THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLANEOUS APPLICATION NO. 431 OF 2015

5 **(ARISING FROM CIVIL SUIT NO. 292 OF 2013)**

NVIRI ROBERT -- APPLICANT

VS.

KENNETH LUBOGO --------------------------------- RESPONDENT

10 **BEFORE LADY JUSTICE FLAVIA SENOGA ANGLIN**

RULING

This application was made by the Applicant under 0.46 rr 1, 2 and 8 C.P.R, S. 82 CPA, S.98 CPA and S.33 Judicature Act, seeking orders to review and set aside the judgment and decree in Civil Suit 292 of 2013, stay of execution of the decree in the same suit and provide for costs of 15 the application.

The grounds of the application are set out in the affidavit of the Applicant and also the motion. I do not find it necessary to reproduce them here.

There is an affidavit in reply to the motion and also an affidavit in rejoinder.

When the application was called for hearing on 21.10.15, it was submitted by Counsel for the 20 Applicant that the application be allowed. He went through the grounds set out in the motion and the supporting affidavit paragraphs 2,3,4,5,13,23,26,27 etc.

He then stated that court has powers to review its judgment under order 0.46r1 (1) (b) C.P.R and S.82 CPA upon sufficient cause to reason being shown.

The case of **Sardar Muhamad vs. Charan Singh and Another [1959] EA 793** was cited for 25 the definition of what amounts to sufficient cause. That is ***"reason sufficient on grounds at least analogous to those specified in the rules".***

And the case of **Saidi vs. Multa [2000] EA 505** for the holding that ***"court has inherent powers to recall an order before it is perfected to amend the same to rhyme with the intention of court".***

Counsel then argued that, the Applicant was not a party to the transaction alleged in the main suit – paragraphs 6,7,8,10 and 12 supporting affidavit.

There is no evidence that the Applicant was ever authorized to transact on behalf of the Applicant. Therefore, the transaction is illegal – paragraphs 8 and 13 – supporting affidavit.

5 Under Regulations 79 (1) of the Company's Act, 2012, Table A, borrowing powers are vested in Directors. Under Regulation 80 – Management of business of the Company is in the hands of the Directors. Regulation 81 (1) Directors may by powers of Attorney appoint a body or persons to be Attorneys for such purpose and powers.

10 It was then contended by Counsel that, since the Applicant was neither a Director or nor a Shareholder, donee of Powers of Attorney or with any authority from the Company, he could not have had powers to transact on behalf of the Company. The alleged transaction is therefore illegal and should not be allowed by court.

He relied on the case of **Scot vs. Brown (1892) 2 QB 724** where it was held that ***"no court***
15 ***ought to enforce an illegal contract or allow itself to be used as an instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal".***

Also that in the case of **Real Gaba Market Property Owner vs. KCCA HCCS 248/2008**, court held that ***"a Company cannot transact or carry out any business in the absence of the Company resolutions authorizing the same".***

20 It was then asserted that the Respondent had not furnished a resolution that authorized borrowing on behalf of the Company.

The case of **Makula International vs. Cardinal Nsubuga [1982] HCB 13** was relied upon for the holding that ***"An illegality once brought to the attention of court overrides all pleadings including any admission made therein".***

25 Counsel then asserted that even if the transaction was admitted, it should not be sanctioned by court.

He pointed out that judgment on admission by Counsel for the Defendants was entered without furnishing sufficient material facts regarding the case. Or in misappropriation or ignorance of material facts which misled court to enter such judgment.

The book of Sultan on **Judgment and Orders 7th Edition Vol 1 Page 124** was relied upon to state that ***"judgment or consent given without sufficient material facts or misappropriation or ignorance of material facts by Counsel or in general for a reason which would enable court to set aside such a judgment is sufficient reason for court to recall such a judgment".***

Counsel submitted that the Applicant in paragraphs 8,9,10,11 and 12 of the affidavit in rejoinder stresses that point. Adding that Counsel for the Defendants never furnished sufficient material facts of this case. If he had done so, court would not have entered the judgment.

That paragraphs 7 of the affidavit in reply of Peter Mulongo offends 0.19 r 3 C.P.R. The affidavit did not distinguish matters of knowledge, belief or information and never severed the one in paragraph 7.

Paragraphs 4 and 5 are not written, the knowledge of the deponent but he never stated the grounds of his belief.

According to the case of **Uganda Journalists Safety Committee and 2 Others vs. Attorney General Constitution Petition 09/97** ***"averments that are based on information – The information must be stated, the grounds of belief must be stated and the same must be saved".***

Referring to the case of **Banco Arabe Espanol vs. Bank of Uganda SCCA 08/1998,** Counsel pointed out that, in that case, Counsel deponed an affidavit in opposition of an application in the same manner as in the present case.

The affidavit did not disclose the means of knowledge, grounds of belief and did not save information not within his knowledge. The court citing with approval the case of **Caspair Ltd vs. Harry Gandy [1962] EA P.414** found the affidavit to be defective.

In respect of paragraph 5 of the affidavit in reply, it was contended that the deponent does not state anywhere that he was in attendance. The said information was not within his belief or knowledge and therefore should have been saved under paragraph 7. It therefore offends 0.19 r 3 C.P.R.

It was then prayed that the affidavit in reply be struck out or the offending paragraphs be rejected and the application allowed.

The application was opposed by Counsel for the Respondent in reply to the contention that the affidavit in reply does not mention the basis of the knowledge and belief of the Deponent. It

was pointed out that the Deponent is a practicing Advocate with the law firm that handled the matter. That this placed the deponent with factual matters and what transpired.

And that therefore restricting matters of knowledge and belief would be useless. In any case that, no prejudice was suffered by the Applicant.

5 Paragraphs 3 refer to the defence filed.

Paragraphs 4 relates to the judgment which is attached and the paragraph shows where the deponent derived knowledge from.

In respect paragraph 5, Counsel referred to the court record and prayed that the objection should be disregarded.

10 Relying on the affidavits in reply and decided cases, it was submitted that Annexture "D" to be application that is the decree is instructive. Both Counsel were present on 18.11.14. Parties appeared before court and made consent judgment. No duress was imposed on the Second Defendant to admit judgment.

Further that the application as made seeks to set aside judgment and decree under 0.46 rr 1 and 2
15 C.P.R the Applicant has to show:-

1) Discovery of new and important matters of evidence which after the exercise of due diligence was not known or could not be produced.

2) Error or mistake apparent on the face of the record or any other sufficient reasons

It was asserted that the grounds raised by the Applicant are only fashionable and factual but 0.46
20 r 1 C.P.R was not complied with. The twenty three (23) grounds raised by the Applicant are only telling of the relationship in the suit. There is no plea of inability pleaded by the Applicant as the decree was being passed. Nor is it stated in the affidavit in support or rejoinder. And on that ground alone, Counsel argued, the application must fail.

It was asserted that the ground raised in the application and affidavit are an afterthought because
25 execution proceedings that were commenced against the Applicant.

Court was referred to paragraph 3 of the affidavit in reply – Annexture E to the application, the written statement of defence – where all Defendants including the Applicant made general denials. No where did the Second Defendant aver that he was not part of the Company. He remained silent all through and went along with the First and Third Defendants.

Insisting that the application is an afterthought and actually a departure from the pleadings, Counsel submitted that it would have been prudent for the Applicant / Second Defendant to bring out in the suit, the facts he is bringing in the application. He argued that, the court could not imagine facts not disclosed to advise the Applicant not to admit the claim.

5 Further that, parties are bound by their pleadings and the Applicant was bound by the pleadings before court.

The admission before court amounted to a consent- a new contract the Applicant was bound by.

To set aside the consent, the Applicant has to show that there was fraud or that he did not apprehend the facts or that there was ignorance of material facts and the agreement was obtained 10 contrary to the policy of court.

That the Applicant has not shown that he was unable to bring out facts stated in the application at the time the judgment was passed. No fraud has been shown either on part of his lawyer or the Co-Defendants.

The case of **Attorney General & Another vs. James Mark Kamoga SCCA 08/04** which deals 15 with issue of setting aside consent judgments was relied upon. It was held that ***"an 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 agreement contrary to policy of court".***

The case, Counsel stated, sets out grounds under which court can set aside an agreement of this 20 nature, but none of those grounds have been established in the present application.

Commenting about the alleged illegality and that it vitiates consent as per the case of **Makula International (Supra),** Counsel argued that no illegality had been brought out in the present case.

And that the Applicants claim that he is not part of the Company does not exonerate him from 25 liability. And in any case, looking at the supporting affidavit paragraphs 10 -12, the Applicant did not in any way prove that he is not part of the Company. No documentary evidence was adduced like articles and memorandum of association. Therefore the claim of illegality fails.

The application is without merit and should be dismissed with costs, Counsel concluded.

In rejoinder, it was submitted in respect of Annexture E to the written statement of defence alleged to be a general denial that, the Applicant intended to raise a preliminary objection. By stating that there was no cause of action, the Applicant was denying the claims.

In paragraph 5 written statement of defence – the cheque was issued by the Third Defendant. 5 Therefore the Applicant never admitted any liability.

Annexture "D" – the decree does not indicate that the Applicant was not present.

As to the alleged lack of grounds for review, it was the submission of Counsel that under 0.46 C.P.R and S. 82 CPA- that three (3) grounds for review required include sufficient cause. And that only one ground suffices for the application to be allowed. That therefore, there is sufficient 10 ground for setting aside the decree.

As to the consent judgment, it was asserted that, it is a rule of practice for consent judgment to be signed by the litigants. But there is no such judgment on record to bind the Applicant. Adding that, the Respondent is intending to benefit from a judgment which is illegal.

The claim that the Applicant was not part of the Company has not be rebutted as paragraph 8 of 15 the supporting affidavit was not challenged.

And it is also not true that the Applicant was quiet all throughout the time of filing the pleadings until admission. The Applicant, Counsel insisted, filed a written statement of defence denying all the claims of the Respondent.

It was prayed as before that the application be allowed, the judgment on admission be set aside, 20 the main suit be fixed for hearing and the Applicant be given opportunity to be heard. - Article 28 Constitution was cited in support.

That the Respondent would not be prejudiced in any way if the parties are heard on merit.

After hearing the submissions of both Counsel, the following issues are framed for determination:-

25 **1) Whether the affidavit in reply is defective and offends 0.19 r 3 C.P.R.**

2) Whether this is a proper case for review of judgment.

The issues shall be dealt with in that order.

- Whether the affidavit in reply is defective and offends 0.19 r 3 (1) C.P.R.

Under the said rule it is mandatory that ***"affidavits be confined to such facts as the deponent is able on his/her own knowledge to prove, except on interlocutory applications, on which statements of his/her belief may be admitted, provided grounds thereof are stated".***

Decided cases have established that ***"a court should not act on an affidavit which did not distinguish between matters stated on information and belief and matters to which the deponent swears from his own knowledge or an affidavit which does not set out the deponent's means of knowledge or his grounds of belief regarding the matter stated or information".*** **–** Refer to **Caspar Ltd vs. Harry Gandy [1962] EA 414 at 416-417** considered in the case of **Col (Rtd) Dr. Besigye Kiiza vs. Museveni Yoweri Kaguta and Electoral Commission, Election Petition No1/2001.**

The Supreme reiterated the position that ***"in proper cases, a court may sever parts of the affidavit which are defective or superfious instead of rejecting the whole affidavit if not a nullity".*** This was after explaining the two types of affidavits. One which distinguishes the facts based on knowledge and those on information and belief. The second category being matters based on knowledge, information, and belief without distinguishing which facts are based on knowledge.

The affidavit in reply in the present case, deponed by Peter Mulongo in my view falls in the second category of the affidavits described by the Justices of the Supreme Court. The affidavit indicates in paragraphs 1,3,4,and 5 that the matters stated therein are based on information and knowledge by virtue of the fact that the deponent is an Advocate in the Law Firm representing the Respondent, and he also read the court proceedings leading to the judgment in admission, and the decree. Thereafter he formed the beliefs in paragraph 6 that the circumstances in the application are misconceived and therefore the application should be dismissed with costs.

This court finds that, in those clearly described circumstances, the affidavit in reply does not offend 0.19 r 3 (1) C.P.R.

The case of **Casper Ltd vs. Harry Grandy (Supra)** is not applicable to the circumstances of the present case.

The objection is accordingly overruled for all those reasons.

The next issue for court to determine is **whether this is a proper case for review of the judgment.**

Under S.82 CPA, any person considering himself/herself aggrieved (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or (b) by a decree or order from which no appeal is allowed by this Act,

May apply for review of judgment to the court which passed the decree or made the order, and
5 the court may make such order on the decree or order as it thinks fit.

0.46 C.P.R gives grounds upon which the Court may exercise its jurisdiction to review. That is where the Applicant, ***"who from discovery of new and important matter of evidence which, after the exercise of due diligence, was not within his/her knowledge or could not be produced by him/her at the time when the decree was passed or the order made, or an account of some***
10 ***mistake or error apparent on the face of the record; or***

– for any other sufficient reason, desires to obtain a review of the decree passed or order made against him or her, may apply for review of the judgment to court which passed the decree or made the order".

In the present case, the Applicant seeks review of the decree and judgment of this court on the
15 ground among other things that there was no cause of action against him as there was never any transaction between the parties.

The Respondent obtained judgment on admission against the Applicant and two others which he seeks to execute. However, that there was never any such admission by the Applicant and judgment against him was erroneously entered as the Applicant has never made any such
20 admission also was never privy to the transactions between the parties, which led to the judgment.

However, in reply, the Respondent insists that there was such admission made by the Applicant and judgment was entered against him jointly and severally in the presence of the Applicant.

Therefore that the application is misconceived and ought to be dismissed with costs.

25 There is nothing in the Applicants affidavits that indicates that there are new and improtant matters of evidence that were not within his knowledge when the admission was made before court.

And there is nothing also to indicate that there is an error or mistake apparent on the face of the record.

The court record is very instructive in this matter. The Respondent sued the Defendants in Civil Suit 292/13. The Applicant was the Second Defendant in the matter where the Respondent (Plaintiff) contended that he advanced money Shs. 68,000,000/= to the Applicant and Third Defendant on behalf of the First Defendant (A Company). The money was to be paid as set out in the plaint but the Defendants who were sued jointly and severally failed to pay back the money.

In their defence, they claimed that the suit did not disclose any cause of action, was misconceived, frivolous and vexatious and an abuse of court process.

They denied knowing anything about the funds claimed by the Respondent (Plaintiff) and prayed the suit be dismissed.

It is further indicated on record that all efforts to settle the matter through mediation failed and the parties were instructed to proceed with scheduling. Time lines were set for the parties to file a joint scheduling memo but the Counsel for the Defendants (Applicant) did not respond or even appear in court as had been directed.

The Respondent was accordingly allowed to proceed exparte under 0.9 r 20 C.P.R and the suit was fixed for hearing. Hearing Notices were issued and were served on the Defendants including the Applicant. Twice the matter failed to proceed for reasons appearing on record.

On 18.11.14, in the presence of Counsel for the Applicant, a preliminary objection was raised to the effect that there was no cause of action against the Second and Third Defendants. This was opposed by Counsel for the Plaintiff / now Respondent. The objection was overruled by court and detailed reasons were to be given latter. But when the matter was stood over, the parties and Counsel returned to court ready to proceed. It was agreed to make the preliminary objection an issue within the suit.

Counsel for the Defendants also informed court that he would wish to issue a Third Party notice.

Further that judgment be entered against the Defendants in the sum of Shs. 60,000,000/- and then third party notice issue to the Third Party – Allied Techs Engineers & Consultants Ltd.

The judgment was accordingly entered on agreement of Both Counsel and Third Party notice issued.

When the Third Party appeared on 20.11.14 and it was indicated that it was to contribute Shs. 48,000,000/- as part of the money owed to the Respondent (Plaintiff then), this was opposed by

Counsel for the Third Party. It was applied that the Third Party be given time to produce documents to indicate that the claim against the Third Party was unfounded and devoid of merit and that the Defendants were sending the Plaintiff /Respondent on a wild goose chase.

Counsel then agreed to meet and report back to court on 02.12.14.

5 On that date only the Second Defendant (Applicant) and Plaintiff (Respondent) were present in court. Neither Counsel nor Third Party appeared. The matter was adjourned to 15.12.14.

On 15.12.14, Counsel for the Defendants (Applicant) informed court that the parties had not met to discuss the amounts of money outstanding but that the parties were still amenable to resolving who owed what to who and the issue of payment would them be answered.

10 They sought five (5) more days to talk and return to court with a clear answer or execute the **judgment entered**.

Counsel for the Third Party emphasized that while discussions had been held, the Third Party maintained that he did not owe the Defendants any money and therefore could not indemnify them. That proof to that effect had been provided to the Defendants, and what was left was for

15 the Plaintiff and Defendants to sort themselves out. Matter was adjourned to 19.12.14.

On that date, Counsel for the Defendants (Applicant) in presence of Counsel for the Third Party indicated to court that the questions between the Defendants and Third Party would require a comprehensive suit, which had already been filed at Mengo Court. That the moneys owed by the Third Party if at all were difficult to determine.

20 And that therefore, they had agreed as Counsel and the parties that the Third Party notice be withdrawn, the Defendants settle their indebtedness to the Plaintiff and the Defendants pursue Civil Suit No. 847/14 at Mengo Court against the Third Party.

Thus submission was made in the presence of all parties. Counsel for the Second Party agreed that, that was the correct position, insisting that the Defendants ought not to involve the Third

25 Party in settlement of what is due to the Plaintiff (Respondent).

The Third Party notice was accordingly withdrawn. The Defendants were directed to settle the moneys due to the Plaintiff (Respondent) and then pursue the suit before Mengo Court. Each party was directed to bear its own costs.

It is clear from the circumstances of the present case that the Applicant has not established any

30 of the principles laid down under 0.46 C.P.R for review of the decree.

There is nothing to indicate that there is discovery of new and important matters of evidence which were not within the knowledge of the Applicant at the time judgment was entered against the Defendants jointly and severely.

There is no error apparent on the face of the record as the admissions were made in the presence
5 of the Applicant and his Counsel who had full instructions to conduct the matter. The parties came to the agreement after several adjournments.

Even when Third Party notice was issued and later withdrawn, it was with the consent of all Defendants including the Applicant. And as already indicated, when the Third Party notice was withdrawn, it was agreed, and it is on record that, the Defendants including the current
10 Applicant would pay the Plaintiff (now Respondent) the money and then pursue the suit filed in Mengo to recover from the Third Party.

Judgment on admission was properly entered under 0.13 r 6 C.P.R. The rule provides that, ***"a party may at any stage of a suit, where an admission of facts has been made, enter on the pleadings or otherwise, apply to the court for such judgment or order as upon the admission
15 he/she may be entitled to, without waiting for the determination of any other questions between the parties; and the court may upon the application make such order, or give such judgment, as the court may think just".***

In this present case, the Defendants admitted that they owed the Plaintiff money which they would then claim from the Third Party. They agreed, as already indicated that they would pay
20 the Plaintiff (Respondent) and then pursue their own claim against the Third Party in a suit that they assured court had been filed before Mengo Court.

Judgment in the sum admitted was accordingly entered for the Plaintiff (Respondent).

In all those circumstances, this court finds that the Applicant is estopped from going back on his word.

25 Judgment was entered against the Defendants jointly and severely.

This court finds that no sufficient cause has been established by the Applicant for this court to review the consent judgment.

The application is accordingly dismissed for all those reasons with costs to the Respondent.

It would appear that the Defendants (including the Applicant) are just trying by their conduct to deny the Respondent the fruits of his judgment with no justifiable reason, which amounts to abuse of court process.

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FLAVIA SENOGA ANGLIN
JUDGE
15.05.17

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