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4. TOM MUYOMBA

..RESPONDENTS

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- a. That the applicant obtained judgment in his favour on the 5th day of October 2019.

- b. That the respondents filed an application for stay of execution vide Miscellaneous Application No. 153 of 2019.
- c. That the applicant's former lawyer Ms. Jacqueline Seguya without consent of the applicant entered into a consent with the respondent's lawyer and filed it in court for the registrar's endorsement.
- d. That the best interests of natural and substantive justice dictate that the administration of justice will be best served with the grant of the orders sought to meet the ends of justice.

The application was opposed by an affidavit in reply sworn by Phinehas Ssendendo and the pertinent paragraphs are reproduced below;

3. That I am informed by the respondents' above said advocates, that they never connived with the applicant's former lawyers M/s Jacqueline Seguya & Co. Advocates, but that what was done was in good faith to safeguard the rights of appeal and more so, since the applicant had taken, and was in possession of the suit/disputed land.
4. That I have subsequently learnt that the applicant proceeded to the land office/registry with the decree and his name was entered as proprietor on the register book, which means the decree was partly executed.
5. That the consent order which was secured was later registered/entered on the register book to restrain further subdivision of the suit land which was one of the orders in the decree.
6. That the appeal has since been filed and served upon the applicant's counsel and is pending hearing, and the restraint in the consent orders only protects that status quo to safe guard the rights of appeal.
7. That at the time Miscellaneous Application No. 153/2019 was filed, the resident judge of this court was indisposed, which position persisted for some time, the application could not be fixed for hearing before him and the deputy registrar managed the file/case by endorsing the consent order to safe guard the respondents' right of appeal.
9. That I am further informed by the same respondents' Advocates that this application is incompetent and offends Rules of procedure.
10. That in the interest of Justice and equity, natural justice, or otherwise the consent order ought not be disturbed as it protects the status quo pending the

appeal, more so, since the land is now in the name of the applicant, and in his possession, he will not be grossly prejudiced as opposed to the 1st respondent.

It was brought to the attention of this court that the 3rd respondent passed on before the main suit was determined. The 4th respondent did not file an affidavit in reply because he has no interest in the matter. This leaves only the 1st respondent and 2nd respondent who is the Chairperson of the 1st respondent.

Representation:

At the hearing of the application the applicant was represented by M/s Buwembo and Co. Advocates whereas the respondents were represented by Sseguya & Co. Legal Consultants. Both sides filed written submissions.

Submissions:

Preliminary objection:

The 1st respondent raised a preliminary objection to the effect that the application was incompetent for having been served out of time and without obtaining leave of court. That this offends the rules of procedure.

Counsel for the 1st respondent argued that the Notice of Motion was signed and sealed by Court on the 8th September 2020 and was served on the respondents on 16/10/2020. That this was 45 days after it had been issued, yet it was meant to be served within 21 days from the date of issue or alternatively upon obtaining leave of court extending time within which to serve. That in the circumstances the application is incompetent and offends **Order 5 Rule 2(1)** of the Civil Procedure Rules and ought to be dismissed. Counsel quoted the case of **Fredrick James Jjunju and Another v. Madhvani Group Limited and Another, Miscellaneous Application No. 688 of 2015**, where it was held that;

"The application whether by Chamber Summons, Notice of Motion, and/or hearing Notices are by law to be served following the manner of procedure adopted for service of Summons under Order 5 Rule 1(2) of the Civil Procedure Rules and the only remedy available to the applicant where the 21 days have elapsed is to invoke the provisions of Order 5 Rule 1(2) of the Civil Procedure Rule, to apply for extension of time within 15 days of the initial stipulation for service if the applicant chooses not to exercise that option, then he/she inevitably locks himself/herself. Service of the application outside the stipulated time

prescribed by law for such service without applying for court extension renders the application incompetent.”

It was submitted for the applicant in rejoinder that the time the application was served and signed was a time when there were lock down restrictions due to the Covid – 19 pandemic after the applicant had been called by Court staff to come and pick the application for service. That the application itself was filed on the 26th day of November 2019. Counsel relied on the case of **Nabanjala v. Nabukalu, Miscellaneous Application No. 250 of 2015** where court held that;

“In the given premises, it is clear that the applicant’s failure to serve the respondent within the time stipulated time under Order 5 Rule 1(2) of the Civil Procedure Rules was not of her making. In my opinion Order 5 rule 1(2) of the Civil Procedure Rules and all the cases cited by the respondent’s counsel would not be appropriate in the circumstances of this case where the file got misplaced and where the hearing date of the application was fixed long after the same had been signed and sealed by the Registrar of court. The omissions of court should not be visited on the litigant.”

I have carefully read the submissions of both parties on the preliminary objection, the law and authorities cited there under. I wish to note that whereas Counsel submitted that the application was incompetent and offended **Order 5 Rule 2(1)** of the Civil Procedure Rules and ought to be dismissed the correct order is **Order 5 Rule 1(2)** of the Civil Procedure Rules.

Upon perusal of the application and the submissions of both parties, I find that the application is premised on challenging an illegality. For this reason I will not delve into discussing the preliminary objection and my basis is on the holding in the case of **Makula International Limited v. His Eminence Cardinal Nsubuga and Another, Civil Appeal No.4 of 1981**, where it was held that;

“A court of law cannot sanction that which is illegal. As Donaldson, J. pointed out in Belvoir Finance Co. Ltd v. Harold G. Cole Ltd [1969] 2 ALLER 904 at 908, illegality, once brought to the attention of the court, overrides all questions of pleading, including any admission made thereon.”

It is also in the interest of justice that the merits of this application be dealt with. It is trite that that rules of procedure are intended to serve as the hand-maidens

of justice, not to defeat it. (See: **Iron and Steel Wares Limited v. C. W. Martyr and Company (1956) 23 E.A.C.A 175 at 177**).

I accordingly overrule this Preliminary objection and proceed with the merits of the application.

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Merits of the application:

It was argued for the applicant that he only authorized M/s Seguya Jacqueline & Co. Advocates to handle the main Civil Suit and not any subsequent matters. Therefore, they had no authority to enter any consent on behalf of the applicant without his knowledge. Counsel relied on **Regulation 2(1)** of the Advocates (Professional Conduct) Regulations to support his argument which provides that;

"No advocate shall act for any person unless he/she has received instructions from that person or his or her authorized agent."

And the case of **Okodi & Another v. Okello, Civil Suit No. 79 of 2016**, where court stated that; no advocate should act unless she/he has instructions.

Counsel for the 1st respondent on the other hand submitted that at the time the consent was entered M/s Jacqueline Seguya & Co. Advocates were counsel for the applicant and were still on record. And they did receive the application; if at all they no longer had instructions then they would have declined service. That the only contention is the fact that the applicant did not consent to the consent order which was not stated in the affidavit but rather in the submissions.

Counsel added that the consent was entered in good faith to safeguard the respondent's right to appeal since there was a vacuum in the court as there was no judicial officer to entertain the application for stay of execution. That the counsel were compelled to enter into a consent to effectively manage the application and there was no connivance.

It was further submitted for the 1st respondent that the change of Advocates was filed much later after the application had been served and received by M/s Jacqueline Seguya & Co. Advocates. That condemning the respondent and vitiating the consent order would cause an injustice to the 1st respondent.

Further, counsel cited **Order 3 Rule 1** of the Civil Procedure Rules and the case of **Electromax Uganda Ltd v. Oryx Oil Uganda Limited** which stated that counsel for

a party is allowed to act on behalf of that party. He also cited the case of **The Registered Trustees of Benedictine Fathers v. Hussein Hassan & Advocates (1997) III KALR 61** where it was held that;

5 *“Where a party instructs counsel to represent him in an action, counsel continues to act on behalf of his client without requiring fresh authority for every step. Therefore, the applicant’s counsel was entitled to compromise on behalf of his client, and the appellant was bound thereto”.*

10 Counsel concluded that in line with the above authority, M/s Jacqueline Seguya & Co. Advocates had instruction in HCCS No. 79 of 2016 and Miscellaneous Application No. 153 of 2019 which arose there under, and therefore had the authority to take the step they took to manage Miscellaneous Application No. 153 of 2019.

15 It was submitted by the applicant in rejoinder that the consent was entered without his consent and in the case of **Anjata Pharma Ltd v. Attorney General and Another (Arbitration Cause 11 of 2011)[2012]**, court stated that Order 3 of the Civil Procedure Rules, gives authority of representation by a recognized agent and advocates are recognized agents of a party to a suit, however, on the authority of the Supreme Court case of Attorney General & Uganda Land
20 Commission versus James Mark Komoga (Supra), ‘the consent must be made in the presence and consent of the parties’. The consent was meant to be entered into in the presence of both parties who have agreed on the terms with the
25 guidance of their advocate and before the trial judge handling the matter.

Analysis of court:

25 I have carefully considered the submissions, law and authorities discussed here under and hereby proceed to resolve the merits of the application.

30 In the instant case Miscellaneous Application No. 0153 of 2019 for stay of execution was not heard on its merits, however, a consent order was entered on the 21st of November 2019 by only the advocates in the absence of the parties. I will reproduce the consent order below;



*"THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MPIGI
MISC APP NO. 153 OF 2019*

(Arising from Mpigi High Court Civil Suit No. 79 of 2019)

- 5 *1. THE REGISTERED TRUSTEES:.....APPLICANTS
OF THE REDEEMED CHURCH OF CHRIST*
- 2. SSENGENDO PHINEHAS*
- 3. APOLLO MUGERWA*
- 4. TOM MUYOMBA*

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VERSUS

ZIIKWA DARLINGTON:.....RESPONDENT

CONSENT ORDER

*Upon consent of Counsel SSEGUYA SAMUEL for the applicants and Counsel
JACQUELINE SEGUYA for the respondent. It is hereby ordered that:-*

- 15 *1. The order doth issue staying execution of the decision, judgment and/or
Decree in Mpigi High Court Civil Suit No. 79 of 2016, (by which
cancellation of the Certificates of Title for Gomba Block 310 Plots 24 and
25 Mpogo was ordered) pending the determination of the intended appeal
there from.*
- 20 *2. That in the event the appeal is not filed within the prescribed time then this
order shall lapse.*
- 3. That each party bears own costs in this application.*

We CONSENT

25 *SSEGUYA & CO. ADVOCATES*

.....
JACQUELINE SEGUYA & CO.

ADVOCATES

For Applicants

For Respondent



Dated and Sealed under my hand this 21 day of 11 2019.

.....
DEPUTY REGISTRAR

EXTRACTED BY

5 *M/S SSEGUYA & CO. ADVOCATES*

PLOT 3 WILLIAM STREET

P.O.BOX 781

KAMPALA."

10 The consent order as quoted above is illegal it should have been made by the parties and witnessed by the advocates then endorsed by a judicial officer and not advocates consenting as though the case is theirs without the input of the parties. A consent will not be binding if the parties are not agreeable to the same.

15 The consent in the instant case was entered by the advocates in the absence of the parties and at a time when the applicant had changed advocates as is evidenced by the Notice of Change of Advocates dated 5th November 2019. The respondents were well aware that the applicant had changed advocates when he filed his affidavit in reply. Merely serving Miscellaneous Application No. 153 of 2019 on the applicant's former lawyers who acknowledged receipt does not mean they had the authority to enter a consent on his behalf more especially after he had
20 changed advocates.

A notice of change of Advocates was filed on the 5th of November 2019 way before the consent order was entered into by the advocates. And that was on the same day the applicant filed his affidavit in reply drawn by M/s Buwembo and Co. Advocates to the Respondents' Notice of Motion filed on the 11th of October
25 2019. If indeed M/s Jacqueline Seguya & Co. Advocates had instructions to handle Miscellaneous Application No. 153 of 2019 why then did the firm not file the affidavit in reply but rather another law firm did so? It is a clear indication that there was connivance on the part of the advocates who went ahead to sign the consent order with the parties being present not to mention without the
30 consent of the applicant. The case of **The Registered Trustees of Benedictine Fathers v. Hussein Hassan & Advocates (Supra)** as relied on by the 1st respondent is distinguishable from the instant case where the applicant had engaged other

advocates to represent him. M/s Jacqueline Seguya & Co. Advocates therefore acted without the consent of the applicant.

On court record is also a letter written by the applicant's advocates M/s Buwembo & Company Advocates addressed to the Registrar, High Court of Uganda at Mpigi requesting court not to endorse the said consent order which letter is dated 6th November 2019.

The Deputy registrar however, advised the parties to file a formal application to set aside the consent and went ahead and signed the consent order on 21/11/2019.

The law is now settled on the conditions for reviewing and or setting aside a Consent Judgment and in the case of **Hirani v. Kassam (1952) 19 EACA 131**, the following passage from Seton of Judgments & Orders, 7th Edition. Vol. 1 p. 124 was adopted and approved;

"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 an 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."

Also in the case of **Geoffrey Opio v. Felix Obote and 2 Others, M.A No.s 0081 and 0082 of 2018** consolidated, it was stated that;

"It is a well settled principle that parties to a Civil Suit are free to consent to a judgment. They may do so orally before a judge who then records the consent or they may do so in writing and affix their signatures on the consent. In that case still the Court has to sign that judgment. Any judgment unless set aside is binding on the parties. A consent judgment has to be upheld unless it is vitiated by the fact that if it was entered into without sufficient material facts or in misapprehension or in ignorance of material facts, or it was actuated by illegality, fraud, mistake, contravention of court policy or any reason which would enable the Court to set aside an agreement (see Hirani v. Kassam [1952] EA 131; Attorney General and Uganda Land Commission v. James Mark Kamoga, S.C. Civil Appeal No. 8 of 2004; Brooke Bond Liebig (T) Ltd v. Mallya

[1975] 1 EA 266; Edison Kanyabwera v. Pastori Tumwebaze [2001 – 2005] HCB 98 and Babigumira John and others v. Hoima District Council [2001 – 2005] HCB 116).”

5 As per the authorities cited above a consent judgment can be set aside if it was among other reasons made in connivance or collusion or illegally. The impugned consent order in the instant case was made without the consent of the applicant; there is no evidence on record to show that the parties were present when the consent was being entered into by the advocates. Not to mention that it was entered into on behalf of the applicant by a lawyer who had no consent to do so.
10 The parties’ signatures are not anywhere on the said consent order.

I accordingly find and hold that the consent order in the instant case was illegally entered into through collusion of the advocates. The said consent is hereby set aside with costs to the applicant. I so order.

Right or appeal explained.

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OYUKO ANTHONY OJOK

JUDGE

14/3/2022