

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(FAMILY DIVISION)

MISCELLANEOUS CAUSE NO. 109 OF 2017
(ARISING FROM CIVIL SUIT NO. 44 OF 2014)

ROBERT MIGADDE ===== APPLICANT/DEFENDANTS

VERSUS

1. MUSOKE TADEO ===== PLAINTIFFS/RESPONDENTS

2. MUSISIS MWANJE JOSEPH

AND

3. SERUWU JOAN NALUBOWA ===== RESPONDENTS

4. NAKINTU IRENE NALUBOWA

5. EDITH NANTEZA

BEFORE: JUSTICE GODFREY NAMUNDI

RULING

This is an application by Notice of Motion brought Under Section 33 Judicature Act Cap 13, Section 98 of Civil Procedure Act Cap 71, Order 52 r. 1 & 3 of the Civil Procedure Rules SI 71-1]. Seeking the following orders;-

- a) The consent judgement in civil suit No. 44 of 2014 signed by the Plaintiffs by the second, third and fourth Defendants on the 13th July 2016 and sealed by Deputy Registrar on 1st August 2016 be set aside

ex debito Justitiae, for violating the Applicants/fifth Defendants right to be heard.

- b) The suit be fixed for hearing on its merits.
- c) Costs of this application be provided for.

The Application was supported by the affidavit of the Applicant and it contained the following grounds.

1. The Applicant is the fifth Defendant in the suit filed against the First, Second, Third, Fourth and Fifth Defendants by the Plaintiffs/ Respondents
2. In the head suit, the Plaintiffs fault the Applicant/fifth Defendant for purchasing a portion of the land comprised in Kibuga Block 17 Plot 733 from the First, Second, Third and Fourth Defendants.
3. Before the suit was heard on its merits the Plaintiffs entered into a Consent Judgement with the first, second, third and fourth Defendants.
4. That the Consent Judgement was fraudulently entered into without the consent or involvement of the applicant/fifth defendant which Consent Judgment was sealed by court on 1st August, 2016.
5. It is just fair and equitable that the Consent Judgment be set aside ex debito justitiae.

The application was opposed by Respondents through their affidavit in reply. At the hearing of the application Counsel Mutawe Geoffrey intimated to court that the 4th & 5th Respondents were not opposing the application.

The Respondents' counsel filed written submissions which I have duly considered in reaching this decision.

Decision of court

I have had the benefit of appreciating the Consent Judgement which is the basis of this matter, the pleadings, and the submissions. I shall therefore resolve the issues as follows:

Whether the application has merits for review and or setting aside?

The applicant contended that the Consent Judgement entered into violated his right to be heard.

The law is now settled on the conditions for reviewing and or setting aside a Consent Judgment.

In the case of **Hirani Vs Kassam (1952) 19 EACA 131**, which adopted and approved the following passage from Seton of Judgments & Orders, 7th Edn. Vol 1 p. 124:

“Prima facie, any order made in the presence and with the consent of 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.”

It was further stated in the case of In **Attorney General & Anor Vs James Mark Kamoga & another SC CA No. 8 of 2004**
Mulenga JSC

“--- It is a well settled principle therefore that 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 ----.”

The Consent judgement once endorsed by court it becomes a judgement and it's binding on all the parties therefore parties are estopped from asserting different positions from the stipulated agreement.

In the instant case the Applicant states that when he appeared for mediation, he discovered through the Plaintiff's/Respondents Advocate that the Plaintiff and 2nd to 4th Defendants signed a Consent Judgement in the head suit on the 13th July 2016 before the court was notified of the change of the Advocates and before service on his lawyers.

That upon perusal of the Consent, the applicant discovered that paragraphs 3, 4, 5 and 7 of the consent judgement affect his interests in the land purchased from the 2nd to 4th the defendants yet he was not a party to the said Consent nor was he notified of the proceedings and filing of the same in court. That if they had given him the opportunity to be heard, he would have demonstrated to court by the date of the consent that he had paid Nabulya Betty and the others mentioned in the consent their interests in the disputed land.

That since he has a good defence to the Plaintiffs claim the main suit should be fixed for hearing on merits.

In reply the Respondents contend that the suit property vide kibuga Block 17, Plot 33 at Lule Zone, Lubaga Division Kampala Division comprises the

estate the late Yoweri Musoke Mujagali who died intestate in 1951 and left behind the children to wit; Charles Kavuma, Nakintu Joyce, Kintu Edward , Edrisa Kalyongo , Israel Lubowa (all deceased). That Joyce Nakintu and Christine Nabuto who has shares in the suit land sold their respective shares to Israel Lubowa, That the Suitland is a property of the estate of the late Israel Lubowa although it remained in the name of the late Yoweri Musoke Mujagali who was survived by the 1st and 2nd Respondents among others.

That the 1st and 2nd Respondents where to apply for Letters of Administration in the estate of the late Yoweri Musoke Mujagali to enable them transfer the suit property in their names, that however they later discovered that Letters of Administration of the said estate where granted to a one Kintu Musoke (deceased), 3rd Respondent, 4th Respondent and 5th Respondent to administer the estate. But instead the 3rd to 5 respondents sold the suit land comprised in Kibuga Block 17 Plot 733 at Lule Zone, Rubaga to the Applicant. That the said sale was illegal and void for want of Letters of Administration which was the basis for signing the consent.

The right to a fair hearing under article 28 (1) of the Constitution, a right from which there can be no derogation under article 44 (c) has to be guarded jealously.

It is my considered view that, the Consent Judgement entered into by the Plaintiffs and 2nd, 3rd and 4th Defendants violated the Applicant's the right to be heard.

The plaintiffs and 2nd, 3rd and 4th defendant's agreeing that the sale to the 5th defendant is null and void for want of letters of administration was

equivalent to passing judgment against the applicant (5th defendant) without affording him an opportunity to be heard.

The Consent Judgment entered is a nullity at law since the same was entered into in the absence of the 5th defendants(Applicant)yet it affects his rights. The Consent Judgement entered into by the Plaintiffs and sealed second, third and fourth Defendants on the 13th July 2016 and sealed by Deputy Registrar on 1st August 2016 is hereby be set aside.

The suit shall be heard and determined on merit.

Costs shall be in the cause.

GODFREY NAMUNDI

JUDGE

DATE 26-06-2020