THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(LAND DIVISION)

MISCELLANEOUS APPLICATION NO.1642 OF 2022

(Arising from Civil Suit No883 of 2016)

REHEMA TURYAKIRA OMAR::APPLICANT

VERSUS

1. **FLORENCE KIRYA**
2. **KAMPALA CAPITAL CITY AUTHORITY**
3. **KAMPALA DISTRICT LAND BOARD**
4. **COMMISSIONER LAND REGSITRATION**
5. **BYOLEKO EPAPHARODITUS::RESPONDENTS**

Before: Lady Justice Alexandra Nkonge Rugadya.

Ruling.

Introduction:

This application brought by way of notice of motion under the provisions of ***Articles 28 & 44 of the Constitution of the Republic of Uganda (as amended), Section 98 of the Civil Procedure Act cap.71, and Order 9 rule 27 of the Civil Procedure Rules SI 71-1*** seeks orders that the consent judgement in ***Civil Suit No.883 of 2016*** be set aside, and the same be reinstated. It also seeks that costs of the application be provided for.

Grounds of the application:

The grounds upon which the application is premised are contained in the affidavit in support of ***Ms. Rehema Turyakira Omar*** wherein she stated *inter alia* that on 7th May, 2018, she entered into a consent judgment with the 1st respondent in respect of granting an access road to her property comprised in ***LRV KCCA 181 F 8 Plot 2E Commercial Lane*** *(hereinafter referred to as the 'suit land')*, and that upon execution of the said consent, the applicant's lawyers ***M/s Katarikawe & Co. Advocates*** extracted a certified copy of the judgement which was lodged with the office of the Commissioner Land Registration, for purposes of having the same executed.

That on 13th June, 2022, the applicant received a letter from the office of the Principal Planner of the Kampala Land Zonal office not only rejecting the implementation of the said order under ***Section 173 of the Registration of Titles Act,*** but also referring her back to this court for guidance based on the recommendation of KCCA as the controlling authority and that upon receipt of the same, the applicant was advised by her current lawyers ***M/s Crest Law Advocates*** to seek a guidance from the office of the Commissioner Land Registration.

That upon presentation of her matter before the acting Commissioner Land Registration, the applicant was informed that there was an error with the titling of her plot because the access to her property was meant to be from Ntinda II road, off ***plot 32A*** which belongs to the 5th defendant which had to be corrected through an amendment of the Register under the ***Land Act,*** and a letter in respect to the implementation of the consent judgment was issued.

That on 22nd June, 2022, the applicant received a letter signed by Mr. Bigiira Johnson from the 4th respondent summoning her as well as the 5th respondent for a hearing in respect of the matter scheduled for 5th July, 2022.

On the said date, the applicant did enter appearance together with her advocates but they were informed that the hearing could not proceed since neither the 5th defendant nor his representatives were present. That on 12th July, 2022 the applicant received another letter inviting her, the 5th respondent and other Ministry officials for another hearing scheduled for the 21st July, 2022 but the same did not also proceed owing to the fact that neither the 5th respondent nor his representatives complied with the summons.

That following a report addressed to the Permanent Secretary of the Ministry of Lands dated 12th September 2022, it was proposed that the applicant seeks redress from this court, with the support and cooperation of the Land Office, and that based on the advice of her lawyers, it is the applicant's belief that once court issues a consent judgment, like the one in issue, it is only court which has the power to set aside any such proceedings and the resultant judgment.

In addition, that courts are mandated to investigate the core nature of disputes, lapses, errors, and defects, should any be found and that the same should not be a bar to negate the applicant's rights in her pursuit of her constitutional right to her property, therefore, not only just, and equitable, but it is also fair that this application should be granted since the consent judgement obtained in the head suit is defective.

Reply by the 1st respondent:

The 1st respondent objected to the application on grounds that the same is not only incompetent, frivolous, vexatious and incurably defective, but also merits no consideration by this court and ought to be dismissed with costs owing to the fact that she has never

entered any consent judgement with the applicant in ***Civil Suit No.883 of 2022*** which is being sought to be set asid, as no such suit was ever filed in this court by the applicant.

That applicant's affidavit makes mention of a different ***Civil Suit No.883 of 2018*** which has never existed between them thus no such consent judgement has ever been entered in the said suit therefore the application is incurably defective I so far as it seeks to set aside a consent judgment in ***Civil Suit No.883 of 2022*** as well as ***Civil Suit No.883 of 2018*** which is mentioned in the affidavit in support, both of which are non-existent and that the only known suit between the applicant and the 1st respondent wherein a consent judgment was reached was ***Civil Suit No.883 of 2016*** which also involved the other respondents.

That the consent judgement in ***Civil Suit No.883 of 2016*** was not only properly but also legally entered between the applicant and the 1st respondent and immediately after the same was endorsed by this court on 7th May, 2018, the applicant embarked on implementing the same and the status quo on ground was fundamentally altered as the shape of the 1st respondent's plot was significantly altered as well so as to give effect to the clauses 1 & 2 of the consent judgment.

That the 1st respondent continued constructing a retaining wall as well as design the compound with stone pitching, well knowing that the dispute between the two had been put to rest by the consent judgement and that the 1st respondent has in addition to paving her compound gone ahead to construct a gate on the suit land in execution of the consent judgement, all of which have cost her a lot of money. That should this application be granted, the 1st respondent stands to suffer serious damages, inconveniences and other costs which should be attributed to the applicant.

Additionally, that while effecting the consent judgment led to fundamental altering of the status quo on ground, the 2nd respondents' advice that the access road to the applicant's land is Ntinda 11 road whose adjacent plot is owned by the 5th respondent should have no bearing on the 1st respondent who is peacefully enjoying property in its current state and that the current consent judgment between the applicant and the respondent does not stop the applicant from pursuing the access road from the 5th respondent who is the owner of the said plot.

Further, the 1st respondent opposes the application and that unless this court orders that the applicant bears the costs and damages so far incurred, and those yet to be incurred in reinstating the suit land to its original position before the consent was entered including but not limited to demolishing and rebuilding the retaining wall, with its designed stone pitching, main gate and the pavement of the affected area on the ground, considering the fact that while the 1st respondent has already incurred over ***Ugx. 50,000,000/= (fifty million shillings)*** putting in place the above developments effecting the said consent judgment, she would be required to spend at least ***Ugx. 64,441,418/= (Sixty-four million four hundred***

forty-one thousand four hundred eighteen shillings) to demolish all the developments and rebuilding of the developments within the original boundaries before the consent judgment.

That the 1st respondent stands to suffer injustice, inconvenience, and damages if this application is unconditionally granted to the applicant without due regard to the current status quo on ground, six years from the date of the consent judgment.

Therefore it is only just and fair that if the applicant wishes to set aside the same, this court should be inclined to order her to meet all the costs and damages amounting to ***Ugx. 114.441.418/= (One hundred fourteen million four hundred forty-one thousand four hundred eighteen shillings only).***

Reply by the 2nd respondent:

The 2nd respondent on its part opposed the application through the affidavit in reply deponed by **Mr. Benson Kwikiriza** who states that the application is incompetent and an abuse of court process owing to the fact that while the 2nd respondent was not party to the said consent, there are also no valid grounds provided to set aside the consent judgment.

That the 2nd respondent was not party to the consent judgement signed between the applicant and the 1st respondent together with their advocates in the presence of the learned Registrar on 7th May 2018 and that setting aside the consent judgment and reinstating the suit will disadvantage the 2nd respondent who will be subjected to unnecessarily lengthy court process as well as litigation costs.

In addition, that the applicant has inordinately delayed for over 4 years therefore it is in the interest of justice that this court dismisses the instant application with costs.

The 3rd, 4th and 5th respondents did not oppose the application despite the fact that they were effectively served with court process as per the affidavits of service on record.

Representation:

The applicant was represented by ***M/s Crested Law Advocates*** while the 1st respondent was represented by ***MACB Advocates,*** and the 2nd respondent was represented by the ***Directorate of Legal Affairs of Kampala Capital City Authority.*** Counsel filed written submissions in support of their respective clients' cases as directed by this court.

Decision of court.

I have had the benefit of perusing the consent judgement which is the basis of this matter, the pleadings, evidence and the submissions of counsel, the details of which are on court record, which I have taken into account to determine whether or not the application merits the prayers sought.

The first issue for consideration is whether the application has merits for review and or setting aside. The remedy of review is provided under ***section 82 of the Civil Procedure Act*** which is available to parties aggrieved by a decree or order from which an appeal is allowed.

It is settled that a consent judgment once endorsed by the court, becomes a judgment, binding on all the parties who are estopped from asserting different positions from the stipulated agreement, and any such 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. ***Refer to: Attorney General & Anor Vs James Mark Kamoga &another SC CA No. 8 of 2004 Mulenga JSC***

The Supreme Court has laid down grounds upon which a consent order can be reviewed and they include proving that the order was made through fraud, collusion, duress, or any other sufficient reason which would enable the court set aside a consent judgment.

Such sufficient reason might include misapprehension of material facts relating to the consent judgment or circumstances which would enable court vitiate a contract. ***(see Mohamed Alibhai v W.E. Bukenya Mukasa & Anor [1996] UGSC 2, Attorney General and Another v James Mark Kamoga and Another Civil Appeal No.8 of 2004)***

In the case of ***Hirani v Kassam [1952] EA 131***, in which court approved and adopted the following passage from ***Seton on Judgments and Orders, 7th Ed., Vol. 1 p. 124*** stated that;

> ***"Prima facie, any order made in the presence and with consent of counsel is binding on all parties to the proceedings or action, 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 the 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 a court to set aside an agreement."***

In the instant case, the applicant seeks to have the consent in ***Civil Suit No.888 of 2016*** reviewed and set aside on grounds that there was a mistake and/or misapprehension of the material facts relating thereto.

It is not in dispute that the applicant and the 1st respondent entered into a consent judgment for the grant of an access road to the suit property comprised in ***LRV KCCA 181 F 8 Plot 2E Commercial Lane*** vide ***Civil Suit 888 of 2016.*** A copy of the said consent agreement is attached to the affidavit in support of the application and marked ***Annexure 'A1'.***

According to the consent judgment, both parties thereto were to both lose and gain equal acreage in the following terms;

a. ***That 3.2m width by length of 17.2m to be cut from Plots 2A-2B Commercial Lane Naguru which is equivalent to 0.014 acres;***

b. ***That 2.2m width by length 26.1m to be cut off from plot 2B Commercial Lane Naguru which is equivalent to 0.014 acres.***

The plaintiff, who is the applicant in the instant case was then required to erect a permanent block boundary wall to separate the land from that of the 1st defendant, and both parties to the judgment were to hand over their respective certificates of title to their surveyors for purposes of rectification and effecting the changes laid out in the agreement. The plaintiff also agreed to withdraw the suit against the 1st respondent herein.

The applicant by affidavit evidence avers that she was informed that there was an error with the titling of her property and that the access to the same was meant to be from Ntinda II Road off plot 32A, which belongs to the 5th respondent, and that the same had to be corrected through an amendment of the Register under the provisions of the Land Act and the RTA.

Samwiri Mussa versus Rose Achen (1978) HCB 297, is to the effect that where facts are sworn to in an affidavit and they are not denied by the opposite party; the presumption is that they are accepted.

It is evident from the above assertions that the consent judgment was premised on a mistake of facts, which the parties thereto believed to exist whereas not.

A common mistake is where both parties hold the same mistaken belief of the facts. The House of Lords case of ***Bell Vs Lever Brothers Ltd [1932] ac 161*** held that common mistake can void a contract only if the mistake of the subject matter was sufficiently fundamental to render its identity different from what was contracted, making the performance of the contract impossible. This position was adopted in our ***section 17 of the Contracts Act 2010*** wherein it was enacted that;

> ***"17. Mistake of fact***
>
> ***Where both parties to an agreement are under a mistake as to a matter of fact which is essential to the agreement, consent is obtained by mistake of fact and the agreement is void."***

It apparent from the record that the consent judgement executed between the applicant and the 1st respondent was clearly premised on a mistaken identification and description of the applicant's access road. The orders were nevertheless executed and it would not only be prejudicial to the 1st respondent who, relying on that order proceeded to ensure its execution.

It is of note that the whole purpose of executing the consent judgment was to ensure that the applicant obtained an access road to her land based on the physical plans of the city authorities.

The applicant however took her time to file this application. Had it been filed in time, ***section 17*** would have been applicable and the 1st respondent would not have expended such huge sums of money to have the order executed.

To that extent therefore, the applicant against whom the doctrine of laches applies is prevented from claiming as an aggrieved party in respect of a consent that she freely consented to, albeit in error.

The fact that the said objective may not have been fully achieved cannot support the review, more so since a reversal thereof would substantially affect the rights and interests of a complying party, against whom the suit had been withdrawn.

It is also noteworthy that the consent in issue was executed between the applicant and the 1st respondent. The applicant's claims against the 1st respondent therefore stand withdrawn. She remains free however to pursue her perceived rights against the 5th respondent and the rest of the respondents.

As correctly argued by the 2nd respondent, there is no valid claim against it in so far as this application is concerned since it had not been party to the consent.

Accordingly, this application is hereby granted in the following terms:

1. ***The consent judgement in Civil Suit No.888 of 2016 has already been executed by the 1st respondent, based on a valid/lawful and undischarged order;***

2. ***The applicant is free to pursue further action against the 2nd, 3rd, 4th and 5th respondents under the main suit;***

3. ***The 1st respondent is hereby struck off as a defendant in the main suit.***
4. ***The applicant shall meet the costs of the 1st and 2nd respondents.***

I so order.

Delivered via email

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Alexandra Nkonge Rugadya

Judge

14th February, 2023.

14/2/2023