

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
MISCELLANEOUS APPLICATION NO. 487 OF 2022
ARISING FROM HCCS NO. 279 OF 2013

1. KADDU MUKASA HERBERT LUYOMBYA BUNNYA
2. PETER MAYANJA
3. SERUWAGI ANTHONY
(EXECUTORS OF THE LAST WILL
AND TESTAMENT OF
LATE CHRISTOPHER KABENGE. APPLICANTS

VERSUS

1. JULIUS KAVUMA KABENGE
2. OSCAR MUGABI KABENGE
3. SIMON TENDO KABENGE RESPONDENTS.

RULING

BEFORE HON. LADY JUSTICE FLAVIA NASSUNA MATOVU

This was an application brought under S. 98 of the Civil Procedure Act and 0.52 rr. 1,2, and 3 of the Civil Procedure Rules. It was seeking for orders that the consent judgement and decree entered in HCCS No. 279 of 2013, Oscar Mugabi Kabenge and Anor versus Julius Kavuma Kabenge & Anor be set aside and costs of the application be provided for. It was brought by Notice of motion which was supported by affidavits sworn by the Applicants. Grounds of the application


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were laid in the Notice of motion and affidavits in support. Briefly the grounds were;

- a) There is an illegality and fraud on the face of the record.
- b) The consent judgement was executed in misrepresentation, ignorance of material facts and without sufficient material facts.
- c) Whereas the late Christopher Kabenge endorsed on the said consent judgement, he was not party to HCCS No. 279 of 2013.
- d) The Respondents were not registered proprietors of the suit property and had no right to deal with it in any way.
- e) That there was collusion between the parties which was aimed at depriving the late Christopher Kabenge of his land.
- f) That some of the parties to the case did not endorse the consent judgement which was a material irregularity.

The Respondents did file affidavits in reply to this application.

The 2nd and 3rd Respondent admitted that the consent judgment was executed illegally and the same should be set aside. That it was vitiated by fraud, illegality, collusion, duress, mistake and was contrary to court policy. In effect they called upon the court to allow the application and grant the orders sought for.

The 1st Respondent on the other hand opposed the application and called upon the court to dismiss the application with costs. Briefly he maintained that;

- a) The consent judgement was properly executed and should not be set aside.


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- b) The applicants were not party to HCCS No. 279 of 2013 and have no locus to challenge the proceedings therein which were completed with the participation of the late Christopher Kabenge.
- c) There was no fraud, illegality or collusion by any of the parties and late Christopher Kabenge was merely invited by court to bring the case to its logical conclusion.
- d) The said decree was partly performed by the parties and late Christopher Kabenge did not challenge the same during his life time.

BACKGROUND

The Respondents are all children of the late Christopher Kabenge. The 2nd and 3rd Respondent filed HCCS No.279 Of of 2013 against the 1st Respondent and 2 others. In the said case the 2nd and 3rd Respondents alleged inter alia that the 1st Respondent had fraudulently and unlawfully dealt with land comprised in Kibuga Block 21 plots 296 and 297 at Busega. This land was registered in the names of late Christopher Kabenge. The 1st Respondent and the 2 other parties filed a written statement of defense by which they denied all the allegations of fraud and illegal transactions. The 1st Respondent further indicated in the written statement of defense that the 2nd and 3rd Respondents had no cause of action against him since Christopher Kabenge who was owner and registered proprietor of the suit land was still alive.



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The matter was sent for mediation and Hon. Justice Kwesiga was assigned to preside over the mediation proceedings. The court in its wisdom invited late Christopher Kabenge who was the registered proprietor of the suit land to be part of the mediation process. As a result, a consent judgement was executed on 4th October 2013. It was signed by the 1st, 2nd, and 3rd Respondents and their advocates, approved by late Christopher Kabenge and endorsed by the judge who mediated.

Late Christopher Kabenge died in 2019 and the Applicants in the instant application were granted probate to his estate on 26th August 2019. In January 2022, the 1st Respondent filed Miscellaneous Application No. 122 of 2022, against the applicants by which he sought to enforce the decree in respect of the consent judgement. The Applicants then filed the instant application in April seeking to set aside the said consent judgement.

All parties filed written submissions in this matter which I have carefully studied and need not reproduce them here. I have also carefully studied the pleadings and proceedings on record, plus the relevant law.

ISSUES

1. Whether the Applicants have locus to file the instant application.
2. Whether the consent judgement executed by the parties in HCCS. No. 279 of 2013 can be set aside.
3. What are the remedies available?


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Issue 1

Whether the Applicants have locus to file the instant application.

The 1st Respondent submitted that the application was not proper before court. That since the applicants were not parties to HCCS No. 279 of 2013, they could only apply for review of the judgement. They had no locus to apply to set it aside. That a consent judgement being a contract amongst parties, the only person who can apply to set it aside basing on the grounds that vitiate a contract, should be the person who is a direct party to the contract. That whereas the consent judgement had a binding effect on late Christopher Kabenge, he was not a direct party to the main suit from which the consent judgement arises. That the only available remedy to the applicants who were third parties to the main suit would be to apply for review of the consent judgment if they consider themselves aggrieved by the same, under S. 82 of the Civil Procedure Act and O.46 of the Civil Procedure Rules. In support of this fact the 1st Respondent relied on the case of ***Mohammed Alibhai Vs. W.E. Bukenya SCCA 56 of 1996*** where it was held that the remedy of a 3rd party who is aggrieved by the consent judgment is to bring an application for review of the same.

The Applicants on the other hand submitted that there are serious allegations of illegality, fraud and collusion which the court should not ignore. That the court should exercise its inherent powers under



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S.33 of the Judicature Act and S. 98 of the Civil Procedure Act and hear the application on merit.

I note that this application was brought under S. 98 of the Civil Procedure Act. The said section gives court inherent powers to make such orders as may be necessary for the ends of justice or to prevent an abuse of the process of the court. The Applicants are challenging a consent judgement that was arrived at, through mediation which is an acceptable court process. Apparently it is challenging the entire mediation process. In my view, it is important that this application is heard on its merit, for the ends of justice to be met. In the interest of justice therefore, the objection raised by the 1st Respondent is hereby over ruled.

Issue 2

Whether the consent judgement executed by the parties in HCCS. No. 279 of 2013 can be set aside.

A consent judgment once signed by the parties, is binding on all parties who signed it and enforceable by and against the parties to it. However, the same can be set aside where it is proved that it was entered into without sufficient facts, or misapprehension, or in ignorance of material facts, or if it was actuated by illegality, collusion, fraud, mistake or in contravention of court policy. **See case of Attorney General and Anor vs. James Mark Kamoga (SCCA No. 8 of 2004).**

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The Applicants invited court to set aside the consent judgement in HCCS No. 279 of 2013 for many reasons which included;

- a) That there was an illegality and fraud on the face of the record.
- b)** That the 2nd and 3rd Respondents who were party to the said consent judgment had admitted to its being set aside and that since 2 out of the 3 parties who executed the consent judgment had opted to set it aside, the court would be left with no option but to set it aside;
- c) The consent judgement was tainted with illegalities since it was signed by only some of the parties, yet it purported to bind late Christopher Kabenge who was not a party to the case and the 2nd and 3rd defendants did not sign on the consent judgment.
- d) The consent judgement purports to grant legal rights and powers to parties in HCCS No.279 of 2013 to deal with land comprised in Kibuga Block 21 plots 296 and 297 at Busega, to which they are not registered proprietors.
- e) The consent judgement purported to affect rights of 3rd parties who were not parties to the case
- f) The late Christopher Kabenge died testate and Applicants who are the executors to his estate have already distributed the suit property in accordance with the will.
- g) The Respondents colluded to deprive the late Christopher Kabenge of his property since he was not party to the suit and yet the property was registered in his names.

The 2nd and 3rd Respondent did not oppose this application and their submissions were in support of the same. They emphasized inter alia



that the consent judgment should be set aside since it was tainted with illegalities, some of the parties did not sign it and it tended to bind persons who were not parties to the case and that it was approved by one Christopher Kabenge who was not party to the case. That late Christopher Kabenge was merely called off the street to witness this consent. They both conceded that it should be set aside. The 1st Respondent however maintained that the said consent judgement was rightfully entered and should not be set aside. That this was a family dispute and the trial judge opted to mediate and promote reconciliation among the family members. It was for that reason that he invited late Christopher Kabenge, the father of the parties and the registered proprietor of the land to be part of the mediation process. As a result of the said mediation a consent was executed. The said judgment was partially executed during the life time of late Christopher Kabenge, who never challenged this judgement at all during his life time.

Resolution

I shall consider each of the grounds alleged by the Applicants separately.

a) Fraud and collusion

The applicants together with the 2nd and 3rd Respondents maintained that the consent judgment should be set aside because it was tainted with fraud.

It is a well-established principle that a consent judgement may be set aside for fraud. This was the decision of court in the cases of ***Muhammed Allibhai Vs. W.E. Bukenya Mukasa and Departed***




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Asians Property Custodian Board SCCA56 of 1996 and Brooke Bond and Liebig (T) Ltd. Malya 1975 EA.

However, fraud must be specifically pleaded and proved. In the case of ***J.W. Kazoora Vs. Rukuba Civil Appeal No. 13/1992***, the court held that allegations of fraud need to be fully and carefully inquired into. That fraud is a serious matter that must be specifically pleaded and proved. The degree of proof required is one of strict proof but not amounting to one beyond reasonable doubt. It must however be more than a mere balance of probabilities.

In the case of ***Hon. Justice. Prof. Dr. Geroge W. Kanyeihamba vs The Commissioner Land Registration & Richardson Musinguzi HCMC 79/2011***, it was held that allegations of fraud require full and careful inquiry where witnesses can be cross examined and this would appropriately be through an ordinary suit rather than by notice of motion where evidence is mainly through affidavit evidence. I have no reason to depart from the above mentioned decisions of court and only wish to emphasize that the proper procedure to prove fraud should be by ordinary suit and not by Notice of motion.

Therefore, whereas fraud is a valid ground for setting aside a consent judgement, the procedure for proving fraud should be by way of ordinary suit and not by Notice of motion. Since the issues of fraud alleged by the applicants in the instant application have not been specifically pleaded and proved the said consent judgment can't be set aside on that allegation.


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b) Admission by 2nd and 3rd Respondents.

The Applicants maintained that the application should be allowed on the basis of admission by 2nd and 3rd Respondent. That since the 2nd and 3rd Respondents had admitted to material facts in the application the court should enter judgement on admission. And secondly that since two out of the three parties who signed the consent judgement had admitted that it was improper, the court would be left with no option but to disregard the 1st Respondent and allow the application.

It is true that when a party makes an admission, the court should enter judgement on admission. However, in the instant application one of the parties (the 1st Respondent) did not make any admission. A court of law does not base its decisions on votes where majority takes the day. It bases its decision on law and evidence. And for this reason the court must also carefully study and consider the reasons advanced by the 1st Respondent in objecting to the instant application. The consent judgment cannot therefore be set aside simply because some of the parties have admitted that it be set aside.

c) *Illegalities*

The Applicants claimed that the consent judgement was tainted with illegalities as follows:

- i) it was signed by only some of the parties;
- ii) it purported to bind late Christopher Kabenge who was not a party to the case; and
- iii) it purported to grant legal rights and powers to parties in HCCS No.279 of 2013 to deal with land comprised in



Kibuga Block 21 plots 296 and 297 at Busega, to which they are not registered proprietors.

Whereas it is true that the 2nd and 3rd defendants in HCCS No. 279/2013 did not sign on the consent judgment, these two parties are not complaining and have not come up to challenge the said judgment. On the contrary it is parties who signed the consent judgment that have come up to challenge it nine years later! Since the parties who did not sign are not disputing the judgment, this ground cannot be a basis for setting aside the said consent judgment.

The Applicants also claimed that the consent judgment purported to bind late Christopher Kabenge who was not a party to the case. While this fact is also true, Late Christopher Kabenge signed on the consent Judgment in 2013 and died in 2019, six years later. There is nothing on record to show that he ever contested or challenged the same during his life time. Since the late Christopher Kabenge did not challenge the said consent judgement during his life time, his legal representatives should not be seen to be challenging it nine years later. There is nothing on the record to show that there was any misrepresentation of facts before the consent judgement was made.

The Applicants also claimed that the consent judgment purported to grant legal right and powers to parties in HCCS No.279 of 2013 to deal with land comprised in Kibuga Block 21 plots 296 and 297 at Busega , to which they are not registered proprietors and that it


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bound persons who are not parties to the case. I note that at the time of mediation, it was clear that the parties in the case were not the registered proprietors of the suit land. The mediating Judge in his wisdom brought registered proprietor on board to guard against future conflicts as the one before court and to bring the case to a legal and logical conclusion. During mediation, the mediator is allowed to involve as many persons as he or she deems fit for the ends of justice to be met. There was nothing wrong with the mediator bringing the late Christopher Kabenge who was the registered proprietor on board. Persons who are not parties can benefit from a judgment and a judgment cannot be set aside simply because it benefits or binds persons who are not parties to the case.

The Applicants further claimed that the late Christopher Kabenge died testate and Applicants who are the executors to his estate have already distributed the suit property in accordance with the will. I must also note that the late Christopher dealt with the property mentioned in the consent judgment during his life time, at the time he got involved in the dispute in HCCS. No.279 of 2013 and a consent judgment was entered. That being the case any clauses of the will concerning the said property which was already dealt with in the consent judgment are void and unenforceable.

It was also alleged that the Respondents colluded to deprive the late Christopher Kabenge of his property since he was not party to the

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suit and yet the property was registered in his names. I have not seen any evidence on record to support this particular fact.

I must note that it is true the subject matter in HCCS. No. 279 of 2013 was land comprised in Kibuga Block 21 plots 296 and 297 at Busega. which was registered in the names of late Christopher Kabenge. Christopher Kabenge was not party to the case but his children were litigating over the same. When the matter went for mediation the mediating judge in his wisdom opted to bring late Chrsitopher Kabenge on board in order to reconcile the parties. There is nothing on record to show that late Christopher Kabenge was coerced to be part of the mediation process. He had the option of not participating in the process. Indeed, if he had refused to participate in the mediation, the judge would not have forced him.

There is equally nothing to show that Christopher Kabenge was merely picked off the street to sign the judgment as alleged by the 2nd and 3rd Respondent. The Judge was merely guarding against eventualities like the current one, where the Registered proprietor would eventually challenge the process. The parties involved should respect the agreement /judgement that they voluntarily and willingly made with the involvement of, and in the presence of their late father.

The consent judgment was signed way back in 2013. Christopher Kabenge died in 2019. He did not challenge the said judgment much as he knew about its existence. Instead he enforced some of the clauses in the judgement and by the time of his death, late

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Christopher Kabenge had partially dealt with his property in accordance with the terms set in the consent judgement.

It was therefore erroneous for him to deal with the same properties again in his will because by the time of his death, he had already dealt with them.

It is also surprising that parties who were part of the mediation process (2nd and 3rd Respondents) eventually turned around to say that the process was unlawful, worse still, after their father was long dead. It is equally surprising and perturbing that 2nd and 3rd Respondents initiated a suit well knowing it was bad in law as they claim, then engaged court into a lengthy mediation process, which prompted the judge to bring their father on board so that it is within the law, and then 9 years later turn around to say that the entire exercise was tainted with fraud and that the consent judgement should be should be set aside. Their conduct is tantamount to an abuse of court process.

I have not found any grounds to set aside the consent judgment. I find that the same was properly made by the parties and late Christopher Kabenge was only brought on board to bring the matter to its logical and legal conclusion.

Issue 3

What are the remedies available?

Having found as above, this application hereby fails and the same is accordingly dismissed with costs to the 1st Respondent.

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Dated at Kampala this16th..... day ofDecember..... 2022


HON. LADY JUSTICE FLAVIA NASSUNA MATOVU.