THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

MISCELLANEOUS APPLICATION NO. 058 OF 2021

ARISING FROM hct-01-CV-CS-005-2019

LIFE FM 93.8 LTD :: APPLICANT

VERSUS

EMAMBA ESAZIRE UNITED BROTHERS CO. LTD ::::::: RESPONDENT

BEFORE HON. MR. JUSTICE VINCENT EMMY MUGABO

RULING

This is an application for setting aside or vary a consent judgment entered by the registrar of this court in Civil Suit No. 005 of 2019. It is brought under Section 33 of the Judicature Act and Order 52 rules 1 & 3 of the Civil Procedure Rules.

Background

The respondent filed Civil Suit No. 005 of 2019 under summary procedure to recover rent arrears from the applicant. The applicant then filed Misc. Application No. 33 of 2019 for leave to appear and defend and the same was dismissed. Court entered default judgment in favour of the respondent on 7th October 2019 for the sum of UGX 76,439,375/= and costs. On 19th March 2020, the parties herein entered into a consent entitled "Consent to Payment of Judgment Debt". This was then endorsed by the registrar on 20th March 2020. It is this consent that the applicant seeks to set aside or vary.

The application is supported by the affidavit of Katusabe Lubega Dickson, a director of the applicant with the grounds of the application, the gist of which is that;

i. Before the applicant entered into the consent, the applicant was heavily indebted and unable to pay its debts and it was sold by its former owners to the present owners to ensure continued existence.
ii. Shortly after the execution of the consent, the country was sent into total lockdown due to the outbreak of COVID-19 pandemic which greatly affected the applicant's radio business
iii. The applicant has not been in a financial position to pay the judgment debt in accordance with the consent and therefore proposes the same to be varied on new terms favourable to the applicant.
iv. Some terms of the consent need to be expunged because they did not take into account the unforeseen circumstances like COVID-19
v. The applicant remains fully committed to paying the judgment debt but on more favourable terms considering the circumstances.

In reply, Tom Rubaale, the chairperson of the respondent's board of directors swore an affidavit on behalf of the respondent. He deponed that the applicant has no reasonable excuse for breaching the consent. Further that the applicant's radio business was not locked down as it was considered an essential service.

Representation and hearing.

The applicant is represented by Ms. Bahenzire Angella of Bahenzire, Kwikiriza & Co. Advocates. Mr. Bwiruka Richard of Kaahwa, Kafuuzi & Co. Advocates represented the respondent. Both counsel filed written submissions which I have considered.

Consideration by court

Counsel for the applicant quoted the following text from the case of ***Attorney General & anor Vs James Mark Kamoga SCCA No. 8 of 2004***. "*…it is a well settled principle, therefore, that a consent decree has to be upheld unless it is violated by reason that would enable a court to set aside an agreement such as fraud, mistake, misapprehension or contravention of court policy. This principle is on the premise that a consent decree is passed on terms of a new contract between the parties to the consent judgment…*"

Counsel for the applicant went ahead to argue that the applicant misapprehended the economic environment at the time and did not foresee that there was going to be a total lockdown. She submits that this application seeks to regularise the terms of the consent to achieve the intention of amicable settlement.

In response, counsel for the respondent argues that what the applicant seeks to vary is not a consent judgment but a consent to payment of a judgment debt. He states that the judgment in Civil Suit No. 005 of 2019 had already been entered before the parties decided to consent on how the judgment debt would be paid. Counsel referred to the case of ***James Mark Kamoga (supra)*** and argued that the reasons advanced by the applicant to set aside or vary the consent do not amount to fraud, collusion, or contrary to the policy of court and that the applicant does not show that the applicant entered into the consent without sufficient material facts and there is no reason to set it aside.

I agree with the argument advanced by counsel for the respondent that what the applicant seeks to set aside or vary was not in fact a consent judgment in respect to Civil Suit No. 005 of 2019. Default judgment in that suit was entered by the trial judge on 7th October 2019. The parties later

reached an amicable settlement of the judgment debt by reducing their settlement into writing and it was endorsed by the registrar of the court. Referring to this as a consent judgment would imply that there were two judgments in respect to the same suit. To this court, this was a consent on how the applicant intended to settle the judgment debt and it was endorsed by court in furtherance of the ends of justice. It could have had the same effect even if it had not been endorsed by court. To this end, and for purposes of this application, it will be treated as a contract between the parties.

From the case of ***James Mark Kamoga (supra)***, it is now well established law that a consent decree must be upheld unless it is vitiated for reasons that would mandate a court to set aside an agreement, such as fraud, mistake, misapprehension or contravention of court policy. From the limited scope of discretion within which this court may set aside a contract, as outlined above, the only grounds applicable to the facts of this application, are the misapprehension of the economic effects of COVID-19 and the argument that the performance of the consent was affected by COVID-19 lockdowns.

I have already noted that the impugned consent is treated as a contract between the parties. Misapprehension in the strict sense is not a factor that vitiates a contract. Could it be considered as a mistake of fact? I think not because it is settled for the mistake to negate a contract, the mistake must precede the contract and must be material to the contract at hand. Before the present consent was executed by the parties, COVID-19 had already broken out elsewhere in the world and only a few days before the lockdown was declared in Uganda. The applicant merely misapprehended the extent

of the pandemic and its economic effects on her business. It was not a mistake that would negate the agreement between the parties.

Could the outbreak of COVID-19 said to have frustrated the agreement between the parties? The basic principle here is that if after a contract is made, something happens, through no fault of the parties, to make its performance impossible, the contract is said to be frustrated, and the obligations under it come to an end. Although there are many events which may make performance impossible, only certain limited types will allow a contract to be frustrated. These are the ones that make performance impossible or illegal or irrelevant through being overtaken by events. See **Contract Law Seventh Edition Catherine Elliott & Frances Quinn pg 303.**

For a contract whose performance is to be considered frustrated by an event out of no party's fault, the applicant needs to show that;

a. Performance was wholly impossible
b. The event must be beyond the reasonable control of the affected party
c. There must be a nexus between the frustrating event and the inability to perform
d. Reasonable steps were taken by the affected party to avoid or mitigate the frustrating event or its consequences

The outbreak of COVID-19 in itself is not a frustrating event. But its effects may be looked at. This comes with the nexus between the effects of the pandemic and the obligation to be performed in the agreement. A disruption that merely affects profitability is not sufficient as a frustrating event. I need to note that the applicant's obligation to pay the judgment debt fell due on 7th October 2019 when the judgment was entered against

her but did not pay for more than six months before they executed the consent to pay. Was this failure also due to the outbreak of COVID-19? I think not. As stated in the affidavit in support, it could have been triggered by the applicant's financial hardship and debt burden.

I also note that by the time the applicant entered into the consent, they were fully aware of their debt burden and financial obligations at the time. They were also aware that payments from the applicant's customers take time.

When the lockdown was declared in March 2020, which could have possibly impaired the applicant's ability to strictly comply with the terms of the consent, the applicant did not take steps to mitigate the effects of the lockdown. The applicant sat back and instead filed the present application in May 2021. Mitigation measures depend on the circumstances of each case. None has been shown to have been taken by the applicant in this case. It is also noticed that the applicant stayed in operation of business during the lockdown although at a reduced scale. It would be erroneous to hold that the lockdown completely curtailed the applicant's ability to perform the terms of the agreement.

This application was an afterthought when the respondent applied for execution and the applicant had already been served with a notice to show cause why execution should not issue. The applicant has not shown sufficient cause why the agreement between the applicant and the respondent ought to be set aside or varied. This application fails and is therefore dismissed with costs to the respondent.

This ruling affects Misc. Application No. 059 of 2021 for stay of execution. It is accordingly dismissed with no order as to costs. Misc. Application No.

150 of 2019 for stay of execution is overtaken by events. It is also closed with no order as to costs.

It is so ordered

Dated at Fort Portal this 14th day of April 2023

Vincent Emmy Mugabo

Judge.

Court: The Assistant Registrar shall deliver the Ruling to the parties.

Vincent Emmy Mugabo

Judge

14th April 2023.