THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)

MISCALLANEOUS APPLICATION NO. 913 OF 2018
(ARISING FROM COSENT JUDGMENT IN CIVIL SUIT NO. 734 OF 2015)

PLANBUILD TECHNICAL SERVICES LIMITED::::::::::::::::::::::APPLICANT
VERSUS
1. DFCU BANK LIMITED
2. KABIITO KARAMAGI:::RESPONDENTS

BEFORE: THE HON. JUSTICE DAVID WANGUTUSI
RULING:

PlanBuild Technical Services Limited the Applicant herein brought this application against DFCU Bank and Kabiito Karamagi the Respondents in these proceedings seeking orders that;

1) That the consent judgment entered by parties in HCCS No 734 of 2015 dated 20th January 2016 to be set aside.
2) That costs of the application be provided for.

The application is grounded on the following;

a) That the Applicants consent was obtained on the basis of the respondents fraud or misrepresentation
b) That the Applicant signed the consent judgment under duress from the 1st Respondents agents employees and or under their undue influence.
c) That the consent judgment lacks consideration by the reason of the respondent's failure to terminate the receivership.
d) That the Applicant signed the consent judgment in misapprehension/ ignorance of material facts relating to actual status of the Applicants loan portfolio.
e) That this application has been made without unreasonable delay
f) That it is in the interest of justice that this application is granted.

The application is supported by the affidavit of Dennis Wandera the Managing Director of the Applicant.

The background to this application lies in *C.S 734/2015 PLANBUILD TECHNICAL SERVICES LTD vs DFCU BANK LTD & KABIITO KARAMAGI.*

Briefly the facts as discerned from Civil Suit No 734/2015 indicate that the applicant then the Plaintiff sued the present Respondents who were Defendants in that suit seeking declarations that the 1st Defendant had breached a contract in their bank customer relationship.

Further that the 1st Respondent had breached a statutory duty, committed professional negligence and fraud. That for those reasons the Plaintiffs' sought Court to award her special damages, general damages and costs of the suit.

In response the Respondent Defendants by way of counterclaim also claimed unpaid loan money in the sum UGX 3,637,871,319/= as sums outstanding on the credit facilities extended to the Applicant with interest at 24% p.a from 22nd Sept 2015 till payment in full.

In the counter claim the Respondents as Counterclaimants also sought general damages and costs of the suit.

On the 20th January 2016 the parties after going through consultations, meetings and a mediation process agreed to settle the matter without trial. The terms as agreed by the parties were reduced into a consent judgment whose terms are provided as here under;

> *"By consent of the Plaintiff and Defendants, IT IS HEREBY AGREED that judgment be entered in favour of the 1st Defendant in the following terms;*

1. *The Plaintiff acknowledges that it is currently indebted to the 1st Defendant in the sum of UGX: 3,637,871,319/= (Uganda Shillings Three Billion Six Hundred Thirty Seven Million Eight Hundred Seventy One Thousand Three Hundred Nine Only) being monies due its credit facilities.*

2. *In the spirit of an amicable settlement of the matter, the 1st Defendant has agreed to discount the debt and to receive a settlement sum of UGX: 2,200,000,000/= (Uganda Shillings Two Billion Two Hundred Million Only) provided that the Plaintiff shall comply with the terms agreed herein below.*

3. *The Plaintiff shall pay:-*

   i) *UGX 440,000,000/= (Uganda Shillings One Billion Seven Hundred Sixty Million Only) shall be paid in equal quarterly instalments of UGX: 180,000,000/= (Uganda Shillings One Hundred Eighty Million Only) with effect from 1st June 2016.*

   ii) *UGX 1,760,000,000/= (Uganda Shillings One Billion Seven Hundred Sixty Million Only) shall be paid in equal quarterly instalments of UGX 180,000,000/= (Uganda Shillings One Eighty Million Only) with effect from 1st June 2016.*

4. *The parties hereby agree to the sale of equipment: (caterpillar Dozer Reg. No. UAQ 369Q, Caterpillar Wheel Loader UAQ 519Q, Champion Grader UAQ 555Q and Roller Ingersoll UAQ 317Q), currently under the custody of the 1st Defendant by private treaty. The proceeds of the sale less any recovery costs incurred by the 1st Defendant shall be applied towards part payment of the 1st instalment agreed upon in paragraph 3(i) above. PROVIDED always that the equipment not be sold by*

15th February 2016, the Plaintiff shall raise the entire UGX: 440,000,000/= (Uganda Shillings Four Hundred and Forty Million Only) and ensure it is paid by the agreed date of 29th February 2016.

5. In addition to the above mentioned sum, the Plaintiff shall pay UGX: 10,000,000/= (Uganda Shillings Ten Million Only) as the Plaintiffs' contribution to the costs of the suit and the receivership.
6. In the event of any single default by the Plaintiff, the 1st Defendant shall by written notice to the Plaintiff and the guarantors mentioned in clause (07) below reinstate the amount waived off / discounted from the Plaintiffs' debt and shall recover the entire sum of UGX: 3,637,871,319/= (Uganda Shillings Three Billion Six Hundred Thirty Seven Million Eight Hundred Seventy One Thousand Three Hundred Nineteen Only) less the amount that shall have been paid by the Plaintiff, (if any), at the time of default.

7. The sum mentioned in six (06) above shall become due and immediately recoverable;-

i) From Mr Dennis Wandera Ochwo and Mrs Jennipher Nannozi Wandera, jointly and severally as guarantors of the Plaintiff;

ii) The above mentioned sum shall be recovered from the guarantors without the necessity of having to prove the same, demands made upon the Plaintiff, or that the Plaintiff has failed or delayed to pay and settle any due amount or instalment or all the instalments.

iii) In addition to any other remedy that the 1st Defendant may elect to pursue against the Plaintiff or jointly and or severally against the Plaintiff and or the guarantors, it is agreed by the 1st Defendant and Mr. Dennis Wandera that the 1st Defendant shall be at liberty in recovery of

the sum due to commence execution proceedings against Mr. Dennis Wandera Ochwo and Ms. Jennipher Nannozi Wandera, jointly and or severally.

8. *By virtue of this Consent Judgment, Commercial Court Civil Suit No. 734 of 2015 and counterclaim therein are hereby settled and resolved.*
9. *By virtue of this Consent, the Receivership commenced by the 1st Defendant in respect of the Plaintiff is hereby terminated."*

This Consent was endorsed by all the parties namely Dennis Wandera who was a Managing Director of the Applicant, Jennipher .N. Wandera who was also a director in the Plaintiff. Both these signatories were guarantors to the loan advanced to the Plaintiff.
Also present and participating in endorsing the consent judgment was Mr. Jonny P Barenzi, learned counsel for the Plaintiff. Juma Kisane who was the Managing D of the 1st Defendant also endorsed a consent judgment together with Mr. Pious Olaki the legal manager of the 1st Defendant and Ms. Kyarimpa Matovu who was counsel for the 2nd Defendant.

Two years and eleven months later, specifically on the 13th November 2018 the Applicant filed this Application seeking orders to set aside the consent judgment.

As I said earlier the Plaintiff contended that the consent judgment was obtained through fraud and misrepresentations.
Fraud has to be pleaded and strictly proved, and although the standard of proof in a civil proceeding is not that of beyond reasonable doubt, it is certainly higher than on a balance of probabilities.

Fraud implies and involves acts of deceiving or misleading another party or his agent to enter in an agreement. Firstly the fraudster must suggest something that is not true and which he himself does not believe to be true.

Secondly the fraudster must conceal facts he has knowledge of to his benefit.

Thirdly he must make promises without intensions of performing them. In these he does acts that are intended to deceive.

In the instant case the Respondents have not been shown by the Applicants to have deceived or hidden facts that were known to them. The facts relevant to this case would mostly be figures of how much money was owed and how much money was paid back as will be seen later in this ruling the Respondents provided bank statements and held open discussions with the Applicants which led to the signing of the Consent Judgment.

Going through the evidence on record I do not find proof of fraud and therefore the claim that the Respondent acted fraudulently is disallowed.

The Applicant alleged that the Respondent demanded and received 6,540,907,222/= which sum was never due and owing from the Applicant. Furthermore that the respondent miss informed her that she was indebted to the tune of UGX 3,637,871,319/= whereas not.

On 14th March 2016 the Applicant made part payment pursuant to the Consent Judgment.

Proof of this part payment is evident in Annexture C1 of the Affidavit in reply headed *RELEASE OF EQUIPMENT AND LOGBOOK TO MR. ANDREW KIZITO*. It reads in part;

> *"In reference to the above subject and sale agreement signed for the same equipment, we confirm to you that*

the full amount of UGX 120,000,000/= has been paid on our account with you."

The notification is proof that the Applicant did not only enter into the Consent Judgment, but went ahead to effect some of the provisions of the same. It is also indicative that the Applicant did not at the earliest opportunity back out of what he claimed he had done under duress.

It is also the Applicants claim that she signed the consent judgment under duress from the 1st Respondents agents, employees and or under their undue influence. Furthermore that this amounted to economic duress.

Duress refers to any unlawful threat or coercion used to induce another to act [or to not act] in a manner they would otherwise would not [or would]. Duress is pressure exerted upon a person to coerse that person to perform an act they ordinarily would not perform, ***Black's Law Dictionary 6th Edition.***

For Duress or economic duress to be proved the claimant must show that he went through illegimate pressure to do that which he would not otherwise have done.

Dyson J describes the position in *DSND Sub Sea Ltd vs Petroleum Geo-Services ASA (2000)B.L.R 530 @131* In these words;

> *"In determining whether there has been illegimate pressure, the Courts take in to account a range of factors. These include whether there has been an actual or threatened breach of contract, whether the person allegedly exerting the pressure has acted in good or bad faith, whether the victim had any realistic practically alternative but to submit to the pressure, whether the victim protested at the time, and whether he affirmed and sought to rely*

on the contract. These are all relevant factors. Illegitimate pressure must be distinguished from the rough and tumble of the pressures of normal commercial bargaining."

Not every word or action by the Defendant amounts to illegitimate pressure.

In the instant Application Mr. Dennis Wandera deposed that the reasons they signed the Consent Judgment was because they were under duress, undue influence and economic compulsion.

Mr. Dennis Wandera also deposed that in a meeting with Willes Barendsen who was the head of credit, Tracy Kivumbi head of business support, Micheal Mayanja assets recovery manager, Afua Ssemukaya special assets manager he was threatened that the 1st Respondent would employ its expansive financial muscle to frustrate the suit and to put the Applicant under perpetual receivership. That in the event of interim order being lifted the Applicants assets would be sold cheaply and that all the facilities leading to the Applicants bankruptcy.

That he was further threatened that the 1st Respondent would proceed to recover outstanding sums from him and his wife by way of attachment of their personal assets in their capacity as guarantors of the credit facility. That the only way he could save their property was to immediately withdraw the suit and vacate the interim order.

I have given considerable thought to these reasons and I still find that the threats of the Managing Director which the Applicant referred to were things that he freely assumed and certainly must have known when he and his wife guaranteed the loans.

He certainly must have expected that in the event of the Applicant failing to pay the 1st Respondent would use all lawful means which include hiring top notch lawyers to get judgment in her favour in the Courts of law.

The issue of receivership is not a threat but a procedure of recovery provided for under the law.

Selling of property which the Applicant feared is also a normal procedure of recovery and a person who was represented by some of the best lawyers in town had no reason to fear that the property would be undersold or even if it was undersold they would not be able to recover sufficient damages in that regard.

And lastly as guarantors he knew before he undertook to guarantee the loan that he would certainly be followed by the Bank if the Applicant failed to pay.

Going by these proceedings, I do not find that the Respondent acted in bad faith.

For the reasons above I do not find allegations of threats or duress proved. Moreover the Consent Judgment was entered 2 years and 11 months before the filing of this Application. This must have been an afterthought because where duress was involved the Applicant was expected to immediately run to the Courts or seek refuge under the law as soon as it had the opportunity especially under this arrangement where time spans for payment were given.

Failure to act immediately is a clear indication that duress was not applied and that it was just a second thought. This ground therefore fails.

Another reason relied on by the Applicant in her application to set aside the consent judgement is that the Respondent having undertaken to lift the receivership declined to do so after the consent had been signed and that such refusal was tantamount to lack of consideration to the signing of the consent judgment.

The lifting of the receivership is provided for in paragraph 9 of the consent judgment in these words;

> *"By virtue of this Consent, the Receivership commenced by the 1st Defendant in respect of the Plaintiff is hereby terminated."*

A scrutiny of the foregoing shows that on the signing of the consent, the receivership seized to exist. In the circumstances the 2nd Respondent had nothing to lift anymore. More so the judgment itself made it clear that the receivership was non-existent.
The ground that the consent judgment lacks consideration by the reason of the respondent's failure to terminate the receivership therefore fails.

The Applicant sought to rely on an advertisement by URSB DW3 dated 28th November 2016 which indicated that she had been listed as one of the companies under receivership. That for those reasons the 2nd Respondent had continued to hold out as a receiver of the Applicant.

I have studied the advertisement and I do not see anything to show that after the Consent Judgment the 2nd Respondent held out as a receiver. What the advert shows is that its origin is URSB. It does not state any other source and for all we know, it could have come from another creditor.

Moreover at the hearing counsel for the Applicant submitted that after the Consent the 2nd Respondent did not continue doing anything as a receiver.

For the reasons given above, there is no evidence to show that the Respondent held himself as a receiver after the consent.

The Applicant also averred that she entered into a consent without information of her indebtness.

Mr. Wandera of the Applicant deposed in paragraph 6 of his affidavit that;

> *"The Applicant repeatedly unsuccessfully requested the 1st Respondent to provide her with all relevant statements."*

That because of the absence of the Bank statements she did not know what was due to the 1st Respondent under the credit facilities so as to make out an accurate loan repayment schedule.

I have gone through the case file and I do not believe that the Applicant was not availed the statements. I say so because on the 9th December 2015, it was the Applicants' advocate who even availed the Court a bound copy of the Bank statements.

It shows that the Applicant was in possession of the statements before they entered into the consent which was on 20th January 2016.

This means that the Applicant was well informed of her financial position by the time she entered into the consent.

Furthermore in paragraph 5 of the Amended Plaint the Applicant clearly states that they are in possession of the bank statements which they annexed to the Plaint.

Again the language of the Consent Judgment itself indicates that the Applicant was availed all that was required before she entered into the Consent. Paragraph 1 of the Consent Judgment reads;

> *"The Plaintiff acknowledges that it is currently indebted to the 1st Defendant in the sum of UGX 3,637,871,319/= being monies due its credit facilities."*

The word acknowledgment is proof that the Applicant had ascertained the money she owed and in my view she must have looked at the statements.
It is this acknowledged debt that the 1st Respondent discounted to UGX 2,200,000,000/=.

For the reasons above, the ground that the Applicant was not aware of the extent of indebtness when she entered in to the Consent Judgment is devoid of support and must be held in the negative.

Lastly the Applicant stated that this application should be allowed because it had not been done with unreasonable delay.

In my view where customers money was involved, where banks core business was to lend and earn interest and where undertaking to pay by the Applicant had been made within specified periods, the 2 and 11 months was certainly very unreasonable delay and in my view the Application was brought in just to buy more time.

For those reasons the argument that the Application was brought in within reasonable time has no support and can only be held in the negative.

Consent Judgments are set aside on grounds that they were entered into without sufficient material facts, miss apprehension or

ignorance of material facts or they were actuated by illegality, fraud, mistake and contravention of court policy or any reason that would enable Court to set aside an agreement, ***Edison Kanyabwera vs Pastori Tumwebaze (2000-2005) HCB.***

In this case I find no reason to set aside the Consent Judgment freely entered into by the parties.

This Application is dismissed with costs.

Dated at Kampala this ......24th......day of......Aug......2021

HON. JUSTICE DAVID WANGUTUSI.

JUDGE