THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

HCT-00-CV-MA-0 155-2008

(Arising from H.C.C.S No. 0784 of 2008)

NALUMANSI CHRISTINE:::::::::::::::::::: APPLICANT/PLAINTIFF

VERSUS

HON. JUSTICE STEVEN KAVUMA:::::: DEFENDANT/RESPONDENT

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

RULING:

When this application came up for hearing on 13/10/2008, Mr. Lwere for the respondent raised a preliminary point of law. He argued that the application is bad in law and improperly before the court. He invited me to dismiss it with costs to the respondent. The applicant, unrepresented by counsel, put up a spirited objection to the prayer for the dismissal of the application.

I have addressed my mind to the arguments of the parties.

By way of a short background to this matter, the applicant herein filed **HCCS NO. 0784 — 2006** against the respondent. The respondent filed a written statement of Defence which included a counter claim. As the case was pending hearing, court received a document dated 23rd day of January, 2008. It was signed by both parties and it reads:

CONSENT

IT IS HEREBY AGREED between the parties as follows:

"1. The above suit be and is hereby withdrawn by the plaintiff and the case file closed.

1. Each party shall bear its own costs.

2. The plaintiff shall not institute any other case or claim in court based on the same facts against the defendant.

Dated at Kampala this 23rd day of January, 2008.

Signed	***Signed***
……	……
NALUMANSI CHRISTINE	***HON. JUSTICE STEVEN KAVUMA***
(PLAINTIFF)	***(DEFENDANT)"***
0772920575	

On the basis of this letter, the learned Registrar of this court sanctioned the withdrawal and closed the file accordingly. After about two months, the applicant filed this application in which she seeks orders that:

(i). The withdrawal by consent entered by the parties in the above mentioned head suit be set aside.

(ii). The costs of the application be provided for.

She advanced the following grounds:

1. That the applicant's claims in the head suit had a high probability of success.

2. The alleged consent of the applicant by signing the withdrawal filed on the 23rd of January 2008 was procured through duress for which the respondent is responsible.

3. The applicant is not interested in withdrawing the head suit as she is ready and determined to prosecute it to the end.

From the pleadings, it is not disputed that the applicant signed the withdrawal order. What she is alleging is that the same was procured through duress.

Mr. Lwere's argument runs thus:
That it is established law that where judgment or order was entered by consent and one of the parties wishes to have the consent order set aside, the interested party can only do it by bringing a fresh action by way of a regular suit, unless all the parties agree otherwise. That an application like the instant one cannot be made to the court of first instance in the original action seeking orders to set aside a consent judgment or order. That since the order was for withdrawal, the applicant cannot be allowed to take any subsequent proceedings on the same cause of action. She has to initiate another action in which she will have to plead, inter alia, duress and give particulars of the duress, including the dates and the alleged acts of the respondent which amount to duress and call the relevant evidence.

The authorities given by the applicant, unfortunately, relate professional rights and duties of Counsel. They are therefore not of any help to court. I will do the best I can given that the applicant was not represented by Counsel.

It is in my view settled law that any person considering himself or herself aggrieved by a decree or order from which no appeal is allowed by the Civil Procedure Act may apply for review of judgment to the court which passed the decree or made the order, and the court may make such order on the decree or order as it thinks fit. Section 82 (b) of the Act refers. It is important to note that this application is not brought under that law. It is brought under 0.52 rr (1) and (2) of the Civil Procedure Rules and Section 98 of the Act. The catch words in

Section 82 are: ***any person considering himself/herself aggrieved.*** This in my view includes even party who consents to a decree or order. He/She can be aggrieved by it if it was induced through illegality, fraud or mistake. The law permits such consent judgments to be set aside in appropriate circumstances. The guiding factor is whether there is sufficient reason for reviewing or setting aside the consent judgment or order.

In short, it is a well settled principle 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 a reason can be fraud, mistake, misapprehension or contravention of court policy. The principle is premised on the ground that a consent decree is passed on terms of a new contract between the parties to the consent judgment. It is in that light that I have to consider the impugned consent order herein. I am of the considered view that much as court has inherent powers to make such orders as may be necessary for the ends of justice, this can only be possible when the matter is properly before the court.

In the instant case, as far as court is concerned, the applicant/plaintiff's action was terminated when she applied to withdraw the suit on or about 23-01-2008. The court entertained and granted the application. There is therefore no suit on record. She can only continue litigating on this matter if she files a fresh suit, subject to the law of limitation, on the same cause of action. Until that is done, court cannot entertain a matter which does not exist on its record: ***Administrator General vs. Wilson Mivule HCCS NO 859/96*** reproduced ***(19981 iv KALR 49.***

I would note that upto the time she filed this application on 20-03- 2008, close to two months following the withdrawal, the only matter pending in court was the counter-claim. The defendant/respondent has since written to court seeking withdrawal of the same. The matter is yet to get the necessary attention. The same shall be attended to hereafter.

Having said so, even if court were inclined to the view that the applicant's grievance be investigated, I would note that fraud is a serious moral stigma to attach to someone. The law properly requires proof and the burden is higher than in ordinary complaints. So how would a party show that he/she was defrauded or that the consent, as herein, was obtained through dress?

The general principle is that unless all the parties agree, a consent order, when entered, can only be set aside by a fresh action. An application cannot be made to the court of first instance in the original action to set aside the judgment or order except, perhaps, in the case of an interlocutory order, nor can it be done by way of an appeal.

See: Halsbury's Laws of England, 3rd Edition, Vol. 22 Page 792 paragraph 1672.

In **Hannington Wasswa vs. Maria Onyango Ochola & Others SCCA No. 22/93 (119941 IV KALR 98'),** the court held that it was improper to commence proceedings to challenge the alleged acts of fraud by notice of motion because the standard of proof must be high. The court held that the allegation of fraud required an ordinary suit where witnesses would be cross-examined.

In my view, given the serious allegations of fraud leveled against the respondent, the shorter way of proceeding, namely, by motion is not open to the applicant. Suffice it to add, that fraud is such a serious allegation which must be pleaded and proved on evidence that can be tested under cross-examination. Affidavit evidence has its own limitations.

Accordingly, even if court were to take a generous course that the issue of fraud be investigated, I would still hold that the procedure adopted by the applicant is improper.

For the reasons stated above, the application is disallowed. In light of the peculiarities of this matter, I would order that each party bears its own costs herein. I order so.

Yorokamu Bamwine
JUDGE
17/10/2008

17/10/2008:
Applicant present
Court:
Ruling delivered.
Yorokamu Bamwine
JUDGE
17/11/ 2008

Applicant:
No objection to the withdrawal of the counter-claim. I can meet my costs.
Court:
Counter-claim withdrawn. No order as to costs.
Yorokamu Bamwine
JUDGE
17/11/2008