THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
AT KAMPALA
(LAND DIVISION)

MISCELLANEOUS APPLICATION NO. 09 OF 2011
(Arising Out Of H.C.C.S No. 63 Of 2010)

1. **TOOLS & FASTENERS LTD**
2. **ENOTH MUGABI :::::::::: APPLICANTS/DEFENDANTS**

VS

1. **KHIMANI RAVJI JADVA**
2. **GORSIYA DINESH MAVJI :::::::::: RESPONDENTS/PLAINTIFFS**

RULING BY HON. MR. JUSTICE JOSEPH MURANGIRA

The two applicants through their lawyers Muyanja Associates & Advocates brought this application against, the two respondents under Order 25 rule 6 of the Civil Procedure Rules, section 39 (2) of the Judicature Act, Cap. 13 and Article 126 (2) of the Constitution of the Republic of Uganda. This application is supported by the affidavit that was deponed by Mavani Niranjan. The applicants also filed in Court two affidavits in rejoinder and in reply to the affidavit in reply that was deponed Bernard Muhangi Bamwine, sworn by Mavani Niranjan sworn on 2nd March, 2011.

The respondents through Kahuma, Khalayi & Kaheru Advocates filed two affidavits in opposition to this application. The respondents vehemently oppose this application.

This application is seeking the following orders; that:-

a) **first prayer to record the agreement entered between Ravji Khimani, Jesani Construction and Tools and Fasteners Ltd as a Decree in so far as it relates to the suit,**
b) **second prayer that consequential orders be issued directing the Registrar of Titles to transfer 25% held by Khimani Ravji Jadva (the 1st Respondent) to Tools & Fasteners (the 1st Applicant), and**
c) **Third prayer for dismissal of the Plaintiff's suit.**

Further, the applicants raised the following grounds in this application, they are that:-

1. That on 25th July, 2010, an agreement was executed between Ravji Khimani (1st respondent), Jesani Construction and tools and Fasteners Ltd (2nd respondent) which effectively resolved the contest of proprietary interest which is the subject matter of this suit.

2. That since the 25th July, 2010 agreement was executed, the respondents handed over the property to the 1st applicant who is in full control and management of the property, thereby rendering the contest of proprietary interest which is the subject matter of this suit moot.

3. That the parties have failed to execute the consequential legal documents because of the intervention of a third law firm which is not on record and which law firm is imposing extraneous overbearing conditions to the draft settlement, which terms had never been discussed between the parties.

Counsel for the applicants submitted that this application has been brought under Order 25 rule 6 of the Civil Procedure Rules. That the respondents have not challenged the agreement in any manner. That the respondents have not denied any part of the Agreement which has been evidenced in court. That the respondents have not endeavored to prove anything unlawful within the compromise, for which reason that it meets all the requirements of a lawful agreement and pray that it be enforced as it is, to the extent that it is relevant to the subject matter of the suit. He prayed that the applicants be granted the above orders and costs in this application.

On the other hand, Counsel for the respondents, Mr. Andrew Kahuma, on 1st July, 2011 when the is case came up for hearing submitted that respondents are committed to the agreement they reached with the applicants so long as each party bears its own costs. That after all the applicants breached that agreement. That if the applicants are ready to bear the own costs, that then they shall sign the consent judgment.

From the submission by the applicants, Counsel for the applicants insists on the costs of the main suit and this application to be granted to the applicants. In the submissions by Counsel

for the respondents, counsel for the respondent's argued that for the fact that parties entered into a settlement agreement, that each party would bear its own costs.

From the nature of the submissions by the parties, the main purpose of the application is for costs; nothing else. It is the Applicants' lawyer that belatedly craves for those costs. Belatedly because he had himself drawn a Settlement document (**Annexture "B" to Affidavit of Bernard M. Bamwine)** which was silent on costs. The desire for costs was interestingly raised by the Applicant's lawyer's letter dated 9/11/2010 (**Annex "F" to Affidavit of Bernard M. Bamwine**). This gives credence to Mr. Hitesh Jesani's assertion that the claim for costs against Respondents was raised after the 1st Applicant refused to pay costs of Shs.40 Million to his lawyers. Otherwise it does not make sense for the same lawyers who, on 3/08/2010, drew a settlement document for Court without costs to turn around later on 9/11/2010 to claim for costs. Accordingly, the motive of the application is not bonafide.

In the last paragraph of the Applicants' submissions, Counsel passionately argues in favour of quick justice to reduce **"the exponentially growing backlog and help other parties access justice as the queue is shortened by settlements"**.Counsel for the respondents submitted that it is the Applicants who have kept the above case in Court. It should have been withdrawn on 01/11/2010 when they were informed that the Respondents had signed the Withdrawal Consent and that the Applicants needed to do likewise. If they loved to reduce backlogs, the Applicants should have immediately accepted and signed the Withdrawal Consent. Even during the trial of this application, counsel for the applicants insisted on a fully flagged trial, which to me was unnecessary.

On whether the applicants are entitled to costs as argued by Counsel for the applicants, it is my considered view that in the circumstances of this case the Applicants are not, in law, entitled to costs. This is because from the affidavits evidence from the respondents, the respondents/plaintiffs were forced by the conduct of the applicants/defendants to file H.C.C.S No. 63 of 2010 in Court against the applicants. The pleadings are very clear; they disclose a prima facie case against the defendants in the main suit, HCCS no. 63 of 2010.

Secondly, the settlement of 25/07/2010 was an admission by the applicants/defendants that the respondents/plaintiffs were entitled to their respective shares in the suit property.

Previous to the filing of the suit, the 1st respondents/plaintiffs by letter dated 16/12/2009 (Attached to annexture "C" to the Plaint) offered to sell his 50% share in the suit property to the 1st applicant/defendant at a cost of Shs.350,000,000/= only. The offer was not accepted. When the case had been in Court for about 5 months, the 1st applicant bought the 1st respondent's interest in the property at a higher figure of shs.400,000,000/= plus VAT. So, in the circumstances who is the successful party? It is the respondents/plaintiffs. Certainly, the respondents succeeded as against the applicants. Accordingly, the applicants/defendants are not entitled to costs even on the legal principle that a successful party is entitled to costs.

It is argued by Counsel for the respondents that as the pleadings clearly show there is a prima facie case against the applicants/plaintiffs in fraud, among other charges. That the 1st Respondent/Plaintiff claims 50% share in the suit premises where his tenants were being threatened with eviction; that because he became a 50% shareholder in the property after purchasing 25% shares thereof from the 2nd respondent/plaintiff.

Counsel for the respondents further submitted that the 2nd respondent/plaintiff on his part claimed that his 25% share had been fraudulently transferred by the defendants. That in fact, it shows that when the 2nd respondent/plaintiff was selling his 25% share to the 1st respondent, he did not know that his share in the property had been transferred from his names. The letter of 5/02/2010 (Annex "C" to Plaint) by the respondent/plaintiff to the defendants clearly stating the fact of sale of the 25% share by the 2nd respondent to the 1st respondent was never controverted by the defendants. Indeed I agree with the submission by Counsel for the respondents to that extent.

The applicants/ defendants having forced the respondents/plaintiffs to file Court proceedings, they cannot be awarded any costs. There are wealth of authorities on the subject but in this case one will suffice. In **Butagira –vs- Deborah Namukasa (1992-1993) HCB 98** at 101 it was held that:

> **"The general rule is that costs shall follow the event and a successful party should not be deprived of them except for good cause. This means that the successful party is entitled to costs unless he is guilty of misconduct or there is some other good cause for not awarding costs to him. The Court may not only**

> **consider the conduct of the party in the actual litigation but matters which led up to the litigation".**

Consequent to the above, Counsel for applicants/defendants referred to Article 126(2)(d) in support of the application. In my considered view that provision supports the respondents/plaintiffs' assertion that, following the settlement reached between the parties on 25/07/2010, the Court case should be withdrawn with each party bearing its own costs. For that way, the "**reconciliation between the parties shall be promoted"** as enshrined in Article 126(2) (d).

Once a withdrawal without costs is filed the Transfer Deed will be given to the 1st applicant/defendant and there will be no need for Court to grant consequential orders under S. 39(2) of the Judicature Act, cap 13.

In final analysis of this application and the parties' arguments in their submissions, it is clear that the parties settled by consent the dispute arising from HCCS No. 63 of 2010 and that even the counterclaim by the defendants collapsed. There is no way how the applicants should be allowed to resurrect the already resolved dispute simply because they want costs from the respondents. The applicants' claims in this application are not honest to say the least. In the premises this application ought to fail.

In sum total the main suit, HCCS No. 63 of 2010 and the counterclaim have no bearing at all on the ground that the parties solved the dispute therein amicably. They ought to have been withdrawn by the parties by consent long time ago. In the premises, therefore, the said main suit and the counterclaim stand withdrawn with each party bearing its own costs.

In the same vein, during the pendency of the ruling in this application, the 2nd applicant filed in Court against the respondents Miscellaneous Application No. 175 of 2013. This application is seeking the order that HCCS No. 63 of 2010 be dismissed with costs for want of prosecution. This application to say the least was filed in this Court at the time seeking costs from the respondents in bad faith. In fact this application and the entire process adopted by his Counsel amount to an abuse of the Court process. And since HCCS No.63 of 2010 and the counterclaim have been hereinabove stood withdrawn without costs, this miscellaneous application no. 175 of 2013 arising from the same suit is overtaken by events. It is accordingly, summarily dismissed without costs.

In conclusion and for the reasons, given hereinabove in this ruling, this application has no merit. It is accordingly dismissed and in the interests of maintaining good blood between the parties, no costs are awarded to the respondents.

Date at Kampala this 25th day of March, 2013.

sgd
Murangira Joseph
Judge