THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLANEOUS APPLICATION NO. 0768 OF 2021

(Arising from Civil Suit No. 0362 of 2021)

1. DILIPKUMAR P. PATEL	**}**	
2. MAGAN MEGHJI PATEL	**}**	
3. GAURAVKUMAR D. PATEL	**}**	**…… APPLICANTS**
4. DHARA MILAN DOBARIA	**}**	
5. PRAMUKH STEEL LIMITED	**}**	
6. KAMULI SUGAR LIMITED	**}**	
	VERSUS	
1. KASHYAPKUMAR B. PATEL	**}**	
2. RAVINDRAKUMAR P. PATEL	**}**	
3. PARTH M. PATEL	**}**	
4. MANUBHAI N. PATEL	**}**	
5. PARIMAL M. PATEL	**}**	
6. PATEL YASH AMRUTLAL	**}**	**…… RESPONDENTS**
7. AMRUTLAL NARSINHDAS PATEL	**}**	
8. KAMALABEN A. PATEL	**}**	
9. BRUCE MUSINGUZI	**}**	
10. ELISON KARUHANGA	**}**	
11. BUGIRI SUGAR COMPANY LTD	**}**	

Before: Hon Justice Stephen Mubiru.

RULING

a. Background.

The applicants jointly and severally sued the respondents jointly and severally for breach of contract and procuring a breach of contract. The applicant's case is that the 1st and 3rd respondents on 7th February, 2020 filed civil suit No. 108 of 2020 against the 1st, 4th and 5th applicants seeking a declaration that the sale and transfer of shares held by the applicants in M/s Pramukh Steel Limited to the 1st and 2nd respondents was void. On 6th February, 2020 the 1st, 2nd, 4th and 5th respondents had filed civil suit No. 102 of 2020 against the 1st, 2nd and 6th applicants seeking a declaration that the sale and transfer of shares held by the applicants in M/s Kamuli Sugar Limited

to the 1st and 2nd respondents was void. The applicants filed their respective defences to the suits. Before the two suits could be heard, the parties negotiated and entered into a "Confidential Release and Settlement Agreement" on 11th March, 2020. Under that agreement, the applicants undertook to pay the 1st – 5th and the 8th respondents a sum of money in full and final settlement of their claims. As part of that settlement, clause 7 (the non-compete clause) stated as follows;

> In consideration of group SH Y [the applicants herein] paying the settlement consideration in clause 3.1 in full to group SH X [the respondents herein], group SH X hereby undertake that they each shall not, for a period that will expire five (5) years after payment of the last instalment in clause 3.2, without the prior written consent of group SH Y, or the companies, directly or indirectly own, manage, operate, control, participate in , perform services for, or otherwise carry on business that is engaged in the manufacture or sale in Uganda of any steel products r sugar products and that they will not during that period , or any time thereafter, challenge the validity of any patent that arises and issue out of patent applications.
>
> Each group SH X party agrees that each party and such party's affiliate will not, for a period of three (3) years after the closing date, seek to employ any person now employed by the companies or any company subsidiaries.

It is on basis of that Confidential Release and Settlement Agreement that the parties executed consent judgments in the respective suits that determined the issues finally. It is contended by the applicants in the current suit that despite the undertakings made in the Confidential Release and Settlement Agreement, and the subsequent consent judgments, the 1st – 5th and the 8th respondents have since directly and indirectly through their agents, acquired shares in Bugiri Sugar Company Limited (the 11th respondent) and also otherwise funded it, thereby reviving its activities in the manufacture and sale of sugar products in Uganda. They have also recruited former employees of the 5th and 6th respondents to work with that company.

In their joint written statement of defence and counterclaim, the respondents refuted the applicant's claim. The 6th, 7th, 9th, 10th and 11th respondents not being party to the Confidential Release and Settlement Agreement, contend they are not bound by its terms. They contend further that its terms were never incorporated as part of the consent judgment, hence are unenforceable against them. On 18th March 2020 the parties replaced the Confidential Release and Settlement Agreement with

a "Release and Settlement Agreement," rendering the former obsolete. The latter agreement does not contain a non-compete clause. The consent judgments only referenced the Release and Settlement Agreement. Since it was a final discharge and settlement of all issues between the parties, the current suit is barred by law. Instead the applicants should seek to execute the consent judgments. The 11th respondent is only engaged in the construction of an industrial building, which activity is not prohibited by the Confidential Release and Settlement Agreement. In any event, the non-compete clause is unreasonable and unenforceable since it serves no legitimate purpose but only the creation of a monopoly for the applicants within the greater Busoga region. The 11th applicant is licenced to manufacture sugar and has already received numerous applications from suppliers of sugar cane. The 5th respondent is engaged in steel production only. The suit is an abuse of process and ought to be dismissed with costs.

Pending the disposal of that suit, the applicants filed the current application seeking an interlocutory injunction restraining the respondents jointly and severally from transferring their shares in Bugiri Sugar Company Limited and the 11th responding from sanctioning such a transfer. Before the application could be heard, counsel for the respondents raised a preliminary objection.

b. <u>The preliminary objection</u>.

The application is barred by section 34 of *The Civil procedure Act*. Under hat section, 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 be determined by the court executing the decree and not by a separate suit.

c. <u>Submissions of counsel for the respondents</u>.

Mr. Joseph Matsiko with Mr. Henry Byenkya on behalf of the respondents submitted that the application is barred by section 34 of *The Civil procedure Act*. The orders sought is an injunction to transfer shares. There is consent judgment in civil suit 102 of 2020 and 108 of 2020 of the Commercial Division. The affidavit is support of the application brings this out clearly para 4 of the affidavit in support of the application of Jay Patel. In paragraph 8 even assuming the CRSA

was part of the consent judgment. They acknowledge there was a final settlement. They should move court to give directions by the court enforcing the decree. In *Simba (K) Ltd v. UBC S. C. Civil Appeal No. 3 of 2014*. Application 840 seeks a temporary injunction from further breach and flouting a consent judgment. In application 840 they seek an injunction against further breach of the CRSA execution of the agreement resulted in the pending suits. Para 12, of that affidavit and para 33 shows that are tied together. Clause 4 of the release and settlement agreement which is the consent judgment. The suit settled was the one in the CRSA. It was all about shareholding and management. The consent judgment and the RSA settled all claims. The applicants are parties to both agreements with some of the respondents. The 7th – 11th respondents are not parties. The new agreement substituted the earlier agreement. Section 51 of *The Contracts Act*. They cannot seek to enforce it. Para 9 the affidavit in support. In the prayers they talk about the CRSA and following the consent judgment. All the applicants are parties to the agreements. Section 34 (3) applies to a representative of the party.

d. Submissions of counsel for the applicants.

Mr. James Nangwala with Mr. Joseph Kyazze, Mr. Nasser Seeunjogi and Mr. Henry Nyegenye on behalf of the rapplicants submitted that the operative word is about parties to the suit. The parties in the application should be the same in both matters. This is not the case. The plaintiffs were paid off. The CRSA was never attached to the consent. The consideration in the two agreements is different. The parties are not the same. Ajay and Bugiri sugar are not parties. The suit is founded on a claim for restraint of trade which was never the subject of the consent judgment. The issues in the two agreements have nothing to do with restraint. The RSA is of shorter than the CRSA. The consideration is smaller. The suit can be deemed as an application under section 34.

e. 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, shall be determined by the court executing the decree and not by a separate suit. This ancillary jurisdiction serves two separate, though sometimes related,

purposes: (1) to permit disposition by a single court of claims that are, in varying respects and degrees, factually interdependent and (2) to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees. The purpose of this provision is to create a cheap and expeditious remedy for determination of certain question in execution so as to avoid the multiplicity of suits in a limited class of cases relating to discharge or satisfaction of a decree.

Such questions may arise before, during or after the execution of the decree, but; (i) must arise between the parties to the suit or their representatives; (ii) must arise in the suit in which the decree was passed, and; (iii) must relate to the execution, discharge or satisfaction of the decree. The court executing the decree can decide two types of questions: (a) questions which are related with the execution, discharge and satisfaction of the decree, and (b) questions which are related with whether a person is a representative of the party or not. These will ordinarily be questions such as; whether a decree is executable? Whether the property 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? Questions regarding attachment, sale or delivery of property.

The key questions arising from the pleadings and submissions of counsel are; (i) whether either the "Confidential Release and Settlement Agreement" or the "Release and Settlement Agreement," or both, were incorporated in the respective consent judgments, and: (ii) whether a decree-holder who seeks to enforce benefits allegedly guaranteed to him or her under the Confidential Release and Settlement Agreement, does not do so in execution of his or her decree or by virtue of the Confidential Release and Settlement Agreement. The two issues will be answered within the context of the criteria applied when invoking section 34 (1) and (3) of *The Civil Procedure Act*.

i. <u>Questions arising between the parties to the suit or their representatives</u>.

The parties to the suit are the persons who actually contest the suit as plaintiff or defendant up to the time of the passing of the decree. However, for the purposes of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed, are parties to the

suit. The purchaser of the property sold in execution too is considered as party under this section, of the suit in which decree has been passed.

The term representative as used in section 34 (1) and (3) of *The Civil Procedure Act*, does not mean only the legal representative of a party, i.e. executor or administrator, but it means his or her representative in interest, and includes a purchaser of his or her interest who, so far as such interest is concerned, is bound by the decree. Every purchaser of the judgment-debtor's interest, who is bound by the decree, is a representative of the judgment-debtor within the meaning of the section. Whether he or she is a purchaser under a private sale from the judgment-debtor or a purchaser at a compulsory sale, held in execution of a decree obtained against the judgment-debtor. The parties must be arrayed as decree-holder or his representative on the one side and judgment-debtor or his representative on the other. Any question arising between the decree-holder and his or her own representative or between the judgment-debtor and his or her representative, save the question as to whether any person is or is not the representative of a party, is clearly not a question with in the purview of this section. The section does not as well apply when a question arises as to the execution of a decree between two persons each of whom claims to be the representative of the decree-holder.

The parties to civil suit No. 108 of 2020 were; Amrutlal Narsinhdas Patel (the 7th respondent), Kashyapkumar B. Patel (the 1st respondent), Parth M. Patel (the 3rd respondent) and Kamalaben A. Patel (the 8th respondent) as plaintiffs; while Dilipkumar P. Patel (the 1st applicant), Dhara Milan Dobaria (the 4th applicant) and Pramukh Steel Limited (the 5th applicant) were defendants. The parties to civil suit No. 102 of 2020 were; Amrutlal Narsinhdas Patel (the 7th respondent), Kashyapkumar B. Patel (the 1st respondent), Manubhai N. Patel (the 4th respondent), Ravindrakumar P. Patel (the 2nd respondent), and Parimal M. Patel (the 5th respondent) as plaintiffs; while Dilipkumar P. Patel (the 1st applicant), Magan Meghji Patel (the 2nd applicant) and Kamuli Sugar Limited (the 6th applicant) were defendants.

Parties that are common to both suits as plaintiffs are Kashyapkumar B. Patel (the 1st respondent), and Amrutlal Narsinhdas Patel (the 7th respondent) while Dilipkumar P. Patel (the 1st applicant) is the only applicant common to both suits as a defendant. The 6th respondent Patel Yash Amrutlal,

the 9th respondent Bruce Musinguzi, the 10th respondent Elison Karuhanga, the 11th respondent Bugiri Sugar Company Ltd, and the 3rd applicant Gauravkumar D. Patel, were not parties to either suit. None of the five (5) named litigants in this application who were not parties to either suit, is a legal representative of a party, i.e. as executor or administrator, nor a representative in interest so far as such interest is concerned, bound by the decree. It is thus evident that the issues which have arisen are not limited to parties to the suit or their representatives but include persons who are not parties to the suit. Such issues are not amenable to this provision.

ii. Questions arising in the suit in which the decree was passed.

Although the object of section 34 (1) of *The Civil Procedure Act* is to preclude the un-necessary expense and delay that fresh trials entail, and such a provision must naturally be construed as liberally as the language would permit, ordinarily, the execution Court cannot go behind the decree and must execute it as it stands. The powers of the court executing the decree under section 34 (1) of *The Civil Procedure Act* cannot go beyond the decree, i.e. the court cannot consider the merits and demerits of decree. Where the decree *prima facie* appears to be vague or ambiguous the question of the correctness of decree may not be amenable to this process. Questions such as whether or not the decree was obtained by fraud or whether the decree was obtained against the wrong person, or contains terms incorporated by reference, cannot be resolved by a proceeding under this section. Disputed rights of the parties cannot be decided under this provision.

A proceeding in execution cannot be said to be completed, at least so far as a decree-holder is concerned, until he or she has obtained the proceeds and benefit of the decree or the execution of his or her decree cannot be said to be satisfied or until all reliefs granted have been effectively realised. The issues that have arisen relate to the enforcement of the terms contained in the "Confidential Release and Settlement Agreement." While the applicants contend the terms of that agreement were never incorporated in the resultant consent judgment but only served as a precursor to it, the respondents contend that the said agreement was superseded by the "Release and Settlement Agreement," whose terms were incorporated in the respective consent judgments. These are some of the fact intensive issues to be determined in the main suit after hearing evidence. Suffice it to say here that the nature of this controversy indicates a *prima facie* ambiguity in the

scope and terms of the respective decrees. Questions of the correctness of decree, as opposed to its interpretation, are not be amenable to the process envisaged under this provision.

iii. Questions relating to the execution, discharge or satisfaction of the decree.

Execution connotes the steps leading to and achieving the satisfaction of the decree. Therefore all questions relating to the delivery of possession of the property to the purchaser or his representative, will be considered as related to execution, discharge and satisfaction of the decree. A question relating to execution, discharge or satisfaction of a decree may be raised by the decree-holder or by the judgment debtor at any time after the decree is passed until its full satisfaction. The pendency of an application for execution by the decree-holder is not a condition of the exercise of this power.

The question here is whether a decree-holder who seeks to enforce benefits allegedly guaranteed to him under Confidential Release and Settlement Agreement, which was a precursor to the consent decree but is not referenced therein, does not do so in execution of his decree but by virtue of the Confidential Release and Settlement Agreement. While the applicants contend the terms of that agreement were never incorporated in the resultant consent judgment but only served as a precursor to it, the respondents contend that the said agreement was superseded by the "Release and Settlement Agreement," whose terms were incorporated in the respective consent judgments.

A consent Judgment 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*). A consent judgment once recorded or endorsed by the Court, becomes the judgment of the Court and binding upon the parties. For that reason, in *Nshimye and Company Advocates v. Microcare Insurance Limited and Insurance Regulatory Authority, H.C. Misc. Application No. 231 of 2014*, it was decided that 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. It is however unique in that it is not a judgment of the Court delivered after hearing the parties. It is

an agreement or contract between the parties. As such it can only be set aside for a reason which would enable the court to set aside or rescind on an agreement.

There may be a change in the parties' circumstances which has taken place since the consent judgment was sealed. However, this would not normally give rise to any case for reopening matters. Settlements are intended to be final and they must be based on a snapshot taken at the time of the trial or agreement. A consent judgment therefore cannot be set aside on account of one of the parties having a change of heart. A party should not expect to profit from, or lose by, later changes in the other's fortune. A party who at the time of the agreement choses a speculative position will have no justification for subsequently seeking to be relieved of the consequences of his or her speculation. A party who chooses to take a gamble by agreeing to a specific method of settlement cannot subsequently ask the court to remedy the situation if the gamble turns out to be a loss due to fluctuations in market prices, however drastic. A significant increase or decrease in the value of a key asset would never be sufficient. It cannot be varied or set aside merely on the ground of a greater benefit or convenience arising from its variation or from setting it aside, except of course by consent of parties.

A consent judgment has to be upheld unless it is vitiated by the fact that if 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 the Court to set aside an agreement.

The authority of a trial court to enter a judgment enforcing a settlement agreement has as its foundation the policy in Article 126 (2) (d) of *The Constitution of the Republic of Uganda, 1995* favouring the promotion of reconciliation between parties though the amicable adjustment of disputes and the concomitant avoidance of costly and time consuming litigation. Under Order 25 rule 6 of *The Civil Procedure Rules*, where it is proved to the satisfaction of the court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject matter of the suit, the court may, on the application of a party, order the agreement, compromise, or satisfaction to

be recorded, and pass a decree in accordance with the agreement, compromise or satisfaction so far as it relates to the suit.

This provision requires the court to be satisfied that the suit has been adjusted wholly or in part by a "lawful agreement or compromise." Courts will not blindly lend their imprimatur to stipulated consent judgments because enforcement may affect the rights of third parties or otherwise be unjust or illegal. The court does have the prerogative and the duty to at least make the minimal determination of whether the agreement is appropriate to be accorded the status of a judicially enforceable decree. The court will therefore want to know the background and specific terms of any consent judgment and insist on deciding whether the order is one that the court would approve. The criteria applied in deciding whether to approve and enter a proposed consent decree are whether it is fair, adequate, and reasonable, as well as consistent with the law and public interest. The language contained in a consent judgment should be unambiguous and clearly state what each party is required to do under the judgment. When the reading of the judgment leads to multiple reasonable interpretations, it may become impossible to enforce.

The court may not modify a consent judgment *sua sponte*. The court should inform the parties of any concerns regarding a proposed consent decree and give them an opportunity to address them, otherwise it must approve or reject the consent judgment as it is presented. Parties need to understand though that by choosing the consent judgment route, they are inviting the court to have a say on the terms of settlement. If the court's concerns are not adequately addressed, it may refuse to endorse the proposed judgment because when court orders are involved, courts have a say in their contents. A judgment entered pursuant to a settlement agreement need not be limited to relief the court could grant on the merits. Court cannot refuse to enter a consent judgment merely because it would afford greater relief than that which could have been awarded after trial. So long as the pleadings state a claim within the court's subject matter jurisdiction and the settlement is within the general scope of the case made by the pleadings, the consent judgment can grant whatever relief is agreed to by the parties.

Standing alone, a settlement agreement is nothing more than a contract. A settlement agreement is the parties' document. It will reflect whatever the parties have agreed to. Whereas a settlement

agreement is a private document, does not have a requisite level of particularity (although specificity in a contract can be a good thing), such that the drafters are free to incorporate other documents by reference and its terms can be kept confidential, a consent judgment on the other hand is a public document that can be accessed by anyone. Therefore, the settlement terms included in a consent judgment will not remain secret. Provisions of a consent judgment must be stated in reasonable detail and cannot incorporate other documents by reference, even publicly available court records, because this does not make it clear that compliance with that agreement is mandated by an order of court and not by the principles of the law of contract. Settlement provisions that are not set forth in the judgment cannot be enforced by court as its decree. The terms must be made part of the consent judgment for them to become enforceable as part of the decree. To ensure enforcement by court, the parties must actually put the settlement terms into a consent judgment that directs the parties to perform those obligations.

Article 28 (1) of *The Constitution of the Republic of Uganda, 1995* guarantees every citizen the right to a "public hearing." The public-hearing guarantee comprises two distinct aspects; on the one hand as an individual right of the litigant. On the other hand, it constitutes an institutional guarantee, a way of ensuring that the administration of justice is subject to public scrutiny and contributes to respect for the law and the persons involved. Courts have recognised the right of public access to civil proceedings. Unfettered access to court proceedings promotes public respect for the judicial process. The right applies to all civil proceedings on the theory that broad public access to civil proceedings serves strong societal interests in promoting judicial and lawyer accountability and deterring court and advocate misconduct.

The right of access to civil proceedings and accompanying court papers is only worthwhile if members of the public can ascertain the material aspects of the case. The public has a right to know about the entry of consent decrees, as well as their modification, and their enforcement. The confidentiality of a private agreement will be lost when enforcement of the agreement is sought by way of a consent decree. Confidentiality of a settlement agreement is forfeited when the parties seek to have it enforced in court. Including settlement terms in a consent decree will preclude confidentiality because they will become part of a public document that is available for inspection. Therefore when settlement terms are incorporated into a consent decree, those terms irretrievably

enter the public domain. If the parties are only concerned with keeping the settlement amount confidential, they can best protect that from disclosure by not including that term in the consent judgment.

Courts have an interest in the contents of their orders. The incorporation of a publicly inaccessible settlement agreement by reference contravenes the Constitutional and common law right to inspect consent decrees. Members of the public and press would lack material portions of a court order because those provisions would be secret. The terms of a consent decree should be publicly available such that if third parties believe that they are adversely affected by the decree, they can move to intervene and to modify the decree. Whereas parties may opt to keep monetary terms of a settlement in a settlement agreement out of the consent judgment in order to ensure that the financial terms remain confidential, what parties cannot do is incorporate an entire settlement agreement by reference into a court order and then not file the agreement.

Ancillary jurisdiction to enforce an agreement does not exist. Unless the terms of a settlement agreement are expressly incorporated into the resultant consent judgment, the court will not be engaged in active supervision of the parties' performance of their settlement agreement through execution of the consent decree. In the instant case, the terms sought to be enforced by the applicants through the pending suit are not reflected in either consent judgments. This fact alone precludes the application of section 34 of *The Civil Procedure Act.* As to whether it was superseded by the "Release and Settlement Agreement," whose terms were incorporated in the respective consent judgments, is one of the fact intensive issues to be determined in the main suit after hearing evidence. All in all, I find that the nature of issues that have arisen, not being limited to the parties to the suit or their representatives, and being issues which are not patently, directly arising from or relating to the execution, discharge or satisfaction of the respective decrees, the objection must fail and it is accordingly overruled. The parties should now set down the application for hearing. The costs of the objection shall abide the outcome of the suit.

Delivered electronically this 7th day of March, 2022

……Stephen Mubiru……..

Stephen Mubiru
Judge,
7th March, 2022.