

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(LAND DIVISION)
MISCELLANEOUS APPLICATION NO. 1163 OF 2021
(ARISING FROM CIVIL SUIT NO. 432 OF 2012)**

SOPHIE NALUMU ::::::::::::::::::::::::::::::::::: APPLICANT/ PLAINTIFF

VERSUS

- 1. M/S STANBIC BANK (U) LTD**
- 2. SSENOGA JAMES BULESA**
- 3. GODFREY KALUNGI ::::::::::::::::::::::::::: RESPONDENTS/ DEFENDANTS**

BEFORE: HON. JUSTICE BERNARD NAMANYA

RULING

Introduction:

1. This is an application brought by way of Notice of motion under Article 126 (2) of the Constitution, Section 82 and 98 of the Civil Procedure Act, Order 46 rules 1, 4, 6 and 8 and Order 52 rules 2 & 3 of the Civil Procedure Rules seeking the following orders: i) That the consent judgment in High Court Civil Suit No. 423 of 2012 be set aside; ii) That High Court Civil Suit No. 423 of 2012 be heard on its merits; and iii) That the costs of the application be provided for.
2. The background to the application is that the applicant and the 2nd respondent were legally married by way of a customary marriage celebrated on the 26th day of July 2008. Sometime in the year 2011, the couple acquired property comprised in Kyadondo Block 256, Plots No 5429 and 5430 at Bunamwaya-



Wakiso District (hereinafter “the suit property”), and it was registered in the name of the 2nd respondent. Subsequently, the 2nd respondent obtained a loan facility from the 1st respondent and mortgaged the suit property to the 1st respondent. Sometime in the year 2012, following a default on the loan facility, the 1st respondent advertised the suit property for sale. Upon learning of the intended sale of the suit property, the applicant filed High Court Civil Suit No. 423 of 2012 against the 1st and 2nd respondents challenging the sale, and argued among other things, that the mortgage over the suit property is illegal and void for want of spousal consent. The parties to the suit negotiated and agreed on a consent judgment which was signed by the parties, including by M/s Kyazze & Co. Advocates, on behalf of the applicant, and by the 2nd respondent (husband to the applicant). The consent judgment was endorsed by the court on the 7th day of August 2014. Following the signing of the consent judgment, the 3rd respondent purchased the suit property and a transfer was executed in favour of the 3rd respondent sometime in the year 2015. It is this consent judgment that the applicant now seeks to set aside.

3. The application is supported by two affidavits sworn by ***Sophie Nalumu*** which set out the grounds of the application, including the following:
 - i). That the consent judgment is illegal;
 - ii). That the said consent judgment led to the fraudulent sale and transfer of the suit property to the 3rd respondent; and
 - iii). That the consent judgment was fraudulent since the applicant did not append her signature nor did she authorize her lawyers to execute it.
4. This application is opposed by the 1st respondent through an affidavit in reply, sworn by ***Dezderanta Alinda Ruhweza***, in which she stated the following;



- i). That the parties settled the matter and entered into a consent judgment which resulted into the sale of the suit property to the 3rd respondent; and
 - ii). That since the applicant was out of the country, the applicant duly instructed her lawyers, M/s Kyazze & Co Advocates to execute the consent judgment.
5. This application is also opposed by the 3rd respondent through an affidavit in reply, sworn by ***Kalungi Godfrey***, in which he stated the following;
- i). That the consent judgment gave the 1st respondent the right to sell the suit property, in exercise of its rights as a mortgagee; and
 - ii). That the 3rd respondent executed the sale and purchase agreement, and fully paid a valuable consideration for the suit property, and the same was registered in the 3rd respondent's name.

Representation:

6. At the hearing of the application held on the 1st day of March 2023, the applicant was represented by Mr. Nuwagira Gerald of M/s Nuwagira, Tusiime & Co. Advocates; Mr. Brian Kalule M/s A.F Mpanga Advocates represented the 1st respondent; and Ms. Nakato Stella of M/s Kabayiza, Kavuma, Mugerwa & Ali Advocates represented the 3rd respondent. The parties filed written submissions which I have considered.

Preliminary points of law:

7. Counsel for the applicant raised preliminary objections, firstly that the 1st respondent's affidavit in reply contains falsehoods, lies, unfounded and

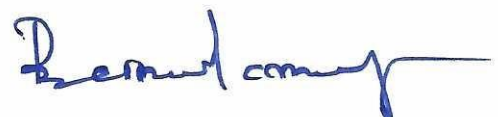


uncorroborated allegations as the applicant has never lived in Denmark as averred by the 1st respondent. Counsel for the applicant also submitted that the retrospective grant of spousal consent is a falsehood and a forgery, and is based on a purported instruction that the applicant never gave.

8. Counsel for the 1st respondent also raised a preliminary point of law to the effect that the application is time barred under section 3(1)(a) of the Limitation Act as it ought to have been brought within 6 years from the 19th May 2014 when the cause of action arose. He argued that the application should have been filed by the 19th May 2020 but was instead filed in June 2021 rendering it time barred.
9. I find no merit in the preliminary objections raised by counsel for the applicant because the validity of the applicant's letter dated 15th May 2014 will be substantially addressed in main issue for determination by this court. The preliminary objection is accordingly overruled.
10. The 1st respondent's preliminary point of law is also overruled since the law of limitation allows the applicant up to 12 years to challenge a judgment of court.

Resolution of the issue:

11. The main issue for determination is whether the consent judgment in HCCS No. 423 of 2012 should be set aside.
12. The legal principles governing the setting aside of a consent judgment are well settled and they were stated in the case of Attorney General & Uganda Land



where the Supreme Court of Uganda held that:

“It is a well settled principle therefore, that a consent decree has to be upheld unless it is vitiated by a reason that would enable a court to set aside an agreement, such as fraud, mistake, misapprehension or contravention of court policy.”

13. The burden is on the applicant to prove the grounds for setting aside the consent judgment as required by *Sections 101, 102, 103 & 106 of the Evidence Act (Cap 6)*, in particular *section 106* which provides that:

“106. Burden of proving, in civil proceedings, fact especially within knowledge

In civil proceedings, when any fact is especially within the knowledge of any person, the burden of proving that fact is upon that person.”

14. In paragraphs 5, 6 and 7 of the affidavit in support of the application sworn on the 14th June 2021, Ms. Sophie Nalumu, the applicant states that:

“5. That [...] I was shocked to learn that a consent judgment had been executed purportedly between the 1st and 2nd Respondents and my lawyers at the time [...]

6. That around the time of executing the impugned consent judgment, I was outside the country in India, Dubai and Turkey but the consent judgment alleges that I gave my consent retrospectively to validate the mortgage and that I approved the execution of the consent judgment in a separate document but this allegation was fraudulent [...]



7. That the purported grant of the alleged retrospective spousal consent to the mortgage and to the alleged settlement of my case was a forgery and I never travelled to Uganda to be able to sign the document and neither did I grant any powers to anybody to sign on my behalf.”

15. In paragraphs 5 and 6 of the affidavit in rejoinder to the 1st respondent sworn on the 18th October 2022, Ms. Sophie Nalumu, the applicant states that:

“5. That [I] confirm that the purported instructions are a forgery intended to defeat my interest in the suit land as I have never been to Denmark as the headed paper purports to be from the same country.

6. That [I] confirm that the same was a forgery and [...] the said instruction and/or spousal consent was unlawful, illegal and does not amount to a power of attorney that conferred any power onto anybody to handle my case in the manner that they did without my knowledge.”

16. The letter that the applicant alleges to be forged is attached as Annexure “C” to the 1st respondent’s affidavit in reply sworn by Dezderenta Alinda Ruhweza. The letter is dated the 15th day of May 2014 and is addressed to the applicant’s then lawyers, M/s Kyazze & Co Advocates. The letter is reproduced below since it is at the heart of whether the applicant’s then lawyers were authorized by the applicant to enter into the impugned consent judgment:

“ERICSSON DANMARK A/S

Arne Jacobsens Alle 17 Kobenhavn – 2300 Denmark

Email: sophienalumu@gmail.com



*M/s Kyazze & Co. Advocates
Mezzanine Floor Jumbo Plaza
Plot 2 Parliament Avenue
P.O. Box 3064
Kampala*

15th May 2014

Attn: Mr. Joseph Kyazze

Dear Sir,

*RE: CIVIL SUIT NO. 423 OF 2012 SOPHIE NALUMU VERSUS M/S
STANBIC BANK (U) LTD AND SSENOGA JAMES BULESA*

Refer to the above mentioned suit and the various communications we have had about the terms of the settlement of the case with the Bank. I have also shared the same with my husband Mr. Ssennoga, who equally agrees with the position of disposing off the property within ninety (90) days.

I have fully appreciated the terms and the legal consequences of the consent. However, since I am currently not in the country, it is not possible for me to sign all the documents in person.

This is therefore to instruct you to go ahead and sign the consent on my behalf in the terms contained in the draft consent, subject to



changes, which you emailed to me. I will fly back to the country to handle other necessary documents myself for the transaction.

I by this letter will duly and unconditionally grant the required spousal consent to mortgaging our matrimonial home and I agree that my consent operates retrospectively to immediately before creation of the mortgage subject to the terms of the consent judgment and further grant consent to the sale of the suit property in the terms set out in the consent judgment.

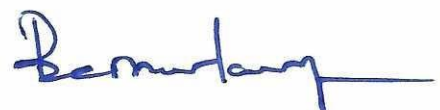
Thank you for your efforts. Please email me a copy of the signed and endorsed consent when you have concluded this.

Yours faithfully,

Signed

SOPHIE NALUMU"

17. The applicant alleges that above letter is forged but the law of evidence, as I have already stated above, places the burden of proof upon the applicant to adduce evidence to prove that the letter is forged. Other than the statements in the affidavits in support of the application alleging that the letter is forged, the applicant has not adduced any other evidence. I am not satisfied that affidavit evidence proves that the letter is forged. The letter bears the signature of Ms. Sophie Nalumu, the applicant. It was incumbent upon the applicant to adduce evidence of a handwriting expert to prove that the signature that appears in the letter is not hers. Such evidence was not adduced.


A handwritten signature in blue ink, appearing to read 'Bernard', with a long horizontal line extending to the right.

18. In the premises, it is my finding that the applicant's then lawyers, M/s Kyazze & Co. Advocates were duly instructed and authorized by the applicant to enter into the impugned consent judgment. Although it is a practice of the courts to require parties to personally append signatures in addition that of their lawyers, the circumstances under which the applicant did not sign the impugned consent judgment is sufficiently explained by the applicant's absence from Uganda. By her sworn affidavits, the applicant confirms that she was indeed outside the country at the material time (see for instance paragraph 6 of the applicant's affidavit sworn on the 14th of June 2021). It was on this basis, that the applicant instructed her lawyers to sign the consent judgment. In the case of Park v. Palmer, 2009 Supreme Court of British Columbia (BCSC) 1854, it was held that a lawyer as an agent and representative of the client has authority to bind the client in a consent settlement. In the case of Little v. Spreadbury [1910] 2 K.B. 658 (C.A.), where the client had agreed to a compromise, but later argued that the actual compromise entered into by the solicitors of both parties did not accord with the terms which she agreed to accept, her claim was denied by the court which held that the solicitors had authority to bind their client, and the power to compromise with respect to the subject matter of the action.
19. Counsel for the applicant argued that the procedure for executing and obtaining spousal consent for purposes of mortgaging matrimonial property set out in section 6 of the Mortgage Act (2009) was not followed. In my opinion, since the applicant chose to settle HCCS No. 423 of 2012 by way of a consent judgment, the applicant cannot now bring these arguments. These are arguments that would have been considered during the trial of the suit but the parties chose to settle the matter.



20. In conclusion, the applicant has failed to satisfy me that the consent judgment dated 19th May 2014 and endorsed by the court on the 7th day of August 2014 should be set aside. This application is accordingly dismissed.
21. In the interest of promoting reconciliation between the parties as required by Article 126 (2) (d) of the Constitution of Uganda (1995) as amended, I order that each party shall bear its own costs.

I SO ORDER


BERNARD NAMANYA
JUDGE
5th April 2023

5th April 2023 at 12:41pm.


Mr. Brian Kalule	Counsel for the 1 st respondent
Mr. Olobbo James holding brief for Mr. Gerald Nuwagira	Counsel for the applicant
Mr. Ramathan Shafiq holding brief for Ms. Nakato Stella	Counsel for the 3 rd respondent
Cheptoeck Liz	Court Clerk

Mr. Ramathan Shafiq:

The matter is for Ruling. We are ready to receive the Ruling.

Court:

Ruling delivered in open chambers.


BERNARD NAMANYA
JUDGE
5th April 2023