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

MISCELANEOUS APPLN. NO. 572 OF 2016
(Arising from Civil Suit No 223 of 2014)

BUSOGA KINGDOM ========== APPLICANT

VERSUS

MULTICOM TECHNICAL SERVICES LTD ========== RESPONDENT

BEFORE HON. JUSTICE MICHAEL ELUBU

RULING

This is an application brought by Notice of Motion where the Applicant, BUSOGA KINGDOM, seeks orders against MULTICOM TECHNICAL SERVICES LTD (the Respondent), to set aside a Consent Judgment entered by the parties in the head suit on the 23rd of April 2015. The Applicant also prays for the costs of the application.

The application had four grounds and was supported by the affidavit of one Dr. Joseph Muvawala. These pleadings state that the consent decree and judgment were procured fraudulently by the Respondent on the 23rd of April 2015. That the consent judgment stated that the applicant was supposed to pay the Respondent 106,156,121/= and complete construction work on the applicants cultural centre.

That Bujagali Energy Limited (BEL) concluded a Memorandum of Understanding with the Applicant where it offered to build a cultural centre and to that end donated $100,000 (One hundred thousand dollars) which was paid in full directly to the Respondent who was the contractor. That the money also covered labour and construction fees.

That inspite receiving this full payment, the Respondent fraudulently secured the consent judgment in their favour claiming unpaid labour fees for construction of the cultural centre. It is also averred that despite receiving the 106,156,121/- as per the consent judgment the Respondent has still breached clause 2 of the consent judgement which stipulated that the remaining works on the Busoga Cultural Centre would be completed within two weeks from receipt of the payment.

The applicant deposes farther that the Respondent took advantage of the leadership conflict in Busoga which had resulted in scanty information about the contract. That the applicant only learnt about the consent judgment after it had been entered.

That Counsel for the Kingdom who entered the consent judgement together with one Juma Munulo did so without the authority of the Kingdom officials.

That it is therefore in the interest of justice that the Consent Judgment be set aside.

The Respondent opposes this application. One Engineer G.T. Nakku Nasser, the Managing Director of the Respondent swore an affidavit in reply.

He averred that respondent was nominated and assigned by the applicant to construct the Busoga Cultural Centre donated by Bujagali Energy Limited as compensation for the effects of the dam on tourism.

That the funding provided by BEL did not include the cost for bills of quantities, structural and architectural designs.

On the 30th of January 2012 the applicant entered a Memorandum Of Understanding with the respondent where it was agreed that the applicant pays the Respondent 18% for bills of quantities, structural and architectural designs. The applicant would also pay 25% as the Respondents labour cost.

That on 17th April 2014 the Respondent made a demand for payment of 106,156,121/- which the applicant failed to pay. As a result the Respondent filed Civil Suit No. 223/2014 in The High Court. It is in the said Civil Suit that a consent judgment was entered.

The Respondent also swore that at the time the consent was entered the Isebantu was out of the country and the only person charged with the Kingdom affairs in his absence as per the constitution of the Kingdom was the Issabalangira, who is the head of the Royal Council. That it was

the Issabalangira who represented the applicant during the mediation and agreed to the claim.

The pleadings on both sides properly capture the broad background to this application. It should also be stated that the consent judgment had 3 clauses stating that the defendant would pay the plaintiff 106,156,121/=; that the Plaintiff completes the remaining work on the Busoga Cultural Centre within two weeks from the date of receipt of payment; and finally that each party meet its own costs.

It was one Juma Munulo, addressed as the Issabalangira of the defendant, and Ngobi Baliddawa Moses (Counsel for the Defendant), who signed on behalf of the Kingdom. Counsel Sewankambo Hamza signed for the Plaintiff. The Consent Judgment was executed by the parties in the presence of a mediator on the 23rd of April 2015.

Mr. Ivan Wanume appeared for the applicant while Mr. Hamza Sewankambo represented the respondent when this application came up for hearing.

The submissions of counsel on both sides are on record and will not be reproduced here. I shall however refer to them as I determine this application. I must add here that counsel on both sides attempted to adduce evidence on several items through their submissions. This Court rejected that unprofessional approach restricting itself to evidence in the affidavits attached.

It was under Section 98 of **The Civil Procedure Act** that the applicants pray the court invoke its inherent power and set aside the Consent Judgment.

Counsel for the Applicant, Mr. Ivan Wanume submitted that the principles upon which a consent judgment can be set aside are laid out in the case of ***A-G & Anor Vs. James Mark Kamoga & Anor SCCA 8/2004***. The Court held:

> The principle upon which the court may interfere with a consent judgment was outlined by the Court of Appeal for East Africa in ***Hirani vs. Kassam*** (supra) in which it approved and adopted the following passage from ***Seton on Judgments and Orders,*** 7th Ed., Vol. 1 p. 124:
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> ***"Prima facie, any order made in the presence and with consent of counsel is binding on all parties to the proceedings or action, and cannot be varied or discharged unless obtained by fraud or collusion, 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."***
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> Subsequently, that same Court reiterated the principle in ***Brooke Bond Liebig (T) Ltd. vs. Mallya*** (supra) and the Supreme Court of Uganda followed it in ***Mohamed Allibhai vs. W.E. Bukenya and Another*** Civil Appeal No.56 of 1996 (unreported). It is a well

settled principle therefore, that a consent decree has to be upheld unless it is vitiated by a reason that would enable a court to set aside an agreement, such as fraud, mistake, misapprehension or contravention of court policy.

This decision properly lays out the conditions (principles) that the applicant must, on a balance of probability, show apply to his application for this court is to grant his prayer.

The burden of proof is therefore on the applicant.

As stated the applicant's premise is that the consent judgement was obtained fraudulently.

I note in the first place that the consent judgment was entered into in the presence of the applicants' counsel called Ngobi Baliddawa Moses.

In paragraph 13 of the affidavit in support the applicant states that the lawyer did not have the applicant's authority to represent them.

No evidence was adduced before this court to show that indeed this Advocate did not have the instructions of the applicant to represent them at the hearing of Civil Suit No 223 of 2014.

The Applicant averred that the respondents' fraud was perpetuated by the respondent demanding monies beyond the $100,000 (One hundred

thousand dollars) that Bujagali Energy Limited agreed to provide in the Memorandum of Understanding the parties executed on the 26th of April 2012. That the $100,000 was paid directly to the respondent and it included monies for labour and construction fees. That it was therefore illegal for the respondent to make a fresh demand for 106.156.121/= (One hundred and six million, one fifty six thousand and one hundred and twenty one shillings) when the money had already been paid.

This court has closely examined the memorandum of Understanding relied on.

On page 3 under the head **'BEL's obligations'**, it is stated in Paragraph 1 that BEL will provide a maximum of $100,000 in accordance with the activity budgets specified in Annex 1.

My reading of this provision is that the money expended by BEL was to be utilised to finance activities listed in an Annex to the Memorandum of Understanding which was marked as Annex 1.

Under paragraph 3 of the same head (BEL's obligations) the parties agreed that BEL would provide 40% of the funds allocated for each activity, then pay 30% at the achievement of a specific activity milestone indicated in the implementation schedule which schedule was again laid out in Annex 1.

The copy of the Memorandum Of Understanding attached to the application and marked 'B' runs to page 4 (signature page).

That 'Annex 1' referred to spells out the particular items and activities the $100,000 would finance. It is this schedule that shows what amounts were agreed for each of the said activities. Crucially, Annex 1 was not attached.

There are also several documents marked 'C1', 'C2'. 'C3', 'D1', 'D2', 'D3' and 'E'. It was deposed that these documents show that the full disbursement of moneys was made to the respondent.

'C1' relates to a payment of 34,398,900/- paid on a cheque dated the 12th of February 2014.

'C2' shows a payment of 43,940,470/- paid on a cheque dated 6th of November 2013.

'C3' is a payment of 100,000,000/=. No cheque is attached but the payment vouchers - C3 shows the money was meant for the respondent.

The court was not furnished with acknowledgements of receipt but the respondent does not deny receiving this money.

The disbursements amount to 178,339,370/=. No evidence was adduced to show whether this was the equivalent of $100,000, as at 12th of

February 2014, when the last payment was made. (The Bank of Uganda website shows the rate was Ug Shs 2450 to the dollar at the time).

The Respondent in their affidavit in reply have another memorandum of understanding dated 30th January 2012 between the parties here, in which they agree that the applicant shall pay the respondent 18% for bills of quantities, structural and Architectural designs. It was also agreed that 25% of the total cost shall be for the labour. It was pursuant to this agreement that the Respondent computed the total figure owed to them as 106,156,121/= as being the total sum owed.

Turning back to the Memorandum of Understanding between BEL and the applicant Paragraph 5 falls under **Busoga Kingdom Obligations.** It states that BEL will be provided accountability for all funds released and that the Kingdom will implement the activities detailed in the Bill of quantities.

It is clear therefore that at the execution of the memorandum of understanding between the BEL and Busoga Kingdom, the Bills of Quantities had already been prepared and they informed the preparation of the implementation schedule in Annex 1 (not attached).

Lastly this court notes that the person who signed for Busoga Kingdom on both Memoranda of Understanding is the same (going by a comparison of the signature). That is the one dated 30th of January 2012 and that of the 26th of April 2012.

The applicants' case is that the fraud arose because all money had been paid.

From the evidence before this court that has not been proved. The total sum expended that is proved in evidence is 178,339,370/= which fell well short of $100,000.

Secondly Annex 1 giving a breakdown of what BEL was paying for is not attached.

It is possible that it was not forwarded to the applicant when they requested for "relevant copies to project" (see annexure "F" to affidavit in support). That however would not be helpful to this court which must act on the facts gleaned from actual evidence adduced.

Thirdly the memorandum of understanding between the BEL and the Respondent dated 26/April/2012 refers to the bills of quantities made by the Respondent as per their memorandum of understanding of 30th January 2012. This would appear to indicate that the bill of quantities were prepared under a different cover and not part of the activities funded by BEL.

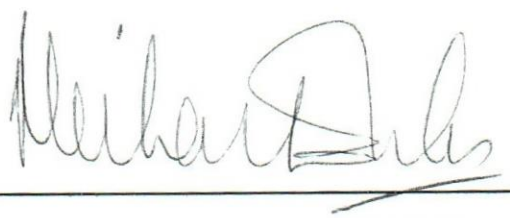
The MOU explaining this was attached to the respondents' affidavit in reply. The applicant did not file a rejoinder to challenge and rebut this evidence.

Lastly the applicant has not proved that Counsel Ngobi Baliddawa Moses did not have the instructions of the Kingdom at the time the consent judgement was entered.

For these reasons this court finds that the applicant has not proved the fraud alleged in their pleadings.

In the result there is no basis for this court to interfere with the consent judgment the parties entered on the 23rd of April 2015.

The application is accordingly dismissed with costs.



MICHAEL ELUBU

JUDGE

21/06/2018