

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
FAMILY DIVISION
MISCELLANEOUS APPLICATION NO. 27 OF 2016
ARISING FROM CIVIL SUIT NO. 526/1996

- 1. KAYONDO MUHAMAD**
- 2. JJUUKO MUSA**
- 3. SSEMPEBWA IBRAHIM**
- 4. WALUGEMBE SULAIMAN.....APPLICANTS**

VERSUS

- 1. THE ADMINISTRATOR GENERAL**
- 2. HAJATI SARAH NAMUSISI.....RESPONDENTS**

BEFORE HON LADY JUSTICE PERCY NIGHT TUHAISE

RULING

This was an application by Notice of Motion brought under sections 82 and 98 of the Civil Procedure Act, Order 46 rules 1(b) and Order 52 rules 1 and 3 of the Civil Procedure Rules (CPR), for orders that this court be pleased to recall the consent judgement entered in High Court Civil Suit No. 526/1996 on 17/05/2013, the decree passed thereon dated 24/05/2013, and the consent order subsequently entered in the same suit on 03/04/2014 for purposes of reviewing, altering or otherwise varying the same; and that costs of the application be provided for.

The application is supported by the affidavit of **Jjuuko Musa** the 2nd applicant. There are numerous grounds of the application which cannot be reproduced to avoid bulk, but they are briefly that there is a matter of new and important evidence affecting the rights of the applicants to the suit land that was not within the knowledge of the applicants and could not have been at or during and even after the execution of the consent judgement, decree, and subsequent consent

order. The application was opposed by the respondents through their respective affidavits in reply.

The application arises from a consent judgement/decree and order executed by the parties in HCCS 526/1996. The subject of contention is property comprised in Kyadondo Block 208 Plot 336 land at Kawempe (suit land) then registered in the names of the 2nd respondent, which was subject to a mortgage in favour of Greenland Bank and a lease by Imperial Cotton Co (U) Ltd to expire around 2020. At the time the consent judgement was executed, the parties, with the exclusion of the 2nd respondent, were not aware that the 2nd respondent had extended the lease to run in favour of Tuffoam (U) Ltd. The lease was not reflected on the white page nor was it disclosed by the 2nd respondent. The 2nd respondent reflected Tuffoam as rent paying tenants, not lessees. The applicants entered into the consent judgement intending to sell the land in question to a third party free of enduring long term encumbrances. The applicants could not complete their contractual obligations of granting vacant possession, and are exposed to legal action from a one Kalibbala. The applicants sought the indulgence of the 2nd respondent who refused to surrender alternative land in substitution, as a result of which they filed this application.

Counsel filed written submissions within time schedules set by this court.

I will first address the submissions by the applicant to strike out the affidavit in reply deponed by Mr. Mutyaba Sempa on behalf of the 2nd respondent before delving into the substantive matters of the application. Counsel, Joseph Kyazze, relying paragraph 3 of the affidavit in rejoinder, submitted for the applicants that the affidavit in reply by Mr. Mutyaba Sempa offends the law, is grossly incompetent, is full of falsehoods accompanied by forged annexures, and that it ought to be struck out. He contended that the affidavit was purportedly sworn on behalf of the 2nd respondent with no evidence of the requisite written authority which offends Order 3 rules 1 & 2; Order 7 rule 4; and Order 1 rule 12(1) & (2), all of the Civil Procedure Rules. He argued that the applicants sued the 2nd respondent in person and that it is only her who could respond; that the affidavit purportedly sworn by Mr. Mutyaba Sempa on behalf of the 2nd respondent does not attach the latter's authority; that the deponent's averments that he read the application and affidavit are not supported by statements that he did so with or in the presence of the 2nd respondent, or whether the said respondent read through and gave him instructions and information on the basis of which to make the affidavit in reply; that the affidavit does not refer

to any information from the 2nd respondent but Mr. Mutyaba depones it as if he is the 2nd respondent. Learned Counsel Joseph Kyazze submitted that in absence of any written authority from the 2nd respondent to depone an affidavit on her behalf, Mr. Mutyaba's affidavit is incurably defective. Learned Counsel Joseph Kyazze further submitted that Mr. Mutyaba's affidavit contains deliberate falsehoods that he was the registered owner of the mailo interest in the suit land, that plot 336 is now 4156 and that the documents he annexed to the affidavit are forged. He accordingly prayed that the affidavit be struck out. He cited **Joy Kaingana V Dabo Boubon [1986] HCB 59; Margret Tumwine & Others V Brian Asiimwe HCMA No 125 & 132/2014; Gladys Nalwoga V Edco Ltd HCCR 05/2012; and Jetha Brothers Ltd V Mbarara Municipal Counsel & ors HCT 05 – CV – 0031/2004** to support his submissions.

The 2nd respondent did not rebut the foregoing averments and submission,s neither did his counsel, Abbas Bukenya, address it in his written submissions.

I have carefully read the supporting affidavit of Mr. Mutyaba Sempa deponed on behalf the 2nd respondent. There is no written authority from the 2nd respondent stating that she had given authority to Mr. Mutyaba Sempa to depone the affidavit on her behalf. This offends Order 3 rules 1 & 2 which provides for appearance of only an advocate duly appointed to act on behalf of a client; plus Orders 7 rule 4, and Order 1 rule 12(1) & (2) of the Civil Procedure Rules which in essence require written authority to be attached. Contrary to the said provisions of the law, Mr. Mutyaba Sempa not only deponed the affidavit in reply without the 2nd respondent's requisite authority, but also avers to be the personal lawyer of the said respondent, as opposed to being an advocate duly appointed by the said respondent. Besides, most of the averments in the affidavit do not refer to any information from the 2nd respondent. Mr. Mutyaba depones the affidavit as if he is the 2nd respondent, including even claiming in paragraph 19 of her affidavit that the leases to the suit land were made "by her late husband."

In **Joy Kaingana V Dabo Boubon [1986] HCB 59** the affidavit challenging the application was sworn by the husband on behalf of the wife when the husband was not even a party. It was held that a person is competent to swear an affidavit on matters or facts he knows about or on information he receives and believes; that whereas the deponent in the application claimed he was fully acquainted with the facts deponed to he nevertheless swore the affidavit in a representative capacity; and that there was no authority given to him to act on his wife's behalf

as an advocate or holder of a power of attorney or duly authorized. The affidavit was struck out as incompetent because in such circumstances the husband required the authority of the wife.

Thus, in the absence of written authority from the 2nd respondent to Mr. Mutyaba Sempa to depone the affidavit on her behalf, or as her advocate or holder of a power of attorney; and also on account of the cited falsehoods apparent in the affidavit, I find the affidavit of Mr. Mutyaba Sempa to be incurably defective and incompetent. I accordingly strike it out and expunge it from the record.

The striking out of the affidavit from the record renders the application and its supporting affidavit undefended or unrebutted by the 2nd respondent, which infers that she is deemed to have admitted the facts as averred by the applicant. In addition, the 1st respondent's affidavit in reply sworn by Madina Nakibuule is to the effect that the consent judgement was procured by misrepresentation, concealment of material facts, plus misapprehension or ignorance of material facts. This confirms and corroborates the applicants' supporting affidavit.

In that respect, this application is allowed. The consent judgement entered in High Court Civil Suit No. 526/1996 on 17/05/2013, the decree passed thereon dated 24/05/2013 and the subsequent consent order entered in the same suit on 03/04/2014, are recalled for purposes of reviewing, altering or otherwise varying the same to accommodate the applicants' beneficial interests in form of availing them available alternative properties identified by both parties within two months from the date of this judgement. If this is not done within the stated time, unless the parties advise court to the contrary, the main suit is to be set down for hearing.

Costs of this application will be met by the 2nd respondent.

Dated at Kampala this 28th day of June 2016.

Percy Night Tuhaise

Judge.