THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(LAND DIVISION)

MISCELLANEOUS APPLICATION NO.2131 OF 2021

(Arising out of Civil Suit No.367 of 2019)

JOHN BOSCO MAYANJA::APPLICANT

VERSUS

DAVID LUBANGA::RESPONDENT

Before: Justice Alexandra Nkonge Rugadya.

RULING.

The applicant brought this application under ***sections 98 and 99 of the Civil Procedure Act Cap.71, Order 46 rules 1, 2, 4, & 8 and Order 52 rules 1, & 3 of the Civil Procedure Rules SI 71-1*** seeking orders that;

1. ***The consent judgement in Civil Suit No.367 of 2021 entered on 22/10/2019 between the applicant and the respondent be reviewed and set aside;***
2. ***Civil suit no.367 of 2019 be fixed, heard and determined on its merits;***
3. ***Costs of this application be provided for.***

Grounds of the application:

The grounds of the application are contained in the affidavit in support of Mr. John Bosco Mayanja, the applicant who deponed that the respondent filed ***Civil Suit No.367 of 2019*** against him in respect of land comprised in ***Block 243 plot 880*** whereon the applicant had a running lease, the applicant filed a written statement of defence upon being granted leave to do so.

That around November, 2019, he (the applicant) was informed by his lawyers at the time that a consent would be entered to settle the matter in a manner whereby no one would lose anything.

That the consent judgement was entered by the parties and the respondent now intends to execute the said consent which the applicant challenges on grounds that the same was entered without his well-informed, independent mind and free will.

That the said consent judgement which was written in English was not translated to the applicant as there is no indication of the same yet the applicant is an illiterate unable to read or understand the same and that although he had a lawyer at the time, the terms, conditions and consequences of the said consent judgement were never explained to him in the language he understands.

That had the applicant fully understood the terms, conditions and consequences of the consent judgement, he would not have signed the same or agree to pay the sum of ***Ug. Shs. 1,000,000/=*** to the respondent as ground rent for a period of 9 months yet the lease agreement he was supposed to pay ***Ug. Shs. 40,000/=*** for a whole year, or pay ***USD. 250,000*** as the purchase price for the land.

In addition, that the respondent signed the consent judgement under the guise that he was the holder of a grant of letters of administration for the estate of the late Christopher Musoke yet did not have *locus standi* to file the main suit or enter the consent judgement.

That in the applicant's application for leave to appear and defend the suit, the judge indicated that one of the issues to be resolved in the main suit was whether or not the plaintiff now the respondent herein had the *locus* to institute the suit.

Further, that the respondent shall not suffer any irreparable injury or loss if the consent judgement is set aside and heard on its merits since it is in the interest of justice and fairness that the consent judgement in ***Civil Suit No.367 of 2019*** is set aside, and the suit set down for hearing, and determined on its merits.

Reply by the respondent:

The respondent in reply however objected to the application claiming that the same is frivolous and vexatious, and should be struck out with costs. That the consent judgement was entered into and signed by the parties on 23rd October, 2019 after four sessions of mediation before Mr. Christopher Rukyarekere, a court accredited mediator.

With his guidance the parties agreed on the terms and conditions of the consent and that the mediator directed that what was agreed upon be put in writing, hence the consent judgement that was signed by all the parties in the presence of their lawyers

and the mediator who after reading the said consent to the parties, confirmed that the same represented the parties' true presents.

That the applicant proceeded to pay ***Ugx. 1,000,000/=*** in partial fulfilment of the consent judgement and in specific reply to *paragraphs 13-16* of the affidavit in support, the respondent contends that he is the administrator of the estate and owner of the suit land and that the applicant was well aware of the same at the time of entering the consent and indeed had *locus* to sue the applicant as a lessor of the suit land, as well as the capacity to enter into the said consent judgement.

That although the applicant proposed to buy out the mailo interest which held the lease interest, he has failed to do so and that the instant application is not only dilatory, but also an afterthought considering the fact that the same was brought 2 years after the signing of the said consent judgement, after being served with a notice to show cause why execution should not in issue, in the applicant's a bid to frustrate the execution process.

That the applicant not only knew about the consent judgement but also the language in which it was drafted and that his contention that he does not know English is only an afterthought since the lease agreement on which he relies was in English, without a jurat, therefore the applicant has no valid grounds for review or setting aside the said consent judgement.

Rejoinder by the applicant:

In his affidavit in rejoinder, the applicant maintained however that the consent judgement is invalid since the contents thereof which were in English were never read out to him or explained to him Luganda before he signed the same.

That there was no proof that he had paid the said amount of ***Ug. Shs. 1,000,000/=*** in partial fulfilment of the consent as alleged by the respondent.

That the respondent was known to the applicant as an interim administrator, who would not enter the said consent without the directions of court as required by law and that he could only bring the suit in the event of breach of the lease agreement by the applicant but the respondent's locus to sue as a lessor cannot be based on in the main suit.

The applicant also denied ever proposing to purchase the mailo interest in respect of the suit land as alleged by the respondent. He further stated that the instant

application has merits and that he has since filed an application to halt the execution of the consent judgement, the contents of which he did not understand.

The applicant further maintained that while the legality of the lease agreement is not matter for determination before this court, this application is not an afterthought as the same was brought in good faith to remedy an injustice that occurred before signing the consent judgement that the applicant did not understand.

Representation:

The applicant is represented by ***M/s Wameli & Co. Advocates.*** The respondent on the other hand is represented by ***M/s Kavuma Kabenge & Co. Advocates***

Consideration by court:

I have carefully read and reviewed the pleadings, evidence as well as the submissions of both parties, the details of which are on court record and which I have taken into consideration to determine whether or not this application merits the prayers sought.

Section 82 of the Civil Procedure Act provides that:

> "***Any person considering himself or herself aggrieved –***
>
> ***a. by a decree or order from which an appeal is allowed is allowed by this Act, but from which no appeal has been preferred ; or***
>
> ***b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of 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.***

Then Order 46 of the Civil Procedure Rules provides; that-

> ***1. Any person considering himself or herself aggrieved-***
>
> ***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.

2. A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party, except where the ground of the appeal is common to the Applicant and the appellant, or when, being Respondent, he or she can present to the appellate Court the case on which he or she applied for the review.

A consent judgment derives its legal effect from the agreement of the parties. It may only be set aside for fraud, collusion or for any reason that which would enable the court to set aside an agreement. (***Brooke Bond Liebig V Mallya [1975] EA 266***).

The circumstances in which a consent judgment may be interfered with were considered in ***Hirani V Kassam [1952] 19 EACA*** wherein the court relying on ***Seton of Judgment and Orders, 7th Edition Volume 1 page 124*** held that;

"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 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."

In ***Attorney General & Anor Vs James Mark Kamoga & another, SCCA No. 8 of 2004*** Mulenga JSC had this to say:

"--- It is a well-settled principle, therefore, that a 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 binding on all the parties therefore parties are estopped from asserting different positions from the stipulated agreement.

In the instant case the applicant states that at the time of signing the consent judgement in issue, the contents thereof were neither translated nor explained to him in a language he understood. That if only he had known and understood the contents of the said judgement, he would not have signed the same.

The respondent on his part contended that the applicant who was part of the mediation process knew and understood the contents of the consent because the same was read and explained to the parties by the mediator that presided over the process.

That the applicant cannot claim that he is illiterate and that the consent judgement was not interpreted to him yet the lease agreement upon which the applicant's claim is premised was written in English and the same was also not interpreted.

Resolution by court:

The term *"illiterate"* is defined under ***section 1(b) of the Illiterates Protection Act*** to mean, in relation to any document, a person who is unable to read and understand the script or language in which the document is written and printed.

Section 2 thereof provides for verification of the illiterate's mark on any document, and that prior to the illiterate appending his or her mark on the document it must be read over and explained to him or her.

Section 3 requires that the document written at the request, on behalf or in the name of any illiterate must bear certification that it fully and correctly represents his or her instructions and was read over and explained to him or her.

In ***Tikens Francis &Another v. The Electoral Commission & 2 Others, H.C Election Petition No.1 of 2012*** it was held that;

> ***"There is a clear intention in the above enactments that a person who writes the document of the illiterate must append at the end of such a document a kind of 'certificate' consisting of that person's full names and full address and certifying that person was the writer of the document; that he wrote the document on the instructions of the illiterate and in fact, that he read the document over to the illiterate or***

that he explained to the illiterate the contents of the document and that, in fact, the illiterate as a result of the explanation understood the contents of the document...the import of S.3 of the Act is to ensure that documents which are purportedly written for and on instructions of illiterate persons are understood by such persons if they are to be bound by their content...these stringent requirements were intended to protect illiterate persons from manipulation or any oppressive acts of literate persons."

The Supreme Court in of ***Kasaala Growers Co-operative Society v. Kakooza &Another S.C.C.A No. 19 of 2010*** citing with approval the case of ***Ngoma Ngime v. Electoral Commission & Hon. Winnie Byanyima Election Petition No. 11 of 2002*** held that;

Section 3 of the Illiterate Protection Act (supra), enjoins any person who writes a document for or at the request or on behalf of an illiterate person to write in the jurat of the said document his/her true and full address. That this shall imply that he/she was instructed to write the document by the person for whom it purports to have been written and it fully and correctly represents his/her instructions and to state therein that it was read over and explained to him or her who appeared to have understood it."

The Supreme Court went on to hold that the illiterate person cannot own the contents of the documents when it is not shown that they were explained to him or her and that he understood them.

Further, that the Act was intended to protect illiterate persons and the provision is couched in mandatory terms, and failure to comply with the requirement renders the document inadmissible. ***(See also: Lotay v. Starlip Insurance Brokers Ltd. [2003] EA 551;Dawo & Others v. Nairobi City Council [2001] 1EA 69***.

In light of the above stated position of the law, the mandatory provisions of the ***Illiterates Protection Act (supra)*** would apply with full force to the consent judgement in issue which cannot be relied upon by any party seeking to enforce the same.

It is also the established law that the provisions are requirements of substantive law and cannot be regarded as technicalities that could be ignored or cured under ***Article 126(2) (e) of the Constitution***.

In ***Tikens Francis& Another v. The Electoral Commission & 2 others*** the court held, inter alia, that;

> ***"The requirements of the Illiterates Protection Act are legal requirements and not procedural requirements. That law cannot therefore be bent under Article 126 (2) (e) of the Constitution."***

The above principles as highlighted are applicable to the instant case just as they did in 1990 when the applicant signed the lease agreement as lessee in 1990. Court took careful look and noted that the signatures which appear on the consent was clearly the same as that on the lease agreement. The signatures did not strike this court as those of an illiterate man, as the applicant wishes this court to believe.

In the unlikely event however that he is, there is hardly any doubt that the applicant as a lessee for years enjoyed some benefits out of the lease arrangement which however did not meet the requirement of the law as highlighted.

The equitable principle of approbation and reprobation would operate as an estoppel, barring him from raising questions of illegality, which questions never came up when he was endorsing the lease agreement that did meet the same criteria.

In ***Verschures Creameries Ltd vs Hull & Netherlands Steamship Co. Ltd(1921) 2 KB 608 at p.612, Scrutton LJ*** stated that a person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn around and say it is void for the purpose of securing some other advantage.

While it is true in this case that the consent judgement sought to be set aside was never translated to the applicant, there is no indication that the lease agreement upon which the main suit from which the instant application is premised was interpreted to the applicant.

I am therefore inclined to agree with the respondent that the applicant cannot claim to be illiterate in as far as the consent judgement in issue is concerned yet he did not insist on those very rights many years earlier.

That is a pointer to court that the applicant in his affidavit was not entirely truthful, which is the reason why I am inclined to reject the application. It is therefore dismissed with costs.

Miscellaneous Application No.2132 of 2021 for stay of execution of the consent judgment is accordingly overtaken by events.

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Alexandra Nkonge Rugadya

Judge

17th August, 2022.

Delivered by email

17/8/2022