



Asiimwe while the respondent was represented by counsel Chris Muganzi. The applicant and the respondent were both present in court.

**The facts giving rise to the application are as follows:**

The applicant and the respondent entered into a consent judgment on the 7<sup>th</sup> day of July 2021 where the respondent agreed to withdraw her caveat against the intended church marriage between the applicant and a one Kiwuka Diana that was supposed to be conducted on Saturday 10<sup>th</sup> July 2021 at Nabingo Catholic Parish on certain agreed terms therein.

The Respondent had filed Civil Suit No. 188 of 2021 seeking *inter alia* a declaration that there subsists a valid customary marriage between the plaintiff (who in this application is the respondent) and the 1<sup>st</sup> Defendant (who in this application is the applicant); that the solemnization of the intended church marriage between the applicant and a one Kiwuka Diana (hereinafter referred to as the 2<sup>nd</sup> Defendant) is void and that the Registered Trustees of Kampala Archdiocese (hereinafter referred to as the 3<sup>rd</sup> Defendant) should be ordered to halt the solemnization of the said marriage because there was a legal impediment to the performance of that marriage due to the closure of places of marriage following the Presidential directives and guidelines governing the lock down.

However, in a twist of events, the respondent and the applicant entered into the above said consent judgment in which the respondent agreed to withdraw her caveat against the intended celebration of the church marriage between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and allowed the same to proceed pursuant to the conditions stated therein and a decree to that effect was entered by court finally disposing of Civil Cuit No. 188 of 2021.

The applicant's marriage to the 2<sup>nd</sup> Defendant however did not take place on 10<sup>th</sup> July 2021 even when the respondent withdrew her caveat and allowed the intended church marriage to proceed because the church authorities asked the

applicant to first resolve the issue that was before court as to whether there was an existent customary marriage between the plaintiff and the 1<sup>st</sup> defendant before they could proceed with the church marriage as the said issue was not resolved by the consent judgment entered into between the applicant and the respondent. It is against that background that the applicant brought the application seeking to set aside and or vary the consent judgment and Decree in civil suit No. 188 of 2021.

### **Issues**

The issues for determination by this honourable court are:

- 1. Whether the consent judgment and decree entered into by the applicant and respondent on 7<sup>th</sup> July 2021 should be set aside and or varied;*
- 2. Whether the Civil Suit No.188 of 2021 should be set down for hearing on its merits inter parties or in the alternative be dismissed with costs to the applicant.*

### **Resolution of issues**

**Issue 1: Whether the consent judgment and decree entered into by the applicant and the respondent on 7<sup>th</sup> July 2021 should be set aside and or varied.**

Before resolving the said issue, I would like to note that when the application came up for hearing on 1<sup>st</sup> November 2021, court directed that the applicant's counsel file written submissions by 3<sup>rd</sup> November 2021, the respondent's counsel file a reply to the applicant's submissions by 5<sup>th</sup> November 2021 and a rejoinder, if any, by the applicant to be filed by 8<sup>th</sup> November 2021. However, the applicant's submissions were filed in this court on 5<sup>th</sup> November 2021 while the respondent did not file any submissions as the same are not on court's file. There is also no evidence on court record to show that the respondent and/ or her lawyer was served with the applicant's submissions.

The consent judgment entered into by the applicant and the respondent on 7<sup>th</sup> July 2021 was to the effect that the respondent withdraws her caveat against the intended celebration of a church marriage ceremony by and between the applicant and the 2<sup>nd</sup> Defendant that was to be conducted on 10<sup>th</sup> July 2021 at Nabingo Catholic Parish and the same could proceed pursuant to and or the other terms contained in the said consent judgment. This would in essence imply that the respondent waived her claim of the existence of a customary marriage between her and the applicant which was the reason as to why she had lodged the said caveat. In other words, the consent judgment would on the face of it imply that the plaintiff had waived her rights as a wife of the 1<sup>st</sup> defendant and authorised him to proceed and contract a church marriage with the 2<sup>nd</sup> defendant.

The applicant in his affidavit of service at paragraph 12, 13, 14 and 15 states that he was advised by his lawyers and the church authorities that the issue of whether there existed a customary marriage could only be resolved by court and that neither him nor the respondent could resolve the said issue by entering into a consent judgment as that would amount to collusion which would in turn make the consent judgment illegal. The applicant also states that he and the respondent entered the consent judgment erroneously. [Emphasis mine]

The applicant's counsel in his submissions relied on the case of **Robert Migadde versus Musoke Tadeo and Another, Miscellaneous Application No. 109 of 2017 arising out of Civil Suit No. 44 of 2014** where a consent judgment was set aside on the ground that the same was a nullity since it was entered into in the absence of the applicant yet it affected his rights. The said cited case referred to the cases of **Hirani Versus Kassam (1959) 19 EACA, 131** and **Attorney General and Another versus James Mark Kamoga and Another SCCA No. 8 of 2004** where it was stated inter alia that a consent judgment cannot be varied unless it was obtained by fraud, collusion, mistake, misapprehension or contravention of court policy. [Emphasis mine]

In the instant case, I am inclined to agree with the applicant and his counsel who state in the affidavit in support of the application and applicant's submissions respectively that the consent judgment was entered erroneously and as such is illegal as it would by implication dissolve a customary marriage said to subsist between the applicant and the respondent without specifically addressing the same in the consent judgement and yet it forms the root of the issue between the applicant and the respondent.

From the foregoing, it is my considered opinion that it was erroneous for parties to purport to enter into a consent judgement by which the respondent vacated a caveat and authorised the celebration of a church marriage between the applicant and the 2<sup>nd</sup> defendant without addressing the reason why in the first place she had lodged a caveat prohibiting the celebration of the marriage. If the respondent still claimed the existence of a customary marriage which she still does, then it was wrong for the parties to purport to enter into a consent judgement which had the effect of authorising an illegality to take place. Both parties either deliberately or intermittently entered into a consent judgement intended to mislead the church that was meant to conduct the marriage.

It doesn't therefore surprise me that the church refused to fall in the trap of the applicant and the respondent and their advocates when it still refused to solemnize the applicant's marriage on the 10<sup>th</sup> day of July 2021 as the same marriage would have still been void, illegal, erroneous and an abuse of court's process since there wasn't a declaration from court about the marital status of the applicant and the respondent.

In the premises, issue 1 is resolved in the affirmative. The consent judgment entered into by the applicant and the respondent on 7<sup>th</sup> July 2021 is hereby set aside. I choose not to vary the said consent judgment to include the issue of whether or not a customary marriage exists between the applicant and the

respondent because that issue can only be determined by court after listening to the evidence.

**Issue 2: *Whether the civil suit No.188 of 2021 should be set down for hearing on its merits inter parties or in the alternative be dismissed with costs to the applicant.***

Having resolved issue 1 in the affirmative, I am compelled to set down Civil Suit No. 188 of 2021 for hearing on its merits inter parties. This is because the said suit still contains the main contention between the applicant and the respondent which is, ***“whether there exists a customary marriage between the applicant and the respondent”***, a fact I find very crucial for this court to make a pronouncement on before the applicant can go ahead with his intended church marriage to the 2<sup>nd</sup> Defendant that was put on halt by the respondent’s caveat lodged on the 30<sup>th</sup> day of June 2021 at Nabingo Catholic Parish.

I had a chance of examining the parties in court on 1<sup>st</sup> November 2021 and I noted that both the applicant and the respondent are interested in resolving the issue of the existence of a customary marriage between them. As such, I am not inclined to dismiss civil suit No. 188 of 2021 as prayed for in the alternative by the applicant because I believe that the said suit has merits and that it should be heard and determined by this honourable court on its merit in the presence of both the applicant (1<sup>st</sup> Defendant) and the respondent (Plaintiff).

Thus, the suit shall be heard and determined on its merits.

### **Conclusion**

In light of the above, I allow this application and make the following orders:

- a) That the consent judgment entered into by the applicant and the respondent on 7<sup>th</sup> July 2021 and the subsequent decree entered into by this court are both set aside;

- b) That the Civil Suit No.188/2021 shall be set down for hearing and be determined on its merits;
- c) That each party shall bear its costs because they both erred.

I so order.

**Dated at Kampala this ..... day of November 2021.**

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**Alice Komuhangi Khaukha**

**Judge.**