THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL DIVISION

MISCELLANEOUS APPLICATION No. 559 OF 2016
(Arising from Civil Suit No. 1022 of 2001)

1. **TURYAGUMANAWE MOSES**
2. **TUGUMENAWE NARRIS**
3. **ORISHABE WILLY**
4. **TUSINGWIRE STEPHEN :::::::::::::::::::: APPLICANTS**
5. **TURYOMURUGYENDO DEZ**
6. **KABARE GODFREY**
7. **BYARUHANGA PATRICK**
   & 1266 OTHERS

Versus

1. **ATTORNEY GENERAL**
2. **UGANDA WILD LIFE AUTHORITY :::::::::::::: RESPONDENTS**

BEFORE: HON. MR. JUSTICE STEPHEN MUSOTA

RULING:

This is an application for review of a Consent Judgment in Civil Suit 1022 of 2001. The application is brought under Sections 82 & 98 of the Civil Procedure Act Cap. 71 and Order 46 Rules 1 (1)(a), (2) and 8 of the Civil Procedure Rules SI 71-1. The applicant seeks the following orders:

1. Consent Judgment in Civil Suit No. 1022 be set aside and or reviewed and appropriate order made.

2. Costs of the application be provided for.

The grounds of the application are briefly stated in the Notice of Motion and explained in the affidavit in support of the application of the 1st applicant. They are:

1. That the 1st respondent and 3549 plaintiffs/claimants in the main suit entered into a consent judgment in settlement of the suit without the involvement of the 2nd respondent and the 1273 other claimants or their representatives.

2. That the consent never considered the interests of the applicants and other 1266.

3. That there is an apparent error on the face of the record where the 2nd defendant/respondent did not sign the consent, it was only signed by then the lawyers without instructions to sign, was further signed by one representative of the applicants; Amos Bakeine hence ought to be reviewed and set aside.

4. That the applicants were struck off the list of the beneficiaries without their knowledge.

5. That the said consent judgment constituted misrepresentation of the interests of the applicants whereby the persons who were appointed to institute the suit were not parties to the consent judgment.

6. That as a result of the consent judgment the 1st respondent has paid only 3459 out of the original plaintiffs who were 4822 and all the rest of the evictees of the Kibaale Game Reserve totaling to 1,273 were left out without notice and subsequent payment.

7. That the verification exercise was conducted without involvement of the 2nd respondent and the people who instituted the suit which amounts to misrepresentation.

8. That there is no pending appeal in the main suit and the suit is ipso facto, considered finally determined whereas not.

9. That it is in the interest of justice that the consent judgment in Civil Suit No. 1022 be set aside.

The applicants filed an undated affidavit in support of the amended application sworn by the 1st applicant.

The 1st respondent filed an affidavit in reply dated 21st November 2016 sworn by Charity Nabaasa a State Attorney in the Attorney General's Chambers.

The 2nd respondent filed an affidavit in reply dated 19th August 2016 sworn by Dr. Andrew G. Seguya the Executive Director of the 2nd respondent.

Counsel Atwijukire Dennis appeared for the applicants, Atwebembere Blair appeared for the 2nd respondent, and Patricia Mutesi appeared for the 1st respondent.

All parties filed written submissions. The applicants filed on 13th December 2016, the 1st respondent filed on 4th January 2017 and the 2nd respondent field on 29th December 2016. The applicants filed submissions in rejoinder on 17th January 2017.

Counsel for the 1st and 2nd respondents raised preliminary objections to this application. I shall deal with them first.

The 1st respondent objected to this application and submitted that the remedy sought by the applicants cannot be granted and the application is incompetent. That the application offends the rules of natural justice in as far as the application has been brought against the Attorney General yet the 3549 beneficiaries of the said Consent Judgment have not been made parties to defend the compensation they received. Further the 1st respondent submits that this application is

incompetent because it seeks orders that are unenforceable because the Consent Judgment in issue was already executed in 2010 and this application was filed in 2016 six years later. So even if the application succeeds the orders will be unenforceable and Courts of Law do not issue orders in vain or orders that are unenforceable. That since the 3549 plaintiffs who were paid as a result of this consent order were not made parties to this suit then the orders in this application would not be binding on them and so the orders would still be unenforceable. That therefore it would be an academic exercise for this Court to even consider this application. For these reasons the 1st respondent prayed that the application be dismissed.

I agree with the submissions of the 1st respondent. This is a tricky application. The applicants even admit it in Ground 6 in the Notice of Motion. The applicants state that as a result of the consent judgment only 3549 of the 4822 were paid. Secondly, the 3549 claimants who were paid and were party to the consent judgment are not made party to this application, the orders in this application will not be enforceable against them. The outcome of this application will be for academic purposes. It is therefore an issue that has already been overtaken by events. For these reasons alone this application would fail.

The 2nd respondent on the other hand also raised preliminary points of law. Their case and submissions were also very strong. Their case is that they were never party to the consent judgment and so they have been sued wrongly. They also fault the application for being brought by the applicants without a representative order. They further submit that the affidavit of the applicants in support of the application is tainted with falsehoods.

I am inclined to agree with the submissions of counsel for the 2nd respondent as well because the consent judgment as per Annexture "B" to the affidavit in support of the application was between the 1st respondent and the 3549 plaintiffs. Although the 2nd respondent was co-defendant with the Attorney General each of them was sued in their individual capacity as defendant so if in the course of the trial the Attorney General to the exclusion of Uganda Wildlife Authority decided to negotiate a settlement with the plaintiffs culminating into the consent judgment in which it seems to have assumed liability for the suit, then there is no way

the Uganda Wildlife Authority can be a party to an application arising from that consent judgment. See: ***Miscellaneous Application No. 140 of 2012 Uganda Wildlife Authority Vs Amos Bakeine & Ors*** where this Court applied the same reasoning.

It is also clear that since a consent judgment is based on agreement between the parties to the consent then the doctrine of privity of contract must apply. So a party who was not privy to the agreement cannot sue on it or be liable under the contract. On that basis alone I would dismiss the application as against the 2nd defendant.

It is also clear that there was no representative order taken out by the applicants before this application was filed. The applicants only have a Power of Attorney which cannot operate to replace the requirement under Order 1 rule 8 of the Civil Procedure Rules. I have held before and I still hold the same opinion to date that the provisions of Order 1 rule 8 of the Civil Procedure Rules have been interpreted by Courts before to be mandatory and if not complied with would render the suit incompetent and incapable of amendment. It is important to seek leave of Court by obtaining a Representative Order and failure to do so leaves the suit incompetent and the suit cannot be stayed but should be struck out. See: ***Henry B. Kamoga & Ors Vs Bank of Uganda HCCS No. 62 of 2009*.**

Notwithstanding my ruling on the preliminary points of law I shall for purposes of completeness deal with whether the application would otherwise have had merit.

The applicants' case in summary is that the consent judgment excluded them and so disentitled them to payment. That their views and interests were not put into consideration and only one representative signed the consent judgment. That the applicants were struck off the list of the beneficiaries without their knowledge. That the said consent judgment constituted a misrepresentation of the interests of the applicants whereby the persons who were appointed to institute the suit were not parties to the consent judgment.

The applicants submitted that the law on review of consent judgments is settled as stated in the East African Court of Appeal case of ***Brooke Bond Liebig (T) Ltd Vs Mallya [1975] 1 EA 266 (CAD)*** where it was held that a consent judgment may only be set aside for fraud, collusion or any reason which would enable the Court to set aside an agreement.

I agree with this statement of the law on setting aside consent judgments. However, in the body of the submissions counsel instead focuses on arguing grounds for Review of a Judgment under Section 82 of the Civil Procedure Act Cap. 71 and Order 46 of the Civil Procedure Rules SI 71-1. I shall consider only submissions that relate to grounds that may vitiate a contract as stated in the case cited by counsel for the applicants.

Counsel for the applicants submits that the Consent Agreement was only signed by the then lawyers without instructions and that only one representative signed and so there was an error apparent on the face of the record. That the consent was entered into without consideration of the material facts and in ignorance of material facts so it should be set aside. Further counsel adds that there was a misrepresentation since the consent was done with the 1st respondent to the exclusion of the 1273 others and the alleged verification was conducted without their consultation and involvement. Further counsel submitted that these facts amounted to common mistakes and omissions which this Court should use in its discretion to set aside the consent judgment. That the applicants will continue to suffer irreparable loss and prejudice if this consent judgment is not set aside.

On merits of the application counsel for the 2nd respondent submitted that a consent judgment can in law be set aside if;

1. It is obtained by fraud, collusion or by an agreement contrary to the policy of Court.

2. If the consent is given without sufficient material facts.

3. If it is entered in misapprehension or ignorance of material facts.

4. In general for any reason which would enable the Court set aside an agreement.

For this submission counsel relied on the case of ***Kiiza Daniel & Ors Vs Uganda Land Commission & Ors Miscellaneous Application No. 1237 of 2013.***

Further counsel for the second respondent added that the grounds raised by the applicants do not fall in any of the above stated categories of grounds because failure to include the 2nd respondent in the negotiations and signing of the consent judgments did not in any way affect the consent judgment. Counsel then prayed that the application be dismissed with costs for being incurably defective and not raising any sufficient grounds to warrant setting aside the consent judgment.

Counsel for the applicants in their submissions make mention of common mistake and misrepresentation. A common mistake is where both parties hold the same mistaken belief of the facts. The House of Lords case of ***Bell Vs Lever Brothers Ltd [1932] ac 161*** held that common mistake can void a contract only if the mistake of the subject matter was sufficiently fundamental to render its identity different from what was contracted, making the performance of the contract impossible. This position was adopted in our section 17 of the Contracts Act 2010 wherein it was enacted that;

> ***"17. Mistake of fact***
>
> ***(1) Where both parties to an agreement are under a mistake as to a matter of fact which is essential to the agreement, consent is obtained by mistake of fact and the agreement is void."***

The mistake which counsel for the applicants refers to is the exclusion of the 1266 persons from the compensation. And the misrepresentation is the number of persons entitled to compensation which excluded the 1266 persons. I see no mistake or misrepresentation here that may warrant the setting aside of a contract. I do not think that any of the facts the applicant raise in this application are essential to the consent judgment. If consent judgment excluded them it is not a

ground for setting aside of the said consent judgment. It only means that they were not bound by it and so their claims were not settled. I therefore do not find merit in the grounds of the application as presented by the applicants. They fall far short of the requirements for setting aside consent judgment.

For the reasons in this ruling I find no merit in this application. I will dismiss the same with costs.

I so order.

Stephen Musota
J U D G E
03.04.2017