**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**LAND DIVISION**

**MISCELLANEOUS APPLICATION NO. 738 OF 2011**

***(From Civil Suit No."OS" 9 of 2005)***

**BASAJJABALABA HIDES AND SKINS LTD. :::::::::::::::::: APPLICANT**

**VERSUS**

1. **BANK OF UGANDA**
2. **COMMISSIONER FOR LAND REGISTRATION** } **:::::::::::::::::::::::::::::::::::: RESPONDENTS**

**Before: HON. MR. JUSTICE J. W. KWESIGA**

**RULING**

This application by Notice of Motion filed 25th October 2011 is stated to be brought under Order 52 Rules 1 and 3 of the Civil Procedure Rules; Section 98 of the Civil Procedure Act, Section 33 of the Judicature Act and Section 177 of Registration of Titles Act (RTA) Cap. 230.

The application seeks orders that:

1. A consequential order be issued for the rectification of the Register by the second Respondent to reflect the Applicant and her transferees in the Title on the Register on the listed Certificates of Title.

2. Any encumbrances/caveats on the listed land Titles be removed.

3. The 1st Respondent returns the above described original Certificates of Title to the Applicant.

4. Costs of the application be provided for.

The Certificates of Titles, the subject of this application were listed as being the following:-

(a) LRV 711 Folio 8 Plot 8 Hunter Avenue, Kampala.
(b) LRV 711 Folio 8 Plot 61 Hunter Avenue, Kampala.
(c) LRV 356 Folio 1 Plot 27 Nkrumah Road.
(d) LRV 918 Folio 1 Plot 226, Kyadondo Block 273 at Masajja.
(e) Kibuga Block 4 Plot 338 at Namirembe.
(f) Kibuga Block 4 Plot 647 at Namirembe.
(g) Kibuga Block 4 Plot 78 at Namirembe.
(h) Kibuga Block 4 Plot 648 at Namirembe.
(i) Kibuga Block 4 Plot 432 at Namirembe.
(j) Kibuga Block 4 Plot 452 at Namirembe.
(k) Kibuga Block 4 Plot 585 at Namirembe.
(l) Kyadondo Block 244 Plot 2283.
(m) Kyadondo Block 257 Plot 126 at Munyonyo.
(n) Kyadondo Block 257 Plot 350 at Munyonyo.
(o) Kyadondo Block 257 Plot 351 at Munyonyo.
(p) Kyadondo Block 257 Plot 352 at Munyonyo.
(q) Kyadondo Block 244 Plot 2285.
(r) Kyadondo Block 22 Plots 83, 84, 85 and 86 Mbogo Road, Kabalagala.

The application is supported by the affidavit of Obed Mwebesa the Applicant's Legal Manager dated 24th October, 2011 and a second affidavit of the said Obed Mwebesa dated 4th October 2013 filed in rebuttal of the first Respondent's allegations made in the affidavit of TITUS MULINDWA on 30th September,

2013. These affidavits have several annextures which shall be evaluated as part of evidence in this application.

This application had been pending hearing since October 2011. The delay of the hearing and disposal appears to be the health challenges of the first Judge to whom the case had been allocated. Secondly, there appears to have been a serries of the Applicant's continued additional instructions to different firms of advocate, who, for the desire of rendering in-puts, caused delays in adjournments for extra filings. At the close of the pleadings the Applicant was represented by M/s Nangumya and Company Advocates, M/s Mugisha and Company Advocates and M/s Alaka and Company Advocates. The first Respondent has been represented by MMAKS Advocates and Mr. Masembe Kanyerezi together with Mr. Steven Zimula appeared for the first Respondent throughout the proceedings.

The matter under consideration has a long and chequered history which I will not indulge in restating in interest of being as precise as possible in identifying the fundamental issues in this application. It is appropriate and convenient to start with the Consent Judgment in Civil Suit No. "O.S" 9 of 2005, Basajjabalaba Hides and Skins Ltd. vs 1. Standard Chartered Bank (U) Ltd. 2. Stanbic Bank (U) Ltd. and 3. Bank of Uganda. The Consent Judgment was entered and sealed by this Court on 3rd February, 2010. The Consent Judgment, the basis of this application is reproduced here below to facilitate easy reference and deduction from it to determine whether this application has any merits or has been proved. The Judgment provided:-

*"BY CONSENT of the parties hereto it is hereby agreed and ordered as follows*;

*(1) The second Defendant be added to this suit as a holder of securities mortgaged by the Plaintiff in relation to the debt mentioned below assigned by the second Defendant to the 3rd Defendant.*

*(2) The 1st and 2nd Defendants were owed various sums of money by the Plaintiff which debt were assigned by the 1st and 2nd Defendants to the 3rd Defendant, on account of Government of Uganda ("GOU") together with the benefit of the securities held, upon payment by GOU through the 3rd Defendant US$9,150,000. in respect of the amounts owed to the 1st Defendant and US $2,425,000. in respect of the amounts owed to the second Defendant, being a total sum paid by GOU through the 3rd Defendant of US$11,575,000.*

*(3) It is hereby agreed that the Plaintiff shall pay to the 3rd Defendant for the benefit of G.O.U. the sum of US$11,575,000. paid by it for the afore mentioned assignment within 6 months from the date hereof and in default of payment the 3rd Defendant shall be at liberty to realise and enforce recovery pursuant to the assignment against the securities mortgaged to the 1st and 2nd Defendants by the Plaintiff.*

*For the avoidance of doubt the securities held are those listed as regards the 1st Defendant in the schedule to the assignment deed dated 30th March 2006 annexed hereto as 'A' and as regards the 2nd Defendant in preamble B to the assignment deed dated 13th June 2008 annexed hereto as 'B'.*

*4.The Plaintiff shall pay the 1st, 2nd and 3rd Defendants costs of Miscellaneous Application 566 of 2008 arising from HCCS 320 of 2007 plus the insurance and receivership costs incurred by the 3rd Defendant in the Receivership of the Plaintiff and in the insuring the said Receiver of the said securities held."*

The consent was signed on 29th January, 2010 and sealed by the Court on 3rd February, 2010.

I have given the above background as a foundation of what the parties require me to resolve for them. This application proceeded without conferencing and after the pleadings were closed, given that the application's disposal is on evidence brought by affidavits, the parties were directed to file written submissions which they all did.

In my view granting or non-granting this application would depend on the following:-

(i) Whether the Applicant performed or satisfied its obligation imposed by the Consent Judgment reproduced above?

(ii) Whether the consequential orders prayed for do flow from the satisfaction of the Consent Judgment?

(iii) Whether the Applicant's securities held for satisfaction of the Consent Judgment obligation can be withheld to satisfy other anticipated decrees outside the Consent Judgment?

The resolution of the above depends on the evidence in the affidavits of the two parties and the annextures that go to prove the parties' rights and liabilities.

In my view it does not matter how voluminous the advocates' submissions may be as long as they do not go to the root of the matter. The bottom line is whether the Applicant satisfied the terms of the Consent Judgment and if it did is it entitled to return of its securities?

I will now proceed to the points of disputes before I visit the evidence for purposes of its evaluation. The Applicant's case in general is that:-

1. That the Applicant's Judgment debt under 'O.S' No. 9 of 2005 was US$ 11,575,000.

2. That it was ordered to pay costs in Miscellaneous Application 566 of 2008 arising from HCCS 320 of 2007 plus receivership and insurance and receivership costs.

3. That the Applicant fully paid the decretal sums and costs stated under 1 and 2 above.

4. That the consent order was silent on handing over of the Titles hence this application.

The proof of payment shall be addressed at a later stage of this ruling.

The Respondent does not contest the Consent Judgment's contents and obligation.

The affidavit of TITUS MULINDWA dated 11th November, 2011 in reply to this application fully acknowledges the contents of the Consent Judgment which he paraphrased in paragraphs 2 and 3 of the affidavit.

In paragraph 5 he states;

> *"5. That the Applicant did not pay the US$ 11,575,000. aforementioned on the 2nd day of August 2010 as adjudged nor has it paid the said sum or any part thereof to date."*

However he accepted that the Applicant did fully pay the costs in HCCS No. "O.S" 9 of 2005, Miscellaneous Application 566 of 2008 of HCCS No. 320 of 2007 plus the 1st Respondent's insurance and Receivership costs in the sums of Shs.37,215,000/= and US$ 35,000 respectively. This is supported by annextures to the affidavits of Obed Mwebesa already referred in proof of these payments.

Mulindwa's affidavit concedes that Cause (4) four of the Consent Judgment was fully satisfied by the Applicant.

Paragraph 7, 8 and 9 of the affidavit contest the allegation that the Applicant fully paid US $ 11,575,000 which was the decretal sum in the Consent Judgment.

Paragraph 10 of the affidavit of Mulindwa states it clearly:-

> *"That further and in any event even if the whole decretal sum has been paid, which it has not, the release of the securities would be to the Applicant and not to the various persons... whose proprietorship and Special Certificates of Titles were cancelled by His Lordship Justice Yorakamu Bamwine, in Miscellaneous Application 566 of 2008."*

To a good extent this paragraph of Mulindwa's affidavit, despite being argumentative states one fact; the crucial requirement of this application. The Respondent is simply stating that the securities are returnable to the Applicant upon fully paying the decretal sums. The burden of proof fully falls upon the Applicant to prove that the Applicant has paid the total US$ 11,575,000.

At this stage of this application it is settled that the consequential actions that can result from the Consent Judgment are the following:-

(a) The first Respondent is entitled to apply for execution of the decree to realise the securities assigned to it under the Consent Judgment to recover the outstanding decretal sums if they were never paid by the Applicant.

(b) The Applicant is entitled to recover its securities if the sums in the Consent Judgment were fully paid.

With due respect the rest of the contents of TITUS Mulindwa's affidavit are mere arguments and not statement of facts, however the annextures to the affidavit have been compared to annextures to the affidavit of Obed Mwebesa and on balance of probabilities this Court is able to ascertain the liabilities and rights of each party.

Paragraph 4 of the affidavit of Obed Mwebesa dated 4th October 2013 seeks to prove that the Applicant discharged all its debt obligation under the Consent Judgment. He particularised the mode of payment in annexture 'A' to the affidavit.

For depicting the supplied Data that was not rebutted by the first Respondent, it stands as follows:

| Date | Proof of payment | Source of payment | Amount paid |
|---|---|---|---|
| A.<br>29/10/2010 | (1) Letter of Governor B.O.U. to PSST, 18-3-2010.<br><br>(2) Letter of PSST to Solicitor General, 6-4-2010.<br><br>(3)Letter of PSST to Solicitor General, 14-5-2010.<br><br>(4)Letter of Minister of Finance to Governor B.O.U. 7-6-2010.<br><br>(5)Letter to Minister of Finance 14-6-2010 to etc. | Deductions from HABA GROUP being compensation by Ministry of Finance/Solicitor General. | Ug.Shs.21,091,676.=<br><br>OR US$ 11,575,000.<br><br>US$ 11,575,000.= |
| B.<br>17/12/10 | UDB Receipt No.40647 of 17/12/2010 AND UDB's CEO letter to Accountant/Treasury Services Department of 3-1-2011. | Direct Transfer to UDB A/C No.0101350015673 in DFCU Bank. | Shs.3,408,506,324/= (money owed to UDB). |
| C. | Banking on the Respondents Advocates Bank A/C No. 0341279410 (Ug.Shs.)<br><br>and<br><br>0344169195 (US$ A/C) all paid by Obed Mwebesa. | Bank slips totalled and annexed to Mwebesa's affidavit in rebuttal. | Shs.37,215,000.=<br><br>and<br><br>US$ 35,000.<br><br>Shs.21,000,000.=<br><br>Shs.156,215,000.= |

NB: This payment under category C is acknowledged by the first Respondent's advocate in their letter dated 14th October, 2011, Ref. E 327/TMK/726 of 2007. The extract from the letter addressed to the Applicant's advocates states in part *"We acknowledge receipt of your letter of 17th October 2011 and payment of the following sums;*

*(i) Ug.Shs.590,000,000.= as discounted party to party costs.*

*(ii) Ug.Shs.37,215,000.= as Insurance costs.*

*(iii) US$ 35,000 as receivership fees."*

MMAKS Advocates, for the Respondent clearly stated that the release of the Securities would be upon proof of payment of US$ 11,575,000. by the Applicant and the Ministry of Finance confirming to this effect.

The affidavit of Obed Mwebesa has attachment/annextures of protracted correspondences which included a letter of the Governor of Bank of Uganda Ref. GOV 908 dated 18th March 2010 addressed PS/The Secretary to the Treasury. The position in that letter was, at the time *"That M/S Bassajjabakaba Hides and Skins is indebted to Bank of Uganda in the sum of US$ 11,575,500. ... is also indebted to UBD Limited in the sum of Ug.Shs.2,826,577,816/=. On 6th April 2010 the Secretary to Treasury agreed to set off the US$ 11,575,500. from the money that government owed HABA GROUP OF COMPANIES"*, to which the Applicant belongs. The Minister of Finance, Planning and Economic Development confirmed the Government indebtedness to HABA Group (U) Limited in the letter of 24th September, 2010. The relevant part of the letter to the Governor Bank of Uganda states:

> *"... this is to confirm the amount of Shs.54,690,517,149/= owing to HABA GROUP (U) LIMITED as compensation less Shs.24,500,000,000/= owed to Government will be channelled directly through Bank of Uganda with the payment schedule earlier agreed upon."*

The receipt of UDB to the Applicant confirms payment of 3,408,506,324/=, CEO of UDB wrote on 3rd January 2011 acknowledging this payment.

Bank of Uganda Statement of Account for Account for Account No.003300148000028 shows that Accountant General's office paid in a total 21,091,401,676 as at 29th October, 2010.

Evaluation of the evidence brought in the affidavit of Obed Mwebesa depict that the Applicant's decretal debt was settled by

| | | | |
|---|---|---|---|
| (a) | Payment to UDB | = | 3,408,506,324 |
| (b) | Payment to bank of Uganda | = | 21,091,491,676 |
| | **TOTAL PAYMENT** | **=** | **24,499,998,000** |

This proof of payment has not been rebutted or challenged by the 1st Respondent. The Respondent's advocates in their final submissions dated 31st October 2013, on issue of whether the Applicant paid the decretal sum stated as follows;

> *"We shall not deal with the extensive matters submitted on by the Applicant with regard to the alleged payment of decretal sum in the Consent Judgment as they are irrelevant to the question in this application as the Consent Judgment does not provide for the release by the 1st Respondent to the Applicant of the Certificates of Title in question as earlier stated this Court cannot add to the terms of the said Consent Judgment which is an agreement of the parties."*

In my view by failing or refusing to address the issue of whether the Applicant made full payment in compliance with the decretal requirement of the Consent Judgment the Respondent is either conceding to the fact that payment was done or is missing the point that proof of payment is a pillar of this application and that it is a necessary expectation of the Consent Judgment.

The Respondent had the opportunity throughout the proceedings in this application to contradict or rebut the Applicant's evidence of payment adduced by way of the affidavit of OBED MWEBESA with all the annextures which show that payment was made by set-off from the money that the Government of

Uganda owed the Applicant. It was settled by his Lordship NTABGOBA (Ag. J) as he then was, and his holding has been widely followed, he held in SAMWIRI MASSA VS ROSE ACHEN [1978] HCB 297 that where certain facts are sworn to in an affidavit, the burden to deny them is on the other party and if he does not they are presumed to have been accepted.

There are other authorities on the same principle of law such as:

(1) Makerere University vs St. Mark Education Institute Ltd. & Others. [1994] KALR 26.

(2) Eridadi Ahimbisibwe vs World Food Programme & Others [1998] KALR 32.

(3) Kalyesubula Fenekansi vs Luwero District Land board & Others, Miscellaneous Application No. 367 of 2011 (unreported).

In the case of Kalyesubula Fenekansi (supra) Hon. Lady Justice P. N. Tuhaise held that *"the facts as adduced in the affidavit evidence of Kalyesubula Fenekansi the Applicant is neither denied or rebutted are presumed to be admitted."*

I have no doubt that this is a correct principle of law and I am of the same view.

In the instant case there is no evidence presented to the contrary and by submission the Respondent expressly opts to leave the evidence of payment intact. After considering all the available evidence as examined in details above I am satisfied that the Applicant has proved that it fully discharged its obligation of paying to the 1st Respondent the equivalent of US$ 11,575,000. plus the

decreed costs. I am live to the fact introduced that there are pending suits between the same parties before the Commercial Division. These suits are different from the suits settled by the Consent Judgment and they do not seek to review the terms of the Consent Judgment. I will not indulge in any arguments in the pending suits or regarding their contents and likely outcomes for these would depend on evidence and pleadings which are both pending and not before me. There is no application before me seeking stay of disposal of this application pending disposal of the suits. There is no evidence presented in this application that the securities that were offered in assurance of performance under the Consent Judgment were extendable to all other suits filed subsequent to the Consent Judgment. I have taken notice of the existence of these subsequent suits as a fact but I have not been influenced by their existence in relation to this application.

It is appropriate at this stage to consider whether the reliefs sought by the Applicant are available. At the commencement of the Applicant's submissions, after stating the background, the grounds and evidence, the Applicant states that it applies for consequential order to give effect to the terms of the Consent Judgment and sought orders to implement it under Section 177 of Registration of Titles Act Cap 230.

The Notice of Motions first sought order was:-

*"1. A consequential order does issue for the rectification of the Register by the 2nd Respondent to reflect the Applicant and her transferees in Title on the register of the following Certificates of Title."* The Applicant at the time of addressing Court abandoned this prayer. In my view this amounted to a withdraw of any pleading for this remedy and does not deserve any discussion or submission as to whether it would be available to the Applicant if she/it had

not abandoned it. To indulge in original arguments of applicability of Section 177 of the Registration of Titles Act was rendered an academic moot which I have found unnecessary to be involved.

The Applicant settled for a prayer for A consequential order for the release to the Applicant the listed Certificates of Title.

The list of the Certificates of Title is reproduced in the earlier part of this ruling and are numbered (a) to (r) and need not be reproduced at this stage because they are already known. Whether the Applicant is entitled to this remedy calls for understanding the spirit and intended parties' benefits embedded in the Consent Judgment from which this application arises. In my view if the Applicant had failed to pay the decretal sums the first Respondent would have, as a matter of law, applied for execution of the decree through selling the securities that were comprised of the listed properties whose Certificates of Title were placed in custody of the first Respondent by virtue of the Consent Judgment. There is no specific provision that after full and final payment in compliance with the Consent Judgment the Certificates of Title would be released to the Applicant. It is just and equitable that an order of the release of the securities to the Applicant be considered without necessarily amending the terms of the Consent Judgment. This would be giving the Consent Judgment effect as would have been the case if the Applicant had breached the Consent Judgment and the consequence would have been execution by sale of the securities.

Section 33 of the Judicature Act (Cap 13) gives this Court powers to grant absolutely or on such terms and conditions as it deems just all such remedies as any of the parties to a matter is entitled to in respect of any legal or equitable claim properly brought before it. After considering this application as a whole

it is my finding that the first Respondent held the listed Certificates of Title on account of the Consent Judgment that obliged the Applicant to pay the decretal sums which the Applicant has proved to have paid in full and satisfaction of the Consent judgment.

Consequently it is hereby ordered as follows:-

1. That the first Respondent returns to the Applicant all the listed Certificates of Title that it held as security for the decretal sums now already paid.

2. That the first Respondent shall release all the encumbrances on the returned securities whether as caveats or mortgages to ensure payments under the Consent Judgment.

3. The 1st Respondent shall pay the Applicant costs of this application and I decline to issue a certificate of three advocates as prayed for because I have not found any justification for it.

Dated at Kampala this 12th day of November, 2013.

**J. W. KWESIGA**
**JUDGE**
**12/11/2013**

In the presence of:-

Mr. J. M. M. Mugisha, Mr. Caleb Alaka and Mr. Nangumya for Applicant.

Representative of Applicant Mr. Obed Mwebesa.

Mr. Masembe-Kanyerezi and Mr. Steven Zimula for the 1st Respondent.

Mr. Magala Sylvester – Court Clerk

**12/11/2013**

**Mr. Masembe Kanyerezi:** We seek leave pursuant Order 44 Rule (2) of the Civil Procedure Rules to Appeal the orders of this Court.

**Mr. Mugisha:** We object.

(1) There is no proof that there is an arguable appeal.

(2) There should be a noval point of jurisprudence to be attended to Appeal.

**Court:** The issue of whether leave to appeal should be granted will be best and fairly addressed on a formal application. The Respondent is at liberty to file a formal application which this Court will consider.

**J. W. KWESIGA**

**JUDGE**

**12/11/2013**