

The Republic of Uganda

In The High Court of Uganda Holden at Soroti

Miscellaneous Application No. 07 of 2021

[Arising from Civil Suit No. 011 of 2018]

Kaabong District Local Government Applicant

Versus

Lokana Enterprises Respondent

Before: The Hon. Justice Dr Henry Peter Adonyo:

Ruling

Background:

The applicant entered into a contract agreement with the respondent on the 16th day of June 2009 for the construction of two dormitories at an amount of UGX 95.000.000/=. The respondent partly performed the contract and the applicant paid 46.000.000/= but sued the applicant in 2018 in Civil Suit No. 0011 for recovery of the whole contracted sum of UGX 95,000,000/ for works it allegedly carried out but had only been partly paid UGX 46,000,000/=.

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On the 20th July 2018, a consent judgement was entered into by both parties and their advocates hence concluding Civil Suit No.0011 of 2018.

However, new information from the applicant's district engineer surfaced after the consent agreement had already been entered indicating that Lokana Enterprise (the respondent) had only partly performed the contract entered into on 16th June 2009 and had abandoned the same with another company altogether namely Kabong United Traders Ltd being contracted to complete the abandoned works.

On the emergence of this new information, the applicant brought this application by way of notice of motion under section 98 of the Civil Procedure Act and Order 52 rules 1 and 3 of the Civil Procedure Rules seeking for the following orders;

- a) An order doth issue setting aside the inter party consent entered in Civil Suit No. 11 of 2018
- b) The costs of the application.

The application was supported by an affidavit deponed by one Musisi Joel the Chief Administrative Officer Kabong District Local Government. The same also contained the grounds of this application.

The respondent opposed this application by filed an affidavit in reply sworn by one Ilukol Gabriel.

With guidance from the court both parties filed written submissions.

Issues for determination:

- a) Whether the inter party consent should be set aside?
- b) What remedies are available to the applicant?

Submissions:

The applicant raised a preliminary point of law against the respondent's affidavit sworn by one Ilukol Gabriel as being defective and an illegality before this honorable court as it was sworn by a person who has no capacity to do so given the fact that the respondent is a sole proprietorship owned by one Loiki Peter who even executed the disputed contract making Mr. Ilukol Gabriel an imposter, an impersonator and a complete stranger with no capacity to deponed the affidavit of the respondent and if that is so then the respondent would be left with no affidavit in reply since the purported deponent is an imposter which this court should find so as was pointed out by Justice Nshimye in *Uganda Railways Corporation vs. Ekwaru & 5104 Others Civil Appeal (Misc. Appln.) No.185 of 2007* that a court of law would not sanction an illegality once brought to its attention as such illegality over rides all questions of pleadings including any admissions.

On the issue whether the inter party consent should be set aside, counsel for the applicant submitted that this court should find that the respondent partly performed the contract and was paid Shillings Forty Six Million Only (UGX 46,000,000/) which was equivalent to the part performed works which was then

abandoned by the respondent and was later completed by another contracted company as per newly established evidence which was contrary to the misrepresentation made by the respondent that it had fully performed its contractual obligations and even demanded for the full contractual price with the result that the applicant was tricked into endorsing a consent which resulted the respondent being paid for the full contractual value yet it had not completed its contractual obligations which consent the applicant is now seeking to be set aside as was held by the Court of Appeal for Eastern Africa in *Hiran vs. Kassam [1952] EA 131* that a consent judgement obtained by fraud, collusion or by an agreement contrary to the policy of court or if it was given without sufficient material facts or for any such reason would be set aside by court which was the situation here in that material information show that the consent was obtained through misrepresentations by the respondent that it had completed its contractual obligations yet it had not done so and as such the consent entered with it for full payments should be set aside by this court.

On the second issue, counsel submitted that the respondent had threatened to execute the illegal consent and thus should be stopped by this court which should also grant the applicant the costs of this application since costs follow the event.

In rebuttal to the submissions by counsel for the applicant, counsel for the respondent submitted that Lokana Enterprises was a family business registered under the Company's Act with two brothers known as Ilukol Gabriel and Loiki Peter



being its directors and that any of them could sign or deposed an affidavit on its behalf as was the case here and so by Ilukol Gabriel deponing an affidavit in support of this family business was not fatal.

Counsel for the respondent further submitted that the substantive application for setting aside the consent judgment was illegal, defective and incompetent for it was brought under wrong law and so must be struck out with costs.

Further counsel for the respondent pointed out that this application was an afterthought to defeat the execution of the consent which has so far been thwarted even after the intervention of the Inspectorate of Government and numerous write ups and reminders by the respondent, personally and his lawyers to the applicant to pay yet the consent judgement was entered into willingly, voluntarily and freely by all parties and their advocates who signed and sanctioned the document.

On the averments that the respondent abandoned the contract midway, counsel referred to them as mere allegations and submissions from the bar which are not admissible before this honorable court and invited court to disregard them in their entirety.

In conclusion, counsel for the respondent urged this court to dismiss this application with costs for the reasons given above.

In rejoinder counsel for the applicant reiterated earlier position that Ilukol Gabriel is a stranger, an imposter to the respondent with no capacity to deponed any affidavit on its behalf given that the respondent is a sole proprietorship thus any affidavit made on its behalf without its authority would be an illegality as was pointed in *Uganda Railways Corporation vs. Ekwaru & 5104 Others (above)*.

Decision of Court:

I have carefully listed to the submissions of counsels as well as having the benefit to peruse all documents in respect to this application in addition to perusing the consent judgement which is the basis of this application.

I now proceed to resolve this application by first considering the preliminary point of law raised by the applicant.

Counsel for the applicant raised a preliminary point of law when he submitted that the respondent's affidavit in reply to this application was defective as it was deponed by one who had no capacity to do so on behalf of the respondent and thus was an illegality which the court cannot rely on as was pointed by Justice Nshimye in the case of *Uganda Railways Corporation vs. Ekwaru & 5104 Others Civil Appeal (Misc. Appln. No.185) of 2007* that an illegality once brought to the attention of the court over rides all questions of pleadings including any admissions and therefore a court of law cannot sanction it.

The deponent of the affidavit in reply to this application was made on behalf of the respondent by one who acted as its agent. The law governing recognized legal agents is found in *Order 3 of the Civil Procedure Rules* with *Order 3 rule 2 (a)* providing that an agent of a parties by appearance, application and by any other acts related to a suit may appear on behalf of such a party only where such agent holds a power of attorney authorizing such a person to make such appearances, applications and do such acts on behalf of the party granting such powers. Since powers is contained in an instrument which authorizes one to act as the agent of the principal and it terminates at some point in the future by its terms or by operation.

My perusal of Annexure D attached by the applicant to this application shows that Lokona Enterprises was registered on the 23rd day of June 2003 with the names of only one individual called Loiki Peter aged 32. The affidavit in reply to this application was sworn by one Ilukol Gabriel who deposes in paragraph 1 as follows;

“That I am a male adult Ugandan of sound mind and the managing director of M/S LOKONA ENTERPRISES, the respondent herein, in the above quoted miscellaneous application and also the plaintiff in Civil Suit No. 11 of 2018 and deponed this affidavit in that capacity”



The import of the above deposition by Ilukol Gabriel would tend to support the submissions of counsel for the applicant that the said Ilukol Gabriel had no authority to depone the said affidavit on behalf of Lokona Enterprises given that he is neither a partner nor a shareholder of the respondent since he is not indicated in the registration document as being one and given that position it is a legal requirement that if he wished to depose the affidavit on behalf of the respondent, he ought to have produced the mandate to do so in form of a power of attorney. That he did so without such powers render his affidavit illegal and of no consequence as was pointed in the case of *Makula International Ltd vs. His Eminence Emmanuel Cardinal Nsubuga [1982] HCB 11* that an illegality once brought to the attention of a court would override all questions of pleadings including admissions.

Given the fact that the affidavit of Ilukol Gabriel was made without the authority of the respondent, I would conclude that it is defective and thus illegal by virtue of the authority of *Makula International's* case cited above and thus I would uphold the preliminary objection raised by counsel for the applicant.

On the issue of whether the interparty consent should be set aside, it was the contention of counsel for the applicant that the consent judgement was entered into through a misrepresentation of certain facts.

The law on conditions for reviewing and setting aside a consent judgment is now well settled. In the case of *Attorney General and Uganda Land Commission Vs.*



James Kamoga & Anor, SCCA No. 8 of 2004 while citing with approval the case of **Hirani V Kassam [1952] 19 EACA 13** the Supreme Court adopted the following passage from **Seaton on Judgments and Orders, 7th Edition Vol.1 at p.124** which is to the effect that;

“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 on those claiming under them... cannot be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to the policy of the court ... or if 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 the court to set aside an agreement.”

This position was highlighted further by Stephen Mubiru J in the case of **Opio Geoffrey vs. Obote Felix and 2 Others (Miscellaneous Civil Application No. 81 and 82 of 2018** arising from **Civil Suit No. 015 of 1998** wherein the learned judge pointed out that *“it is a well settled principle that parties to a civil suit are free to consent to a judgement. They may do so orally before a judge who then records the consent or they may do so in writing and affix their signatures on the consent. In that case still court has to sign the judgement. Any judgment unless set aside is binding on the parties”*

Relating the above to the instant matter, it is the contention of the applicant that the consent which was entered into by the parties herein was effected after a misrepresentation which according to *Black's Law Dictionary 8th Edition page 1022* is defined "as the act of making a false or misleading assertion about something usually with the intention to deceive. It denotes not just written or spoken but also any other conduct that denotes a false assertion."

In the case of *Britannia Allied Industries Ltd vs. Aya Biscuits (U) Ltd HCCS NO.24 of 2009*, misrepresentation was defined as a false description made consciously or unconsciously by the defendant.

In the instant case there appears to have been no fraud or mistake but misrepresentation of facts that the respondent had performed all its contractual obligations to the full yet new evidence has emerged indicating that the respondent did not do so as seen from Annexure 'C' wherein it is clear that another company named Kaabong United Traders Ltd was contracted by Kaabong Technical Institute to complete the execution of the remaining works which had earlier been contracted to the respondent. There is no evidence brought by the respondent to rebut this fact meaning that the consent judgment was entered into by a clear misrepresentation.

It is well settled principle of law that a consent judgement can only be vitiated by a court of law only by reason of fraud, mistake, misrepresentation or contravention of court policy. In the instant consent judgment, I would find that it was

entered into through misrepresentation of facts by the respondent and thus would be vitiated accordingly.

As to what remedies would be available to the parties, the applicant prayed for the vitiation of the consent judgment as well as costs for this suit. The respondent prayed otherwise that this application be dismissed with costs as it was an after-thought brought in with the aim of preventing the execution of the consent which was willingly entered into by the parties thereto.

I have already found that the consent agreement was entered into by fraud. I will now turn to the issue of costs.

In law, it is an established principle that costs of any action, cause or matter shall follow the event unless court for good cause orders otherwise. This is the import of *Section 27(2) of the Civil Procedure Act Cap 71* which was position followed by court in the case of *Francis Butagira Vs Deborah Namukasa [1992-1993] HCB 98* in which the court had this to say; “Costs of and incident to all suits shall be in the discretion of the court and the court has full power to determine by whom and what property and to what extent those costs are to be paid and to give all necessary directions for the purpose aforesaid.”

The applicant is the successful party in this application and I find no good reason to deprive it of the costs of this application, accordingly it is awarded the cost of this application.

Orders:

In the final result, this application is successful and in the final result I would make the following orders: -

- a) The consent is entered by both parties on the 20th July 2018 is set aside.
- b) The costs of this application is awarded to the applicant.

I so Order



Dr Henry Peter Adonyo

Judge

8th July 2021

Order:

This ruling is forwarded to the Registrar of this court to have it delivered online to parties in line with the Hon Chief Justice's directions on COVID-19 SOP's.

I so order



Judge

8th July 2021

23/7/21

Court: Ruling Believed

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23/7/21

AR.