

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

MISC APPN. NO. 836 OF 2021

(Arising out of EMA NO. 524 OF 2018)

(Arising out of MISC. APPN. NO. 2042 of 2018)

[All arising out of CIVIL SUIT NO. 532 of 2017]

1. NANSUBUGA AIDA NALULE alias NSUBUGA AIDA

2. SSALONGO NSUBUGA MOSES :::::::::::::::::::::::::::::::APPLICANTS

VERSUS

SEBULIBA DAVID :::::::::::::::::::::::::::::::::::::::RESPONDENT

BEFORE: HON JUSTICE SSEKAANA MUSA

RULING

This is an Application brought under section 98 of the Civil Procedure Act, Section 33 of the Judicature Act and Order 22 rule 23 of the civil procedure rules for orders that;

1. An order of Stay of execution doth issue against the Respondent and his agents restraining him/them from executing the orders of the Deputy Registrar arising under EMA No. 524 of 2018 pending the disposal of the main application for setting aside Consent order illegally and through fraud entered into by the respondent without knowledge or consent of the applicants vide Application No. 2042 of 2018 or until further orders of this court.

2. Costs of this application be provided for.

The application was supported by the affidavit of Ssalongo Nsubuga Moses briefly stating that;

1. That the Deputy Registrar had issued a notice to show cause why execution should not issue.
2. That the execution arises out of an illegal consent order dated 17th October, 2018 that was procured through fraud without our knowledge, consent and illegally.
3. That an application to set aside the said consent order that was procured through fraud and illegally, without our knowledge and consent by the respondent in collusion without former lawyers, Semuyaba, Yiga & Co Advocates was filed before this honorable court.
4. That the said order was purportedly executed by his Lordship Gandeya Paul Wolimbwa, when we were not present at court on the purported date and have no any scintilla of knowledge of the same.

In the respondent's affidavit in reply wherein a simple background is laid that the applicants conceded as they are demanded money to a tune of Ugx80,000,000/= which they have as far paid Ugx55,000,000/= and the outstanding balance being 50,554,500/= inclusive of interest which they undertook to pay before the Deputy Registrar on the 21st day of June 2021 but failed thus opposing the grant of the orders being sought on grounds of obvious falsehoods, frivolous and vexatious and that it should be dismissed with costs.

The applicant was represented by *M/s Mugisa, Namutale & Co Advocates* and *M/s Ochieng Associated Advocates & Solicitors* represented the respondent.

The parties were directed to file written submissions that the court has carefully considered, the law applicable and the case authorities cited for its assistance.

Issues

- 1. Whether the applications to stay execution of orders vide Execution Miscellaneous Application No. 524 of 2021 before the Deputy Registrar should be granted pending the disposal of the illegal and fraudulent consent order vide Misc. Application No. 2042 of 2018?*
- 2. What remedies are available to the parties?*

Determination

- 1. Whether the application to stay execution of orders vide Execution Miscellaneous Application No. 524 of 2021 before the Deputy Registrar should be granted pending the disposal of the illegal and fraudulent consent order vide Misc. Application No. 2042 of 2018?**

It is submitted by counsel for the Applicants that the impugned consent order vide Misc. Application No. 2042 of 2018 is frivolous, vexatious, illegal, fraudulent and against court policy because it was entered into without the knowledge, consent and absence of the Applicants but rather with the applicants former lawyers M/s Semuyaba, Iga & Co Advocates who entered into the consent order and blinded court into endorsing a consent reached on at their own conjecture and through collusion with the respondents' lawyers. This resulted into withdrawing instructions hence the instant Application vide **Misc. Application No. 837 of 2021** seeking to set aside the consent order vide **Misc. Application No. 2042 of 2018** and stay of **Execution Miscellaneous Application No. 524 of 2018**.

The aforementioned Applications were brought under Section 98 of the Civil Procedure Act Cap 71, Section 33 of the Judicature Act Cap 13 and O.22 r. 23(1) of the Civil Procedure Rules S.I 71-1.

Counsel for the applicants submit that with the above cited laws, there are a number of anomalies in obtaining the consent order vide **Misc. Application No. 2042 of 2018** and the **Execution Miscellaneous Application No. 524 of 2018** before the Deputy Registrar in issue and if this application for stay of execution is not granted, **Misc. Application No. 837 of 2021** seeking to set aside the consent order will be rendered nugatory, owing to the fact that the same was entered illegally without the knowledge and consent of the applicants which is an illegality on the face of the record, which illegality can best be appreciated upon hearing of the application to set aside.

Counsel for the Respondent submits that this application for stay is made as an afterthought, since the applicants on diverse occasions attended court and requested for more time to complete the outstanding balances for which they have voluntarily made substantial payments in fulfillment of the terms of the consent order in a period of 4 years now. Therefore, there is no substantive application before this honorable court and the application is made with a deliberate motive to circumvent the course of justice and frustrate the respondent from recovery of the balance by way of attachment and sale of the judgment debtors' property.

Counsel cited **Order 43 rule 4(3) of the Civil Procedure Rules** wherein it reads;

“That the applicant must show that he/she will suffer substantial loss if the stay is not granted, the application has been made without any reasonable delay and further that the security has been given by the applicant for due performance”.

Therefore, in citation of the above provision, none of the legal requirements have been met out by the applicants and that the applicants have miserably failed to show why they kept paying money towards the settlement of the alleged fraudulent consent since 2018.

Justice Boniface Wamala, in the case of *krone (U) Ltd versus Kerilee Investments Ltd Misc. Application No. 306 of 2019 arising from CS No. 365 of 2015*, while explaining the above cited order his Lordship noted that;

“The grounds of setting aside a consent order are well articulated that a consent judgment can only be set aside where it is proved that it was entered into without sufficient material facts or in misapprehension or in ignorance of material facts, or it was actuated by illegality, fraud, mistake, contravention of court policy or any reason that would enable court to set aside an agreement”.

The grounds of this application are not sufficiently strong and have not been well substantiated to the level that would persuade court to deprive the respondent of the fruits of the Court order.

It is the submission of the respondent that this application lacks merit and should be dismissed with an order that the execution proceeds and costs to the application be paid to the respondent.

Counsel for the applicants in his submissions in rejoinder further contends that the respondent’s submissions are baseless, unfounded on law and fact and that if Misc. Application No. 837 of 2021 seeking to set aside the consent order vide Misc. Application No. 2042 of 2018 entered on 17/10/2018 is not granted, the interest won’t be protected.

Analysis

This application was brought under **Order 22 Rule 23(1)** which provides that;

“The court to which a decree has been sent for execution shall, upon sufficient cause being shown stay the execution of the decree for a reasonable time to enable the judgment debtor to apply to court by which the decree was passed, or to any

court having appellate jurisdiction in respect of the decree or the execution of the decree, for an order to stay the execution, or for any other order relating to the decree or execution which might have been made by the court of first instance, or appellate court if execution has been issued by the appellate court or if application for execution has been made to it."

This means that for the above order to be invoked there must be a transfer of a decree from the court that passed the decree to another court so as that other court to which the decree has been sent for execution, stays it for any sufficient cause.

In this particular case there is no such decree that has been transferred from one court to another. It is this same court that passed the decree being appealed against.

I find the provision not applicable to the present circumstances as the appropriate Order would be **Order 43 rule 4(2) of the CPR or Order 22 rule 26.**

Therefore, this application is improperly before this court and since the respondents did not raise an objection to the same, I will also exercise my powers under section 33 of the Judicature Act Cap 13 and section 98 of the Civil Procedure Act, Cap 71, to proceed and address the merits of the application despite having addressed the procedural impropriety under which this application was brought to this court.

The applicant has filed an application to set aside the consent judgment pending before this court vide Miscellaneous Application No. 837 of 2021. The nature of the application challenges the consent judgment for being fraudulently procured against the applicants. This court would be slow in applying the conditions in order 43 as it interrogates the matter. There are special circumstances which warrant the order of stay of execution of a consent judgment allegedly obtained by fraud.

A court has unimpeded discretion to grant or refuse a stay of execution of judgment. The court however is bound to exercise its discretion not only judicially, but judiciously as well. The discretion of the court must not be exercised capriciously or erratically. The stay of execution is dependent on the circumstances of each particular case and the court is entitled to arrive at a just and equitable conclusion.

This court would grant a stay of execution in order for the court to examine the circumstances surrounding the execution of the alleged consent judgment. The policy of the court is that it should not enforce consent judgment secured through fraudulent misrepresentations by parties.

The application is allowed. Each party should bear its costs.

I so order

Ssekaana Musa

Judge

24th October 2022