THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

[COMMERCIAL DIVISION]

MISCELLANEOUS CAUSE NO. 128 OF 2023

[ARISING FROM CIVIL SUIT NO. 909 OF 2020]

1. MUHANGI WILBERFORCE] APPLICANT

2. GLOBAL INTERNATIONAL ALLIANCE LTD

VERSUS

KAMUSINGA FAITH] RESPONDENT

Before: Hon. Justice Ocaya Thomas O.R

RULING

Background

This is an application under the provisions of Orders 46 Rule 1 and 8 and Order 52 Rule 1 of the Civil Procedure Rules ["CPR"] and Sections 82 and 98 of the Civil Procedure Act ["CPA"]. The Application seeks the following reliefs:

(a) The Consent Judgment entered by this court in Civil Suit 909 of 2020 be reviewed and set aside.

(b) Civil Suit No. 909 of 2020 be reinstated and heard on merit.

(c) Costs of this application be provided for.

The Applicants contend that the 1st Applicant entered engagements with the Respondent for her to join the 2nd Applicant as a shareholder. Pursuant to those discussions, the Respondent paid UGX 80,000,000 to the 2nd Applicant for 45% of its issued shares. Following from the same, the Respondent became a shareholder and director in the 2nd Applicant. The Applicants contend that the Respondent was

supposed to source letters of credit guaranteeing payment of USD 2,000,000 for use in the business of the 2nd Applicant but almost immediately after being onboarded as director and shareholder, the Respondent began demanding repayment of the sums invested above.

It was contended that when this happened, the 1st Applicant involved the Respondent that he would pay to her UGX 80,000,000 which she paid for the shares if he could get a buyer for her 45% stake. The Applicants contend that before a buyer could be obtained, the Applicant filed Civil Suit 909 of 2020 ["the main suit"]. After filing of the suit, the parties began engaging and the 1st Applicant indicated that he was willing to pay to the Respondent UGX 80,000,000 she paid for her 45% stake if he found a buyer. The 1st Applicant insists that this was recorded into a Consent Judgment which the parties executed.

However, the Respondent's lawyers changed the first page of that consent and replaced it with an unconditional agreement to pay UGX 130,000,000 and caused the same to be endorsed by court without an identification of the consent by the parties. The Applicants insist they only got to know about this when execution started hence the reason for filing this application.

For the Respondent this application was opposed. The Respondent contends that she filed the main suit seeking to recover UGX 150,000,000 but the same was reduced to UGX 130,000,000 by compromise of the parties recorded in the consent judgment endorsed by this court on 17th September 2021. The Respondent contends that the same was endorsed after interviewing the parties and their advocates and the court satisfying itself about the truthfulness and accuracy of the consent.

According to the Respondent, the Applicants did not discharge their obligations under the consent which caused the Respondent to commence execution proceedings. The Respondent took out a notice to show cause why execution should not occur and the hearing on the same was scheduled for 7th February 2023. Upon being served with a

notice to show cause, the Applicants filed HCMA 196 of 2023 seeking to set aside the consent judgment and the same application was dismissed for want of prosecution. Following the dismissal, the Respondent contends that she re-initiated execution proceedings and obtained a notice to show cause why execution should not issue and a hearing on the same was fixed 4th September 2023. According to the Respondent, it is when this occurred that the Applicant filed the current application.

The Respondent contends that this application is therefore designed to prevent recovery of the sums indicated above.

Representation

The Applicants were represented by M/s Oketcha Baranyaga & Co. Advocates while the Respondent was represented by M/s Muwema & Co. Advocates.

Evidence and Submissions

The Applicants led evidence by way of an affidavit in support deponed by the 1st Applicant. The Respondent led evidence by way of an affidavit in reply deponed by her. Both parties made brief submissions in support of their respective cases reiterating the contents of the respective affidavits, which I have considered before arriving at my decision below.

At the close of submissions on 19th December 2023, I delivered a ruling dismissing the application and undertook to provide the reasons shortly which I do here below.

Decision

PART I: PROPRIETY OF THE APPLICATION

Before I proceed to the determination of the application on the merits, if at all, I felt it necessary to consider the propriety of this application. The Applicants previously commenced HCMA 196/2023 seeking the same reliefs, and against the same parties. I dismissed HCMA 196/2023 under **Order 17 Rule 4** of CPR, upon, interalia, the absence of the Applicants' and its advocates.

A decision under **Order 17 Rule 4** of the CPR is a decision on the substance and accordingly, the Applicants had two options namely (a) appeal or (b) apply to set aside and/or review my decision in HCMA 196/2023.

Having not done so, in my view, this constitutes a re-initiation on a decided matter between the same parties, before the same forum on the same subject matter. In my view, this application is Res Judicata.

Section 7 of the Civil Procedure Act provides thus:

"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try the subsequent suit or the suit in which the issue has been subsequently raised, and has been heard and finally decided by that court.

Explanation 1. —The expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior to it.

Explanation 2. —For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation 3. —The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation 4. —Any matter which might and ought to have been made a ground of defence or attack in the former suit shall be deemed to have been a matter directly and substantially in issue in that suit.

Explanation 5. —Any relief claimed in a suit, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.

Explanation 6. —Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in

that right shall, for the purposes of this section, be deemed to claim under the persons so litigating."

The doctrine of Res Judicata, now codified in Section 7 of the Civil Procedure Act traces its roots from the latin maxim *nemo debt bis vexari pro una et eada causa* (No one should be vexed twice for the same cause). The position of the law, therefore, is that once a matter has been fairly and correctly tried once, it should be tried again. Litigation must come to an end. See **Cwezi Properties v UDB HCMA 1315 OF 2022, ATC Uganda v Smile Communications Uganda Limited HCCS 842/2023, Geraldine Busingye Begumisa v EADB & Ors HCMA 436/2022**

In **Karia and another v. Attorney General and others [2005] 1 EA 83**, the court laid out a three item test to determine whether a matter was res judicata. The test is as below:

(a) there has to be a former suit or issue decided by a competent court

(b) the matter in dispute in the former suit between the parties must also be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar, and

(c) the parties in the former suit should be the same parties or parties under whom they or any of them claim, litigating under the same title.

In **Boutique Shazim Limited v. Norattam Bhatia & Anor CACA No.36 of 2007** court held that essentially the test to be applied by court to determine the question of res judicata is this: is the plaintiff in the second suit or subsequent action trying to bring before the court, in another way and in the form of a new cause of action which he / she has already put before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon? If the answer is in the affirmative, the plea of res judicata applies not only to points upon which the first court was actually required to adjudicate but to every point which belonged to the subject matter of litigation and which the parties or their privies exercising reasonable diligence might have brought forward at the time.

In my view, in light of the dismissal of HCMA 196/2023, this suit would be res judicata. In **King's College Budo Staff Savings Scheme Limited v Zaverio Samula & Ors HCCS 26/2020**, the court defined abuse of court process thus:

"The term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient administration of justice. It is a term generally applied to a proceeding, which is wanting in bona fides and is frivolous, vexatious or oppressive. The term abuse of process has an element of malice in it. The concept of abuse of judicial process is imprecise, it implies circumstances and situations of infinite variety and conditions."

See also **Deox Tibeigana v Vijay Reddy HCMA 665/2019, Uganda Land Commission and Another V James Mark Kamoga and Another, SCCA No. 8 of 2014**.

It further came to my attention that the Applicant had filed MA 2278-2023 for stay of execution pending leave to appeal vide MA-22376 arising from CS0909-2020 was dismissed with costs on 20th October 2023 by Hon. Justice Mubiru. The Applicants conduct amounts to forum shopping having known very well that the matter had been dismissed by another judge had this one placed before me and didn't bring any of that to my attention.

In my view, the re-presentation of this matter post the dismissal of HCMA 196/2023 and MA-2278-2023 before another Judge constitutes an abuse of court process because otherwise, judicial time and effort would be wasted by a reconsideration of a matter already determined.

Section 98 of the CPA provides:

"Nothing in this Act shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."

In my view, where an action is an abuse of court process, the remedy is to have the same dismissed. Accordingly, on this consideration alone, I would dismiss the Applicants' application with costs and it accordingly stands dismissed.

PART II: CONSIDERATION ON THE MERITS

My determination above means that I do not need to delve on the merits of the Application. However, I will pronounce what would have been my ruling on the merits, in the event that my decision on the competency of this application above is overturned on appeal.

Propriety of The Application

Unfortunately, I find myself to consider the propriety of this application again, as regarding whether the same was made in time, before delving into the merits. For the Respondent, it was alleged that the application was aimed only at frustrating execution.

An inordinate delay is a delay that is unusually or disproportionately large or excessive. See **Abel Belemesa v Yesero Mugenyi HCMA 126/2019**

Where a party takes an inordinate delay in seeking for a relief, the court may refuse to grant that relief. see **David Muhenda v Humphrey Mirembe SCCA 5/2012**

When a consent is endorsed, a diligent litigant/advocate ought to check on the court record or with the opposite party or its counsel to ensure that they obtain a copy. Even if it can be said that the consent endorsed was different from what the parties agreed as claimed by the Applicants, the Applicants by following up to obtain an endorsed copy of the Consent Judgment would have discovered the same and taken the necessary measures.

The said consent was endorsed on 17th September 2021. The Applicants, two years later, brought this application for setting aside of the consent. The Applicants did not

provide sufficient reason why they were unable to know of the existence of the consent until the first execution attempt. Court proceedings are generally public record and consent judgments are generally accessible, especially to litigants. The Applicants failed to exercise diligence and, in my view, this application is brought after an inordinate delay. I accordingly dismiss the same with costs.

Setting Aside

Owing to my decision above, I would not need to rule on the remaining matters. However, for the sake of completeness, I will give what would have been my decision.

A Consent Judgment was defined 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. Therefore, when it 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. **See Agrafin Management Services Limited v Agricultural Finance Corporation and 5 others [2012] eKLR, Koboko District Local Government v Okujjo Swali HCMA 1/2016**

The nature of a Consent Judgment is a judgment of the parties validated by **Order 25 Rule 6** of CPR and is enforceable in the same manner and with the same fervour as a judgment rendered after a full trial. See **British American Tobacco (U) Limited v Sedrack Mwijakubi, SCCA 1/2012**

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, HCMA. 231 of 2014**

Order 25 Rule 6 of the CPR provides for compromise of suits, and states that where the court is satisfied that a suit has been adjusted wholly or in part by any lawful

agreement or compromise, it shall, on the application of any party, order that such agreement, compromise or **satisfaction be recorded and enter judgment in accordance therewith.**

In **Hirani v Kassam [1952] EA 131**, in which it approved and adopted the following passage from **Seton on Judgments and Orders, 7th Ed., Vol. 1 P. 124:**

"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."

See Also **Attorney General and Another v James Mark Kamoga and Another, SCCA 8 of 2004, Jennifer Harriet Bamwite v Arvind Patel, HCMA 188 of 2014, Mohamed Allibhai v W.E. Bukenya and another, Civil Appeal No.56 of 1996**

However, where there is misapprehension or mistake of fact or law, it can be a ground for setting aside a Consent Judgment. The nature of misapprehension or facts which will result in setting aside a consent judgment was explained in **Eleko Balume and 2 others s Goodman Agencies Limited and 2 others HCMA 12 of 2012** where court observed that:

"The misapprehension or facts that may form the basis for setting aside a consent judgment must relate to the state of mind of the parties to the consent judgment by which state of mind informed by the facts before them they were misguided into executing the consent judgment."

It is now well-established law that a consent decree must be upheld unless it is vitiated for reasons that would mandate a court to set aside an agreement, such as fraud, mistake, misapprehension or contravention of court policy.

Here, the Applicants allege that there was fraud in the obtaining of the consent namely that the terms of the consent contained on the first page agreed by the parties were fraudulently substituted with a new page and the signatures of the Applicants which were on a separate page were inserted thereon.

A Consent Judgment can be set aside for fraud. See **Mohammed Alibhai v W.E Bukenya Mukasa & Anor SCCA 56/1996, Kaddu Mukasa Herbet & Ors v Julius Kavuma Kabenge HCMA 487/2022**

In **Kaddu Mukasa Herbet & Ors v Julius Kavuma Kabenge HCMA 487/2022** it was held that where the grounds for setting aside a consent judgment is fraud, a separate suit should be filed where such allegations can be carefully investigated and concluded. See also **Hannington Wasswa vs. Maria Onyango Ochola & Others SCCA No. 22/93, Nalumansi Christine v Hon. Justice Steven Kavuma HCMA 155/2018, Yahaya Walusimbi v Justine Nakalanzi HCMA 386/2018, Stephen Wandera v Goodman Agencies & Ors HCMA 680/2021, Hilda Wilson Namusoke v Owalla's Home Investment CACA 15/2017, Naguyo Amos v Olivia Birungi HCMA 1404/2021**

The above decisions are grounded on the understanding that fraud is a serious allegation which must be strictly proved and attributed to the adverse party.

Accordingly, a full and comprehensive examination of the allegations of fraud is necessary before returning a decision on the same. See **Kampala Bottlers v Damanico (U) Ltd SCCA 22/1992**

Accordingly, the procedure chosen by the Applicants is not adapted to the determination of the allegations raised and this court cannot therefore pronounce itself on them, as, owing to the limitations of this procedure, and in keeping with above decisions, some of which are binding on me, the allegations of fraud raised by the

Applicant cannot be comprehensively investigated and determined herein. This court is therefore constrained to dismiss the Applicants' application with costs.

Conclusion

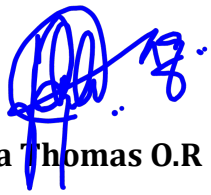
In sum, I make the following orders

(a) The Applicants' application is Res Judicata and is therefore dismissed with costs. I decline to reinstate HCCS 909 of 2020.

(b) In consideration of all other grounds I still find that the Applicant's application is inordinately delayed, incompetently before this court and is therefore dismissed. I decline to reinstate HCCS 909 of 2020.

I so order.

Delivered electronically this 2nd day of January 2024 and uploaded on ECCMIS.



Ocaya Thomas O.R

Judge

2nd January, 2024