

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA
FAMILY DIVISION

MISCELLANEOUS APPLICATION NO. 0190 OF 2022

(Arising from Miscellaneous Appeal No. 620 of 2021)

(Arising from Civil Suit No. 147 of 2021)

- 1. LAURA NAKUBULWA**
- 2. KYOLABA CATHERINE SHEMMY**
- 3. PAUL MUKASA BWANIKA::: APPLICANTS**

VERSUS

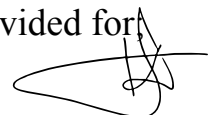
ANGELINA KAGERE LUBOWA::: RESPONDENT

Before: Lady Justice Ketrach Kitariisibwa Katunguka

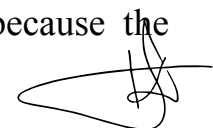
Ruling

Introduction.

1. Laura Nakubulwa, Kyolaba Catherine Shemmy and Paul Mukasa Bwanika (herein called ‘the Applicants’) have sued Angelina Kagere Lubowa(herein called ‘the Respondent’), for orders that the order dated 10/12/2021 extracted by M/s. Simon Tendo Kabenge & Co. Advocates acting for the Respondents in Miscellaneous Appeal No. 620 of 2021 be reviewed and set aside; and that costs be provided for



2. The Application is brought under Section 33 of the Judicature Act Cap 12, Section 82 of the Civil Procedure Act Cap. 71 O.46 rules 1 (a) and (b) & rule 8 of the Civil Procedure Rules;
3. The grounds of the application are in the affidavits deposed by Laura Nakubulwa, Kyolaba Catherine Shemmy and Mr. Denis Owor but briefly that; the order made in Miscellaneous Appeal No. 620 dated 10/12/2021 was extracted in error; prematurely and mistakenly endorsed by court; the proceedings and appointment of Angelina Kagere Sarah Ssemanda Musoke, Catherine Shemmy Kyolaba and Robert Bwanika leading to the Order in Miscellaneous Appeal No. 620/2021 were conducted without the Applicant's express authorisation, consent and instructions; the 1st Applicant is a mother to Loyal Lubowa Kisakye and Blessed Lubowa Ddembe who are biological Children and beneficiaries to the estate of late Patrick Lubowa who died intestate;
4. The Respondent filed Civil Suit No. 147/2021 for removal of caveat lodged against her Petition for Letters of Administration vide AC 239/2021; MA No. 620/2021 was filed seeking orders to set aside abatement order in Civil Suit No. 147/2021 and for reinstatement; a discussion on possible amicable settlement took place and counsel proposed Angelina Kagere Lubowa, Sarah Semanda Musoke (the respondent's sister), Kyolaba Catherine and Mr. Robert Bwanika as administrators of the estate; Court ordered that a consent be filed and the parties appear so that a consent judgment be entered;
5. On 10/12/2021 Mr. Simon Tendo Kabenge for the Respondent extracted an order yet there was no record showing the parties appeared and a consent judgment was entered; The Applicant distance themselves from the Consent Order and their lawyer A.D Awor protested the premature extraction of the Order because the



Applicants were not agreeable to the terms and this was quickly raised through their lawyer; their lawyer did not have instructions to enter a consent; the order was extracted in error and mistakenly endorsed by this court so this is a proper case for this honourable court to review and set aside the order dated 9/12/2021.

The Application is opposed by Angelina Kagere Lubowa who filed an affidavit in reply;

Representation;

6. The Applicants are represented by Mr. Munabi Philip together with Mr. Mugalura January while Mr. Tendo Deogratiuous represents the Respondent; they both filed written submissions which I have considered;

Issues;

The issue framed by Counsel for the Applicants is whether the order dated 10/12/2021 should be set aside;

7. Counsel for the Applicants submitted that there is a glaring error on the face of the record; court directed that a consent be filed and the parties appear before the court to enter judgment but Counsel for the Respondent went ahead to extract an order which had not been entered by court;
8. Counsel for the Respondent submitted on Preliminary points; first on the incompetence of the application because Counsel did not have instructions to represent the 2nd and 3rd Respondents; that there is an application for contempt so it should first be addressed as it takes precedence; the 1st and 3rd Applicants have no entitlement so they are not aggrieved parties; the 2nd Applicant is a beneficiary so she is not aggrieved; there is no error apparent on the record of court warranting setting aside the order of court;



Page 3 of 9

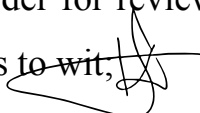
9. The Applicants through their lawyer entered a consent; the estate ought to be distributed and that is all that matters; the Applicants bring this Application in bad faith and have approached the Administrator General to appoint parallel administrators thereby making a mockery of this court; litigation must end so this application should be dismissed because in any case the grounds for review do not exist.

Resolution:

10. A look at the gist of the application is that a consent order should not have been issued by this court ; whether the counsel has instructions to represent the 2nd and 3rd applicants in my view would not take away the application if the counsel has instructions to represent the 1st Applicant; on whether a person should not apply for a consent to be reviewed/set aside simply because he/she is a beneficiary has not been substantiated because a beneficiary may opt for one administrator and not the other; on the issue of the contempt of court application taking precedence; is also in my view not supported because if the application has not been fixed for hearing or if it is based on the consent order which is the basis of this application then it can not take precedence since it would have no hinges;

On the above premises I shall resolve the issue as to whether the consent order ought to be reviewed and set aside because in my view the rest of the preliminary points of law are technical.

11. Section 82 of the Civil Procedure Act as properly cited by counsel provides for the aggrieved party's right to apply for a review of judgement to the court which passed the decree and court may make such order as it thinks fit. The grounds for allowing an order for review are provided for under Order 46 Rule 1 of the Civil Procedure Rules to wit,



12. *‘Any person considering himself or herself aggrieved—*
1. (a) by a decree or order from which an appeal is allowed, but from which no
appeal has been preferred; or
(b) by a decree or order from which no appeal is hereby allowed, and who from the
discovery of new and important matter of evidence which, after the exercise of due
diligence, was not within his or her knowledge or could not be produced by him or
her at the time when the decree was passed or the order made, or on account of
some mistake or error apparent on the face of the record, or for any other sufficient
reason, desires to obtain a review of the decree passed or order made against him
or her, may apply for a review of judgment to the court which passed the decree or
made the order.’

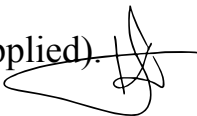
13. Like in all civil matters the burden to prove the grounds for review lies with the applicant.(see **OKECH VS ODONG [2015] UGHCLD 4**);Courts have considered section 82 of the Civil Procedure Act and O 46 and restated the grounds for review. as ; i)*There is a mistake or error apparent on the face of record; ii)Discovery of new and important evidence which after exercise of due diligence was not within the applicant’s knowledge; or could not be produced at the time the decree was passed; iii) Any other sufficient reason exists; (emphasis added);(see Fx Mubuke Vs UEB , HCMA98 of 2008).*

14. **In Kampala Capital City Authority v Nabimara & 10 Ors (Miscellaneous Application 321 of 2019) [2020] UGHCCD 84 (08 May 2020); Justice Musa Ssekaana** rightly stated : *‘Review means re-consideration of order or decree by a court which passed the order or decree. If there is an error due to human failing, it cannot be permitted to perpetuate and to defeat justice. Such Mistakes or errors must be corrected to prevent miscarriage of justice. The rectification of a judgment stems from the fundamental principle that justice is above all. It is exercised to*



remove an error and not to disturb finality. Reviewing a judgment/ruling based on mistake or error apparent on the face of the record can only be done if it is self-evident and does not require an examination or argument to establish it'

The ground raised in this application is that the consent order was issued in error because there was no consent judgment;

15. The law on consent judgment is that a consent judgment is based on the new contract /agreement of parties; the same rules that govern contracts apply; the consent judgment therefore cannot be set aside except for illegality, fraud, or mistake.
16. The conditions for reviewing a consent judgment were earlier considered in **Hirani Vs Kassam (1952) 19 EACA 131**, which adopted and approved the following passage from Seton of Judgments & Orders, 7th Edition. 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’.
17. In **Attorney General & Anor Vs James Mark Kamoga &another SCCA No. 8/2004**; court held;“--- 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** ----.”(see also Migadde v Musoke & 4 Ors (Miscellaneous Cause 107 of 2017) [2020] UGHCFD 9 (26 June 2020);(emphasis supplied).
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18. The gist of the issue for this court's determination is whether there was a consent of the parties filed before court; A consent judgment emanates from a consent by parties or even by Counsel with instructions; (see **Jack Erasmus Nsangiranabo VS Col. Kaka Bagyenda – The Director General of Internal Security Organisation and Attorney General) MA-671/2019 (arising from MC 203/2019)**). A consent is defined by Black's Law Dictionary as a *“a voluntary yielding to what another proposes or desires; agreement, approval or permission regarding some act or purposea legally effective assent”*;

19. *According to Marvin A Chirelstein; Concepts and Case Analysis in the Law of Contracts 66(1990); the requirement of assent which is fundamental to the formation of a binding contract implies in a general way that both parties to an exchange shall have a reasonably clear conception of what they are getting and what they are giving up.*

20. Unlike other orders which are extracted from a ruling or judgment of court, a consent order must come from the consent of the parties duly entered before court and endorsed by parties whereby then court makes a judgment and enters a consent decision. Its after the consent judgment has been entered that a consent order can issue; in instances where it is on record that the parties agreed either through their counsel and the said consent was entered by court thereby concluding the matter, all that would remain is to extract the order from the decision made by court; In the case at hand the matter was never concluded because court directed that a consent be filed and the parties were to appear. If court had intended for counsel to enter the consent, which they did not file, court would have specifically stated so.

21. On 9th December 2021 when the matter came up court directed and I quote: *‘Let the consent be filed and the parties appear for court to enter a consent judgment’*



22. There is no other record to show that the parties appeared and that a consent was filed and a consent judgment was entered; the gist of the consent was recorded by court on the basis of what both counsel informed court but the parties themselves were to appear; That a consent order was entered when the parties had not filed a consent, and had not appeared before court to confirm the terms of the consent, and that they were the persons duly mandated and entitled to enter a consent as court had directed (for there is no proof that they did); is a grave error which can not be ignored; whether it is a genuine error on the part of the counsel/officer of court who extracted the order (who insists it is not an error), does not cure the illegality.
23. An order that does not emanate from a considered decision of court is in my view legless and an illegality unless proved otherwise. It is well settled that a court of law cannot sanction what is illegal; and an illegality once brought to the attention of court, overrides all questions of pleadings including any admission made thereto (see **Makula International vs. His Eminence Cardinal Nsubuga & Another [1989] HCB 11**); and **Neptune Noratan Bhatia vs. Crane Bank Ltd CACA No. 75 of 2006**);
24. To allow such an order would be to open a plethora of suits which must be discouraged pursuant to section 98 of the Civil Procedure Act and section 33 of the Judicature Act; in the interest of justice but also to avoid abuse of court process yet the parties have an opportunity to either continue negotiations or be heard in the main suit; In absence of the consent duly filed and entered by the parties before court and in absence of a consent judgment; the consent order dated 10/12/2021 extracted by M/s. Simon Tendo Kabenge & Co. Advocates acting for the Respondents in Miscellaneous Appeal No. 620 of 2021 was premature and can not be allowed to stand;

It is therefore hereby ordered that:

1. The application is allowed.
2. The consent order dated 10/12/2021 extracted by M/s. Simon Tendo Kabenge & Co. Advocates acting for the Respondents in Miscellaneous Appeal No. 620 of 2021 was entered in error, it is void and a nullity.
3. The said order in MA 620/2021 dated 10/12/2021 is hereby set aside.
4. The Respondent shall pay costs of the application but the said costs shall stay in the cause;



Ketrah Kitariisibwa Katunguka

Judge

27/02/2023

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