

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL DIVISION

MISC. APPLICATION NO. 352 OF 2015

(Arising from Civil Suit 392 of 2014)

1. THE RAMGARHIA SIKH SOCIETY
2. THE REGISTERED TRUSTEES OF
RAMGARHIA SIKH EDUCATION SOCIETY
3. KIRPAL BANSAL

} **APPLICANTS**

VERSUS

1. THE RAMGARHIA SIKH EDUCATION
SOCIETY LIMITED
2. PERIMINDER SINGH MARWAHA KATONGOLE
3. AMANDEEP SINGH SAINS
4. KULWANT SINGH NOTAY
5. MOHINDER SINGH CHANA
6. SATNAM SINGH SONDH
7. BALDEEP SINGH SHRA
8. M/S HENLEY PROPERTY DEVELOPERS LIMITED
9. UGANDA REGISTRATION SERVICES BUREAU

} **RESPONDENTS**

BEFORE: HON. MR. JUSTICE STEPHEN MUSOTA

RULING

This is an application brought by way of Notice of Motion under Sections 33 of the Judicature Act, Section 98 of the Civil Procedure Act Cap.71 and Order 52 Rule 1 of the Civil Procedure Rules seeking for orders that:

1. The consent judgment dated 3rd September 2015 and entered between the plaintiffs and defendants in High Court Civil Suit No. 392 of 2014 be set aside.
2. The suit be heard on its merits.
3. The interlocutory orders granted under Misc. Application No.579 of 2014 and No.195 of 2015 freezing bank accounts for the first defendant held with Bank of Baroda and Fina Bank be reinstated.
4. In the alternative but without prejudice to the three above, an order doth issue against the respondent, their agents, servants, successors restraining them against any further withdrawals from all the 1st defendant's accounts on which the claimed amount of money is held until determination of the main suit.
5. Costs of this application be provided for.

The grounds of the application are briefly outlined in the application and are that:

1. The consent judgment was procured through fraud and deceit.
2. The people who executed the consent had no authority to do so.
3. The 3rd plaintiff was not represented in the consent.
4. The consent order is vague, self defeating and defeats the interests of the plaintiffs which it purports to protect.
5. It is in the interest of justice that the consent order and judgment be set aside.

The application is supported by three affidavits of Kilpal Bansal the 3rd applicant who is also a registered trustee of the 2nd applicant and Chairman of the 1st applicant dated 10th September 2015. Then the affidavit of Balbil Singh Chana Vice Chairman and member of the 1st applicant also dated 10th September 2015 and an affidavit of Grusharan Singh member and General Secretary of the 1st applicant dated 10th September 2015.

In reply, the respondents filed an affidavit sworn by Kulwat Singh Notay the 4th respondent and treasurer in the 2nd applicant. No affidavit in rejoinder was filed.

The brief background to this application is that the 1st applicant owned land comprised in LRV 3841 folio 20 Plots 60 and 62 at Nakivubo road. Later the 2nd applicant took over the management and control of this land on behalf of the members of the 1st applicant. Sometime later the management committee and the registered trustees of Ramgarhia Sikh Society Limited resolved to sell plot 60, 62, 64, and 66 along Nakivubo road. The 2nd to the 4th respondents were amongst the persons appointed to a committee to dispose of the said land on behalf of the 1st and 2nd applicants. The 2nd to the 4th respondents later after being appointed as members of the committee incorporated the 1st respondent company. They sold the land referred to above at USD 2,717,000 and instead deposited the sum on the 1st respondent's account.

The applicants then filed Civil Suit No. 392 of 2014. Before the suit could be heard on its merits, a consent judgment was entered on 3rd September 2015 between the respondents as defendants and other persons who the applicants claim were not true representatives of the applicants. The applicants also claim that the said persons were only claiming to represent the interest of the applicants whereas not. It is because of these facts that this application to set aside the consent judgment on grounds of fraud and deceit has been brought to court.

At the hearing of the application, Mr. Tom Mbalinda appeared for the applicants while Mr. Elison Karuhanga appeared for the 1st to the 7th respondents. The 3rd applicant was in court as a representative of the applicant. The 8th and 9th respondents were not represented in court and did not file any reply to the application.

Court allowed respective counsel to file written submissions in support of their respective cases which they did.

In his written submissions, learned counsel for the applicant raised a preliminary point of law that the 1st to the 7th respondents' affidavit in reply was filed out of time in contravention of Civil Procedure Rules under Order 8 Rule 1(2) which requires a defense or reply to an application to be filed within 15 days after service. That the said affidavit be struck out.

At the commencement of the hearing, only learned counsel for the respondents raised issues in their submission which I will adopt as follows;

1. Whether the 1st to 7th respondents' affidavit in reply was filed out of time and if so whether it should be struck out.
2. Whether the consent judgment in Civil Suit 392 of 2014 was obtained by fraud and deceit.
3. Whether the applicant is entitled to the orders sought in the application.

After a thorough consideration of the submissions by respective counsel and the law applicable, I will go ahead and resolve the issues in the order they were raised. Before doing that, I wish to state that I am in agreement with the submissions of both learned counsel that the principle upon which a court may interfere with a consent judgment was well laid out in the celebrated case of **Attorney General Vs James Kamoga & Anor, SCCA No. 08 of 2014** as per Mulenga JSC where he followed a case **of Hirani vs Kassam [1952] EA 131.**

The principle is that *prima facie* any order in the presence and with consent of counsel is binding on all parties to the proceeding or action and cannot be valid or discharged unless obtained by fraud or collusion or by an agreement contrary to court policy or if the consent was given without sufficient material facts or in misapprehension of or ignorance of material facts or in general for reasons which would enable a court to set aside an agreement. This was emphasized in **Hiran Vs Kassam** (supra) wherein it was held that it is a well settled 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. This principle is premised on the view that a consent decree is passed on terms of a new contract between the parties to the consent judgment.

I will now start with:-

- Issue 1.** Whether the 1st to the 7th respondents' affidavit in reply was filed out of time and if so, whether it should be struck out.

On this issue, the applicant's submission is that having been served with the application on 14th September 2015, the 1st to 7th respondents ought to have filed their affidavit in reply within 15 days from that date. However, they filed their reply on 30th October almost two months later. That therefore the affidavit ought to be struck out. Learned counsel relied on the case of **Stop and See (U) Limited Vs Tropical Africa Bank HCMA No. 333 of 2010** for his submissions.

In reply learned counsel for the 1st to 7th respondents submitted that learned counsel for the applicant has submitted the authority of **Stop and See (U) Limited** out of context. He submitted that Order 12 Rule 3(2) of the Civil Procedure Rules which court dealt with in that case is only applicable to remaining applications after scheduling conference or alternative dispute resolution. Learned counsel submitted further that this application is not a remaining application because it seeks a final order to reinstate a suit. Therefore the affidavit in reply is not a pleading as far it is not signed by counsel.

I do not agree with learned counsel for the 1st to 7th respondents. He appears to suggest that there are no timelines for filing an affidavit in reply as long as it is filed before the hearing date or on the day for hearing of an application. Had this to be the case, then it would cause a mischief. It would mean that once an application is filed, the respondent would wait for the day of the hearing and come to court with this affidavit in reply. This would lead to wastage of time because most likely the opposite party would seek out for an adjournment to make an affidavit in rejoinder.

I am in agreement with the decision by Madrama J. in **Stop and See (U) Limited quoted** above. Rules of procedure are meant to give parties timelines within which to file and complete their pleadings. The timelines that apply to a plaint and written statements of defense also apply to applications and affidavits in reply and rejoinder. A reply to an application must be filed within 15 days from the date of service of the application. Failure to file that affidavit in reply within 15 days puts the reply out of time prescribed by the rules. Once a party is out of time, he or she must

seek leave of court to file the affidavits in reply outside the prescribed time. Therefore, I will find that the affidavits in reply of the 1st to 7th respondents were filed out of time.

However, learned counsel for the respondents prayed in the alternative that court should exercise its discretionary powers to enlarge the time and admit the affidavit in reply on the ground that it is in the best interest of justice. Learned counsel relied on the case of **Koluo Joseph Andrew & 20 others Vs the Attorney General and others Misc. Cause No.106 of 2010** and Section 96 of the Civil Procedure Act and order 52 Rule 6 of the Civil Procedure Rules for this submission.

In view of this owning up of the omission by learned counsel for the 1st to the 7th respondent and request of indulgence of this court, I will find that in the interest of justice, the affidavit in reply will be admitted in order to allow court to finally and effectively dispose of this matter. The delay in this case was not as long as that which was in **Stop and See case** (supra) quoted above of over six months. In this case, it was only a matter of days. The 1st to 7th respondents shall pay costs to the applicants for the preliminary point of law.

Issue 2: **Whether the consent judgment in Civil Suit 392 of 2014 was obtained through fraud or deceit.**

Regarding this issue, the applicant submitted that the persons who purported to represent the plaintiffs/applicants had no authority to do so since they were not the designated officials of the 1st and 2nd applicant who instructed the former lawyers of the applicants. That to this end, the representatives of the applicants/plaintiffs as reflected in the consent judgment acted fraudulently and with ill intentions to enable the respondents place the sale proceeds from the 1st and 2nd applicants' land beyond reach. Secondly learned counsel submitted that parties to the consent judgment must affix all their signatures and later file it with the registrar for endorsement as per Justice Kitumba in the case of **Peter Mulira Vs Mitchell Cotts Limited CACA No. 15 of 2007.** That following that decision, one can only be bound by that which he has appended his or her signature to. Therefore, learned counsel went on, the fact that the 3rd plaintiff/applicant did not

sign the consent coupled with other irregularities renders the consent unenforceable and on that ground, it should be set aside.

Learned counsel for the applicants further submitted that the former lawyers acted without instructions and in total disregard of the interests of the applicants/plaintiffs and as such they acted unprofessionally and fraudulently under unlawful inducement. That they were promised 80 million shillings as costs which was paid as per paragraph 12 of the affidavit in reply and they presented persons who did not have authority to sign the consent.

In reply, learned counsel for the 1st to 7th respondents submitted that the allegations by the applicants that the persons who signed the consent had no authority to do so is baseless and has no backing by evidence. He submitted that they signed as trustees and as such under section 1 (3) of the Trustees Incorporation Act, they had authority to sue and be sued. That an advocate who had instructions can also enter consent.

Having carefully considered the submissions by respective counsel, I will find that the applicants have not proved on a balance of probabilities that the persons who signed the consent were not trustees. I would have expected the applicant to provide documentary or relevant evidence to prove the allegations since trusts are well regulated business vehicles under the Trustees Incorporation Act. The assertion by the 1st to the 7th respondent that they were trustees was not disproved by the applicants. In any case, the applicant did not reveal who the true trustees were. Simply saying the respondents were not trustees was not enough. According to Section 12 of the Trustees Incorporation Act, every contract made or entered into by the trustees of a body or association of persons which would be valid and binding according to the constitution, settlement or rules of the body or association of persons is valid and binding although it has not been made or entered into under a common seal of the trustees.

In the instant case however, learned counsel submitted that the 3rd applicant attended meetings that led to the consent where lawyers for both parties were present. He relied on annexure '2' to

the affidavit in reply for this submission. This assertion was not disproved by the applicant. Since lawyers on both sides attended the meeting that led to the consent, it implies that they had instructions. It is trite law that an advocate who is generally instructed to pursue a court case by his client also has instructions to enter consent See: ***BM Technical Services Vs Francis X Lugunda [1999], KALR 821*** followed in ***Lenina Kemigisha Mbabazi/StarFish Ltd Vs Jing International Trading Ltd MA No. 344 of 2012.*** The applicants have not proved that their lawyers had been given limited instructions to exclude powers to enter consent.

Finally, I will find that the applicants have failed to prove fraud or deceit on a balance of probabilities as grounds for setting aside a consent judgment. I will as such find that the consent judgment was not entered into through fraud or deceit to warrant setting it aside.

Issue 3: Whether the applicant is entitled to orders sought in the application.

Having ruled that there was no fraud or deceit to warrant setting aside the consent judgment, I will find that the applicants are not entitled to the remedies sought in this application.

This application stands dismissed with costs.

Stephen Musota
J U D G E

15.03.2016