THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL SUIT NO. 794/99

GEORGE MUKAMA…… PLAINTIFF

VS

NATIONAL HOUSING AND CONST. CORPORATION…… DEFENDANT

BEFORE: THE HON. MR. JUSTICE MUGAMBA

RULING

Messrs. National Housing and Construction Corporation brought this application for review under sections 101 and 83 (b) of the Civil Procedure Act, section 35 of the Judicature Statute (Statute 13 of 1996) and Order 42 rule 1(b) of the Civil Procedure Rules. The applicants seek for the consent judgment entered between themselves and Mr. George Mukama, the respondent, to be set aside or varied. Needless to say, the application is opposed by respondent.

In an application of this nature it is gainful to heed the wisdom of the Court of Appeal for Eastern Africa in Ismail Sunderji Hirani vs. Noorali Esmail Kassam (1952) 19 EACA 31 where at page 134 it is observed:

> '.... The position is clearly set out in Seton on Judgment and Orders (7th Edition), Vol.1, page 124, as follows:-
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> "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 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 the Court to set aside an agreement."'

The same Court maintained this position in Brooke Bond Liebig (T) Ltd vs. Mallya [1975] EA 266. This Court echoed this view in Kamanzi & Others vs. Nkambwe & Others [1978] HCB 105. The task facing this Court is to see if the consent judgment was attended by the variables necessary to obviate the setting aside or variation of the same. The notice of motion in support of the application sets out three general grounds as follows:

1. The consent judgment/decree is contrary to the policy of the Court as it tends to bind parties which are not before Court.

2. Parties to and in a civil matter cannot consent to compromise prosecution of a criminal case.

3. The consent was entered into without sufficient material facts or in misapprehension or in ignorance of material facts.

In addition to the motion there were three affidavits and, of course, spirited submissions on behalf of the applicant. The respondent, apart from submissions by Counsel, proffered two affidavits, one by the respondent himself and another by Charles Odere Esq. an Advocate which were in opposition to the motion. Counsel for the applicant in his submission argued that the affidavits in support of the respondent's case were incompetent because no fees had been paid in Court for them. It has since been confirmed by the Registry that the payment was effected and the affidavits are spotless.

I have referred to the case of Ismail Sunderji Hirani (T) Ltd. There it is shown that consent judgment entered by consent is binding on parties. Consequently, I find the argument that the consent judgment and decree is contrary to policy of Court unreasonable and I would dismiss

it for what it is worth.

The second ground is that parties to and in a civil matter cannot consent to compromise prosecution of a criminal nature. In his arguments Counsel for the applicant stated that an agreement to stiffle prosecution is illegal and that when the consent judgment included provision for dropping and withdrawing all complaints and criminal charges against the respondent herein in respect of Buganda Road Court Criminal Case No.1079 of 2001 on or before 4th October 2001 the act was an infringement on the process of the Director of Public Prosecutions and an illegal contrast came into being. This, he argued, called for review of the judgment and he called Windhill Local Board of Health vs. Vint (1890), 45 Ch.D.351 to his aid. I find this submission persuasive especially when Counsel accompanies this authority, as he does, with that of Makula International Ltd vs. His Eminence Cardinal Nsubuga & Another [19821 HCB 11 where it was held inter alia that a Court of law cannot sanction what is illegal and illegality once brought to the attention of the Court, overrides all questions of pleading, including any admissions made. What was agreed to under the consent judgment regarding to criminal case is tantamount to arrogating on tie parties powers of the Director of Public Prosecutions under Article 120 of the Constitution. This is illegal and calls out for a remedial measure by way of review.

Another ground advanced by the applicants is that consent was reached without sufficient material facts or in misapprehension or in ignorance of material facts. I note that at the time of the consent judgment a fresh lawyer had been engaged by the applicant. That lawyer was Kiboneka Esq. This followed an observation earlier on, by applicant's then Counsel, Mutaawe Esq. on 12th July 2001, that his personal acquaintance with the case was such that he was likely to be called as a witness. Therefore he stated that he was withdrawing from conduct of the case and an adjournment followed. Consequently on 27th August 2001 Kiboneka Esq. appeared as Counsel for the defendant, the role previously played by Mutaawe Esq., and applied for adjournment to go and study details of the case. Adjournment was granted. On 4th September 2001 when it was time for hearing of the case to commence Counsel both for the plaintiff and defendant asked Court to record a consent judgment. This was done. Given the above chronological detail I find it hard to appreciate contention by the applicant regarding lack of, misapprehension or ignorance of material facts on the occasion,

particularly after Kiboneka Esq. had prudently asked for time to go and study details of the case. I am not persuaded by the ground.

It has been argued by Counsel for the applicant that the applicant should not pay Shs.23, 000,000/= to the respondent given what had transpired between the parties prior to the suit. Respectfully I find this reasoning cannot be sustained given the fact that this is what the parties freely elected to agree to and that in any case the original amount claimed in the plaint by the respondent herein was Shs.32,350,000/= - an amount less than what came to be agreed upon.

For the reasons already given I would particularly review the consent judgment by running from it only those parts relating to the criminal case currently at Buganda Road Court and I would have the consent judgment read as under:

1. That the defendant pays the plaintiff a total sum of shillings twenty three million (Shs.23, 000,000/=) in full and final satisfaction of the plaintiff's claim in HCCS No.794 of 1999, such amounts being payable on or before the 4th day of October 2001, whereupon the plaintiff shall relinquish all claims to the land in dispute.

2. Each party shall bear its own costs.

3. By this decree each party has indemnified the other of all civil claims it may have had against the other in respect of the suit property.

This review has been partial and is in consequence of a mistake originating from both parties. Parties to this application are therefore to meet their own costs.

P.Mugamba

Judge

19/11/2001