

THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
(LAND DIVISION)  
MISCELLANEOUS APPLICATION NO.1514 OF 2019  
(ARISING OUT OF MISC. CAUSE NO.71 OF 2018)

DINGKUII DENG GOC AYUEL-----APPLICANT

VERSUS

1.MUGISHA ROBERT

2.COMMISSIONER LAND REGISTRATION-----RESPONDENTS

**Before: Hon. Lady Justice Olive Kazaarwe Mukwaya**

**RULING**

This application is brought under Section 82 & 98 of the Civil Procedure Act, Order 46 r. 1,2,4 and 8 and O. 52 r. 1 and 3 of the Civil Procedure Rules SI 71-1. The Applicant, Mr. Dingkuui Deng Goc Ayuel is seeking orders that:

- a) The Consent Order entered between the Applicant and the 1<sup>st</sup> Respondent in Miscellaneous Cause No.071 of 2018 and all other orders arising therefrom be reviewed and set aside.
- b) Costs of this application be provided for.

**Background to the application.**

This application arises out of Miscellaneous Cause No. 071 of 2018. In that matter, the Applicant, Mr. Mugisha Robert, who is the Respondent herein, sought orders of the court for cancellation of the 1<sup>st</sup> Respondent, Mr. Ayuel's lease which existed upon Mailo land described as Kyadondo Block 226 Plot 691 at Buto.

In that application, Mr. Mugisha described the lease as an 'idle lease interest' registered by Mr. Ayuel as an incumbrance on the white page vide instrument no. WAK00113715 of 31.10.2017. Mr. Mugisha asserted that Mr. Ayuel, in breach of the lease terms, failed and or refused to pay reserved ground rent and premium to Mr. Mugisha and/or predecessors in title, a fundamental breach of the lease agreement and the law. It was further asserted by Mr. Mugisha that he exercised his right of re-entry, fenced off the land and erected a house thereon. Thereafter, he applied to have re-entry noted on the white page but was advised by the Commissioner Land Registration (2<sup>nd</sup> Respondent) to get a court order to that effect. He therefore prayed for an order for cancellation of Mr. Ayuel's lease.

According to the affidavit in reply filed by Mr. Ayuel under the Miscellaneous Cause, he did not oppose the application of Mr. Mugisha and that he was no longer interested in the lease. He added that he was aware the Applicant re-entered the land, fenced it off and constructed a house following Mr. Ayuel's default to pay premium and ground rent and he did not see the need to challenge his actions.

On the 23<sup>rd</sup> October 2018, a Consent Order was issued by the Deputy Registrar of this court in the following term;

'The 1st Respondent's lease registered as an incumbrance on the Applicant's land described as Kyadondo Block 226 Plot 691 land at Buto is hereby cancelled on grounds of fundamental breaches of the lease agreement and the Commissioner for land registration is directed to cancel the same from the white page.'

The Consent Order was signed by Mr. Mugisha Robert, the Applicant, Mr. Dingkuii Deng Goc Ayuel, the 1<sup>st</sup> Respondent, M/S Kintu, Nteza & Co. Advocates, Counsel for the Applicant and M/S Nsubuga K.S & Co. Advocates for the Respondent.

Mr. Dingkuii Deng Goc Ayuel is a South Sudanese national. He is aggrieved because he was fraudulently made a party to Miscellaneous Cause No. 071 of 2018 and his prayer is that Consent be set aside and costs be provided for.

#### Grounds for the Application

In the affidavit in support deposed by the Applicant, the following grounds were outlined;

1. The Applicant purchased land comprised in LRV WAK 2678 Folio 22 Plot 261 Kyadondo 226 at Buto, Wakiso district from a one Isah Musoke and was duly registered on a lease terms of 99 years. A copy of the certificate of title was attached and marked "A".
- 5 2. He was given a leasehold certificate of title for the suit land but his then lawyer retained the mailo certificate of title and transfer forms which had been issued to him by the lessor. A copy of the mailo title was attached and marked "B".
3. Soon after obtaining the title, the Applicant took possession and fenced off the entire land.
- 10 4. In May 2019, the Applicant discovered that unknown people had demolished his fence which matter he reported to police that conducted investigations.
5. During the investigations, the 1<sup>st</sup> Respondent had filed a fictitious case in High Court against him for cancellation of the lease. A copy of the Misc. Cause No.71 of 2018 and the affidavit in reply was attached and marked "C" and "D".
- 15 6. Without the Applicant's presence and instructions, the Respondents fraudulently and illegally entered into a consent order wherein they purported to terminate his lease on the suit land. A copy of the consent order was attached and marked "E".
7. Using the said consent order and in collusion with the 2<sup>nd</sup> Respondent, the Applicant's lease was cancelled and the mailo interest was registered into the 1<sup>st</sup> Respondent's names. A copy of the mailo certificate was attached and marked "F".
- 20 8. The Applicant was never served with any court documents and/or pleadings in South Sudan where he resides to enable him personally appear before Court or instruct a lawyer of his choice.
9. The Applicant has never instructed the law firm of M/s K.S Nsubuga & Co. Advocates to represent him in any Court and in particular Misc. Cause No.071 of 2018.
- 25 10. The 1<sup>st</sup> Respondent lied on oath that the Applicant was in breach of the fundamental terms of the lease agreement whereas not true and Court should not let a consent order filled with glaring falsehoods stand.
- 30 11. The Applicant is aggrieved with the said consent and the actions of the Respondents who fraudulently deprived him of the suit land.

12. It is in the interest of justice that the Application be granted and the impugned consent order be set aside.

### **The Reply**

5 The 1<sup>st</sup> Respondent, Mr. Mugisha Robert in his affidavit in reply averred that;

- 1) In the year 2018, he was approached by a one Hakim Kasirye and his Counsel Jagwer Benedict who offered to sell him land comprised in Kyadondo Block 226 Plot 691 land at Buto.
- 10 2) He carried out a search at the land office which revealed that the land was registered in the name of Hakim Kasirye and had a caveat registered on as an encumbrance by Jagwer Benedict.
- 3) Subsequently, he visited the plot, inquired from the immediate neighbours and the local council authorities who all confirmed that indeed Hakim Kasirye and Jagwer Benedict were known to them as owners of the land.
- 15 4) On the strength of these findings, the 1<sup>st</sup> Respondent purchased all the suit land for valuable consideration and had it transferred into his name. A copy of the sale agreement and caveat withdrawal were attached and marked "A" and "B" respectively.
- 20 5) The 1<sup>st</sup> Respondent thereafter graded the land, built a house thereon and also filed Misc. Cause No.71 of 2018 for an order to vacate the idle lease of his mailo land title.
- 6) Subsequently, the Applicant through his Counsel indicated that he was not opposing the application and a consent order was entered.
- 25 7) He has never filed a sham and fraudulent case as alleged by the Applicant and was well within his rights as the then Registered proprietor of the suit land to file Misc. Cause No.71 of 2018.
- 8) He then lawfully subdivided the suit land into Plots 786-797 and sold it off to third parties therefore Plot 691 no longer exists. A copy of the deed print and transferred titles were attached and marked "C" and "D" respectively.

9) The third parties who purchased the suit land shall be greatly affected by the outcome of this application and yet they are not parties to it.

10) The issues raised in this application are also subject of an earlier suit H.C.C.S No.543 of 2019 filed by the Applicant which is still pending hearing and final determination.

11) This application is an abuse of Court process and the same should be struck out with costs.

### **Rejoinder**

The Applicant averred that in 2018 he acquired a lease interest vide LRV WAK 2678 Folio 22 Plot 691 out of the suit land which land Jagwer Benedict in connivance with Hakim Kasirye allegedly sold to the 1<sup>st</sup> Respondent. By the time the 1<sup>st</sup> Respondent allegedly carried out a search in the land office and proceeded to have the land transferred, his lease interest was still registered as an encumbrance. He added that at that time, he had entrusted the signed transfer forms and duplicate certificate of title for safe custody with the said Jagwer Benedict who was his lawyer in the said transaction. The Applicant also stated that this application which seeks review of a consent order is distinct from HCCS No.543 of 2019 which seeks cancellation of titles and recovery of land. Therefore, the two suits ought to be heard on their merits. He further reiterated his earlier averments.

### **Submissions for the Applicant.**

Counsel for the Applicant relied on the case of Mohamed Alibhai Vs W.E Bukenya Mukasa & DAPC B which provides for the circumstances under which a consent may be set aside which include fraud, collusion or any other reason which would enable Court to set aside an agreement. He thus submitted that the Applicant was cited in Misc. Cause No.71 of 2018 Mugisha Robert Vs Dingkuii Deng Goc Ayuel and another in which the said consent order was entered without his presence or consent since he was not aware of the proceedings. Counsel submitted that the consent order was not only obtained through fraudulent actions but was also obtained illegally without him being in Court.

The Applicant's Counsel also submitted that there was a series of fraud right from filing a cause in which Counsel purported to represent the Applicant without instructions, filing

an affidavit in reply purported to have been deposed by the Applicant whereas not. He added that the Applicant's signature was also forged on the consent order and later on lying that the Applicant appeared before the Registrar whereas not. Counsel argued that none of this evidence was rebutted by the Respondent which further confirmed that the consent order was entered through fraud and misrepresentation.

Counsel therefore submitted that due to the above reasons, the consent order was obtained unlawfully and is therefore invalid. He thus submitted that the same ought to be reviewed and set aside accordingly.

### **Submissions for the Respondent.**

In response to those submissions, the Counsel for the Respondent raised preliminary objections to the effect that this Court is barred under Section 5 of the Civil Procedure Act from proceeding with this suit in so far as the matters in issue raised in this Application are also directly and substantially in issue in a previously instituted suit. Counsel went on to argue that the matters in issue in this Application involve setting aside the consent judgment in Misc. Cause No.71 of 2019 on grounds of fraud, illegality and collusion which are the same issues among others for determination in HCCS 453/2019.

Secondly, Counsel submitted that issues of fraud cannot be disposed of by affidavit evidence. Particularly, Counsel argued that the Applicant through the affidavit in support before Court raised serious allegations of fraud, illegality and collusion which he ought to have particularised. He added that the Applicant also had a heavier burden to prove fraud through cogent evidence which cannot be done by affidavit evidence. He further relied in the case of Yahaya Walusimbi Vs Justine Nakalanzi and 4 Ors CAMA No.386 of 2018 to augment his position. Counsel further argued that the 1<sup>st</sup> Respondent should have a right to challenge all the evidence adduced by the Applicant through cross examination which cannot be done since the Court directives were for parties to file submissions.

Thirdly, Counsel submitted that in light of paragraph 10-16 of the affidavit in reply, it is clear that there are several parties who will be affected by Orders in this application if granted. He added that the said parties however are not parties to this application but are parties to HCCS 543/2019 which was previously filed by the same Applicant against the

Respondents and 10 others. In order to avoid a multiplicity of suits, Counsel thus prayed that the Court stays this Application until HCCS 543/2019 in which issues are directly and substantially the same as the ones in this application is heard and determined.

### **Submissions in rejoinder**

- 5 In rejoinder, Counsel argued that the Court is not barred from proceeding with this application since the grounds herein are to review and set aside the consent judgment and order in Misc. Cause No.71 of 2018. He further argued that this application is between the Applicant and Mr. Mugisha Robert, the 1<sup>st</sup> Respondent and the Commissioner for Land Registration whereas HCCS No. 543 of 2019 is between the Applicant and eleven
- 10 Defendants including the Respondents. Furthermore, Counsel submitted that in the suit the Applicant also seeks orders inter alia cancellation of titles and recovery of land. Therefore, Sections 5 and 6 of the CPA do not apply in these circumstances because the two are exclusively different.

### **Issue**

- 15 **Whether the Consent Order issued under Miscellaneous Cause No. 71 of 2018 ought to be set aside?**

Before I tackle the issue, I will comment on the preliminary objection raised by the 1st Respondent's Counsel. It was a point of law on res judicata, however, Counsel did not attach the Plaint in that suit to his submissions to allow Court ably consider the point of

20 law. This grave oversight rendered the objection incomplete and incompetent in my view. I therefore did not consider it.

Turning to the issue before this court, I had the opportunity of thoroughly perusing the pleadings giving rise to the impugned Consent Order. The Applicant herein is emphatic that he did not participate at all in those proceedings, that Counsel on record appearing

25 on his behalf was not instructed by him and that he did not appear before the Registrar to execute the Consent. And yet this was the impression made by the pleadings and Order under Miscellaneous Cause No.71 of 2018.

The law on review of consents has been laid out by the courts and reiterated by Counsel for the Applicant in the instant application. It was imperative that the applicant demonstrate any of the following to justify the review of the Consent Order;

- a. Fraud
- 5      b. Mistake
- c. Collusion
- d. Misapprehension or Ignorance or insufficiency of material facts
- e. Agreement contrary to court policy
- f. Any reason which would enable court to set aside an agreement.

10      (See **Hirani V. Kassam 1952 EA at 131**)

It is a fact that the 1<sup>st</sup> Respondent concedes that the Applicant did not participate in the Consent under paragraph 12 of the affidavit in reply when he states;

‘That the Applicant through his Counsel indicated that he was not opposing Misc. CAUSE No. 71 of 2018 and a consent order was subsequently entered before the Deputy Registrar of the Court’

15      This evidence demonstrates that the Applicant did not appear in person and yet the pleadings suggest that he affixed his signature on the affidavit in support and the Consent Order. For the first time on the bench, I was introduced to the term, ‘idle lease’ coined by the 1<sup>st</sup> Respondent and his advocate. The term does not exist in law. A lease either exists or it does not. It cannot be defined as ‘idle’.

20      I find that the 1<sup>st</sup> Respondent presented no cogent defence to this application, choosing instead to deflect this court’s attention by taking it on a journey on how he acquired the suit land and the third party rights which had accrued from his subdivisions on the land that needed protection.

As far as this Court was concerned, the person in need of protection was the Applicant.

25      There is no doubt in my mind that the Applicant was the victim of the fraud giving rise to the Consent Order. The evidence is overwhelming that he did not consent to the deprivation of his rights as a leaseholder on the suit land.



**In conclusion, I find that the Consent Order issued under Miscellaneous Cause No. 71 of 2018 was fraudulently issued and I hereby set it aside with costs to the Applicant.**

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**Olive Kazaarwe Mukwaya****JUDGE****4<sup>th</sup> November 2022**10 **Delivered by email to Counsel for the parties.**