



agreement is harsh and unconscionable and that the Respondent has no money lender's license and, as such, he could not charge any interest. He also stated that he never sold any land to the Respondent and never received the sums of money in the impugned agreement and consent. As such, he is not indebted to the Respondent in the sums claimed. The deponent finally stated that the consents relied upon were procured through fraud, duress or coercion and were contrary to public policy. He concluded that it is just and equitable that the said consent judgment and order respectively be set aside.

[3] The Respondent opposed the application through an affidavit in reply deposed by **Joseph Mwanja**, the Respondent, who stated that he bought from the Applicant land comprised in Kibuga Block 4 Plot 413 at Mengo Kampala at an agreed price of UGX 250,000,000/=. When he attempted to take vacant possession of the subject land, he discovered that there were other people who claimed interest in the same. The Applicant then made an undertaking to refund the purchase price by 30<sup>th</sup> June 2018 failure of which the money would be recoverable by summary procedure with a penalty of 25% per annum. The Applicant, however, only paid back UGX 60,000,000/= and failed to pay the balance. The Respondent instituted a summary suit wherein the present Applicant did not apply for leave to appear and defend but undertook to pay the money with interest. A consent judgment was thus prepared, signed by both parties with their lawyers and endorsed by the Court in the presence of the Applicant but he still failed to honor the consent judgment.

[4] The Respondent further stated that he then applied for execution and a notice to show cause why execution should not issue was served on the Applicant but he did not appear in court. A warrant of arrest was issued whereupon the Applicant was arrested and committed to civil prison. The Applicant later made a fresh undertaking to pay and a consent was prepared between both parties and their lawyers and endorsed by the Court in the

presence of both parties on 20<sup>th</sup> June 2019. The Respondent averred that it would be an act of dishonesty and an attempt at discrediting the sanctity of the court to claim that the two consent agreements which were signed before judicial officers and in court were entered under duress. He further stated that the interest of 25% per annum was contractual and duly consented between the parties. He also stated that the whole transaction was a land transaction and not a money lending transaction. He concluded that the application lacks merit and it is in the interest of justice that the same is dismissed with costs to the Respondent.

[5] The Applicant filed an affidavit in rejoinder whose contents I have also taken into consideration.

### **Representation and Hearing**

[6] At the hearing, the Applicant was represented by **Mr. Kenneth Kajeke** while the Respondent was represented by **Mr. Ocen Milton**. Court directed that the hearing proceeds by way of written submissions which were duly filed and have been adopted and taken into consideration in the determination of the matter before Court.

### **Issue for Determination by the Court**

[7] One issue is up for determination by the Court namely;

**Whether the application discloses any grounds for setting aside the consent judgment dated 9/01/2019 and the consent order dated 20/06/2019?**

### **Submissions by Counsel for the Applicant**

[8] Counsel for the Applicant relied on *Hiran v Kassam (1952) EA 13* that was cited with approval by the Supreme Court of Uganda in *Attorney General v James Mark Kamoga, SCCA No. 8 of 2004* to the effect that any order made in

the presence of both parties in the presence 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 that would enable a court to set aside an agreement. Counsel submitted that the Applicant has pleaded grounds of fraud and duress which vitiate the consent judgment and order. Counsel argued that the transaction between the parties was a loan agreement disguised as a sale of land agreement. Counsel also wondered why the Respondent was not interested in enforcing the guarantee against Mr. Shaffic Jjombwe who purported to guarantee the Applicant and argued that this was because the guarantee was meant to hoodwink the Applicant and the Court. Counsel further submitted that the agreement dated 31/5/ 2018 was procured through duress which was evident in the menacing words of the agreement that “the agreement is going to be put on proper legal agreement and whatever is written is binding”. Counsel stated that indeed the Applicant complained to police on 4/6/2018. Counsel concluded that the impugned contract arose from an agreement which is contrary to public policy and the same was accordingly vitiated.

### **Submissions by Counsel for the Respondent**

[9] In reply, Counsel for the Respondent relied on the case of ***Betuco (U) Ltd & Anor v Barclays Bank (U) Ltd, SCCA No. 01 of 2017*** on the position of the law governing the circumstances under which a consent judgment may be set aside. Counsel submitted that the grounds cited by the Applicant in the present case for vitiating the consent were fraud, duress/coercion, unconscionable interest and being contrary to public policy. Regarding the allegation of duress, Counsel cited the case of ***CTM (U) Ltd v Allmuss Properties (U) Ltd & Anor, HCMA No. 806 of 2015*** to the effect that duress can only give protection to an applicant if he or she has acted immediately after

the act complained of by taking steps to counter it. Counsel submitted that the present application is incompetent and without merit for having been brought with unreasonable delay on 3<sup>rd</sup> December 2020, a period of more than one year and half after the last consent. Counsel also argued that in the alternative, although the Applicant claims duress and being incarcerated at the time the consent judgment and order were entered into, the record of proceedings shows that the Applicant at all material times appeared before the Judge and Registrar and agreed to the terms of the consent personally and in the presence of his lawyer.

[10] Counsel further submitted that whereas the Applicant pleaded fraud in paragraph 11 of his affidavit in support, the particulars listed do not relate or give any evidence relating to any fraud by the Respondent but instead restate allegations of duress and coercion. Counsel disputed the purported complaint to police dated 4<sup>th</sup> June 2018 regarding underlying fraud prior the two consent judgments on account that it bears no receiving date, that the consent judgment and order were entered before judicial officers on 6<sup>th</sup> December 2018 and 20<sup>th</sup> June 2019 respectively in the presence of the Applicant and his lawyers and that the Applicant ought to have raised the same underlying facts of fraud before court then.

[11] Counsel for the Respondent also submitted that the claim of unconscionability is untenable on account that the Applicant has not proved any fraud or misrepresentation and had even committed by making part payment of UGX 30,000,000/=. Counsel stated that the Applicant does not particularize the terms of the consent that are contrary to public policy and what policy in particular, and that the Respondent has never had a money lending transaction with the Applicant for which a money lender's license would be required. Counsel concluded that the Applicant is well-educated and

there was no misapprehension of the terms of both consents whatsoever. Counsel prayed that the application be dismissed with costs.

### **Determination by the Court**

[12] The law on consent judgments, decrees or orders is now well settled. Parties to civil proceedings are free to amicably settle a dispute and consent to a judgment, decree or order being entered. The parties may do so orally before a judicial officer who then records the consent or they may do so in writing, affix their signatures and place the same for endorsement by the Court. See: *Order 25 rule 6 of the CPR* and the case of *Betuco (U) Ltd & Another v Barclays Bank & Others, HCMA No. 243 of 2009*.

[13] The law, however, provides that after a consent judgment has been entered, it may be vitiated, varied and/or set aside where it is proved that it was entered into without sufficient material facts or misapprehension or in ignorance of material facts, or if it was actuated by illegality, fraud, mistake, contravention of court policy or any reason that would enable court to set aside an agreement. See: *Ismail Sunderji Hirani v Noorali Esmail Kassam [1952] EA 131* and *Attorney General & Uganda Land Commission v James Mark Kamoga & James Kamala, SCCA No. 8 of 2004* which cited with approval the following passage from Seton on Judgements and Orders, 7<sup>th</sup> Edition, Vol 1, page 124, thus;

*“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 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.”*

[14] It is also the correct position of the law that a consent judgment/decree is passed on terms of a new contract between the parties to the consent judgment or decree. See: *Brooke Bond Liebig (T) Ltd v Mallya (1975) EA 266* and *Mohamed Allibhai v W.E. Bukenya & Anor, SCCA No. 56 of 1996*.

[15] On the case before me, it is the Applicant's allegation that the impugned consent judgment and order respectively were entered into through duress/coercion, fraud and arose from an agreement which is contrary to public policy. The Applicant averred and it was argued by his Counsel that the consent judgment and order respectively were vitiated by the fact that they were based on the agreement of 31/05/2018 which had been procured by duress and was therefore no agreement at all. This argument, however, is devoid of any merit. As pointed out above, the position of the law is that a ground for vitiation of a consent judgment, decree or order must relate to the conduct of the parties at the time of execution of the consent. The rationale of this position is that a consent is a different agreement and a consent judgement/decree is passed on terms of a new contract between the parties to the consent judgment. See *Brooke Bond Liebig (T) Ltd v Mallya (supra)* and *Mohamed Allibhai v W.E. Bukenya & Anor, (supra)*. That being the case, a defect in the original agreement or dealings between the parties that led to the filing of the suit will not vitiate a consent judgment that is properly entered upon the agreement of the parties. The alleged vitiating factor must relate to the execution of the consent.

[16] Be as it may, even if it was possible to use the circumstances of the earlier agreement to vitiate a consent judgment or decree, the Applicant could still not sustain such a claim in the present case. This is because the Applicant had an opportunity to challenge the said agreement in the summary suit vide HCCS No. 340 of 2018 wherein he was summoned to file an application for leave to

appear and defend the suit. If at all there was any duress or fraud applied on the Applicant, he had all the opportunity to raise it as ground of defence in the summary suit. The Applicant did not do so but instead chose to consent to the then plaintiff's claims leading to the impugned consent judgment. As such, even before the consent judgment was executed and entered, the indication was that the Applicant was not challenging the agreement upon which the plaintiff's suit was based. The plaintiff would now be estopped from seeking to re-open that agreement. He is unable to sustain any claim in that regard.

[17] Regarding the claim that the consent judgment entered on 9<sup>th</sup> January 2019 and the consent order entered on 20<sup>th</sup> June 2019 were executed in circumstances amounting to duress or coercion, the evidence by the Applicant is that when he signed the consent judgment, his lawyer was not present and when he signed the consent order, he was incarcerated in civil prison. Regarding the consent judgment entered on 9<sup>th</sup> January 2019, the record of proceedings attached to the Respondent's affidavit in reply indicates that the Applicant appeared before the trial Judge and expressed his agreement to the terms and conditions stipulated in the consent document. The copy of the consent judgment was duly signed by the Applicant in presence of his lawyer from M/s Enoth Mugabi Advocates & Solicitors. The Applicant appeared before the Court freely and without any constraining factors. Despite the absence of his lawyer in court, the trial Judge was satisfied by the statement of the Applicant that he had freely agreed to the consent. According to available evidence by the Respondent, the Applicant is a well-educated person and there is no possibility that he did not comprehend the content and implication of the consent judgement. There is, therefore, nothing to satisfy me that any duress or coercion was exercised on the Applicant before entering the consent judgment dated 9<sup>th</sup> January 2019. This ground of claim by the Applicant accordingly fails.

[18] Concerning the consent order dated 20<sup>th</sup> June 2019, this followed the committal of the Applicant to civil prison for failure to pay as agreed in the consent judgment. It is alleged by the Applicant that he executed the same under duress or coercion given that he was in civil prison and he was threatened that unless he signed, he would be taken back to prison. It is important to examine what amounts to duress under the law. According to the Black's Law Dictionary, 5<sup>th</sup> Edition at page 452, duress consists in any illegal imprisonment, or legal imprisonment used for an illegal purpose, or threats of bodily or other harm, or other means amounting to or tending to coerce the will of another, and actually inducing him to do an act contrary to his free will. It is a condition where one is induced by a wrongful act or threat of another to make a contract under circumstances which deprive him of exercise of his free will.

[19] In *Barton v Armstrong (1976) AC 104*, it was held that for a claimant to succeed on an allegation of duress, he/she must prove that;

- a) Some kind of pressure was exerted on the contracting party (it may be actual pressure, economic pressure, etc.);
- b) The pressure induced the claimant into entering the contract;
- c) The claimant had no choice but to enter into the contract; and
- d) The claimant protested at the time or shortly after the contract.

(Also See: *CTM (U) Ltd v Allmuss Properties (U) Ltd & Another, HCMA No. 806 of 2015.*)

[20] The above authorities underscore the fact that the pressure exerted upon the alleged victim must be unlawful or wrongful. As such, a threat to take legal action against another person cannot amount to duress. In the present case, the Applicant was already serving civil imprisonment that had been ordered by the Court. He consented to be released on terms that were set out in the

consent order of 20<sup>th</sup> June 2019. He took benefit of the agreement and was discharged from civil prison. He was not taken back even when he breached the terms of the said agreement. In those circumstances, there was no application of unlawful or wrongful force or pressure upon the Applicant. It is clear the Applicant desired to be released from lawful civil imprisonment and the consideration he had to offer was constituted in the terms of the consent agreement. The Applicant is thus estopped from going back on his agreement. In any case, the Applicant did not take any steps to counter the consent order any time earlier than a year and a half when he brought this application. Clearly, no duress or coercion has been proved by the Applicant in that regard.

[21] It was further alleged by the Applicant that the consent judgment and order respectively were executed amidst circumstances that amounted to fraud. Although under paragraph 12 of the affidavit in support the Applicant set out particulars of fraud, I agree with Counsel for the Respondent that none of the alleged particulars amount to fraud on the part of the Respondent, the court or any other persons involved in execution of the consent. It is clear from the record that the transaction leading to the Respondent's claims was not a money lending transaction but a sale of land. The question regarding lack of a money lending license is therefore irrelevant. The allegation of charging excessive and unconscionable interest would not amount to an act of fraud. If such interest was charged, it could be an illegal or wrongful act but the same cannot constitute evidence of fraud. In this case, however, the initial agreement of 31/05/2018 had a term as to interest at 25% per annum in case the Applicant did not pay in time. This would be a reasonable commercial rate in such circumstances. But even then, the consent judgment of 9<sup>th</sup> January 2019 reduced the interest to 10% per annum on the outstanding balance. I therefore fail to see the basis for the Applicant's allegation concerning excessive or unconscionable interest.

[22] Counsel for the Applicant also questioned why the Respondent was not interested in enforcing the guarantee against Mr. Shaffic Jjombwe who purported to guarantee the Applicant and argued that this was because the guarantee was meant to hoodwink the Applicant and the Court. I believe this argument by learned Counsel is not based on a true construction of the law on the subject. In law, under a contract of guarantee, the guarantor promises the lender to be responsible, in addition to the principal borrower, for the due performance by the principal of their existing or future obligations. The guarantor thereby promises or undertakes that he/she will be personally liable for the debt, default or miscarriage of the principal. The guarantor's liability is ancillary or secondary to that of the principal who remains primarily liable to the creditor. There is no liability on the guarantor unless and until the principal has failed to perform his obligations. See: *Moschi v Lep Air Services and Ors* [1973] AC 345 and *Paul Kasagga & Anor v Barclays Bank HCMA No. 113 of 2008*.

[23] In the instant case, the principal debtor was at all times available and, in the view of the Respondent, able to make good on his obligations. It was within the Respondent's right to choose to pursue the principal debtor and such would be the right thing to do in the circumstances. The same does not disclose any fraud as alleged by the Applicant and or argued by his advocate. The Applicant has, therefore, failed to establish any fraud against the Respondent or any of the persons concerned at the time of execution of the impugned consent judgment and order such as would vitiate the impugned consent judgment or order.

[24] Finally, although the Applicant alleged that the consent judgment and order were contrary to public policy, he did not set out any facts to prove this assertion. This claim by the Applicant also fails.

[25] In all, therefore, the Applicant has failed to satisfy the Court on any of the grounds upon which the consent judgment dated 9<sup>th</sup> January 2019 and the consent order dated 20<sup>th</sup> June 2019 could be vitiated. My finding is that the said consent judgment and order were validly executed and entered by the Court. They ought to be enforced upon the terms set out therein. This application accordingly fails and is dismissed with costs to the Respondent.

It is so ordered.

***Dated, signed and delivered by email this 24<sup>th</sup> day of October, 2023.***



**Boniface Wamala**  
**JUDGE**