

REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
HCT-OO-CV-MA-0437 OF 2002
(Arising from High Court Civil Suit No. 304 of 1994)

CITY AFRICAN TEXTILE SHOP (U) LTD:..... APPLICANT
VERSUS

JAN MOHAMED LTD :.....RESPONDENT

BEFORE: THE HONOURABLE MR. JUSTICE F.M.S. EGONDA-NTENDE RULING

1. The applicant was the successful party in the main suit. It received judgement for shs.64,063,125/=, interest and costs against the respondent on 25th July 1997. On the 5th March 1999 a compromise cum order of satisfaction of decree was by consent filed in court. It was drawn by M/S Nyanzi, Kiboneka and Mbabazi Advocates, newly instructed advocates for the applicant, in conjunction with Kangwamu and Co. Advocates, counsel for the respondents.
2. The compromise cum order of satisfaction of decree in effect provided that the sum of Shs25,600,000/= to be paid to the applicant by the respondent shall satisfy fully and effectually the decree in the suit in consideration of the Respondent not pursuing the intended appeal.
3. The applicant has now come before this court, seeking to set aside the said consent order, on several grounds. Firstly that the order was illegal, null and void. Secondly that it was procured by fraud, collusion, and complicity between one Hussein Abdalla and the Respondents. Thirdly that the M/S Nyanzi Kiboneka and Mbabazi Advocates, who acted for the applicant had no instructions from the applicant to act for the company or to enter into the said compromise on the applicant's behalf. This application is supported by the affidavit of Jackson Mugooha with many aimextures including affidavits of Hanif Hudda, Hussein Abdalla and Mohamed Mbabazi filed previously in other proceedings under this suit.
4. The respondent opposes this application and it has filed two affidavits in support of its position sworn by HanifHudda and Issah Kamugisha.
5. At the hearing of this application, learned counsel for the applicants, Mr. Gilbert Niwagaba, submitted that the compromise was illegal because it in effect reduced an award of court. He referred to the case of Konde v Nankya [1985] HCB 22 as authority for this proposition.

6. Secondly Mr Niwagaba submitted that the consent order was procured by fraud and complicity between one Hussein Abdalla and the Respondent. The Respondent had filed an appeal and an application for stay of execution. Stay of execution was granted by the High Court on condition that the respondent would pay the decretal sum and costs in court. Instead of compliance with this order a consent order was filed. Mr. Mohamed Mbabazi was instructed by Hussein Abdalla, who was not an officer of the company. There was no resolution of the company authorising a settlement for a lesser sum. There was no resolution granting authority to Hussein Abdalla to negotiate on behalf of the company. There was no resolution appointing an Nyanzi, Kiboneka & Mbabazi Advocates to act on its behalf. He referred to the case of **Bugerere Coffee Growers LTD v Sebaduka and Anor [1970] EA 147.** The advocate did not have instructions to act for the applicant and to compromise the decree. Where an advocate consents to an order without authority of the company the resultant judgment is a nullity, He referred to the cases of **Steven Kasozi and 2 others v Peoples Transport Services Supreme Court Civil Appeal No. 27 of 1993, Buikwe Estate Coffee LTD & 2 others v Rutabi and Anor, [1962] EA 358 and Kafuma v Kimbowa Builders & Contractors [1974]EA 91.**

7. Mr. Niwagaba attacked the letter, annexure B to HanifHudda's affidavit annexed to Jackson Mugooha's affidavit that purported to instruct Nyanzi Kiboneka and Mbabazi Advocates that it was not a resolution of the company. It was not signed by the Managing Director of the applicant Mr. Jackson Mugooha. The letter was also signed by some people who were not directors of the company though they purported to be. He prayed that the consent order should be set aside.

8. Mr. Kato Sekabanja, learned Counsel for the Respondent, submitted that the essential question was whether the lawyers who acted for the applicant had sufficient instructions to do so. For if they did have instructions to act for the applicant, they had implied authority to settle the suit, It was the contention of the respondent that annexure B was clearly signed by the company. Any two directors could bind the company, and four directors had signed the notice of instruction. This was sufficient to show the other party that the advocate had ostensible authority in the matter.

9. Mr. Kato Sekabanj a further submitted that Annexure J, the faxed instructions are irrelevant, as they were between advocate and client. The applicants must show that there was a

requirement for a resolution in order for an advocate to be instructed or that the managing director had to sign the instructions. This was a case of one director against the other directors and all he should have done was to file a derivative action. He prayed that this application be dismissed.

10. The facts of this case appear not to be substantially in dispute. It is the interpretation attached to the same that is in controversy. The applicant was initially represented by Kayondo and Company Advocates in the main suit. Mr. Mbabazi took over just before the consent order was concluded. He was instructed to act for the applicant basically by Mr. Hussein Abdalla who styled himself an Executive Director of the Applicant and some people who claimed to be directors of the applicant. This is clear from the affidavit of Hussein Abdalla and that of Mohamed Mbabazi. In addition there is annexure B, the letter of 12th January 1999 written by Hussein Abdalla and countersigned by some persons named without their offices or designations being stated. It is contended for the respondent that this letter was sufficient authority to instruct the firm of advocates as it was signed by at least two of the directors. On the other hand it was contended for the applicants that this letter was not sufficient authority to instruct the advocates as it was not signed by the Managing Director of the company while at the same time it was signed by persons, two of whom were not directors of the applicant.

11. I shall set out the relevant portions of the affidavit of Hussein Abdalla.

“1. That I am a shareholder and the Executive Director of City African Textile Shop (U) Ltd., the plaintiff in HCCS No. 304 of 1994 against Janrnohamed Jaffer Ltd.

2. That I am the one who instructed M/S Kayondo & Co. Advocates to institute the said HCCS No. 304 of 1994.

3. That City African Textile (U) Ltd, got judgement for Shs.64,063,125/r (Sixty for million, sixty three thousand, one hundred and twenty five) but M/S Janmohamed Jaffer Ltd instituted appeal proceedings.

4. That in consideration of the said Defendant abandoning the appeal I as Executive Director of City African Textile Shop (U) Ltd, did negotiate with the Directors of the Defendant to pay a lesser sum instead of proceeding with the appeal provided payment was immediate.

5. That I instructed MIS Nyanzi, Kiboneka and Mbabazi Advocates to proceed and finalise the compromise by executing the necessary documents and collect the Shs.25,600,000/ (twenty five

million, six hundred thousand) I had agreed upon as full and final settlement with the defendant.

6. That City African Textile Shop (U) Ltd. has no claim whatsoever against Janmohamed Ltd.

7. That I know Mugooha Jackson has no or any rightful claim on the payment which occurred from HCCS No. 304 of 1994.

8. That the payment was in respect of renovations on the defendant's building which I had personally carried out and paid for personally.

9 That I personally paid the legal fees for prosecuting HCCS No. 304 of 1994 to M/S Kayondo & Co Advocates and all incidental expenses.”

12. I shall set out also the relevant portions of the letter of 12th January 1999.

“M/s. NKM Advocates

CT:03/99 Dear Sirs, Re: INSTRUCTIONS TO TAKE OVER HOUSE NO. 3 04/94 BETWEEN CITY AFRICA ETC.

The management of City Africa hereby instruct you to take over the contract of the above suit for M/s. Kayondo & Co. Also note that all lawyers who handled this matter e.g. shall have been instructed to withdraw from representing City Africa. Yours sincerely,

(signed)Executive Director

1. Hussein Abdalla (signed)

2. Angra Mohamed (signed)

3. Issa Muhisha (signed)

4. SamklifMusinguzi (signed)

5. Haruna Ssendendo (signed)

6. Jackson Mugooha (unsigned)”

13. From the affidavit of HanifHudda, acting company secretary of the respondent, the advocates for the respondent received from the advocates for the applicants the above letter, and an annual return filed in the company registry showing the directors and secretary of the applicant, annexure C to the affidavit of Jackson Mugooha. On the basis of these documents she was satisfied that the applicant's new advocates had authority to settle this matter.

14. Annexure C names the following people as Directors of the applicant.

I. Jackson Mugooha (Managing Director)

2. Angira Mohamed

3. Sengendo Haruna

4. Musinguzi Sam

5. Kamugisha Issah

It is important note at this stage that Hussein Abdalla was not a director of the company on the basis of this return. There is also evidence not in dispute that he had been removed as a director of the company prior to this return being filed. The respondents were aware of this fact at the material time.

15. Annexure E to the affidavit of Jackson Mugooha is an affidavit sworn by Mohamed Mbabazi, the advocate who signed the consent order in question. Relevant portions of this affidavit state,

“6. That towards the end of October last year I received a letter from M/s Mwesigye, Mugisha & Co. Advocates, a photocopy of which is annexed marked MM1. 7. That I wrote a reply with 42 pages of annexures furnished to me by the Executive Director of the Applicant to the said letter annexure MM1 and my said reply detailed my role in carrying out my instructions from CITY AFRICAN TEXTILES (U) LTD re the compromise settlement of HCCS 304 of 1994, a photocopy of my said reply together with its 42 pages of annexures attached marked MM2 and the original of the same was filed at the High Court Registry on 9/11/2001 .“

16. I shall set out in part the letter mentioned above in which Mohamed Mbabazi explains what happened in relation to the consent and the role of both Hussein Abdalla and Mohamed Mbabazi. The letter is dated 2nd November 2001.

“1. Our firm was instructed to take over the above matter from M/s Kayondo & Company Advocates vide a letter dated 12th January 1999 hereto attached as Annexure “A”. You will note that therein Hussein Abdalla alias Habre who brought the letter together with the case file is described as the Executive Director. You may also note that from the documents hereto annexed as annexe “B” the said Hussein Abdalla features as a director and key person in the management of the plaintiff company as even the court fees in respect of the suit were paid by the said Hussein Abdalla. From the same documents there is a letter from Jackson Mugooha recognising the efforts of Hussein Abdalla in pursuing the case in question.

2. Upon receipt of the letter of instructions we duly filed a notice of change of advocates which we copied to all lawyers involved. Copy is attached as annexe “C”. 3. Thereafter we received a fax annexed as annexure “D” from Hussein Abdalla whose contents are self explanatory. But you

will note from that fax that negotiations on behalf of the plaintiff company with the defendant to accept the Twenty five million six hundred thousand (shs.25, 600,000/)as satisfaction, and full and final payment were done by Hussein Abdalla. The Judgement Debtor must have negotiated with him as a Director acting for and on behalf of the Decree Holder in order to come to such agreement.

4. The twenty five million six hundred thousand (*Shs.25,600,000/=*) was duly paid by the Judgement Debtor as is well stated in the compromise and we received it. This fact is well known to Mr. Jackson Mugooha together with his former lawyer M/s Badagawa & Company Advocates.

5. After deducting our agreed fees together with other deposits made in respect of other suits, the balance was paid and received by the said Hussein Abdalla alias Habre as per copies of receipts and vouchers hereto annexed as annexe

17. The fax of Hussein Abdalla to Mohamed Mbabazi states in part,

“ATTN: MR. MIBAZI

P’SE DO DISCUSS WITH THE ABOVE LAWYER CONCERNING CITY

AFRICAN. I HAVE AGREED WITH THE OTHER PARTY 25,600,000/ YRS

HUSSEIN HABRE”

18. In the latest affidavit sworn by Hanif Hudda for the Respondent she states, “2. That in the month of March 1999 I was approached by two gentlemen who identified themselves as directors of the Applicant company and offered to negotiate a compromise settlement instead of the Respondent proceeding with the appeal.

3. That I directed the officers of the applicant company to approach us through their company advocates.

4. That their advocates M/s Nyanzi, Kiboneka and Mbabazi Advocates subsequently contacted our then advocates M/s Kangwamu and Co. Advocates and produced a letter of instruction annexed ‘B’ to my earlier affidavit now included in the Applicant’s affidavit in support of the application.

5. That upon confirmation of the details of the signatories of the letter of instruction to M/s Nyanzi, Kiboneka, Mbabazi and Co Advocates we decided to go ahead with the negotiations for a compromise settlement.

6. That M/s Nyanzi, Kiboneka, Mbabazi & Co Advocates were duly instructed by the applicant company in this suit and their actions in the above suit are valid.

7. The compromise cum order of satisfaction was duly executed and is binding on the applicant company.”

19. The second affidavit for the respondent is sworn by Issah Kamugisha who states that he is a director of the applicant company and that M/s Nyanzi Kiboneka Mbaba7i and Co. Advocates were duly instructed by the company in the letter of 12th January 1999. And that he is the person who is named in that letter as Issa Muhisa.

20. From the foregoing evidence as presented by both sides it is clear to mc, especially in light of the affidavits of Hussein Abdalla and Mohamed Mbabazi the substance of the consent order was negotiated between Hussein Abdalla and the respondent. Though Mr. Hussein Abdalla passed himself off as Executive Director and director (vide letter of 12t1 January 1999), he was not a director of the applicant company to the knowledge of the respondents. The letter of 12th January 1999 did not purport to grant him any authority to negotiate with the respondents which is in fact what occurred in this suit. The negotiations were not between counsel for the parties but between Hussein Abdalla and the respondents.

21. The letter of 12t1, January 1999 instructing NKIVI advocates was not signed by the Managing Director of the applicant. It was written by a person who was not a director of the company. It was signed by one other person whose name did not appear in the list of directors filed with the Registrar of Companies. These facts were known to the respondent at the time. The affidavit of Mr. Issa Kamugisha that explains this as a typing error was not available at the material time, and there is no indication that such explanation was either sought or given to the respondent at the material time. The respondent does not indicate beyond this letter of 12th January 1999 what satisfied it that Hussein Abdalla, a person who was not a director or secretary of the company, had derived the authority to settle the suit. There is no evidence that such authority existed.

22. The letter of 12 January 1999 could not, in my view, form the basis of authority of the company instructing Nyanzi, Kiboneka and Mbabazi Advocates to act for it in the suit at hand for several reasons. The letter was not signed by all the directors of the company. The letter was signed by persons who were not directors of the company. There has been no suggestion that there was ever meeting of the board of Directors of the applicant company in which a decision to

instruct this particular firm of advocates was made. The affidavit of Issah Kamugisha does not allege any meeting of the Board of Directors having taken place. The Board of Directors could only act in a properly constituted meeting or if the articles of association so allowed, if all the directors consented in writing to such a resolution.

23. No memorandum or articles of association of the company have been introduced in evidence. And I am not sure what they provide on this point or any other. In the absence of the articles I cannot accept the submission by Mr. Kato Sekabanja that two directors had sufficient authority to instruct *MIS* Nyanzi, Kiboneka and Mbabazi Advocates. That proposition simply has no basis upon which to stand. I find that *M/S* Nyanzi, Kiboneka and Mbabazi Advocates were not properly instructed to act for the applicant company.

24. I further find that on the evidence available to me that the disputed consent order was negotiated and agreed upon by Hussein Abdalla and the Respondent, and Hussein Abdalla instructed Mohamed Mbabazi to formalise this settlement with the respondents lawyers. This was formalised and Mr. Hussein Abdalla, and not the applicant company, received the proceeds of this consent order, and applied the same to his purposes.

25. Mr. Jackson Mugooha, the Managing Director of the applicant company states in his affidavit that Mr. Hussein Abdalla was not a director of the company. This is borne out by records available at the time to all the players in this saga, including both the respondents and its advocates as well as Nyanzi, Kiboneka and Mbabazi Advocates.

26. There is no evidence available to this court to suggest that applicant company authorised Hussein Abdalla to negotiate a settlement with the respondent. There is no evidence to show that Hussein Abdalla was authorised by the company to instruct the firm of lawyers to record the settlement he had negotiated. The settlement so recorded was in my view void. For to the knowledge of the respondent, Hussein Abdalla was not a director of the applicant company or its attorney. Similarly *M/s* Nyanzi, Kiboneka and Mbabazi Advocates, ought to have been aware, in light of the annual return, that was available at the time, that Hussein Abdalla was not a director of the company.

27. I am satisfied that the respondents, instead of asking the gentlemen who initially approached them to settle the case, for their authority to do so, only required them to name a firm of advocates. This did not settle the basic question of authority to negotiate a settlement, which was lacking on the evidence I have accepted. In spite of this lack of authority, the respondent went

ahead to negotiate with a person who had not shown that he had authority to do so.

28. In the result I find that the compromise cum order of satisfaction recorded in this suit on Hthday of March 1999 was void as the persons who purported to act for the applicant company, that is Hussein Abdalla and M/s Nyanzi, Kiboneka & Mbabazi Advocates had no authority, real or implied, of the applicant company, to the knowledge of the respondent, to compromise the suit on behalf of the applicant company. The Compromise cum order of satisfaction is accordingly set aside with costs to the applicant company.

Dated at Kampala this 14TH, day of October 2002

Fredrick M.S Egonda-Ntende

Judge

14th October 2002