THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(FAMILY DIVISION)

MISCELLANEOUS. APPLICATION NO. 76 OF 2012

(ARISIING FROM HCCS NO 141 OF 2009)

ROBERT KAGUDDE MUBIRU:::::::::::::::::::::::::::::: APPLICANT

VERSUS

1. **DAVID MUBIRU**
2. **MARGARET NAKAZZI :::::::::::::::::::::::::::::::: RESPONDENT**
3. **JUSTINE NAKAYOMBYA**

BEFORE HON. MR. JUSTICE B. KAINAMURA

RULING

During the trial of HCCS No 141 of 2009-***David Mubiru & 2 others Vs Robert Kigudde Mubiru***, the Applicant here in filed this Misc. Application by Notice of Motion under S. 33 of the Judicature Act (cap 13), S.98 of the CPA (cap 7 1) and order.52 rr, 1 & 2 of CPR for an order setting aside an order made by this Court in Main Suit HCCS No 141 of 2009 dated 30th March 2011.

By way of background, HCSS No. 141 of 2009 came before me for the first time of 5th November 2010. The Plaintiffs were represented by Mr. Kanyerezi Masenbe while the Defendant was represented by Mr. F. Sentometo. The case next came up on 2nd December 2010 and the parties opted to try Court assisted mediation as a

means of resolving the case. When the case next came up on 10th February 2011, the parties reported that they had zeroed on two steps to be taken i.e that the residential house at Rubaga and the commercial building at Nakulambye be valued by a valuer of the Defendant's choice and the report be filed in Court.

Apparently the position agreed to on 10th February 2011 was not implemented by the Defendant and when the parties next appeared on 22nd March 2011, Mr. Masembe applied under Order 7 CPR for Court to order for inspection and valuation of the properties. On his part Mr. Sentomero notified Court that attempts were made by his client to value the properties but the valuers he had contracted had declined. He sought for a 20 minute adjournment to consult his client. The adjournment was granted. On resumption of the hearing, Mr. Sentomero reported to Court that the parties had agreed on a position that the valuer be jointly instructed by both parties. Mr. Masembe read out the specific terms for the valuation.

a) M/s Semaganda & Associates be instructed to value the properties.

b) In relation to the Nakulabye property, the valuer be asked to advise on present day market value of the property discounted by:-

(i) Area at the back of the property comprising of a hall which was an addition to the property by the Defendant (the land on which it was built).

(ii) The improvements to the property carried out by the Defendant in respect of the Rubaga Property discounted from the present day market value.

The valuer was to report to Court by 5th April 2011. The agreement above was to be reduced into a Consent Order.

On 30th March 2011 the parties registered in Court the impugned order.

Subsequently the valuation was done and when the case next came up on 27th October 2011, a report to that effect was made. On 31st October 2011, the case came up in Court but the Defendant was not in Court as he was reported sick. Mr. Mulumba who was holding brief for Mr. Sentomero declined to agree to any proposed way forward without confirming with the Defendant first. Court gave the parties up to 1st December 2011 to persue an amicable settlement failure of which the Suit would be set down for hearing on 14th December 2011. If the parties realised an amicable settlement was not forthcoming, they were requested in the intervening period to file an amended Scheduling Memorandum. On 12th day of December 2011, a notice of change of Advocates was filed and M/s Tibaijuka &

Co Advocates and M/s Mugarura, Kwarisiima & Co Advocates jointly took over the conduct of the case on behalf of the Defendant.

When the case came up for mention on 25th January 2012, both Counsel reported that they had agreed to some changes to the amended joint Scheduling Memo which they were to file that day. On 31st January 2012 an amended joint Scheduling Memorandum was filed.

The hearing of the case started on 6th February 2012 and the first Plaintiff was called as PW1.Examinataion in chief was completed on the same day and cross-examination started on 22nd February 2012. During cross-examination Counsel Tibaijuka posed a question relating to the Nakulabye property and Counsel Masembe objected contending that matters relating to ownership of the property were resolved by Consent Order filed in Court. The Applicant being dissatisfied with this position filed this Notice of Motion to set aside the Order dated 22nd March 2011.

The application is based on three grounds:

1. ***The Applicants former Advocates purported to sign the said order without the consent of the Applicant and the order is grossly prejudicial to the Applicant's case in the main suit.***

2. ***The Respondents who have a right to cross-examine the Applicant and / or to adduce more evidence stand to lose nothing if the said order is set aside.***

3. ***It is fair just and equitable that the said order be set aside in the interest of Justice.***

While urging the first ground, Learned Counsel for the Applicants contended that the former Advocates of the Defendant (now applicant) in HCCS No 141 of 2009 purported to sign the said impugned order without the consent of the Applicant. He went on to urge that the insertion into the order of the statement that the Nakulabye property formed part of the deceased's estate was fraudulent as it was intended to deprive the Applicant of his proprietary rights as regards the Nakulabye property and in effect barred the Applicant from pursuing his claim over the Nakulaye property. Learned Counsel took issue with how the former Advocates of the Applicant conducted the case up to the time he took it over. He argued that the order was secured by the former Advocates of the Applicant without his consent.

Learned Counsel relied on the case of ***Attorney General & Anor Vs Kamoga & Anor Civil Appeal No. 8 of 2004*** for the notion that even a party who consents to a decree may be aggrieved by it. Counsel quoted a paragraph at pg 22 in the Judgment to the effect that:-

"It is a well settled principle therefore that a consent decree has to be upheld unless vitiated by a reason that would enable Court to set aside an agreement such as fraud, Mistake, Misapprehension or Contravention of Court policy. The principle is on the premise that a consent decree is passed on terms of a new contract between the parties to the Consent Judgment".

Basing on the above, Learned Counsel submitted that the conduct of the former Attorney of the Applicant could not be condoned by Court as it was not in Consonant with Court Policy. Learned Counsel concluded by contending that the former Advocates and the Respondents Advocates misled Court in believing that the fraudulent insertion arose out of what had transpired in Court as borne out by the Court record.

On the second ground, Counsel contended that the Respondents stand to lose nothing as they will be at liberty to cross examine the Applicant and adduce more evidence to discharge their burden.

Counsel concluded by asserting that it is fair, just and equitable to set aside the order and called upon Court to do so.

In reply, Learned Counsel for the Respondent dealt with the grounds in the order in which Counsel for the Applicant had urged them. On Ground 1, Learned Counsel

stated that the parties had agreed that the valuation of the Rubaga and Nakulabye properties would be used as the basis of the settlement negotiations. He pointed out that it was the agreement between the parties of 22nd March 2011 that formed the basis of the Consent Order. He went on to say that the two properties were valued in the presence and with the involvement of the Applicant pursuant to the Consent Order. Learned Counsel contended that as long as Counsel is acting for a party in a case and his instructions have not been terminated, he has full control over the conduct of the trial and apparent authority to compromise all matters connected with the action.

He agreed with the principle in the authority of ***Attorney General & Anor Vs Kamoga & Anor*** (supra) which rejects the notion that a party who consents to a decree cannot be aggrieved by it but additionally agreed with the principle that a Consent Decree has to be upheld unless it is vitiated by reason that would enable a Court to set aside an agreement such as fraud, Mistake Misapprehension or Contravention of Court Policy. He concluded by submitting that none of the circumstances that justify the setting aside of an agreement had been proved by the Applicant.

Urging Ground 2, Learned Counsel reiterated his submissions on Ground 1 and called upon Court not to condone a party seeking to set aside his own agreement by alleging fraud on the part of his Counsel.

On Ground 3 Learned Counsel contended that there is no justification whatsoever warranting this application.

The principles upon which a Consent order can be set aside have long been settled as well enunciated by both Counsel in their submissions. I will therefore not belabor on the principles any further.

Relying on the above principles, Learned Counsel for the Applicant singled out one and vehemently urged that the former Advocates of the Applicant committed fraud against him in collusion with the Respondents Advocates. This to say the least is a very serious allegation and must, in my view be sufficiently proved to the satisfaction of Court. In the case of ***Fredrick J.K. Zaabwe Vs Orient Bank Ltd & Others Civil Appeal No. 4 of 2006***, *Justice Katureebe JSC* had this to say at pg 14:-

> ***"In my view an allegation of fraud need to be fully and carefully inquired into, Fraud is a serious matter, particularly where it is alleged that a person lost his property as a result of fraud committed upon him by others".***

In my view the Applicant other than alleging fraud has not sufficiently demonstrated that his former Advocates committed fraud against him in the conduct of his case. The record of how the Consent Order was arrived at is there to

speak for itself. The allegation of fraud on the part of former Counsel for the Applicant has not been proved and consequently barring any other reason the Consent Order cannot be set aside on that basis.

The Learned Counsel for Applicant also relied on the proposition that by the former Counsel for the Applicant entering into a Consent Order against the wishes of his client, it was contrary to Court Policy and Court would not condone it.

The Applicants Counsel further advanced the proposition that the former Counsel for the Applicant entered into the Consent Order against the wishes of his client and in so doing acted contrary to Court Policy. With due respect, Learned Counsel other than making the above assertion did not indicate how and which Court Policy was contravened other than prudence and caution as set out in the case of ***Brooke Bond Liebeg (T) ltd Vs Mallya (1975) E.A 266*** where the compromise was signed by all parties and their Advocate. I do agree this is a good policy but in event it is not done, as is the case in the instant matter does not in itself suffice to vitiate a Consent Order. On this to, the Applicant has failed to convince Court to set aside the Consent Order.

I will not dwell on Ground 2 and 3 as my consideration of Ground 1 sufficiently covers those grounds as well.

The test for the Court to follow in cases of this nature is as was pointed out by the Supreme Court in the ***Kamoga Case*** (supra):-

> ***"……. The crucial issue for determination in the instant case is whether there was sufficient reason for reviewing or setting aside the Consent Judgment."***

As I have found none, this application fails and is dismissed.

Costs to abide the result of the main suit.

_____

B. Kainamua
Judge
19-06-2012