and to be recognized as a foreign company with a presence in Uganda.

It was argued for the Applicant that the Respondent Company misrepresented itself in paragraph 1 of the plaint as *"a dully registered company under the laws of Uganda with power to sue and be sued in that capacity …"* Although this anomaly was not explained by the Respondent in these proceedings, I do not think it is of such substance as to vitiate the Respondent's legal capacity to sue or be sued. In my view, it is an erroneous statement that does not go to the root of the matter and capable of being corrected; as long as it is true that the Respondent is a duly registered company.

That being the case, it is not true that Civil Suit No. 365 of 2015 was incompetent, null and void before the court. It was properly instituted by a duly incorporated legal entity with capacity to sue and be sued in Uganda. Therefore, the Applicant's attempt to vitiate the consent judgement on grounds of illegality and contravention of court policy in as far as the same are based on

incompetence of the main suit, cannot hold. My finding, therefore, is that no illegality existed either at the institution of the suit or at execution of the consent.

It is also clear that the ground of contravention of the court policy was based on the same aspect of illegality of the suit. The same also fails. No other evidence or allegation of illegality that was raised by the Applicant based on the conduct of the parties at the time of execution of the consent. As such, the Applicant has not satisfied the Court that the instant consent judgment is capable of being vitiated on grounds of illegality and contravention of the court policy.

Regarding the grounds of misrepresentation and misapprehension of the facts, it was alleged by the Applicant that the Respondent Company represented itself as a duly incorporated entity capable of bringing and maintaining a suit in Uganda when, in fact, it was not. In light of the finding herein above, this argument needs no further consideration and accordingly fails.

It was further alleged by the Applicant that the Applicant's Director, Amooti Kakiiza Isingoma, the deponent of the affidavit in support and the one who signed the consent, was manipulated by both his lawyers and the advocates of the Respondent to sign the consent without proper apprehension of the facts. The deponent alleged that he was bedridden and preparing to go to Durban, South Africa, for an operation when a lawyer for the Respondent, one Roland Kwesiga, approached him with the consent and convinced him to sign the same which he did. The said deponent stated that there was no meeting between the Applicant and its lawyers before the signing of the consent. He further stated that even when the consent judgment was taken before the court for endorsement, none of the Applicant's representatives appeared before the Registrar. The deponent therefore insisted that that the consent judgment was

entered in circumstances of misapprehension of facts and the same ought to be set aside.

For the Respondent, it was argued that there was no evidence of misapprehension of any facts as the Applicant was well represented by advocates who continued representing them long after the said consent was entered. Counsel for the Respondent argued that if it was true that the Applicant's advocates had committed such misconduct as alleged, the Applicant would have commenced disciplinary proceedings against them; which they have never done.

Looking at this particular allegation by the Applicant, the deponent does not set out clearly which facts were the subject of misapprehension. It is, however, clear from the facts before me that the main reason that the Applicant's representative signed the consent was because he was convinced that the liability would be borne by the Attorney General who had been added as a third party and against whom a default judgment had been entered. In my view, this is not a case of misapprehension of the facts but rather, a case of collusion. Under the law, as above cited, collusion is one of the factors that may vitiate a contract, and hence a consent judgement.

According to the **Black's Law Dictionary, 5th Edition, page 240**, Collusion connotes **"an agreement between two or more persons to defraud a person of his rights by the forms of law, or to obtain an object forbidden by law. It implies the existence of fraud of some kind, the employment of fraudulent means, or of lawful means for the accomplishment of an unlawful purpose. A secret combination, conspiracy, or concert of action between two or more persons for fraudulent or deceitful purpose"**.

Under the law, a consent judgment cannot be varied, set aside or discharged unless it is proved to the court that it was obtained by fraud or collusion, or by an agreement contrary to the policy of the court, or if the 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 a court to set aside an agreement. See: ***Ismail Sunderji Hirani versus Noorali Esmail Kassam (supra); Brooke Bond Liebig (T) Ltd vs. Mallya;*** and ***Attorney General & Uganda Land Commission versus James Mark Kamoga & Another (supra)***.

As such, where facts disclose collusion and the same is proved upon the evidence before the Court, the same is capable of vitiating a consent judgement. On the evidence before me, in paragraph 6 of the affidavit in support of the application, the deponent states as follows;

> *"That on 12th November, 2015, without being appraised of the full facts pertaining to HCCS No. 365, I was approached by a one Roland Kwesiga, while bedridden at Kabowa, and due to travel for an operation in Durban, South Africa, to sign the consent judgement on grounds that liability would be met by the Attorney General."*

The deponent goes ahead to show that the said Roland Kasigwa was an advocate from Muganwa, Nanteza & Co. Advocates, which firm represented the Respondent Company at the time. These averments were not rebutted by the Respondent.

The above evidence discloses conduct that amounts to an agreement or understanding between the parties to obtain an object forbidden by law or the employment of lawful means for the accomplishment of an unlawful purpose. In this case, the consent was used as a lawful means of achieving an unlawful purpose. An agreement with the effect of shifting full liability in a matter before

the court to a third party who did not participate in such an agreement was in bad faith and intended to defraud the third party. This should be looked at against the background that the sums agreed upon under the said arrangement had not been proved before the court and were most probably arbitrarily reached by the parties. Yet the parties expected a third party that was totally alien to the agreement to pay such amounts. I find this conduct deceitful and amounting to collusion between the parties herein. Such an agreement cannot be allowed to stand.

For the above reasons, the impugned consent judgement has been proved to have been vitiated by collusion on the part of both parties. The consent judgement/decree is therefore liable to be set aside on the said ground.

Issue 4: What remedies are available to the parties?

In light of the above findings, the consent judgement/decree entered between the parties on 16th November 2015 is to be set aside having been vitiated by conduct amounting to collusion. Accordingly, I set aside the said consent judgement/decree and order that HCCS No. 365 of 2015 be set down for hearing inter partes on its merits. Since both parties were party to the vitiating conduct, each party shall bear their own costs of this application.

It is so ordered.

Dated, signed and delivered by email this 21st day of May 2021.

Boniface Wamala

JUDGE