THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT GULU

MISCELLANEOUS APPLICATION NO. 01 OF 2022

(ARISING FROM HIGH COURT CIVIL SUIT NO. 36 OF 2021)

OLARA DENIS MICHAEL.....APPLICANT

VERSUS

OMONY STEPHEN KHESMODEL.....RESPONDENT

BEFORE: HON. MR. JUSTICE GEORGE OKELLO

RULING

Introduction

This Ruling is in respect of an application to set aside consent judgment entered into by the parties in Civil Suit No. 36 of 2021 on 10th December, 2021. The consent was lodged in Court on 13th December, 2021. The Deputy Registrar of court signed and sealed it on 23rd December, 2021. The instant application was filed on 10th December, 2022. It was fixed for hearing on 19th January, 2023. The Application lost position but was later re-fixed at the Respondent's instance for hearing on 7th July, 2023.

Background

The background facts leading to the consent judgment are as follows;

The Applicant who is a businessman within Gulu City and said to be engaged in construction and civil works, needed money to finish a project. He approached the Respondent being his longtime friend, for the latter to lend him Ugx 150,000,000. The Respondent accepted the request. The two executed a memorandum of agreement for a loan on 10th January, 2020. In it, it was agreed that the Respondent would lend the amount on certain terms. The Applicant would deposit security, comprising of original certificate of title to the Applicant's mailo piece of land situate in Wakiso District; and would also deposit original copies of sales agreements for developed property in Ariaga Ward, Laroo Division, Gulu City; and a Sale agreement for vacant surveyed piece of land located at plot 12 Otema Alimadi Road, Laroo Division, Gulu City. The Applicant would repay the money within three months from 10th January, 2020. The Applicant would also pay a fixed sum of Ugx 33,000,000, as interest. Further, it was agreed that, should the Applicant default by one week, the principal sum plus interest would attract 10% charge which would continue accruing until the principal amount and interest are repaid. The parties also agreed that, in the event of default, the matter would be referred to court for redress. The parties stated, they were entering the agreement voluntarily and freely agree to be bound by the terms. They signed their document in the presence of a witness for each side. The Applicant's spouse who apparently doubled as his witness, duly consented to the use of the securities. The bargain was sealed before a one Akena Kenneth Fred, an advocate of the

High Court. He also drew the memorandum for the loan. From the turn of events, however, it appears the Applicant did not live up to his promise. After a year and ten months, the Respondent launched High Court Civil Suit No. 36 of 2021 in contract breach. He sought to recover Ugx 507,400,000. He claimed the amount was comprised of principal sum and interest. The Respondent also sought for general damages and costs. In the Plaint, the Respondent clarified that the Applicant had defaulted to pay the principal sum of Ugx 150,000,000, fixed interest of Ugx 33, 0000,000, and the accumulated interest on the two in the sum of Ugx 329,400,000. The Respondent contended he had made several demands but the Applicant willfully and negligently refused to pay the amount due. He had served a notice of intention to sue but the Applicant had ignored. The Respondent further averred he had suffered great loss and inconveniences. He also averred he had suffered loss for non-use of his money which was for business and would thus seek interest at the prevailing commercial rate. He thus claimed for 30% interest from April, 2020 (the contract repayment deadline being 10th April, 2020.), and costs of the suit.

Summons served

The Applicant was served with the Summons and Plaint. The summons was issued on 9th November, 2021, requiring him to file Defence. It was apparently served within 21 days upon issuance by court, as per the rules

of procedure. The Applicant did not lodge a Defence. He instead entered into the impugned consent judgment on 10th December, 2021. It is apparent at the time he consented, the Applicant still was still within fifteen days of lodging his Defence.

Consent Judgment

In the consent judgment, the parties agreed that the Applicant (Defendant) would pay a consolidated sum of Ugx 347,700,000 (not the Ugx 507,400,000 sued for). The agreed amount would be paid in the terms set out by the parties, namely; Ugx 120,000,000 would be paid on 31st January, 2022 (about 52 days from the consent date); Ugx 63,000,000 to be paid on 31st March 2022 (60 days after the first payment); and the remaining balance of Ugx 164,700,000 would be paid in instalment of Ugx 10,000,000 every month, effective June, 2022 till 2023 December. Court notes, this last term totals to 19 months. The ultimate amount payable for 19 months, would be Ugx 190,000,000, thus in excess by Ugx 25,300,000. This arithmetic notwithstanding, as I will point out, the parties agree that Ugx 175,000,000 have so far been paid, and that Ugx 172,700,000 remains outstanding. So, it appears no prejudice is occasioned by the mathematical error.

Grounds of the Application

The Application is premised on section 98 of the Civil Procedure Act, Cap. 71, section 33 of the Judicature Act, Cap, 13, and Order 52 rules 1 and 3 of the Civil Procedure Rules, S.I 71-1, Laws of Uganda. The Applicant rests his case on the averment that, the consent judgment was entered into illegality, and on the basis of misrepresentation and concealment of facts. He also claims he lacked *locus standi* at the time as he had not yet lodged his Defence in the suit. The Applicant asks this court to set aside the impugned consent judgment. He also seeks leave to file Written Statement of Defence out of time, and prays for costs. The Applicant swore an affidavit to support the Motion. He details some of the matters already set out herein before.

In summary, in his affidavit, the Applicant deposes that, when he was served with summons, the Respondent's lawyers, M/s Odongo and Co. Advocates, invited him through a phone call to their Chambers. The lawyers allegedly advised the applicant to enter into consent judgment. The Applicant alleges, the lawyers advised him not to hire counsel as that would waste money as the suit could easily be settled amicably. Convinced, the Applicant did not instruct any lawyer to defend him. The Applicant added, in any case, the lawyer who rendered advice, had acted for both parties in drafting the memorandum of loan agreement. The Applicant deposes, he trusted the lawyer's words, having known counsel

for a long time. The Applicant does not, however, name the specific lawyer, in his affidavit. He also deposes that, the lawyer drafted the consent judgment for the parties which both signed and lodged in court. According to the Applicant, the consent required him to pay Ugx 347,700,000. He contends, there is no breakdown in the consent judgment on how the total amount was arrived at. The Applicant also claims he inquired from the Respondent on how the amount was arrived at, and the Respondent told the Applicant the amount is comprised of agreed interest, penalty, general damages and costs. The Applicant then started paying the amount. However, he defaulted and that Bailiffs were engaged by the Respondent to allegedly sell the Applicant's family home. Consequently, the Applicant discovered he had been duped into consenting. He claims the consent judgment is illegal, exaggerated, and misrepresented and concealed facts. He says he now regrets having not hired a lawyer and having not filed a Defence. The Applicant deposes he has so far paid Ugx 175,000,000 to the Respondent and that Ugx 172,700,000 remains outstanding. He also now believes that, part of this balance is unjust, having been reached at by adding illegal interest and penalty not sanctioned by the laws of Uganda, let alone having been procured through misrepresentation and concealment of facts. The Applicant has also since learnt that, the Respondent was not a licensed money lender at the time he lent the money. The Applicant believes the interest charged on the principal sum is illegal and thus should not have been included in the consent judgment. The

Applicant, however, qualifies his claims, saying, his application is not motivated by inability to pay what is agreed in the consent judgment, but it is due to the opaque, unjust and illegal manner the consent judgment was entered into. The Applicant also claims he has not presented the application to delay the Respondent from enjoying the fruits of litigation but to allow this Court to prevail over the manner and ploy under which the consent was procured and signed. The Applicant claims the Respondent's lawyer did not act in the applicant's best interest yet the Applicant had believed both parties' interests were being represented at the time of executing the consent judgment. Having since realized the truth, the Applicant obtained the services of the present counsel (M/s Oyet & Co. Advocates) to represent him in the instant matter. The Applicant also claims he has since realized he also lacked *locus standi* to enter into the consent Judgment since he had not filed a Defence. The Applicant concludes by asserting that he has since been advised it was unprofessional for the lawyers of the Respondent to also represent the Applicant in drafting and witnessing the consent agreement. In his view, this as well amount to misrepresentation.

The Response

In his opposing affidavit, the Respondent admitted the parties entered into a memorandum of agreement for a loan on 10th January, 2020 and in the terms stated by the Applicant. He also concedes he lodged Civil Suit No.

36 of 2021 on the Applicant defaulting to honour terms of the agreement. The Respondent deposes that, the Applicant voluntarily entered into a consent judgment on 10th December, 2021. He denies that the Applicant was advised by the same lawyers who drafted the agreement to enter into consent judgment. The Respondent further denied the allegations that his lawyers advised the Applicant not to retain services of independent counsel. According to the Respondent, the Applicant's default to lodge his Defence was self-created. He asserted, the Applicant could have sought independent legal advice. He added that, there was no concealment and or misrepresentation of facts when the consent judgment was being executed. The Respondent also asserted that, the money advanced to the Applicant was not a loan transaction but it arose from a gentleman's agreement, given the parties' good social relationship. According to the Respondent, the interest charged on the principal sum was agreed upon, and was a precautionary measure to ensure repayment. He added that, the contract between the parties was lawfully executed and had all the elements of a valid contract. It was asserted, the Applicant freely consented. The Respondent also contended, the application to set aside the consent judgment, and for leave to file a Defence out of time, is frivolous, vexatious and devoid of merit. He prays the application be dismissed with costs.

Representation

At the hearing, Mr. Michael Okot Obalo represented the Applicant who did not attend the hearings, while Mr. Akena Kenneth Fred appeared for the Respondent. Both learned counsel filed written submission which court has considered, and is grateful.

Issues

The main issues for determination in this application are;

i) Whether a ground exists for setting aside the consent judgment executed by the parties in Civil Suit No. 36 of 2021?

ii) Whether time ought to be enlarged for filing of the Written Statement of Defence in Civil Suit No. 036 of 2021?

iii) Remedies available to the parties

Determination

Court will resolve the first two issues together as the resolution of the first will have a bearing on the second issue. The issue of remedies will be addressed last.

It is shown on the face of the consent judgment that it was lodged in the High Court on 13th December, 2021. The Deputy Registrar of Court signed and sealed it on 23rd December, 2021. Although there is no record showing the parties' appearance before court to confirm the terms of the consent judgment, both parties agree they executed the consent judgment in the

terms stated. Consent Judgments are regulated by the rules of Civil Procedure of Uganda. Order 25 rule 6 of the Civil Procedure Rules (CPR) provides:

"O.25 r.6 Compromise of a suit. Where it is proved to the satisfaction of the court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject matter of the suit, the court may, on the application of a party, order the agreement, compromise, or satisfaction to be recorded, and pass a decree in accordance with the agreement, compromise or satisfaction so far as it relates to the suit."

The conditions that ought to be satisfied for the validity of invoking the provision of O. 25 rule 6 of the CPR and passing a decree/Judgment under the rule are;

i) There must be a lawful agreement or compromise;

ii) The agreement or compromise must relate to adjustment of a suit or satisfaction of the subject matter of the suit, either wholly or partially;

iii) A party must apply to court to have the agreement or compromise or satisfaction recorded.

iv) Court must be satisfied before endorsing the agreement/compromise.

It should be noted that, the scheme of O. 25 rule 6 of the CPR is to avoid multiplicity of litigation and to permit parties to amicably come to a settlement which is a lawful and voluntary act of the parties. There must be voluntariness because the law confers on a party no rights or benefits which he/she does not desire, a term expressed in Latin as *beneficium non datur*. Therefore, once a decree is endorsed by court, certain rights come to be vested in the person in whose favour the decree is passed. It is therefore, incumbent on court to ensure that the agreed compromise or agreement is lawfully effected and finality attached to it, as a court can never impose a compromise on an unwilling party. See: **Chand Kaur Vs. Raj Kaur (died) AIR 1997 P & H 155; Mulla, Commentary on the Code of Civil Procedure (Amendment) Act 1999 and Code of Civil Procedure (Amendment) Act 2002 (of India), at p. 3197**.

Although O.25 rule 6 of the CPR does not expressly require that parties to a consent judgment appear before court to confirm the terms of their agreement or compromise, in my view, it is prudent and good practice that courts insist on parties' appearances as that may be the only way court can satisfy itself in terms of rule 6. Appearance under O.3 rule 1 of the CPR is by a party in person or an advocate of a party or by the party's

recognized agent. Regarding appearance by counsel, it has been held that, so long as counsel is acting for a party in a case and his/her instructions have not been terminated, he/she has full control over the conduct of the trial and counsel has apparent authority to compromise all matters connected with the action. See: **Shah Vs. Westlands GSP Ltd [1965] EA 642; Wasike Vs. Wamboko [1982-88] KAR 625; Karani & Others Vs. Kijana & others [1987] KLR 557; Brooke Bond Liebig (T) Ltd Vs. Mallya [1975] EA 266.** Counsel should, however, act bona fide at all times.

I am thus of the view that, where practicable, both parties and their respective counsel ought to appear before court, to confirm the terms of the consent. This would help in avoiding possible future denials or accusations and counter accusations when issues arise after execution of the consent, and would curb potential abuse of court process. It would also prevent false and frivolous pleas that a suit has been adjusted by lawful agreement or compromise, whereas not. It is thus proper that, when parties enter into a consent or compromise, it is prudent they reduce their terms into writing and sign it. Court is of course acutely aware that, O.25 rule 6 of the CPR has no requirement that a consent be in writing and signed. This is not like the situation that obtains under the equivalent provision of the Indian Code of Civil Procedure, where under Order 23 rule 3 (as amended in 1976), there is a mandatory requirement that consent be in writing and signed. In spite of our rules' omission, oral consent has no

place in law. Parties must therefore still reduce their consent into writing or where not practicable, they must appear and verbally state their agreed terms to court, for the record. Court may read back the terms to the parties, for their confirmation. Court's duty should be to ensure that it does substantive justice by reducing the parties' oral consent into writing. Courts should therefore be flexible to accommodate consents which may not be in writing, depending on the circumstances of each case, provided parties appear and confirm their terms to court. This could be in instances where, for example, parties self-represent, or where they may not be conversant with the rules of procedure of court. In some instances, parties may simply sign and forward their consent to court under a cover letter signed by both counsel and their clients. In such a case, whereas court may not question the parties' wishes, it would be proper that court satisfies itself that the parties have indeed agreed in the terms being presented to court. I think it would be proper that parties still appear, even where they have both written to court communicating their agreement. I must admit, it is not possible to state diverse circumstances that could arise in matters where suits are compromised and I can only state general guidelines as there appears to be none in our rules or a Practice Direction for that purpose. The approach in each case, should, therefore, depend on its special facts and circumstances. The overriding duty of court, however, is to do justice which can only be achieved on satisfying itself that the consent presented to court, is lawful and was voluntary executed, and

complies with the requirements of O. 25 rule 6 of the CPR. In my view, a court cannot refuse to endorse a consent or compromise merely because it considers it to be too favourable to one of the parties, unless of course it considers that substantial injustice would be worked. See: **Sourendra Nath Vs. Tarubala (1930) 57 IA 133**. A court may also refuse to endorse consent if it is a nullity, or it is contrary to public policy. See: **Malek Vs. Amirkhan 19 Guj LJ 482, AIR 1978 Guj 42**.

Turning to the present case, it is apparent the parties did not appear before the Deputy Registrar to confirm the terms of their consent. However, I see no prejudice, as the parties agree they entered into the impugned consent judgment before it was sent to court for filing and endorsement. The Deputy Registrar of court had the requisite power to endorse the consent judgment. This is in light of the Practice Direction No. 1 of 2002 which provide for their added powers. The Practice Direction has since been incorporated in the CPR, under O.50 rule 10. The powers of Registrars or Deputy or Assistant Registrar to enter consent judgment, among others, has since been recognized by superior courts. See **Attorney General & Uganda Land Commission Vs. James Mark Kamoga and James Kemala, Civil Appeal No. 8 of 2004 (SCU)**.

It is a requirement that where consent judgment relates to the whole suit, the court records the agreement and pass a decree compromising the

whole suit. This would mark the end of the suit. However, where a decree is passed as to part of the suit only, the court should proceed to hear and determine the rest of the matters not settled by the decree. In the instant case, the learned Deputy Registrar of Court, His Worship Ntalo Nasulu, passed a consent judgment, thereby wholly determining the suit, in accordance with the parties' consent. It should be noted that, a consent decree/ judgment once endorsed by court has the same force and binds parties just as any other decree of court. It also confers benefits, and must therefore be acted on. See: **Mulla, Commentary on the Code of Civil Procedure (Amendment) Act 1999 and Code of Civil Procedure (Amendment) Act 2002** (*supra*), p. 3198.

I should observe that, in this jurisdiction, a decree entered into by the consent of the parties is not appealable, as an appeal is barred by section 67 (2) of the Civil Procedure Act. Therefore, being a binding judgment of the parties, a consent judgment, and decree or order operates as *res judicata* as well as estoppel between the parties. See: **Byram Pestonji Gariwala Vs. Union Bank of India (1992) 1 SCC 31**.

Given the clear statement of the law, and having set the stage on which to proceed, I now find it convenient to consider the grounds canvassed in the motion.

The Applicant seeks to have the consent judgment set aside on grounds of illegality, misrepresentation, concealment, and lack of *locus standi* when he signed it.

Consent judgment, decree or order has contractual and binding effect and the legal consequences of recording and passing a decree under O.25 rule 6 of the CPR is that the decree is passed on a new contract between the parties superseding the original cause of action. This view was stated in **Hirani Vs. Kassam (1952) 19 EACA 131**. The view traces origin and finds support in the literary works of **Chitty on Contracts, 26 Ed. Vol. 1**, where at para 1584, the learned authors state:

"More often, however, the claimant will agree to accept the other party's promise of performance in satisfaction of his claim. The original claim is then discharged from the date of agreement and cannot be revived. The claimant's sole remedy, in the event that the other party fails to perform, is by an action for breach of the substituted agreement; and has no right to resort to the original claim. If he wishes to proceed with the original claim should the other party fail to perform, an express term should be incorporated in the agreement to that effect."

The above text was referenced with approval by Githinji, J.A, in the persuasive Kenyan case of **Diamond Trust Bank of Kenya Ltd Vs. Ply and Panels Ltd & others [2004] 1 EA 31 (CAK)**.

Regarding the grounds for setting aside a consent judgment, decree, or order, it is now settled that the same can only be set aside on grounds which would justify setting aside a contract. See: **Hancox J.A** in **Wasike Vs. Wamboko [1982-88] KAR 625, at p.626**.

From my reading of the decided cases on the subject, I can safely state that the circumstances for setting aside a consent judgment, decree or order, are not in doubt. Almost all court decisions have followed the passage from **Seaton on Judgments and Orders 7th Ed, Vol. 1, page 124**, where it is written, thus:

" Prima facie, any order made in the presence and with the consent of the counsel is binding on all parties to the proceedings or action, and on those claiming under them... 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 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."

In **Brooke Bond Liebig (T) Ltd Vs. Mallya [1975] EA 266** the above passage was quoted by the then Court of Appeal for East Africa with approval. The court followed the decision in **Hirani Vs. Kassam (1952) 19 EACA 131** where the passage was equally quoted with deference. Similarly, the Supreme Court of Uganda referenced the same legal principle in **Attorney General & Uganda Land Commission Vs. James Mark Kamoga & James Kamala, Civil Appeal No. 8 of 2004 (SCU) (per the leading Judgment of Mulenga, JSC).**

In **Waskike Vs. Wamboko [1982-88] 1 KAR 266 (*supra*)** the Kenyan Court of Appeal after applying the settled principle, went ahead to give examples of grounds for setting aside a contract such as fraud, mistake, or misrepresentation. The Court was also emphatic that it would not readily assume that a judgment recorded by court by consent, was not so, unless it was demonstrably shown otherwise. In **Brooke Bond Liebig (T) Ltd Vs. Mallya (*supra*), Mustafa, A VP** stated the grounds for setting aside consent judgment as being: fraud, collusion, lack of consensus between the parties, public policy, or such grounds as would enable a court to set aside or rescind a contract.

Given the legal exposition, the question this court seeks to answer is whether the circumstances pleaded and argued for the Applicant exist for

setting aside the consent judgment. I shall consider each grounds canvassed, in turn.

Illegality

Regarding illegality, the bone of contention is that the loan amount consented to in the sum of Ugx 347, 700,000 included interest, yet the Respondent is not a licensed money lender. The Applicant's counsel argued that the Respondent should not have charged interest at all. Learned Counsel cited section 84 (1) (a) of the Tier 4 Microfinance Institutions and Money Lenders Act, 2016 (hereafter 2016 Act), to argue that, it is an offence to carry on money lending business without a license. Counsel submitted that, under section 84 (1) (b) of the 2016 Act, a penalty of two hundred currency points is provided for first conviction, and four hundred currency points, on second conviction. Learned Counsel claimed, the Respondent did not rebut the fact that he is not a licensed money lender and thus the Applicant's claim is true. Counsel cited the case of Kagumaho Kakuyo Vs. Shilla Ninsima, HCCS No. 531 of 2019 (Esta Nambayo, J) which defines who a money lender is, as per the Black's Law Dictionary. Learned Counsel adverted to the memorandum of agreement, and submitted that, the document shows that the Respondent carries business of lending money at charged interest. Counsel argued, the security pledged further confirms the arrangements was a loan and not merely a gentleman's agreement. He thus contended, being an illegal

interest, a court can not sanction an illegality. Learned counsel cited the case of **Friedhelm Erwin Jost & another Vs. Roko Construction Ltd & 2 others, Misc. Application No. 089 of 2021(Mubiru, J.)** to support his arguments on the import of O.25 rule 6. Counsel pressed that, in light of the principles in the cited decision, a judicial officer mandated to endorse a consent judgment must first cross check the legality thereof, the background facts, and also ascertain whether the consent judgment meets the criteria. Learned Counsel reasoned, had the endorsing court engaged the parties and verified the background facts leading to the consent judgment, it would have found that the amount stated in the consent judgment is exorbitant, and includes illegal interest. Learned Counsel contended, no wonder the consent was endorsed in the absence of the parties, contrary to the practice where parties ought to have appeared to confirm the terms of their consent. Counsel concluded, since the amount embodied in the consent judgment included interest charged by the Respondent as a money lender, the consent judgment ought to be set aside on the ground of illegality.

In response, learned Counsel for the Respondent did not agree. Counsel cited the Money Lenders Act Cap. 273, to define who a money lender is. With respect, the cited law is not applicable to the matter, being a repealed law that was no longer applicable at the time of the impugned consent of 2021. Even at the time of the memorandum of loan agreement in 2020 (not

in issue herein) the law had since ceased to apply. Therefore, the 2016 Act is the relevant law for the purposes of understanding what constitute money lending. I therefore, with respect, find the definition of money lending as in Black's Law Dictionary, and case law decided either wholly or partially on the basis of the now repealed Money Lenders Act, inapplicable.

In my view, a money lender, under the current legal regime, can only be a company. The company must be licensed, and must comply with certain legal requirements. Thus under section 5 of the 2016 Act, a money lender means a company licensed under section 82. Of course section 5 of the 2016 Act wrongly refers to section 82. Section 82 is in respect of renewal of money lending license. So, the proper section which the legislature should have referenced to in section 5, is section 78 (1). Section 78 (1) provides for application for a money lending license. It thus provides that, a person intending to engage in money lending business shall be a company. In the instant case, the Respondent is not a company but a natural being. Thus references to him by the Applicant as a money lender, simply because the Respondent allegedly did not rebut the Applicant's averments to that effect, is flawed. Money lending is a matter of law, to begin with. Thus facts must be adduced to prove the Respondent's money lending business status when he executed the impugned consent judgment. None was adduced. In any case, the money lending status relate

back to the circumstances of executing the memorandum of the loan agreement, a matter not in issue in this court. The instant proceedings is strictly for determination of the validity of the consent judgment and not the memorandum of loan agreement that gave rise to the settled suit. The agreement has not been challenged in any suit.

Having further considered the arguments for and against the ground of illegality, I find the ground not well made out. First, in their consent, nowhere did the parties specify that the sum of Ugx 347, 700,000 is comprised of interest. Whereas it is clear from the Plaint and the documents on record that, only Ugx 150,000,000 was advanced by the Respondent, this court cannot infer that the excess sum in the consent judgment is, therefore, interest, although it is possible. However, court notes that, the Respondent sued for general damages and costs of the suit, as well. Thus in the absence of cogent proof, court finds it unsafe to conclude that, interest is embedded within the amount consented to. In any case, court does not know how much of the agreed sum was to cater for interest. And given that the parties compromised from a higher amount to a lower figure, in full and final settlement of the whole claim, it would be dangerous for court to surmise that the agreed amount comprises interest.

In his submission, learned counsel insisted that the Respondent is a money lender because he charged interest. I find no force in that argument. There is no law in Uganda that bars individuals from lending to their acquaintances, friends, or persons belonging to a group, among others, and charging some interest on the loan, as may be mutually agreed. In the present case, being a natural being, the Respondent cannot be said to have been a money lender.

Learned counsel for the Applicant also submitted that, since the parties' agreement had a security clause, then that means the Respondent was a money lender. That argument is faulty, because, that is not a legal test for money lending. In my view, when parties adopt good practices in their lending arrangements, some of which may have been borrowed from legal provisions with modifications, it does not transform their transaction into what it is not. Furthermore, the 2016 Act did not purport to bar humans from crafting their affairs in money lending relations, to protect their often prized but hard-earned financial assets. I, therefore, see nothing wrong with an individual giving credit on friendly terms to persons they choose to give. I also see no wrong in individuals structuring their money lending terms to provide for security deposit and interest. There is no legal bar, provided the 'lender' is not purporting to be carrying out a money lending business. Courts should be alive to the reality of the Ugandan community where acquaintances or friends give money to their own, to satisfy urgent

needs. It would defeat common sense and the doctrine of freedom of contract if it were to be suggested that, friendly loan advances should be interest-free, and that no security deposit be required. Such a postulation, with respect, would tantamount to an erroneous understanding of the current regime on money lending. In my view, the legal regime has not purported to do away with freedom of persons to obtain quick and easy loans from their acquaintances or friends, on their own terms. To think otherwise would create an oligopoly situation in the Ugandan economy for licensed money lenders, with the adverse consequences of locking out many people from quick access to capital for production, inter alia. In my considered view, it should only be wrong for a person to operate or purport to do money lending business when not registered as a company. There, the law should bite.

It is for the foregoing reasons that I found the Applicant's reference to section 84 (1) of the 2016 Act which creates an offence of carrying money lending business without a license, irrelevant in the present context. I note that whereas section 84 (1) targets "persons" thus an expansive provision covering a natural being for the offence purposes, I find no evidence that the Respondent ever represented himself to the Applicant as a money lender. On the contrary, the applicant approached his longtime friend for money. That was the best he could prove. He did not prove that the longtime friend was doing money lending business. I of course note that

the parties crafted their first contract (not in issue in this application) in a manner closer to money lending memorandum envisaged under section 85 (2) of the 2016 Act. However, the parties and their draftsperson were careful in that, they did not state that the interest payable was being charged as a percentage. They carefully put a fixed interest sum. This further disqualifies the initial agreement from being a money lending contract. The parties also did not provide for compound interest. They did not purport that the rate or the amount of interest would be increased by reason of any default in repayment. They also carefully fixed the interest on default at 10% per month from the date of default. Regarding these arrangements of 10th December, 2020, it is my view that, if the applicant was unhappy with it, he should not have waited to be sued first, only to consent. He should have sued to reopen the transaction and challenge the interest charged. This course is apparent and available under section 89 (1) and (2) of the Act of 2016, to an aggrieved borrower, just as it is available to a lender.

Regarding the related claim that the Applicant was advised by the Respondent's counsel to enter into the consent, hence the illegality, I find the same not proved. In this case, both parties signed the consent judgment on 10th December, 2021. On the consent document, Mr. Akena Kenneth Fred is named as counsel for the Respondent (the Plaintiff at the time). This defeats the Applicant's claim that Mr. Akena was acting for both

parties. In the consent, it is not shown that the Applicant (Defendant) had counsel of his own. It is also not shown that he instructed Mr. Akena to act for him but he double crossed. There is no evidence that counsel acted for both parties, a conduct that would run into conflict with professional ethical code of Advocates because of potential conflict of interest. It is also not shown that counsel took advantage of the Applicant. It is not shown that the Applicant had any shortcomings. Nothing stopped the applicant from obtaining services of independent counsel, if he wished. It is not shown the Applicant was ignorant of his rights.

Accordingly, I find no illegality in the consent executed by the parties.

Regarding the need for court's investigation of circumstances of executing consent judgment before court endorsement, learned counsel submitted that, the Deputy Registrar of the Court should have interacted with the parties and sort of investigated the basis of the consent judgment. Whereas I appreciate these sentiments, with respect, I find no fault in the learned Deputy Registrar's endorsement of the consent judgment. In any case, the parties have not, in this application, denied the document. I have already expressed myself on the proper practice to adopt when a court is confronted with consent judgment, decree or order for endorsement under O. 25 rule 6 of the CPR. I, however, do not think the guidance given is cast in stone, as circumstances may militate against insisting on certain fixed

positions. It suffices that, a court satisfies itself, within the meaning of O.25 rule 6 of the CPR before endorsing consent judgment. In light of the views expressed, I find the ground of illegality not proved.

Misrepresentation and concealment of facts

The second ground canvassed by the Applicant is an alleged misrepresentation, and concealment of facts.

Learned Counsel defined the term *'misrepresentation'* as per section 2 of the Contracts Act, 2010. He submitted inter alia that, misrepresentation occurs when a positive assertion is made in a manner which is not warranted by the information of the person making it, or by making assertion which is not true, though the maker believes it to be true. Learned Counsel then contended that, misrepresentation occurred in the instant matter, in that, the Respondent did not disclose that he was not a licensed money lender and was not entitled to charge interest.

The other aspect of the alleged act of misrepresentation, learned counsel argued, is that, the Respondent and the lawyers who acted for him (whom the Applicant thought was also acting for the Applicant) did not reveal to the Applicant the legal consequences of charging interest by the Respondent who was not a money lender. The other alleged act of misrepresentation is that, the Respondent and his lawyer did not reveal

how the loan of Ugx 150,000,000 skyrocketed to Ugx 347,700,000. Learned counsel contended, the amount repayable was lumped up in the Consent judgment and was presented as a consolidated figure, payable in full and final settlement of the claim. He argues, the term used in the consent judgment, and the figure stated, was opaque and intended to conceal facts on how the amount was arrived at. Learned Counsel reasoned, the amount should have been broken down. In closing, counsel submitted, the acts amount to misrepresentation and concealment of facts.

In his response, learned counsel for the Respondent made submission respecting the underlying loan memorandum, which I find, not on point. Counsel also alluded to factual matters in submission which are extraneous as they are not borne out of his client's affidavit in reply. Learned counsel went on to explain the circumstances of executing the impugned consent judgment, by alluding to the Plaint. In my view, those circumstances are extraneous. What, however, is material, is the contention that, the Applicant had all the time to dispute the consent judgment, yet he wrote to court, a letter dated 31st May, 2022, received by court on 1st June, 2022, admitting the debt but asking for more time to pay up. Counsel argues, the Applicant cannot now claim he never knew about the terms of the consent judgment. He also cannot be heard to argue that some facts were concealed from and others misrepresented to him.

Learned Counsel wound up his submission on the matter, asserting, the Applicant knew how the amount embodied in the consent judgment was arrived at.

I have considered both contentions and the material on record. I find no evidence that there was any misrepresentation and or concealment of material facts from the Applicant by the Respondent at the time the parties entered their consent judgment. The parties of course did not minute their discussions and presented no record of their discussions to court. However, the Applicant must have known very well that he was not dealing with a money lender as legally understood. Throughout his affidavit, the applicant however keeps referring to the Respondent as a money lender. He then contends that; the Respondent should have disclosed the fact that he is not one. I find the line of arguments devoid of legal force. As I have observed, there is no evidence that the Respondent was a money lender or that he purported to be one. There is also no evidence that the Respondent was dishonest to the Applicant in any way. There is also no proof of concealment that allegedly caused the Applicant to enter into the consent judgment. The Applicant pleads a negative which he failed to prove. I find no act of dishonesty, let alone of a material nature, on the part of the Respondent when he dealt with the Applicant. There is no law that barred the Respondent from consenting with the Applicant in the terms embodied in their consent judgment. In my view, not particularizing what comprised

the amount embodied in the consent judgment, is no evidence of concealment. What is important is that, the initial amount sued for was compromised by the parties, and reduced to a lesser sum, in full and final settlement of the suit. The parties agreed. I am thus not persuaded that the Respondent falsely represented any relevant facts and circumstances to the Applicant. I am also not convinced that the Respondent induced the Applicant to enter the consent judgment. No bad faith was shown to have existed on the part of the Respondent. If the Applicant thought particularizing the sum in their consent would have given him mileage and was important, he should have insisted on inserting it. With all due respect, the Applicant's arguments lack merit and is at beast an afterthought.

In a nutshell, I find no evidence of misrepresentation or concealment on the part of the Respondent. There is no evidence of false statement made by the Respondent, with the intent to deceive or mislead the Applicant into executing the impugned consent judgment. The allegations remain bare and ought to fail.

Locus standi

The last ground canvassed for setting aside the consent judgment in this matter, is the contention that the Applicant lacked *locus standi* to consent. It was argued, since he had not yet lodged his Defence in the head suit,

the Applicant lacked capacity to consent. Learned Counsel argued, Civil Suit No.36 of 2021 should have been proceeded with by the Respondent ex parte, instead of the Applicant being asked to consent to it. With respect, the argument is flawed. First, the so called lack of *locus standi* to consent merely because Written Statement of Defence had not been lodged by the Applicant (Defendant in the head suit), is no basis for setting aside consent judgment. Learned Counsel's argument, with respect, is premised on a flawed understanding of the law on the effect of not filing a Defence. Learned counsel thinks a Defendant who has not lodged a Defence cannot consent to matters in which he/she is sued. In my considered view, there is nothing in the wording of O.25 rule 6 of the CPR to suggest that, filing a Written Statement of Defence is a *sine qua non* to a Defendant executing a valid consent judgment, decree or order. Again, O.25 rule 6 of the CPR is broad enough to, and indeed encompasses a Defendant who has not lodged his/ her Defence to a suit. Thus a Defendant who is yet to lodge a Defence does not lose the status of being a party to the suit. The rule does not bar such a Defendant from compromising the suit or satisfying the plaintiff's subject matter claim, either wholly or partially. In any case, it makes no sense for a Defendant to lodge a Defence where there is none. Lodging a Defence where the Defendant is admitting the entire claim, makes no sense, if not only to aggravate costs. I, therefore, find the concept of *locus standi* not well thought out. That argument collapses.

Before I take leave of this matter, I have further considered the conduct of the parties from the time they executed the impugned consent judgment. It is clear that, after executing the consent judgment on 10th December, 2021, the Applicant started paying the amounts due. At the time of lodging the present application on 19th December, 2022 (which is one year later,) the Applicant has so far paid Ugx 175,000,000, a fact not disputed by the Respondent. In my view, the delay of one year to file the application for setting aside the consent judgment, after making deposits, in the circumstances of the case, is an affirmation that the compromise was valid. See: **Diamond Trust Bank of Kenya Ltd Vs. Ply and Panels Ltd & others [2004] 1 EA 31, per Githinji, JA**.

I also think, contrary to the Applicant and his counsel's claim, the present Application was designed not to achieve the pleaded end, but to buy time, and also delay the Respondent from realizing the outstanding debt. I thus find it apposite to conclude by quoting from the persuasive case of **F and G Sykes (Wessex) Ltd Vs. Fine Fare Ltd [1967] Lloyds Rep 53** where the celebrated Lord Denning said:

"in a commercial agreement the further the parties have gone on with their contract the more ready the courts are to imply any reasonable terms so as to give effect to their intention. When much has been done, the courts will do their best not to destroy a bargain. When

nothing has been done, it is easier to say there is no agreement between the parties because the essential terms have not been agreed." (Underlining is mine.)

The above wisdom resonate perfectly with what has obtained in the circumstances of the present parties. The parties have gone far with their consent, with the Applicant partially performing the terms thereof, before waking up a year later, to purport to recant and impugn. Having impugned the consent judgment, the Applicant ought to have proved his allegations, which he has failed. The law is that he who seeks to impugn consent judgment, order or decree, bears the burden of proof. See: **Diamond Trust Bank of Kenya Ltd Vs. Ply and Panels Ltd & others (Supra), per Githinji, JA**.

For the foregoing reasons, the application and the prayers for setting aside the consent judgment, and for enlargement of time to file Written Statement of Defence in the now settled Civil Suit No. 36 of 2021, are unsustainable. I accordingly reject them and do hereby dismiss the Application with costs.

Delivered, dated and signed in Court this 5th day of October, 2023.

05/10/2023

George Okello
JUDGE HIGH COURT

Ruling read in Court

9:00am

5th October, 2023

Attendance

Ms. Akello Nancy Onono, holding brief for Mr. Michael Okot Obalo for the Applicant.

Parties absent.

Counsel for the Respondent (Mr. Akena Kenneth Fred) absent.

Mr. Ochan Stephen, Court Clerk.

05/10/2023

George Okello

JUDGE HIGH COURT