

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**CIVIL DIVISION**

**MISC. APPLICATION NO. 385 OF 2013**

**UGANDA AIR CARGO CORPORATION LTD :::::::::::APPLICANT**

*VERSUS*

**1. MOSES KIRUNDA**

**2. ROGATINO MIGISHA**

**3. JACK CALNAN**

**4. THE ADMINISTRATOR OF THE ESTATE**

**OF THE LATE JOSEPH NYAKANA**

**5. DICK BWEBALE KABALI**

**6. BUMALI MUWANGA**

**::::: RESPONDENTS**

**BEFORE: HON. MR. JUSTICE STEPHEN MUSOTA**

**RULING**

The applicant, Uganda Air Cargo Corporation Limited represented by M/S O.N Osinde & Co. Advocates filed this Notice of Motion against six respondents, that is:- Moses Kirunda, Rogatino Migisha, Jack Calnan, Administrator of the estate of the late Joseph Nyakana, Dick Bwebale Kabali and Bumali Muwanga all represented by M/s Nsubuga & Co. Advocates. The application is brought under order 9 rule 12 of the Civil

Procedure rules and Section 98 of the Civil Procedure Act asking for the setting aside of a consent judgment in Civil Suit No.169 of 2001 and for costs.

The grounds of the application are contained in the affidavit of Eria Nantamu and in brief are as follows:

- a) That the Attorney General then in his capacity as counsel for the applicant had no instructions and/or authority to enter that said judgment.
- b) The terms of the consent judgment made the applicant liable to the respondents/plaintiffs which consent judgment is prejudicial to the applicant's interests and a good defence to the respondent's/plaintiff's claims.
- c) The applicant is a corporate body and never issued the Attorney General any instructions as its counsel to enter into a consent judgment.
- d) The Attorney General entering into a consent judgment making the applicant liable without the applicant's explicit instructions is tantamount to collusion with the respondents.
- e) It would be manifestly unfair to visit on the applicant a consent judgment purportedly entered by the Attorney General on its behalf without instructions to enter the same.
- f) It is just and equitable that the consent judgment in the suit be set aside.

The affidavit in support by the Corporation Secretary of the applicant, Mr. Eria Nantamu outlined the background to this dispute in a lengthy narrative with an attachment to it. I will not reproduce the contents thereof in this ruling. I have however studied and comprehended the same. The application is also supported by a supplementary affidavit in support of the application sworn by Charles Wacha Angulo a former Corporation Secretary and former Ag General Manager of the applicant. The said affidavit has several Annextures attached to it. I have studied and comprehended the same with the Annextures thereto.

For the respondents, the affidavit in reply was sworn by one Jack Calnan the third respondent. It is a lengthy affidavit of 37 paragraphs with attachments which I will not reproduce in this ruling. I have however studied and comprehended the contents thereof which basically rebut the averments in support of the application.

The contested consent Decree is coached in the following terms:-

**“THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**HIGH COURT CIVIL SUIT NO. 169 OF 2001**

**1. MOSES KIRUNDA**

**2. ROGATINO MIGISHA**

**3. JACK CALNAN**

**4. THE ADMINISTRATOR OF THE ESTATE**

**OF THE LATE JOSEPH NYAKANA**

**5. DICK BWEBALE KABALI**

**6. BUMALI MUWANGA .....PLAINTIFFS**

**VERSUS**

**UGANDA AIR CARGO CORPORATION LTD ..... DEFENDANT**

**DECREE BY CONSENT**

This matter coming up on the 2<sup>nd</sup> day of June 2010 before **Her Lordship Hon. Justice Elizabeth Musoke**, in presence of **Mr. John B. Kakooza** counsel for the first, second, fourth fifth and sixth plaintiffs and **Mr. Richard Nsubuga** for the third plaintiff and **Ms Fatuma Nanziri** on behalf of the Attorney General, for the Defendant. **IT IS HEREBY AGREED AND DECREED BY CONSENT OF ALL PARTIES**

That the Defendant pays the Plaintiffs' claim as follows:

1. To the first plaintiff, Uganda Shillings 1, 676, 500/= (one million six hundred and seventy six thousand, five hundred only) and USD 306,700 (US \$ Three hundred and six, seven hundred only) in full and final settlement of the said first plaintiff's claim in the suit.
2. To the second plaintiff Uganda Shillings 2, 755, 500/= (Ug Shs. Two million, seven hundred fifty five thousand, five hundred only), and USD 13,266 (US Dollars thirteen thousand, two hundred sixty six only) in full and final settlement of the second plaintiffs' claim.
3. The third plaintiff USD 340,500 (US \$ Three hundred forty thousand, five hundred only), less 2,050,000/= owed by the third plaintiff to the defendant in full and final settlement of the third plaintiff's claim in this matter.
4. To the fourth plaintiff Ugs.1, 569, 250/= (One million, five hundred sixty nine, two hundred fifty only) and USD 193,748 only (One hundred ninety three thousand, seven hundred and forty eight only) in full and final settlement of the fourth plaintiffs' claim.

That the fifth and sixth plaintiffs' claim be and are hereby dismissed, not having been proved.

**THAT BY CONSENT OF ALL PARTIES THIS SUIT BE AND HEREBY SETTLED IN TERMS HEREINABOVE AGREED**

Dated at Kampala this 29<sup>th</sup> day of June 2010.”

The consent was signed by all parties to the suit and the suit was settled in those terms as mentioned above.

During the hearing of this application, Mr. Sentomero represented the applicant and both Mr. J.B Kakooza and Mr. Nsubuga represented the respondent. In his submissions, Mr. Sentomero reiterated the contents of the application and the supporting affidavit and emphasized that the reasons for setting aside the consent judgment/decreed is because the Attorney General entered the consent without instructions.

Learned counsel referred to paragraphs 5 and 8 of Mr. Nantamu's affidavit. He submitted that when a matter is in court, the party must give instructions to counsel before being bound by a consent judgment. That in the instant case, there was no resolution of the applicant and a State Attorney called Adrole denied instructions. That it was strange that another lawyer entered the consent with the respondent. Mr. Sentomero further submitted that there is no way consent would be entered for what the applicant was not liable. That this was an illegality and a consent judgment can be set aside only in appropriate circumstances such as illegality, fraud and mistake. Further that consent was made by a State Attorney who was not handling the matter which amounted to collusion.

In his submission in reply, Mr. Kakooza for the respondent submitted that the Attorney General who is representing the applicant represented them in Civil Suit 169 of 2001 in which the applicant did not file a written statement of defence for a claim of 29,671,596/= and US \$ 854,214 yet they were served with notice. That the applicant replied to the notice through one Captain Wacha Olwol and admitted the claim but could not pay for financial constraints. That when no defence was filed, judgment in default was entered as per Annexure "A" to the affidavit in support. Later on 25<sup>th</sup> May 2001, by Notice of Motion, the Attorney General applied to the High Court to have the default judgment set aside. The court granted the application on condition that costs were paid. That the Attorney General was told to file a Written Statement of Defence and the case was to be heard. The case was fixed many times but the Attorney General was absent because he was looking for money to pay. That this meant that the Attorney General had instruction. Mr. Kakooza further submitted that when the case was finally fixed, the applicants said they were in consultations to settle the dispute. That hearing was eventually fixed for 2<sup>nd</sup> June 2010.

Mr. Nsubuga for the respondent submitted that on 16<sup>th</sup> April 2010 before scheduling, the Attorney General proposed a settlement with approval of the Solicitor General and the agreed figures were shillings 6,1250,000= and US \$ 854,214 which was lower than what was claimed by the respondents of 229,671,696/= and US \$ 854,214. That although the agreed figure was lower the same was accepted in the

interest of justice and no costs were involved. Mr. Nsubuga further submitted that in consideration of the proposal and the promise that the applicant would pay, the respondents agreed to the proposal. Subsequently a consent judgment was entered on 2<sup>nd</sup> June 2010 before Hon. Lady Justice Elizabeth Musoke. A decree was extracted and was endorsed by both parties as in paragraph 21 of the affidavit in reply. That a decree was extracted as per annexure "E" and "F" and the judgment debtor promised but failed to pay. This made the respondent to apply for execution upon which the Assistant Registrar directed a Notice to Show Cause to issue. That the judgment debtor was represented by Mr. Adrole who caused eight adjournments and three last adjournments. That throughout, Mr. Adrole did not say he had no instructions to represent the applicant. Mr. Nsubuga further submitted that it was surprising that at this moment, the applicant is applying to set aside judgment claiming that the Attorney General had no instructions. That after 3 years and five months, the respondents were served with a notice of change of advocates removing the Attorney General. According to Mr. Nsubuga, this is a ploy to frustrate the case and defeat justice.

Mr. Kakooza further submitted that the notice of change of advocates was clearly put as change of instructions at the stage of execution implying that instructions were existent before. He clarified that Mr. Adrole was handling execution proceedings not any proceedings. That Mr. Wacha's affidavit in paragraph 2 clearly acknowledges instructing the Attorney General for legal representation. That nowhere in the applicant's affidavit is fraud or collusion alleged or absence of material

fact to counsel to prevent consent. That Sentomero's submission has nothing to legally set aside or discharge the consent judgment. That the evidence presented by the applicant is not enough to meet the legal criteria to set aside a consent judgment. That the Attorney General who entered the consent was represented by one Fatuma Nanziri who was in charge of the case. That Mr. Adrole came in later.

Mr. Kakooza submitted that a judgment entered by a judge is different from one recorded by a Registrar under O. 50 of the Civil Procedure Rules. That the one by the judge cannot easily be set aside under O 9 r 12 of the Civil Procedure Rules. That by entering a consent judgment, parties enter a new contract which supersedes the original cause of action.

I have considered the application as a whole and the affidavits in support. I have also considered the affidavits in reply. I have related the same to the submissions by respective counsel in support of their respective cases. I have related all this to the law applicable and the authorities cited to me for my assistance including the

1. **Attorney General & Another Vs James Mark Kamoga & Others, SCCA 8 of 2004.**
2. **Peter Kagwa Vs New Vision Printing & Publishing Corporation & 2 others HCCS 244/2002.**
3. **Hirani Vs Kassim [1952] EA 131.**
4. **Makula international Vs His Eminence Cardinal Nsubuga & another [1982] HCB 11.**



5. **Lenina Kemigisha Mbabazi/Starfish Limited Vs Jing Cheng International Trading Limited MA 344 of 2012.**

The law governing setting aside consent judgments or decrees has been correctly put by learned counsel on both sides. A consent judgment can only be set aside if the consent was actuated by illegality, fraud or mistake. Consent judgments can be set aside on limited grounds. The Supreme Court in the **Attorney General & Uganda Land Commission Vs James Mark Kamoga** (supra) gave guidance on the law governing setting aside a consent judgment. A consent judgment is not an *ex parte* judgment.

The principle upon which the court may interfere with a consent judgment was outlined by the Court of Appeal of East Africa in **Harani Vs Kassam [1952] EACA 131**, in which it approved and adopted the following passage from **Seton on Judgments and Orders 7<sup>th</sup> Edition Vol.1 page 124**;

***“prima facie, any order made in the presence and with a 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 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 court to set aside an agreement.”***

Reasons that would enable court to set aside an agreement are fraud, mistake, misapprehension or contravention of court policy.

In the instant case, what led to entering into a consent judgment has been brought out clearly in the affidavit evidence on record. As deposed by Jack Calnan, the respondent's case was first filed in February 2001, approximately 13 years ago under Civil Suit 169 of 2001 for liquidated damages of UGX 229, 671,596/= and US \$ 854,214 plus general damages and interest at 8% and costs. A default judgment was entered for the sum and costs were taxed at 52,635,500/=. The decretal sum was not paid and on 25<sup>th</sup> May 2001 the Attorney General on behalf of the applicants applied to set aside the judgment. The Attorney General was given a chance to be heard by setting aside the judgment. It filed the WSD on behalf of the applicant. The case dragged on, on the pretext that Attorney General was exploring a settlement. Before the suit was filed, the Ag General Manager of the applicant Captain Charles Wacha Angulo admitted liability but the said organization was at the time experiencing financial constraints but promised to pay soon as the situation improved. The Civil suit came up several times before Lady Justice Elizabeth Musoke and the Attorney General intimated that it was consulting with the applicants regarding instructions on how to defend or settle the matter and on 16<sup>th</sup> April 2010 before the scheduling date, the Attorney General on behalf of the applicants wrote to the respondent's lawyers proposing a settlement and stating that:

***“Upon receiving verification from the Auditor General the Solicitor General has approved the following as full and final settlement of the whole matter”***

This is in annexure “D” to the affidavit in reply. The sums proposed for payment were in aggregate 6,100,250/= plus UD \$ 854,214 which figures were significantly below the sums pleaded for plus interest which would have been 229, 671,696/= plus US \$ 854,214. The respondents were to forego part of the original claim, legal costs and interest in the interest of the settlement. The settlement was accepted since payment was overdue.

On 2<sup>nd</sup> June 2010 a consent judgment was entered before Lady Justice Elizabeth Musoke, a decree extracted which was endorsed by the parties. Despite repeated demands, payment was not made. The respondents applied for execution and when the applicants were served a Notice to Show Cause why execution should not issue, they filed this application seeking to set aside the consent judgment claiming that the Attorney General did not have instructions to enter the consent.

Clearly the above background to this application indicates that the arguments by the applicants are unfounded. There is no way the Attorney General would have appeared in court for over ten years without instructions. There is evidence that indeed the applicant instructed the Attorney General to represent it in the civil suit and this

was effectively done. It is unbelievable that the applicant would realize it did not give the Attorney General instructions when the case had reached execution. To further prove that the applicant gave instructions to the Attorney General is the averment in paragraph 2 of the supplementary affidavit in support sworn by Charles Wacha Angulo the former Ag General Manager of the applicant wherein he deposes that:

***“When the respondents instituted the suit against the applicant, I personally contacted the Attorney General’s chambers for legal representation and furnished all documents relating to the applicant and respondents including terminal benefits, payment documents, staff terms and conditions of service and a joint Respondent/Applicant’s claim against LC Aviation and government of Zaire.”***

Although the deponent denies giving specific instructions to consent, the law on legal representation is clear. It was held in **BM Technical services Vs Francis X. Rugunda [1999] KALR 821** followed in **Lenina Kemigisha Mbabazi/Starfish Limited Vs Jing Cheng International Trading Limited, MA 344 of 2012** that:

***“..... the court cannot set aside a consent judgment when there is nothing to show that counsel for the applicant has not entered into it without instructions. Furthermore that even in cases where an advocate has no specific instructions to enter consent judgment but has general instructions to defend the suit, the position would***

***not change so long as counsel is acting for a party in a case and his instructions have not been terminated, he has full control over the conduct of the trial and apparent authority to compromise all matters connected with the action.”***

The fact that the Attorney General was instructed and given all documents and facts relating to the respondent's claim, he had full instructions and apparent authority to compromise all matters connected with this action. The consent entered into was endorsed by the solicitor general as indicated in annexure 'D' dated 16<sup>th</sup> April 2011 ref. 169/01 and annexed to the affidavit in reply.

It has not been alleged or proved by the applicants that the consent complained of was entered through fraud, connivance or absence of material facts. The applicant was fully represented by Nanziri Fatuma a State Attorney with instructions from the Attorney General in the main suit and Mr. Adrole a State Attorney in the application for execution. The consent judgment was entered by a Judge after due consideration of the circumstances of the case. It was therefore done diligently. A decree was extracted and a judgment debtor promised but failed to pay. The judgment entered by a Judge cannot be easily set aside. It should be noted that a notice of change of instructions was only made at the time of execution implying that there were instructions before.

Nowhere in Mr. Sentomero's submissions has he raised any valid legal argument to set aside the consent judgment. The evidence by the applicant is not enough to meet the legal criteria for setting aside a consent judgment.

The applicants are basing their application on after thoughts because they claim to have financial difficulties. However financial constraints is not a ground for setting aside a consent judgment legally entered into by the parties. Like a binding agreement, parties are bound by their consent.

In view of the overwhelming evidence for supporting the consent judgment, I will decline to set it aside.

Accordingly this application will be dismissed with costs.

**Stephen Musota**

**J U D G E**

**24.09.2014**