

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
LAND DIVISION**

**MISCELLANEOUS APPLICATION NO. 23 OF 2012
(ARISING FROM CIVIL SUIT NO. 81 OF 2004)**

RICHARD SEMBATYA MUKISA.....APPLICANT

VERSUS

ANNA NAGADYA..... RESPONDENT

RULING

BEFORE HONOURABLE LADY JUSTICE EVA K. LUSWATA

This application is brought by Notice of Motion under **Section 177 of the RTA, Section 38 (f) and 98 of the CPA** and **Order 52 of the CPR** for orders that:-

- a) The Commissioner Land Registration removes the caveat lodged by the respondent on Busiro Block 401 Plot 448 at Mewing (hereinafter called the suit land).
- b) Burial graves on the suit land be relocated.
- c) Costs of this application be provided for.

The application is supported by the affidavit of Beatrice Maize (the applicant's attorney) and the facts as related by the applicant upon which this application is founded can be summarized as follows:-

1. The respondent is the current registered proprietor of block 401 plot 448 at Mawangi (hereinafter called the suit land).
2. That the respondent was compensated for the kibanja unregistered interest in the suit land, vide a consent Judgment dated 12/2/2007 in the head suit above.
3. That although the respondent vacated the suit land, her graves remained therein.

4. That at the time the consent judgment was made; the applicant was unaware of an existing caveat on the suit land in favour of the respondent.
- 5 That the respondent has declined to remove the graves on the suit land, which is psychological injury upon the applicant.

The respondent opposed the application in an affidavit she filed in reply where she stated briefly:-

1. That she lodged the main suit against the applicant after he demolished her home and illegally evicted her from the suit land.
2. That she subsequently agreed to and received compensation of shs.8,000,000/- for the destruction of her house which was on the suit land. She was informed by counsel for the applicant and understood the money to be compensation for the house only.
3. That she never relinquished her right to the suit land as a customary occupant, because she was never compensated at all in that respect.
4. She denied ever signing the consent judgment and had at some point instructed her lawyers to ensure that it is removed from the court record.
5. She denied ever receiving Shs.2,000,000/= for the removal of the grave yard as stated in the consent order.

The respondent through his attorney filed an affidavit in rejoinder rebutting the claims made by the respondent in her affidavit in reply and maintained that after the respondent was compensated, her interest in the suit kibanja was extinguished and there is no application to set aside the consent judgment and no valid grounds exist for doing so.

Before I delve into the gist of the application, it is important to lay down what briefly transpired at the hearing of this matter. On 18/12/2013 when the application came up for hearing, I observed that the respondent had lost touch with her former lawyers yet she was clearly of advanced age and illiterate and would certainly require legal representation. She was advised to return to her former lawyers or instruct a new lawyer to assist her in defending the application and the matter was for that reason adjourned.

On 17/03/2014, the respondent again appeared without a legal representative claiming that her lawyer was attending to another matter in Entebbe Court. The respondent came with her son in law, one Kityamuwesi Disan to speak for her as she claimed that she was partially deaf and had lost her voice. However, since this was a session case and the respondent had been given ample opportunity to obtain legal representation, and since the pleadings were by then closed. I directed that the parties file and serve their written submissions. The respondent was specifically advised that immediately upon service, she should take the applicants submissions to her lawyer and seek their assistance to respond and file her submissions. Counsel for the applicant filed his submissions on 12/3/14.

After I started preparing this ruling, I noticed that written submissions had been filed on behalf of the respondent by M/s Kibirige, Kibirige & Co., Advocates on who claimed to be offering pro-bono. However, I note that that firm is not properly entered on the record as no notice of instructions was filed on their behalf. Further, there is nothing to show that they were instructed by the respondent to represent her and to quote part of their preliminary remarks they stated that “..... *we are belatedly coming into the picture, of the present court matter – having resolved that the respondent deserves “pro-bono service” in that regard*” (emphasis mine). An advocate cannot resolve by themselves to represent a party, they must first be instructed even where they are offering pro-bono.

Again, the submissions themselves appear suspicious. Although someone signed for that law firm, its full address is only inserted at the foot in writing. Without a formal notice of their instructions and with such written inscriptions, the court cannot even guarantee that the lawyer who signed is licensed to practice law or that the firm is formally registered. My conclusion is fortified by an earlier oral submission made earlier in court by the respondent that her lawyer is called Magala. Nothing was shown to connect Magala to Kibirige, Kibirige & Co, Advocates.

For those reasons, I choose to ignore those submissions. Likewise, I will not consider the submissions made by counsel for the applicant in rejoinder to the ‘respondent’s reply submission, and will instead make my ruling based on the pleadings of both parties and submissions of the applicant. However, since it was by direction of the court, all the original documents filed on 27/3/14, are noted and will be given due consideration.

In support of the application, counsel for the applicant advanced two arguments. Firstly that the respondent had no customary interest on the land. Secondly that her affidavit in reply was tainted with falsehoods that rendered it defective and her response to the application incompetent. In this he cited the cases of **Uganda Microfinance Union Ltd vs. Sebuufu Richard HCMA 0610 of 2007** and **Kalyesubula Fenekansi Vs. Luwero District Land Board Misc Application No. 367 of 2011**. He further argued that the respondent was paid and accepted Shs.8,000,000 in full and final settlement of the claim in the main suit. That the money was received on her behalf by her legal representative on 12/2/07 the same day that the consent judgment was signed. He then concluded that the consent judgment is binding on the respondent unless set aside by a competent court which was not. He quoted, **Saroja Gandesha Vs. Trans Road Ltd SCCA No. 14 of 2009**.

The respondent accepted that Shs.8,000,000/- was paid to her lawyers but she denied ever receiving Shs.2,000,000/- to remove the graves on the suit land. She then argued that she was misled (by the applicant's counsel) or understood the payment of Shs.8,000,000/- to be in respect of her damaged house on the suit land. She denied ever relinquishing her customary interest and even asserted that she never signed the consent judgment.

In my opinion, the consent judgment signed between the parties was a centre document in HCCS No.81/2004 and indeed this application. According to the applicant, and the record bears witness that the main suit was determined when the parties signed the consent judgment on 12/2/07. The applicant provided a certified copy thereof. This application is directly premised on this consent judgment because the applicant argues in part that although the respondent signed and was bound by it, she has lodged a caveat on the suit land (that is the subject of both actions) and has refused to remove her graves from it.

I have noted that two different sets of consent judgments were filed in this suit. The first was signed on 12/2/07 and in it; Mr. Mukwatanise signed for both himself and the applicant. The second one (which was attached to the application as Annexure A) was signed on 3/5/07 and therein. Only Mr. Mukwatanise signed for himself as the 2nd defendant. I confirmed that both were endorsed by the Registrar on 14/7/08. The terms in both judgments are substantially coached in similar terms and the former one reads in part as follows:

“By consent of the parties in the above suit, it is agreed that judgment be entered in favour of the 1st defendant in the following terms:-

- 1. The first defendant pays cash Shs. 8,000,000/= to the plaintiff in full and final settlement of the plaintiff’s claim in the suit above upon execution hereof.***
- 2. The 1st defendant shall make a contribution of 2,000,000/= to the plaintiff towards the removal of the grave yard in the suit land; the grave yard shall thereafter be removed before the 30th of April 2007.....” (emphasis mine).***

However it appears in the latter judgment that it was the 2nd defendant to pay Shs.8,000,000/-. That notwithstanding, I will give strength to the former judgment since it came first in time.

Therefore by Black’s Law Dictionary (2nd Ed) defines a consent decree as

“one entered by consent of both parties; it is not properly a judicial sentence but in the nature of a solemn contract or agreement of the parties, made under the sanction of the court and in effect an admission by them that the decree is just determination of their rights upon the real facts of the case if such facts had been proved”.

By its nature, a consent judgment is a judgment by consensus or one arrived at upon agreement of the parties. It is a final judgment and puts to an end the matters in controversy between the parties. Indeed the consent judgment in issue although entered in favour of the 1st defendant (now respondent) was meant to vindicate the plaintiff (now respondent’s) claim and assist her remove graves from the suit land with a monetary value of the Shs.10,000,000/-. Being an agreement, the consent judgment had to be signed by both parties and their counsel and then endorsed by the court. In the case of **Betuco Vs Barclays Bank** and **Peter Mukisa Vs Mitchell Cotts Ltd (CA 15/07)** the learned justices meticulously laid down the procedure to be followed before and at the signing of a consent judgment. To quote: *“the law regarding a consent judgment is that parties to a civil suit agree to consent to a judgment.”*They may do so orally before a Judge who then records the consent or, they do in writing and affix their signatures to the consent. In that case, still the Judge has to sign the judgment. (emphasis mine).

Civil Suit No.81/04 was filed by the present respondent against the present applicant (as the 1st defendant) and Arthur Mukwatanise t/a Mukwatanise & Co., Advocates as the 2nd defendant.

The above authority presupposes that Richard Sembatya Mukisa, the present applicant had to sign the consent judgment by himself or his agent and his advocate would counter sign for him. This was what was done for Anne Nagadya who it is shown, signed for herself and her lawyer Mukasa Fred Eddie also added his signature. This was not the case for the applicant.

It is not disputed that the applicant was in the main suit represented by Mukwatanise & Co., Advocates. However, Arthur Mukwatanise was by himself a party to the suit, and when he did sign the consent judgment, he signed in that capacity (as 2nd defendant) and not as counsel. There is authority to show that even when Mr. Mukwatanise signed on behalf of the 1st defendant, he could not, in law do so.

The Civil Procedure Rules have laid down in order 3 the rule on when an advocate may or may not act as agent for his client. In discussing that rule, the court in **Tibeyingana Godfrey Vs Kabwende Stephen (High Court Civil Revision No.006.02)** was of the view that 0.3.R.1 CPR does not equate a party's advocate to an agent. Also that 0.31.R 2 CPR does not define the term 'recognized agent' to conclude a party's advocate. The court then concluded that a party's consent to the execution of a consent judgment cannot be presumed and shall be expressly communicated to their advocate or indicated as their signature to the consent judgment.

The sum total of the above is that the applicant (then 1st defendant) did not sign the consent judgment and was therefore not a party to it. It may well be argued that counsel Mukwatanise proceeded as the applicant's advocate. However under 0.3 R. 1 CPR, any act in court must be done by the party personally and if they choose to use an advocate, they must specifically appoint him in such manner. I see no specific instructions to Mr. Mukwatanise to sign the consent judgment. Those instructions were by power of attorney specifically given by the applicant to Beatrice Mpamize and/or Robert Kayondo Kisekka on 29/12/2007 well after the consent judgment had been signed. Therefore, any payments the applicant made under the consent judgment to the respondent and/or her lawyer were wrongfully made.

The respondent also argued that she did not sign the consent judgment and never received the Shs.2,000,000/- to remove the graves. However nothing was put forward in evidence to support her claim which under Section 100 of the evidence Act is entirely her burden in law. However,

whether or not she signed the consent judgment is irrelevant, for I have already found that the consent judgment was not binding upon the 1st defendant who did not sign it.

However, I am inclined to believe the applicant on the fact that shs.2,000,0000/- was paid to the respondent. This was first by cheque which was then exchanged for cash received by Zeiya Mukasa & Co., Advocates her lawyers on 2/5/07. They were her agents in law land if she did not receive it from them then that is a matter to be handled between them.

Having found that the execution of the consent judgment was legally improper and irregular, I find unfortunately that no other order can be given as a consequential remedy from it. It was a serious mistake of the applicant's counsel not to have involved him or his attorneys in execution of the consent order. As it is now, I find that it cannot be binding on either the applicant or the respondent, except that the respondent cannot be allowed to profit from this mistake. However, the prayers in this matter did not extend to my interrogation of the consent judgment or to set it aside. The applicant may if he so wishes pursue a refund of all monies paid in compensation for the respondent's interests in the suit land that for removal of the graveyards and costs paid to the respondent's counsel.

My findings on the execution of the consent judgment are enough to dispose of this application as a preliminary issue. I therefore find no reason to go into the merits or de-merits of the other points raised by the parties in their arguments.

For now, I decline to grant the orders sought in the application and the application is dismissed. However since the mistakes elaborated upon in this ruling were by the applicant's counsel and the respondent did partially profit from those mistakes, I do not award costs to the respondent. Instead, I order that each party bears their costs of this application.

I so order.

EVA K. LUSWATA
JUDGE
31/3/14