THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT GULU
CIVIL APPEAL NO. 0019/2012

ARISING FROM MISC APPLICATION NO. 005 OF 2012
ARISING FROM CIVIL SUIT NO. 004/2012 AT PADER

OYUGI MARTIN :::::::::::::::::::::::::::::::::::::APPELLANT

VERSUS

OYOO ANTHONY :::RESPONDENT

BEFORE HON. LADY JUSTICE MARGARET MUTONYI

RULING/JUDGMENT

This Appeal was brought by Oyugi Martin hereinafter referred to as Appellant against the ruling of His Worship Okot Edward Magistrate Grade One, Pader delivered on 12/09/2012 in favour of Oyoo Anthony the respondent.

Back ground of the case

Oyoo Anthony filed Civil Suit No. 004/2012 against the Appellant in Pader in a land dispute where he sought the following orders:-

i. A declaration that he was the lawful owner of the land;
ii. Permanent injunction against the Appellant,
iii. Eviction Order and
iv. Costs of the suit.

A consent order was entered after the Respondent/Plaintiffs Counsel offered to mediate between the parties.

The Magistrate entered the consent Judgment and after two weeks, the Appellant filed for a review alleging that what was extracted in the Decree was different from what was agreed upon.

The trial Magistrate heard the Application and did not grant the review, ruling that the Applicant merely changed his mind, hence this Appeal.

The Appellant filed a Notice of Appeal on 14-09-2012, two days after the ruling. In the Notice of Appeal, he informed court that the grounds of Appeal should be enumerated upon receipt of the typed and certified copy of the record of proceedings from the lower court.

The Appellant filed a Memorandum of Appeal on 27th February 2013. It appears the court issued the Appellant with the Appeal case number upon filing the notice of appeal.

From the certified proceedings, it is also not known when the proceedings were certified as they were signed and stamped but not dated.

The Memorandum of Appeal had three grounds namely;

1. That the trial magistrate erred in law and facts in failing to properly evaluate and consider the grounds of the application thereby arriving at the wrong decision.
2. That the trial magistrate erred in law and fact by ruling that the ground for the application was a mere change of mind hence failing to grant the application to review the consent judgment.
3. That the trial magistrate erred in law and fact by amending paragraph two of the Decree to appear that the defendant and his agent to evacuate the suit either partially or totally at the option of the plaintiff, is ambiguous and creates uncertainty and confusion in enforceability.

The Appellant proposed to seek orders from the appellate court for; (1) allowing the Appeal and grounds of review of the consent judgment. The appeal to be allowed and grounds for review of the consent judgment considered.

(2) Appropriate orders be made by this court for review of the consent judgment

(3) That in the alternative, the matter be set for trial Denovo and costs of the Appeal be provided for.

Both counsel for the Appellant and Respondent made written submission in support of their clients which are on record.

Counsel Egaru Emmanuel from Ikilai & Co. Advocates was for the Appellant while Counsel Okidi Ladwar from Ladwar, Oneka & Co. Advocates was for the respondents.

At the hearing of this Appeal, Counsel Egaru was not present and Counsel Odong Phillip held the brief for him. It was however agreed that the parties file written submissions which was done.

Preliminary objection:

Before considering the grounds of Appeal, let me first consider the legal objections raised by counsel Ladwar for the respondent.

He submitted that an Appeal is commenced by filing a Memorandum of Appeal and not Notice of Appeal. He further submitted that an Appeal to the High Court must be filed within 30 days from the date of judgment. This was in reference to S. 79 of the Civil Procedure Act. He submitted that this was not done rendering the Appeal incompetent.

I wish to state that court agrees with Counsel Ladwar on the issue of commencement of an Appeal. It has to be by a Memorandum of Appeal.

The Appellant filed a Memorandum of Appeal on 27/2/2013 five months after the court opened a file for him on 14/09/2012.

S. 79(1) (a) (b) in part reads "Except *as otherwise specifically provided in any other law, every appeal shall be entered within 30 days of the date of the Decree or Order of the court ……….as the case may be, appealed against; but the appellate court may for good cause admit an Appeal though the period of limitation prescribed by this has elapsed"*

S. 79(2) provides "*In computing the period of limitation prescribed by this section, the time taken by the court or registrar in making a copy of the decree or order appealed against and of the proceedings upon which it is founded shall be excluded"*

Perusal of the lower record reveals certified copy of the proceedings which are typed, stamped, and signed. But the date of certification is not known. This is a serious error and omission on the side of the certifying officer. The same applies to the ruling. It is stamped, signed but the date of certification is not indicated.

In view of the above omission, the first legal objection is overruled as there is sufficient cause for allowing this Appeal after the expiry of the period of limitation.

On the second objection, the Civil Procedure Rules are applied to operationalise the Civil Procedure Act.

As the first Appellate Court in this case, I read thoroughly well the Civil Suit, the Application for review and the ruling and formed the view that this is a proper and fit case to apply S. 98 of the CPA in

order to make ends of justice meet. I therefore over rule the objection and proceed to hear the Appeal on merit.

RESOLUTION OF GROUNDS OF APPEAL

The grounds of Appeal have already been enumerated herein above.

Counsel for the Appellant argued grounds 1 and 2 jointly.

He submitted that the Appellant made an application seeking a review of a consent judgment and decree which was entered in error and specifically paragraph 2 of the decree which was extracted by the respondent and endorsed by the Magistrate Grade one Pader.

He submitted, the appellant while seeking a review submitted before the trial Magistrate that the consent judgment was entered in error and specifically term two of the agreement as extracted in paragraph 2 of the decree which gave a different account of what was agreed upon by the appellant, hence causing miscarriage of justice where upon the appellant seeks an appropriate redress from this court. He stated, that during the mediation that resulted into entering a consent judgment by the parties, the parties in a bid to end the litigation process to promote peace and reconciliation since they are close relatives agreed on three terms. That unfortunately, the 2nd term of the agreement turned out to be different from what the appellant agreed. The three terms were as follows:-

1. That the suit land belonged to the respondent and that the Appellant acquired the same from his late father who is a brother to the respondent and constructed a permanent building on part of the suit plot 20 years ago.
2. That the Appellant agrees to partially vacate the suit land by staying in his permanent commercial house and leaving the behind plot for the respondent where he has grass thatched houses.
3. That the appellant agrees to pay mitigated costs of the suit for promotion of reconciliation and co-existence.

That after coming up with this agreement, Counsel for the appellant and the respondent entered this agreement before the Magistrate Grade 1 Court Pader in the absence of both the disputing parties.

He submitted, the Appellant was surprised to notice that the respondent had extracted a Decree altering grounds two of the said consent agreement which reads ***"that the defendant and his agents should vacate the suit land."*** which variation fundamentally altered the meaning of the consent agreement.

The appellant immediately filed an application seeking a review by the trial magistrate to correct the anormally in the consent judgment and paragraph 2 of the decree, since his consent was

for partial evacuation of the suit land and not permanent evacuation as decreed in paragraph two of the said Decree.

He submitted the trial magistrate ignored to review and instead agreed with the respondent that the appellant was just changing his mind after a consent judgment was entered hence unfairly disallowing the appellants application for review. The rest of the submissions on the two grounds are on record and I will revert to them as and when necessary.

On ground three that the trial magistrate erred in law and fact by attempting to review paragraph two of the decree that the appellant and his agents to evacuate the suit land at the option of the respondent is ambiguous and creates uncertainty and confusion in enforcement. Counsel submitted that according to Black's Law Dictionary, a consent judgment issued by a judge based on an agreement between the parties to a law suit to settle the matter aimed at ending the litigation with a judgment is enforceable.

The attempt by the magistrate to review a consent judgment that the appellant can vacate the suit at the option of the respondent is not only ambiguous, confusing and or unenforceable but contrary to policy of court which demands judicial officers to make clear and unequivocal judgments. That his review created uncertainty and insecurity not only for the disputing parties but also for the agents and relatives or successors in title of both

parties. He submitted and prayed that this court exercises its discretion to set aside the consent judgment.

He relied on the cases of **Attorney General and Uganda Land Commission vs. James Mark Kamoga (SCCA No. 8 of 2004**) where the Supreme Court cited with approval the principle upon which court may interfere with a consent judgment outlined by the Court of Appeal for East Africa in the case of **Hirani Vs. Kassam (1952) 19 EACA at page 131.**

He also relied on the case of **Brooke Bond Liebig (T) Ltd V Mallya (1975) EA. 266** and **Mohamed Allibhai Vs. W.E. Bukenya and Another (SCCA No. 56 of 1996)**

In all the above cases, it was held that "Prima facie, any order made in the presence and with consent of counsel is binding on all parties to the proceedings or action and cannot be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to the policy of court, or if the consent was given without sufficient material facts, or in misapprehension or ignorance of material facts or in general for a reason which would enable a court to set aside an agreement.

In reply Counsel for the respondent submitted that court follows an already clearly spelt out principle when exercising its

powers of review. He relied on the case of **Eremiya Serunkuma vs Elisabeth Nandyose for Robert Kyagaba (1959) EA. 127** where it was held that review, like an appeal is a creation of statute… a court has no inherent power to review or alter its own judgments except for the limited purpose of correcting clerical or mathematical errors: He submitted, pertinent to this is the principle of functus officio. When court pronounces itself on a matter, it does not alter the judgment just at the wish of a party.
He submitted the thrust of the application for review was that the appellant merely agreed to ownership by the respondent out of respect and so was the reason for agreeing to pay mitigated costs.
That all along he never envisaged the possibility of being asked to vacate the suit land.

Counsel further submitted that this was the reason why the magistrate correctly held that the application was a change of mind from the consent judgment as this was not a mere clerical or mathematical error for correction by review.

Counsel submitted, the Appellant did not allude fraud, or collusion in the lower court. That he does not dispute that he agreed that land belongs to the respondent or that he pays costs. He only does not want to be asked to vacate the land he agrees belongs to the respondent.

He submitted the consent was made in court in the presence of all parties and counsel should not hint that it was probably entered without the consent of his client the appellant. The rest of the submission is on record.

It should be noted that the application for review arose out of a consent judgment.

It is important to explain clearly what constitutes a consent judgment.

It is a decision reached by court upon the agreement of all the parties. It takes place when all the parties involved in a court suit agree to a set of terms. If the parties involved are able to work out an agreement, the court then finalizes the case with a consent judgment so that the case is ended. When the court enters or endorses a consent judgment, neither party can contest or re litigate the suit in future.

Consent judgments are binding on the parties involved in the agreement.

For a judicial officer to issue a consent judgment, all parties involved in a suit or the agreeing parties must indicate that the agreement has been mutually agreed on and that they find it acceptable.

If the party does not agree, then litigation must proceed in court as entering judgment against that person's wishes would result in a violation of his legal rights to be heard.
In case the consent agreement is a result of mediation, the mediator must be an impartial person not taking any side.

To avoid allegations of fraud, or ignorance of material facts, the consent agreement should be in writing or where it is not in writing, the court must reduce it in writing in the exact words of the parties and they should sign on the agreement.

This is because a consent judgment is not prima facie a judgment of court until the judge endorses it. It is endorsed after the agreeing parties have agreed to each and every term of the agreement, which agreement is exhibited by their respective signatures on the document.

It is an agreement which is entered before the judge hears and determines the case basing on the law and evidence adduced before him. In other words it is the agreement between the parties but facilitated by court to give it legal effect and enable execution in case one party breaches the agreement as it puts to end litigation in the case. That is why it is a consent judgment.

Because, it is a judgment based on mutual agreement between the parties without coercion, inducement, fraud, or collusion, and it is presumed that the parties to the suit are in a better position to know the material facts of the case, between themselves, once endorsed by court, it cannot be varied or set aside with ease. One has to prove that consent was obtained illegally or irregularly or that he did not apprehend the facts or terms well.

The judicial officer in the case is not expected to merely endorse the agreement. He or she must be satisfied that the parties understand the terms of the consent, agree to them as their own terms and must sign on the agreement. Court also satisfies itself on the legality and enforceability of such a consent agreement.

Failure to understand fully, or having a misconception of the terms of the consent renders it null and voidable at the earliest opportunity. This would also complicate the execution process and inevitably would imply there was no consent after all, in the legal sense.

Let me revert to what transpired in the lower court as indicated in the court proceedings which led to the application for review which was denied and hence this appeal. For purposes of this appeal, I refer to what happened in court on 23/3/2012:

Mr. Okidi Ladwar for the plaintiff reported to court as follows: "***The parties have reached the following agreement and we hereby tender as consent judgment"***

1. It is agreed that the land belongs to the plaintiff.
2. The defendant submits to the discretion of the plaintiff in regard to the vacation of the land on which he has some houses.
3. The defendant agrees to pay the mitigated costs of the suit.

Counsel Egaru: This is the position of the agreement.

Court: Following the mediation process conducted in this case and the submission by the counsel of both parties, this court therefore enters consent judgment and holds that:-

1. The suit land belongs to the plaintiff
2. The plaintiff to have discretion over the vacation of the land by the defendant and his agents i.e. either totally or partially.
3. The defendant to meet mitigated costs.

Right of Appeal explained

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Okot Edward David

Magistrate Grade One

It is apparent that there was no written agreement tendered in court formally for acceptance.

It is also apparent that due to lack of such an agreement, the magistrate wrote his own things based on his own comprehension of what was submitted before him.

All the three statements as submitted by Counsel Ladwar were written differently by the magistrate.

A Decree is extracted from the judgment and states what the court order is.

> **O.21 r 6 (1) of the Civil Procedure Rules provides** "The ***decree shall agree with the judgment. It shall contain the number of the suit, the names and description of the parties and particulars of the claim and it shall specify clearly the relief granted or other determination of the suit."***

The magistrate signed a document he called Decree. I wonder who extracted it because it does not mention it is a consent Decree.

This is how it was worded:

> *"This suit coming up for hearing and final disposal on the 23rd day March 2013 before His Worship Okot Edward David Esq. Grade 1 Magistrate, Pader Magistrates Court, in the*

presence of Mr. Okidi Walter Ladwar of Odongo & Co. Advocates, Counsel for the plaintiff and in the presence of Mr. Egaru Emmanuel of ULA, Legal Aid Clinic Labule road, Pader town council, Counsel for the Defendant Decreed as here under:-

That the judgment in this suit be and is hereby entered for the plaintiff against the defendant as follows:-

1. *That the plaintiff is the lawful owner of the suit land*
2. *That the defendant and his agents should vacate the suit land.*
3. *The defendant to meet the mitigated costs.*

Given under my hand and seal of this court this 23rd day of March 2012.

....

Okot Edward David

Magistrate Grade 1

This Decree was issued on the same day of the purported consent judgment: whatever transpired in court must have been very fresh in the mind of the judicial officer

It was not submitted anywhere that the defendant and his agents should vacate the suit land. This was his own invention.

The appellant applied for review of the consent judgment particularly the 2nd term. This was made under S.82 of the Civil Procedure Act and S. 98.

S. 82(b) provides "Any person considering himself or herself aggrieved by a decree or order from which no appeal is allowed by this act (consent Decree) may apply for a review of the judgment to the court which passed the decree or made the order and the court may make such order on the decree or order as it thinks fit.

He invited court to use its inherent powers to make orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

In his ruling which is not dated, he said "***In my considered view I see no merit in this application however to apply the principle of the thin "skull policy"*** mining the simple mind of the applicant and basing myself under S.98 of the CPA this honourable court can review paragraph 2 of the decree so that the said mind of the applicant can consume the content easily by amending the same to appear *" that the defendant and his agents to evacuate the suit land either partially or totally at the option of the plaintiff*". The rest of the contents of the agreement, consent judgment and paragraphs of the Decree must remain undisturbed". He went on to say, "In view of the above,

the application as to the review of the applicant and settling aside of the decree must fail, hence the same dismissed.

With due respect to the trial magistrate, he used derogatory and profane language when he described the mind of the Applicant. I supposed that description applied to counsel for the applicant as well. Such language is a disgrace to the bench and should never be used by judicial officer.

Counsel Ladwar objected to this appeal on the ground that the Appellant had no right to appeal without seeking leave of court. I disagree with him because in essence, the magistrate allowed the review but in such a way that the results suits his own apprehension of the purported consent agreement. His Decree was very different from his own recording of what he perceived as the agreement between the parties.

A lot has been submitted about the consent judgment.
In courts view, there is no consent judgment worthy the description, as what was recorded on record by the judicial officer does not have a single ingredient of a consent agreement or judgment. Courts of Law are courts of justice and it is the duty of the higher bench to set precedents that should be followed by the lower court.

Mediation, before coming into force of the Judicature (mediation) Rules 2013 Statutory instrument No. 10 of 2013 was a gamble, but that is not justification for officers of court, to pervert the cause of justice and abuse the court process by confusing the parties as to what a consent agreement or judgment constitutes.

Allowing the purported consent judgment to stand would amount to denial of the legal rights of the Appellant/defendant in the Civil Suit.

I do not agree with the trial magistrate that application for review was based on change of his mind after the agreement and consent were drawn and entered respectively.

The magistrate did not see any agreement signed by the parties. What was entered on the court record? There is no agreement to that effect and therefore no consent judgment and decree. The trial magistrate with due respect exhibited confusion of the highest order. In his ruling which is not numbered but on the 2nd last page paragraph 5 he stated "*According to the application, this honourable court agrees with counsel for the respondent that the same does not dispute the contents of the judgment i.e. as to ownership of the suit land, the mitigating costs and also partial evacuation of the respondent*" Partial evacuation is actually the main born of contention that the parties agreed to. Not total vacation of the land. In spite of the above statement that was his,

the judicial officer did not address his mind to the fact that there was misapprehension of material facts by both parties which would allow him to review his decision. Upon realizing that the submission of counsel Ladwar, was different from what the magistrate recorded as consent agreement and very different from the decree, since counsel submitted he was functus officio, the trial magistrate would have used his discretion under S.98 of the CPA and made an order forwarding the file to the Chief Magistrate for necessary action. He instead tried to use S.98 of the CPA erroneously to review the contentious paragraph 2 of the Decree which in essence allowed the application but he dismissed it.

In view of what has been said above, I allow the appeal with the following orders.

1. The consent judgment and decree is set aside.
2. A retrial for land Civil Suit No. 4/2011 is ordered before another magistrate Grade 1.
3. Each party should bear own costs in view of the fact that the parties are closely related as per the record.

Right of appeal explained.

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Margaret Mutonyi

Judge

29/08/2014

10:00am

Ladwar for respondent

Jenifer Ayot for the appellant

Appellant in court

Respondent is sick and not able to attend.

The matter is for judgment and ready to receive.

Court: Judgment read in the presence of the above.

Anna for court clerk