

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(FAMILY DIVISION)
MISCELLANEOUS CAUSE NO. 1188 OF 2022
(ARISING FROM CIVIL SUIT NO. 729 OF 2019)

JOWERIA NANYONGA NAKATO===== APPLICANT

VERSUS

1. NAMAVUMBA FATUMA===== RESPONDENTS

2. NALUBEGA MADINAH

3. NAKIYANA LUKIA

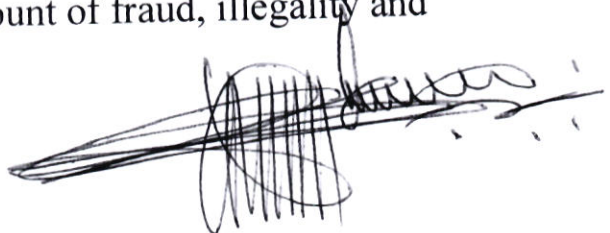
4. NAKISINDE SHIFAH

BEFORE: HON. JUSTICE TADEO ASIIMWE.

RULING

This is an application by Notice of Motion brought Under Section 33 of the Judicature Act Cap 13, Section 98 and 82 of Civil Procedure Act Cap 71, Order 46 r. 1, 2 & 8 of the Civil Procedure Rules SI 71-1]. Seeking the following orders;-

- a. The consent judgement in civil suit No. 729 of 2019 signed by the parties to it and sealed by Deputy Registrar on the 18th day of September 2019 and 20th December 2019 respectively be reviewed and set aside ex debito Justitiae, for violating the Applicants right to be heard on account of fraud, illegality and Ex turpi Causa Non Oritur Actio.



b. Costs of this application be provided for.

The Application was supported by the affidavit of the Applicant dated 12th July 2022.

The grounds of this application are contained in the notice of motion and in the affidavit in support of the motion but briefly that;

1. The applicant is a lawful owner of the suit and registered land with the six bed roomed residential house situate at Nakibinge Stage, Kasubi, Namungoona, Rubaga Division, Kampala District by virtue of her marriage to Ddungu Yusuf Hamis (now deceased) and being in occupation, utilization of the suit land and the derived sustenance.livelihood from the same for over 40 years to date unchallenged.
2. On 7/7/2022, the Applicant was informed by an LCI Committee Official of the area where the suit property is located that the Respondents' agents delivered to him the Consent Judgment and Decree dated the 18th September 2019 and the 20th December, 2019 respectively vide H.C.C.S No. 729 of 2019 entered into by the parties,
NAMAVUBA FATUMA, NALUBEGA MADINA, NAKIWALA LUKIA, NAKISINDE SHARIFAH VERSUS DDINGO YUSUF HAMIS.
3. The applicant was not a party to the impugned Consent Judgment.
4. The impugned Consent Judgment attempts to declare the Respondents as the lawful purchases of the suit property whereas not.
5. The applicant's rights to a fair hearing were violated before and during the filing of H.C.C.S No. 729/2019 coupled with the fraudulent, illegal conduct that led to the signing of the impugned Consent Judgment by the parties therein.
6. The suit property has at all material time during the Applicant's occupation of the same been treated as a family and Matrimonial Property and during the subsistence of the marriage between Ddungu Yusuf Hamis and the Applicant which was solemnized/celebrated with the Applicant in 1979 under the

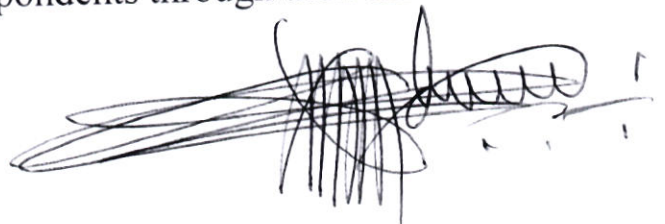




Islamic Law (the Marriage and Divorce of Muhammedans Act, Cap. 252) until the 18th November 2021 when the Applicant's husband died.

7. After the death of the Applicant's husband, the Applicant has still lived on and occupied the suit property as her Matrimonial Property and has never heard of anyone claiming the same during the lifetime and the passing on of the deceased.
8. The alleged signature appearing on the impugned Consent Judgment purporting to be that of the Applicant's husband is suspicious, dubious and unknown to the applicant.
9. The Respondents through fraud, connivance, misrepresentation, illegality conspired and created a false "*Ddungu Yusuf Hamis*" to masquerade as the applicant's deceased husband in being sued and signing of the impugned Consent Judgment with hidden motives to fraudulently grab the Applicant's Residential Property.
10. This being a land matter with a residential holding, it was illegal in that *lo Locus in Quo visit* was conducted by the parties to the suit and the Court before signing the impugned Consent Judgment.
11. Upon conducting due diligence, the Applicant discovered that the documents which the Respondents used to file a claim vide H.C.C.S No 729/2019 and in respect of the suit unregistered Residential holding were and are still fraudulent and illegal.
12. That discovery has been made in respect of the alleged Respondents' claim filed vide H.C.C.S No. 729/2019 and has revealed forged documents and of a fictitious person who was purportedly sued under a false identity.
13. It is fair and equitable in the circumstances that this application for review of the impugned Consent Judgment be allowed and the Consent Judgment be set aside.

The application was opposed by Respondents through their affidavit in reply.

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At the hearing, the Applicant was represented by Counsel Brian Tindyebwa while the Respondents were represented by Counsel Kato Fred holding brief for Caleb Alaka.

Both Counsel filed written submissions which I have duly considered in reaching this decision. However, before I proceed to the merits of the application, I have noted the preliminary objection raised by counsel for the respondents which I shall deal with first.

The gist of the 1st preliminary objection is that this application is incompetent and bad in Law since its against only 4 parties to the Consent Judgment instead of 5 parties which included the said Ddungu Hamis who was the only defendant in Civil Suit No.729 of 2019.

The second preliminary objection was to the effect that the affidavit in notice of motion offended rules of the Illiterates Act and the Oaths Act which demand that the Commissioner of Oaths must certify that he read and explained the document to the illiterate person and the same understood.

As regards to the first preliminary objection, I am cognisant of the fact that an application for review of a Consent Judgment must be brought against all parties to the Consent Judgment. However, the circumstances differ in different cases. In this case, the Application was brought against all parties to the Consent Judgment to the exclusion of the only defendant in Civil Suit 729 of 2019 who is dead. The Applicant is a wife of the said Ddungu Yusuf Hamis and ideally a beneficiary of his Estate. The Applicant's grievance stems from Ddungu Yusuf who signed Consent Judgment wherein as a party.

In my opinion, although the Applicant did not bring this application in the capacity of Administrator of the Estate of Ddungu Yusuf, she is a beneficiary and stands in such a capacity. Therefore, it was only logical that the Applicant would not bring this Application against a party whose interest she intends to protect by bringing this Application.

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I therefore find no merit in this preliminary objection and the same is hereby overruled.

As regards the second preliminary objection, I am also cognisant of the Laws governing affidavits of illiterates as per the Illiterates Act and the Oaths Act which require the Commissioner of Oaths to certify that the document has been read and explained to the illiterate person to the language he/she understands.

In this case, the affidavit of the Applicant was signed by both a Translator and the Commissioner for Oaths. Although the translation part was signed by a translator, the Commissioner appended his signature at the end of the document. The signature of the commissioner of oaths was not appended on that document in vain.

In my opinion, the Commissioner's signature serves to confirm and verify the translation of the translator to the illiterate person. To hold otherwise would be to go against Article 126 of 1995 of the Constitution of Uganda whose effect is to ensure the Justice is achieved without undue regard to technicalities.

However, my decision would have been different if the certificate of translation was only signed by a translator which is not the fact in this case.

I therefore find no merit in the second preliminary objection as well and the same is hereby overruled.

I shall therefore proceed to determine the merits of this application.

RESSOLUTION.

I have had the benefit of appreciating the Consent Judgement which is the basis of this Application, the pleadings, and the submissions. The issues that arise are as follows:-

1. Whether the Applicant is an aggrieved person.
2. Whether the application has merits for review and or setting aside?

I shall resolve above issues concurrently.

The applicant contended that the Consent Judgement entered into violated her right to be heard since she is the only wife of the defendant in Civil Suit No.729 of 2019 and the consent prejudice her interest in the suit property which is matrimonial property. She also contends that the said consent was procured by fraud and that the signatures thereon are not the ones of her husband a one DUNGUNGU YUSUF.

The remedy of review is provided under **Section 82 of the Civil Procedure Act** which is available to parties aggrieved by a decree or order from which an appeal is allowed. Under **Section 67 of the Civil Procedure Act**, appeals are not allowed from decrees or orders made with consent of the parties.

The Supreme Court has laid down grounds upon which a consent order can be reviewed and they *include proving that the order was made through fraud, collusion, duress, or any other sufficient reason which would enable the court set aside a consent judgment. Such sufficient reason might include misapprehension of material facts relating to the consent judgment or circumstances which would enable court vitiate a contract.* (see **Mohamed Alibhai W.E. Bukenya Mukasa & Anor [1996] UGSC 2 (15 August 1996), Attorney General and Another v James Mark Kamoga and Another ((Civil Appeal No.8 of 2004)) [2008] UGSC 4 (6 March 2008))**)

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

In the instant case from the evidence on record, there exists an agreement of sale of land described as a Kibanja with 6 roomed houses with a fence located at Namugongo Rubaga Division, Kampala District between the respondents and the vendor Yusuf Ddungu Hamis, husband to the Applicant. From this sale agreement, disputes arose between the parties, Civil Suit No.729/2019 was filed and the Consent Judgment in question resulted.

The Applicant states that the said Consent Judgement was procured by fraud and that the same affected her interest in the suit land which is matrimonial property.

Issues of fraud, illegality and evidence of matrimonial property are not the kind that can be proved through evidence of affidavits and therefore cannot be sufficiently dealt with in an application for review. However, what is clear from the record is that the Applicant is a wife to the late Ddungu Yusuf Hamis the defendant in the main suit as per Annexure C of the affidavit in support of the motion. It is also clear and was confirmed by the Respondents that the said Ddungu Yusuf Hamis stayed on the suit land with his family until his death.



Perusal of the Consent Judgment reveals that the suit property, which the applicant claims to be matrimonial property, was given to the respondents in the said Consent Judgment where the Applicant was not a party.

Being a wife of the vendor of land subject to the Consent Judgment, she is an aggrieved party within the meaning of the law and ought to have been heard to prove whether the suit property was matrimonial property. Ideally, consent of a legally married wife on sale of matrimonial property is key once it is established that the property in question is matrimonial property.

The right to a fair hearing is provided under Article 28 (1) and is a non derogable right which must be guarded jealously.

It is my considered view that the Consent Judgement entered into by the by the Respondents/plaintiffs and the defendant in Civil Suit No.729 of 2019 violated the Applicant's right to be heard.

I therefore find that the Applicant established sufficient grounds to set aside the Consent Judgment in Civil Suit No.729 of 2019.

The Application is hereby allowed with the following orders;

1. Consent Judgment in Civil Suit No.729 of 2019 is hereby set aside.
2. Civil Suit No.729 of 2019 should be heard on its merits with an order to substitute the Defendant with the Applicant.
3. Main suit to be heard inter-parties.
4. Costs shall be in the cause.



TADEO ASIMWE

JUDGE

17-11-2022.

