

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT JINJA**

**MISC. APPLICATION NO. 288 OF 2013**  
(ARISING FROM CIVIL APPEAL NO. 009 OF 2007)  
(ORIGINAL MUKONO CIVIL SUIT NO. 071 OF 2001)

**MUGENI OUMA ::: APPLICANT**

**VERSUS**

- 1. EDIRISA KIRYA**
- 2. JAMES OGUTTU ::: RESPONDENT**

**BEFORE: THE HON. JUSTICE GODFREY NAMUNDI**

**RULING**

This Application is brought under Section 98 of the Civil Procedure Act and Order 52 rr.2 and 3 of the Civil Procedure Rules.

It seeks Orders that the;

1. Consent Judgment in Civil Appeal 009/2007 be set aside.
2. Civil Appeal No. 009/2007 be heard on merits.
3. Costs of the Application be provided for.

The background to this application is that the Applicant and the second (2<sup>nd</sup>) Respondent sued the 1<sup>st</sup> Respondent in Mukono Chief Magistrate’s Court for Trespass on a piece of land located at Wakisi, Webikola in Mukono District (By then). They were successful as against the Applicant. Among other Orders, the trial magistrate issued a permanent Injunction restraining the Defendant from further trespass on the suit land. This was on 25/01/2007.

The 2<sup>nd</sup> Respondent appealed against the said Judgment in this Court.

On 7/12/2007, Counsel for the Appellant together with Counsel for the Applicant and the 2<sup>nd</sup> Respondent entered into a Consent Judgment which is the subject of this Application.

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**Grounds:**

In the Application (Notice of Motion) and supporting affidavit, the Applicant claims that:

- The consent was entered into without his consent.
- That the Applicant's signature on the said consent was forged.
- 10 - That it is just and equitable that the Application be granted.

The affidavit in support largely reiterates the grounds outlined above.

The 1<sup>st</sup> Respondent filed an affidavit in reply, in which he depones that the consent;

- 15 - Was reached on the advice of the Judge then.
- Negotiations for out of Court settlement commenced and all parties under the guidance of their Counsel agreed and signed a consent which was duly sealed by the High Court.
- The said consent was signed voluntarily by the Applicant in the presence of their
- 20 Counsel.
- That the Applicant knows how to read and write and he is just duping and abusing the process of Court.
- The Application is dilatory and being brought in bad faith given the inordinate and unexplainable delay.

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The second Respondent also filed an affidavit in reply to the Application which is exactly the same in content as that of the 1<sup>st</sup> Respondent.

In the Chief Magistrate's Court, Mr. Mangeni Ivan Geoffrey was Counsel for the

30 Plaintiffs – James Ogutu and OumaMugeni, while Mr. JumaMunulo was Counsel for the

Defendant EdirisaKirya. The said Counsel also represented the same clients on Appeal in the High Court up to the time the contested consent Judgment was entered.

5 The consent Judgment in effect resolved the land dispute by apportioning the said land between the Appellant (EdirisaKirya) at 30% and the two Respondents in the Appeal sharing the remaining 70%. It was agreed that each party would bear their own costs.

OumaMugeni then filed the instant application against both the Appellant and his Co-Respondent in the Appeal (009 of 2007).

10

Mr. Mangeni Ivan Geoffrey remained representing the 1<sup>st</sup> Respondent in Appeal 009/2007 while Mr. Munulo remained representing the Appellant (now turned 1<sup>st</sup> Respondent in Misc. Application No. 288/2013). It is also noteworthy that this Application was filed in December 2013 – seven (7) years down the road after the consent.

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This Application is brought under **Section 98 CPA** which mandates this Court to invoke its inherent powers to meet the ends of justice.

20 Further, it is settled law that a consent Decree may not be interfered with unless it has been procured through fraud, mistake, misapprehension or is in contravention of Court policy. Ref: **Attorney General & Another Vrs. James Mark Kamoga SCCS 8/2004.**

25 A consent Judgment is akin to an agreement between the parties. The grounds that would vitiate a contract would similarly apply to a consent Judgment. A consent is premised on consensus or agreement and binding parties to a consent Judgment without their consent is a mistake that vitiates the said consent Judgment.

In the instant case it is submitted that the consent was entered into without prior consensus. Further that the Applicant is illiterate and cannot read and write.

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That there ought to have been verification of the consent Judgment that it had been read to the Applicant in accordance with Sections 2 and 3 of the Illiterates protection Act, Cap. 78.

5 It is also submitted that the Applicant did not complain early because he only came to learn about the consent in 2013 when he went to Court to find out what had happened to the appeal. He did not know that it existed.

Paragraphs 5 and 6 of the Applicant's affidavit in support of the Applications avers that  
10 the Applicant's signature on the consent Judgment was forged which I consider a contradiction of the claim of the Applicant having no education and hence cannot read and write.

It has been submitted for the Respondents that the Applicant can read and write. That  
15 both Applicant and the 2<sup>nd</sup> Respondent agreed to file a joint action and used the same Counsel, and are therefore jointly bound by their deeds or omissions under the suit.

Further that the Applicant does not indicate in his Application, how or to what extent the consent Judgment Injunction or causes him loss more so as he stands to gain 35% of the  
20 disputed piece of land. That the Application is vexatious and frivolous and should be dismissed under **Order 7 r. 11 CPR.**

For the 2<sup>nd</sup> Respondent it is submitted that the Applicant's affidavit is defective as it does not disclose the means of knowledge or grounds of belief.

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That the source of information was not disclosed in paragraph 10.

That the Applicant can read and write as shown by writing his names in full on the affidavit in support, and yet in paragraph 6 he depones that he cannot read and write. That  
30 this is a major contradiction.

- That the Applicant's signature appears on PEx.II in the lower Court and is similar to the one on the questioned consent. That exhibit was his in the lower Court and he cannot turn around and disown it.

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- That there was no forgery as the Applicant freely signed the consent. In any case he did not plead the particulars of forgery.

10

- That there was no fraud and or collusion shown in the Applicant's pleadings as required by Order 6 r.2 CPR.

- That the Applicant was aware of the consent as he freely participated in the negotiations and all the terms were within his knowledge.

15 It is finally submitted that the Application is dilatory having been filed almost 7 years after the event. Ref: **Marisa Vrs. Uganda Breweries (1988-1990) HCB 131.**

I have considered all the submissions by both parties.

20 I have already pointed out that this matter was filed 6 plus years after the event.

Much as the Applicant claims he was not aware of the consent Judgment, I find it hard to believe that a party who diligently followed up his case in the lower Court, would then sit back for all that long without knowing the outcome of the said appeal especially when the  
25 Judgment in the lower Court was in his favour. It is logical that he would have been diligent to ensure that he benefited from the fruits of his Judgment.

The general principle is that there must be an end to litigation.

30 It is unacceptable for litigants to think they can resurrect old or dead matters at will.

This Court will not buy the argument that he was blissfully unaware of the progress of the appeal for almost seven years.

The first ground of the Application accordingly fails.

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Regarding allegations that the consent Judgment was forged. It is a cardinal principle of the law of evidence that whoever desires Court to give Judgment as to any legal right of liability dependent on the existence of facts which he asserts, must prove those facts. Reference in that respect is made to **section 101 of the Evidence Act and 102** thereof which places the burden to prove so on the party making the allegations.

10

Reference was made to earlier proceedings where the Applicant's signature appears on other documents.

15 Secondly he then alleges that he cannot read and write and yet he has written his name on his affidavit and his same name and even signature is on the documents referred to in the earlier proceedings (See PEx.II). I would have expected better evidence (possibly expert evidence) to prove that what he denies as being his signature is indeed not his.

20 It is not enough to allege and throw the said allegations at the Court hoping that the Court will blindly believe the said allegations without proof.

And what about the apparent contradiction in the same affidavit (Paragraphs 6 & 7) that the signature was forged and yet the same affidavit claims the Applicant is illiterate?

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I dismiss the claim that the Applicant should benefit from the **Protection of Illiterate Persons Act** due to the contradictions in the pleadings and submissions of the Applicant.

The allegation of forgery has not been sufficiently proved and cannot stand.

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In respect of the 3<sup>rd</sup> ground that it is just and fair that the consent Judgment be set aside, I find that in the Applicant's pleadings, he does not state in what manner the consent Judgment prejudiced him or his case.

5 I must say he cannot for sure claim that if the appeal were heard on merits, the Judgment of the lower Court would have been upheld.

I accordingly also find this ground unsustainable.

10 At the beginning of these proceedings, an attempt was made by way of a Preliminary Objection impeaching the participation of Counsel Mangeni Ivan Geoffrey from representing the 2<sup>nd</sup> Respondent.

It was submitted that this amounted to a conflict of interest, the said Counsel having  
15 earlier represented both the Applicant and the 2<sup>nd</sup> Respondent.

That in so doing, he breached his duty as a fiduciary. The case of **BalekeKayira Peter & Another Vrs. Attorney General; Civil Suit No. 179/2002** was cited in this respect.

20 It has been submitted in response to this objection that there is no conflict of interest in this matter Mr. Mangeni having been instrumental in protecting the interests of both the Applicant and the 2<sup>nd</sup> Respondent.

I have had occasion to read the authority cited. I find it distinguishable in that the  
25 circumstances of that case were different from the instant matter.

Further, it is also incumbent for the Applicant to demonstrate how his matter has been prejudiced by the participation of Mr. Mangeni in this Application.

30 Finally, I must also comment that the Applicant is wanting in merit.

Even without the participation of Mr. Mangeni in this Application, the said Application stood no likelihood of success as demonstrated by the various flows pointed out in this Ruling. The objection is accordingly overruled.

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All in all, I find that the Applicant has not proved that the Application has any merits. It is dismissed for lack of merits, being frivolous and vexatious and for having been filed as an afterthought.

10 Costs to the Respondents.

**Godfrey Namundi**

15 **Judge**

**16/07/2014**



16/07/2014:

Wakosese Michael on brief for MagomuNasur for Applicant

5 Aroja Joseph on brief for Mangeni for 2<sup>nd</sup> Respondent

Both parties in Court

Court: Ruling read in open Court.

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**Godfrey Namundi**

**Judge**

**16/07/2014**

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