

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
MISC. APPLICATION NO.1101 OF 2015  
(ARISING FROM MISC. APPLICATION NO.447 OF 2015)  
(ARISING FROM CS. NO.357 OF 2015)**

**1. ASHWAN BAMMAR**

**2. PAWAN BABBAR..... APPLICANTS**

**VERSUS**

**DALIPH SINGH..... RESPONDENT**

**RULING**

**BEFORE HON. LADY JUSTICE EVA K. LUSWATA**

The application is presented under Order 51 Rule 1 and 3 CPR and Section 98 CPA, by which the applicants seek for an order to have their passports released from court custody and costs.

The grounds of the motion are briefly that the applicants' passports Nos. G5892146 and J9523983 which were voluntarily deposited in court are now required because the 1<sup>st</sup> applicant who has applied for Ugandan citizenship, needs to present his to the Directorate of Citizenship and Immigrations Control and both applicants wish to travel to China to purchase merchandise for their shops. The applicants in addition stated that Milkha Singh the respondent's older brother has prior to filing this application, made an undertaking with the Bank of Baroda (hereinafter called the Bank) to guarantee payment of the loan for which a legal mortgage was registered in respect of LRV2970 Folio 6, Plot 211 Kisenyi (hereinafter called the suit property). The 1<sup>st</sup> applicant swore an affidavit in support expounding on those enumerated grounds and in addition, deposed that the applicants are the defendants and the respondent the plaintiff in Civil Suit No.367/15 (hereinafter called the main suit). That the respondent filed Misc. Appl. No.447/15 for an order for the arrest of the applicant's before judgment and as a result, the applicants deposited their passports to allay the respondent's fear that they would abscond from jurisdiction. One Milkha Singh filed an additional affidavit supporting that of the 1<sup>st</sup> applicant and in addition, deposed that he co-owns the suit property with the respondent. He also showed that he had made an undertaking to pay the bank in the event of the applicants' default and in his view, that undertaking was sufficient to end the whole case. The 2<sup>nd</sup> applicant did not file any evidence in support of the application.

Daliph Singh the respondent filed an affidavit opposing the application. He deposed that the applicants' passports were so deposited as a result of a consent order and no sufficient grounds have been raised to have the same set aside. He contended that his suspicion of the applicants' intention to flee jurisdiction is still valid. That they have no known property in Uganda, have not taken any steps to service the loan yet they claim to have funds to travel to China for shopping. That an additional undertaking by Milkha Singh would not displace the respondent's liability to the bank in case of default or secure his interest in the suit property. Instead, that interest on the loan continues to accumulate and that if the applicants who have no property in Uganda are allowed to travel out of jurisdiction, the applicant will be left unsecured and the decree in the main suit will be rendered nugatory.

Counsel were directed to file written submissions but it is only counsel for the respondent who complied on 31/12/15.

There appears to be consensus of both parties that Misc.Appl. No, 447/15 was settled by the applicants agreeing to deposit their passports in court to prevent their travel out of jurisdiction until the main suit is concluded. It is the same passports that the applicants wish to be released to which the respondent is strongly opposed. In essence, the applicants are calling upon this court to interfere with that consent order, for the reasons given.

The Supreme Court in **Attorney General & Anor Vs James Mark Kamoga & Anor Civil Appeal No.8/2004** following the earlier authority of **Hirani Vs Kassam (1952) EA 131** (adopting a passage **from Section on Judgments and Orders 7<sup>th</sup> Ed, Vol. 1 p. 124**) laid down the following principle:-

*“Prima facie any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and cannot be varied or discharged unless obtained by fraud or callusion 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.”*

The court equated a consent decree to a contract between the parties and was of the view that at all times, it had to be upheld unless vitiated by a reason that would enable a court to set aside an agreement such as fraud, mistake misapprehension or contravention of court policy.

Counsel for the respondents has extensively submitted that Order 40 CPR under which Misc. Appl. No, 447/15 proceeded, gives this court no discretion to vary an order given under that law, but more important, that no sufficient reasons have been presented to move this court to vary the consent order. I respectfully do agree with that submission. According to Annexure “A” to the 1<sup>st</sup> applicant’s affidavit, the suit property which is owned by the respondent in concert with Milkha Singh is the subject of a mortgage in favour of the bank as a result of an overdraft facility taken out by M/s Garv Enterprises (U) Ltd. The applicants are cited as the joint personal guarantors of the mortgage facility. The applicants have to date not redeemed the suit property and it is facing danger of being sold. All these are issues raised in the main suit and not of object here.

The result of Misc. Appl. No. 447/15, which was an interlocutory matter in the main suit, was for the applicants to agree to deposit their passports to restrict their travel out of jurisdiction. This was a compromise arrived at to give the respondents some protection in that, it would ensure their presence in this jurisdiction to aid in execution in the event the main suit was decided in the applicant’s favour. That consensus was voluntarily arrived at by both parties and the respondents have not raised any new grounds or circumstances that would convince this court to vary that order by allowing the release of the passports. I do also agree with respondent’s counsel that allowing the application would be permitting the mischief for which the order in Misc. Appl. No, 447/15 was sought in the first place. That is compounded by the fact that the applicants do not appear to have property within jurisdiction and may have no means to meet their obligations or even have interest to return to this jurisdiction once they are allowed to leave.

Again, the contention that the undertaking made by Milkha Singh may not extinguish the respondent’s liability to the bank is valid. Even if Singh was to pay the bank upon the applicant’s default, the law would still allow him to claim from the respondent for indemnification as a co-surety. The authority of **Morgan Vs Parker Hulk (1894) 341** quoted by

respondent's counsel stated that a surety is allowed to recover contribution from his/her co-sureties of any payment that he/she may have made under a guarantee in excess of his proper proportion. This in my view may generally compromise the claims that the respondent may have against the applicants in the main suit.

In the result, this application has failed and is denied. It is accordingly dismissed with costs to the respondent.

I so order.

*Signed*

**EVA K. LUSWATA**  
**JUDGE**  
**27/1/2016**