THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLANEOUS CIVIL APPLICATION No. 0497 OF 2021

(Arising from Civil Suit No. 0085 of 2019)

1. KIZITO LEONARD }
2. KIGOONYA FRANCIS } **…… APPLICANTS**

VERSUS

MUTAZAHANSI GEOFFREY …… RESPONDENT

Before: Hon Justice Stephen Mubiru.

RULING

a. Background.

The applicants were at all material time the proprietors of land comprised in Bugangaizi Block 236 plot 1 at Kiryangobe village in Kibaale District, which they were desirous of disposing off. Together, they engaged the services of the respondent, together with other brokers, to find them a suitable buyer. Differences having subsequently arisen in the resultant transaction, the applicants together with the respondents were jointly sued by the other brokers for the recovery of their commission, in a suit that on 28th May, 2019 ended with a mediated consent judgment, with the following pertinent clauses;-

6. The 1st and 2nd plaintiffs (the applicants herein) plus the 3rd defendant (the respondent) Ssentumbwe Grace, Bakuseka John, Allan Atwiine, the brokers are jointly entitled to a sum of UGX 101,500,000/= (one hundred and one million, five hundred thousand shillings only).

7. The 3rd defendant (the respondent herein) did receive UGX 150,000,000/= (Uganda Shillings one hundred and fifty million only) and a sum of UGX 130,000,000/= (Uganda Shillings one hundred and thirty million only) herein agreed as already spent in meeting the financier's costs, a sum of UGX 20,000,000/= (Uganda Shillings twenty million) only was paid to the 1st and 2nd plaintiffs (the applicants herein).

8. The 3rd defendant (the respondent herein) shall further receive a sum of UGX 50,000,000/= (Uganda Shillings twenty million only) to cater for any other unpaid services for the whole process.

The respondent having failed to recover the money due to him under that consent judgment, on 11th January, 2021 filed an application for a garnishee order for the attachment of shs 54,500,000/= out of money paid to the applicants by the purchaser of the land and deposited onto their joint account in Centenary Bank Limited. The Court issued a decree Nisi on 11th March, 2021 but by that time there was only shs. 9,174,644/= available on the account. On 18th March, 2021 the decree was made absolute, resulting in its partial satisfaction in the sum of shs. 9,174,644/= leaving an outstanding balance of shs. 45,325,356/=

b. <u>The application</u>.

The application is made under sections 82, 98 and 99 of *The Civil Procedure Act,* section 33 of *The Judicature Act,* and Order 52 rules 1, 2 and 3 of *The Civil Procedure Rules*. The applicant seeks orders that the garnishee order be varied, amended or declared as discharged. The grounds for seeking the orders are that Garnishee Order was procured my falsehoods and misstatements made by the respondent, which misled the court. The applicant claimed that a sum of shs 54,000,000/= was due and owing to him under the consent judgment, which is not true since under clause 8 of the consent judgment, the respondent was only entitled to shs. 50,000,000/= The respondent thereafter received shs. 6,327,000/= on 1st October, 2019; shs. 3,500,000/= and 11,371,000/= on 19th October, 2020; and shs. 2,331,000/= on 27th November, 2020. The implication is that by the time he made the application for a garnishee Order, the respondent had already received a total sum of shs. 20,029,500/= (the availed acknowledgments though total shs. 23,529,000) which fact he never disclosed to the court. The outstanding balance should have been shs. 29,970,500/= (when the availed acknowledgments are deducted the outstanding should have been shs. 26,471,000/=). Unless the error is corrected, the applicants will suffer injustice as a result of the respondent receiving more than what is due to him under the consent judgment.

c. The affidavit in reply

In his affidavit in reply, the respondent avers that at the time of executing the consent judgment, and as a result of a deliberate concealment by counsel for the applicants, he was ignorant of the fact that an additional sum of shs. 93,750,000/= was due to him in the underlying transaction. The additional shs. 4,500,000/= was interest accruing of the shs. 50,000,000/= due to him under the consent judgment, at the rate of 6% per annum. Following the execution of the consent judgment, he only received a total sum of shs. 25,341,000/= out of the shs. 93,750,000/= that had been concealed. He later recovered shs. 9,174,644/= by garnishee out of shs 54,000,000/= due to him under the consent judgment, leaving an outstanding balance of shs. 45,325,356/= which sum continues to attract interest. Resort to garnishee proceedings was prompted by the fact that the applicants were not disclosing to him the instalments received from the purchaser and as when they received them. He never received the sum of shs. 2,331,000/= on 27th November, 2020 as attributed to him by the applicants. Consequently, he received a total of shs. 25,341,000/= and not shs. 20,029,500/= as claimed by the applicants, which was part payment of the concealed shs. 93,750,000/= and not as part payment of the amount stipulated in the consent judgment.

d. The affidavit in rejoinder

In the applicants' affidavit in rejoinder it is contended that there is no factual basis for the allegation that shs. 93,750,000/= was concealed from the respondent. That sum is not part of the consent judgment anyway. The respondent has never taken out proceedings to impeach the consent judgment. The respondent does not deny receipt of the instalments that were paid to him following the execution of the consent judgment.

e. Submissions of counsel for the applicant

Counsel for the applicant, M/s Kalyango and Partners Advocates, submitted that the debt in issue arise from the sum of shs. 50,000,000/= due to the respondent under the consent judgment. Since execution of the consent judgment, the respondent has received shs. 20,029,500/= which he never disclosed to the court when applying for the garnishee order. Consequently there is an error

manifest on the face of the resultant order. The applicants are aggrieved by the fact that as a result the respondent stands to recover more than what is due to him under the consent judgment. The amount outstanding due to the respondent should therefore be corrected to reflect shs. 29,970,500/=

f. Submissions of counsel for the respondent.

Counsel for the respondent, M/s Wakabala and Co. Advocates submitted that the respondent realised later after signing the consent judgment that the applicants' con had concealed shs. 93,750,000/= The payments received by the respondent following the execution of the consent judgment were in respect of that sum rather than the shs. 50,000,000/= reflected in the consent judgment. The respondent has so far received shs. 25,341,000/= and not shs. 20,029,500/= as claimed by the applicants. The sum of shs. 50,000,000/= due to the respondent under the consent judgment have since attracted interest of shs. 4,500,000/= at the rate of 6% per annum. The shs. 9,174,644/= recovered by garnishee was out of an instalment of shs. 150,000,000/= that had been paid by the purchaser, out of which the applicants were unwilling to pay the respondent. The outstanding balance therefore is shs. 45,325,356/= The application should be dismissed.

g. The decision.

According to section 34 (1) of *The Civil Procedure Act*, all questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge, or satisfaction of the decree, have to be determined by the court executing the decree and not by a separate suit. The scope of this provision is very wide as exclusive jurisdiction is conferred on the executing court in respect of all matters relating to execution. For the provision to apply; (i) the questions must have arisen between the parties to the suit or their representatives; (ii) they must arise in the suit in which the decree was passed; (iii) they must relate to the execution, discharge or satisfaction of the decree; and (iv) they must be determined by the execution court.

This provision is intended to provide an inexpensive and expeditious remedy for determination of certain questions that arise in the course of execution, so as to avoid a multiplicity of suits. Such

questions usually include; whether a decree is executable? Whether the property attached is liable to be sold in execution of the decree? Whether a decree is fully satisfied? Whether a particular property is included or not in decree? Generally all questions regarding attachment, sale or delivery of property.

On the other hand Order 15 rule 3 of *The Civil Procedure Rules*, provides that the court may frame issues from all or any of the following materials; - (a) allegations made on oath by the parties, or by any persons present on their behalf, or made by the advocates of the parties; (b) allegations made in the pleadings or in answers to interrogatories delivered in the suit; and (c) the contents of documents produced by either party. A ruling may be pronounced not only as to all matters that were in fact formally put in issue by the parties, but also on those matters that were offered and received to sustain or defeat the claim, where it is necessary to the court's ruling, in order to ensure the reliability, conclusiveness, completeness and fairness of a decision. This principle serves mainly the public policy of reducing litigation. Unfairness and waste of judicial resources would otherwise flow from allowing repeated litigation of the same subject matter as long as party is able to locate new issues to be litigated. With that in mind, the questions arising in this application are;

1. Whether or not the garnishee order was procured by misinformation.
2. Whether or not or not the garnishee order should be corrected.

First issue; <u>whether or not the garnishee order was procured by misinformation</u>.

The garnishee order in issue was taken out under the provisions of Order 23 rule 1 of *The Civil Procedure Rules*. Under that provision, such an order is issued on application of a judgment creditor stating that a decree has been issued and that it is still unsatisfied and to what amount, and that another person is indebted to the judgment debtor and is within the jurisdiction of the court. Therefore there are three factual requirements for its issuance; (i) that the decree is not fully satisfied; (ii) that a specified amount is still owing; and (iii) that another person is indebted to the judgment debtor and is within the jurisdiction of the court. The first and third factual requirements are not in dispute, it is the second that is in dispute.

In the instant case, the amount due to the respondent was ascertained by way of consent judgment. A consent judgment is a contract in which parties make reciprocal concessions in order to resolve their differences and therefore avoid litigation or where litigation has already commenced, bring it to an end (see *Agrafin Management Services Limited v. Agricultural Finance Corporation and 5 others [2012] eKLR*). It is a judgment of the court in terms which have been contractually entered into by parties to the litigation, validated by Court under O.50 rule 2 and Order 25 Rule 6 of *The Civil Procedure Rules* (see *Brooke Bond Liebeg (T) Ltd v. Mallya [1975] E.A 266*). By consent judgments, the Court assists and facilitates parties to meet the ends of Justice and that it would therefore be unfair and cause injustice to nullify a consent judgment properly concluded (see *Nshimye and Company Advocates v. Microcare Insurance Limited and Insurance Regulatory Authority, H.C. Misc. Application No. 231 of 2014*).

When a consent judgment complies with the requisites and principles of contracts, it becomes a valid agreement which has the force of law as between the parties and once given judicial approval, it becomes more than a contract. Having been sanctioned by a court it becomes a determination of the controversy and has the force and effect of a judgment. According to clause 8 of that judgment, the respondent was entitled to "50,000,000/= (Uganda Shillings twenty million only) to cater for any other unpaid services for the whole process." It is in respect of that amount that the respondent on 11th January, 2021 filed an application for a garnishee order for the attachment of shs 54,500,000/= claiming that the additional shs. 4,500,000/= had accrued by way of interest at the rate of 6% per annum.

It is contended by the applicants that since the filing of the consent judgment, the respondent had by the time of that application received a sum of shs. 20,029,500/= which he never disclosed to the court when applying for the garnishee order. The implication is that had he done so, the amount outstanding should have been shs. 26,471,000/= rather than shs. 45,325,356/= claimed by the respondent.

On his part the respondent acknowledges receipt of shs. 25,341,000/= since the filing of the consent judgment but argues it was part payment of a sum of shs. 93,750,000/= due to him from the applicants but was concealed from him at the time of executing the consent judgment.

It is a well settled principle that a consent decree has to be upheld unless it is vitiated by a reason that would enable a court to set aside an agreement, such as fraud, mistake, misapprehension or contravention of court policy (*Mohamed Allibhai v. W.E. Bukenya and another, S.C. Civil Appeal No.56 of 1996*). Misapprehension or mistake of fact or law, can be a ground for setting aside a consent judgment (see *Babigumira John and others v. Hoima Council [2001 – 2005] HCB 116* and *Eleko Balume and two others v. Goodman Agencies Limited and two others, H.C. Misc Application No. 12 of 2012*). Similarly, fraud, whether intrinsic or extrinsic, misrepresentation, or other misconduct of an adverse party can justify the setting aside of a consent judgment (see *Livesey (formerly Jenkins) v. Jenkins [1985] AC 424, [1985] 1 All ER 106*).

However the respondent has not sought to have the consent judgment set aside on account of the alleged fraud. In any event he might be prevented from doing so by the maxim of "approbate and reprobate" which reflects the principle that a person cannot both approve and reject an instrument, commonly described as blowing hot and cold, or having one's cake and eating it too, considering that the respondent has already achieved partial enforcement of the consent decree. A person cannot accept a benefit under an instrument without at the same time confirming to all its provisions, and renouncing every right inconsistent with them (see *Codrington v. Codrington [1875] LR 7 HL 854 at 861-862*; *Express Newspapers plc v. News (UK) Ltd [1990] 1 WLR 1320; PT Building Services Ltd v. Rok Build Ltd [2008] EWHC 3434 (TCC)* and *Redworth Construction Ltd v. Brookdale Healthcare Ltd [2006] EWHC 1994 (TCC*).

The respondent's argument that the recovery made so far is in respect of a sum not included in the consent decree is therefore misconceived since the application before court is not one for setting aside the consent judgment. A consent order or judgment operates as estoppels against the parties thereto from asserting something contrary to the agreement (see *Huddersfield Banking Company Ltd v. Henry Lister and Sons Ltd (1895) 2 Ch D. P. 273 at 280*). Consequently, payments that were made by the applicants after execution of that consent judgment are deemed to have been paid towards the amount specified therein as due to him. The respondent cannot seek to recover, by way of garnishee proceedings under Order 23 rule 1 of *The Civil Procedure Rules*, any amount that is not included in the resultant decree. Since the respondent acknowledges having received

shs. 25,341,000/= the principal amount outstanding at the time he applied for recovery by way of garnishee order was shs. 24,659,000/= and not shs, 50,000,000/=

In that application, the respondent further included a sum of shs. 4,500,000/= as a component of interest on the amount due to him under clause 8 of the consent judgment at the rate of 6% per annum from the date of the judgment. Interest for the period prior to the date of the suit may be awarded, if there is an agreement for the payment of interest at a fixed rate, or it is payable by the usage of trade having the force of law, or under the provision of any substantive law entitling the plaintiff to recover interest. On the other hand, interest subsequent to the suit is exclusively a matter of statutory power. Interest for the period after the date of the decree till realisation of the decretal amount is also in the discretion of the court, but it is subject to the overall limitation that the court cannot award any interest on the principal sum adjudged for such period at a rate higher than 6 % per annum, provided that where the liability in relation to the sum adjudged arose out of a commercial transaction, the rate of such further interest may exceed 6 %per annum, but should not exceed the contractual rate of interest or where there is no contractual rate, the rate at which moneys are lent or advanced by commercial banks in relation to commercial transactions. Such interest is not a penalty or punishment; it is normal accretion on the principal amount. The rationale of such interest is that it is damages for wrongful retention of' money.

When the court pronounces a decree for a principal sum due under a contract, the obligation to pay that sum is then owed under the court's decree and not under the contract. According to section 26 (2) of *The Civil Procedure Act*, "where and insofar as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree…." Hence interest does not accrue automatically on court decrees. When an obligation to pay interest is created for the first time by a decree of court, the decree should contain a specific order to that effect. Therefore for interest to be recoverable as part of a judgment debt, it should have been awarded by court. Where a decree is silent with respect to the payment of interest on the principal sum from the date of the decree to the date of payment or other earlier date, the court is deemed not to have awarded such interest.

In the event of a consent judgment, the parties by themselves and by their own contract, must fix the rate of interest which is to be paid, or else none is recoverable. In the instant case the parties did not include a component of interest in their consent judgment and consequently none was awarded by court. It was erroneous for the respondent to have included it in his application for a garnishee order.

In conclusion therefore, the respondent obtained the garnishee order by misguided misrepresentation when in his application for the order, he failed to disclose the fact that he had received shs. 25,341,000/= from the judgment debtors and when he included a component of interest that did not from a part of the consent decree.

Second issue; whether or not or not the garnishee order should be corrected.

Under section 99 of *The Civil Procedure Act*, clerical or mathematical mistakes in judgments, decrees or orders, or errors arising in them from any accidental slip or omission may at any time be corrected by the court either of its own motion or on the application of any of the parties. This section not only allows the court to correct garbled or incorrect transcriptions, spelling and grammatical mistakes, and even matters of style, but also mistakes arising from accidental slips arising from a misrepresentation of facts made to the court. This power may be invoked where the order does not correctly reflect the true facts existing at the time it was made.

Having found that the amount outstanding on the decretal sum was shs. 24,659,000/= and not shs. 54,500,000/= at the time of the application, and that error having arisen from an accidental slip, I find this to be a proper case for invoking that power. Accordingly, the garnishee order is hereby corrected to reflect that the amount outstanding and recoverable thereunder, after deduction of the shs. 9,174,644/= previously recovered, is now shs. 15,484,356/= and not shs. 45,325,356/= The garnishee order stands so corrected, with no order as to costs.

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Delivered electronically this 6th day of August, 2021

……Stephen Mubiru……..
Stephen Mubiru
Judge,
6th August, 2021.