

- (2) The said consent settlement was signed under a mistake of the fact that what was previously agreed upon was omitted as in the terms of payment, balances and execution clause.**
- (3) Prior to signing of consent settlement and by consensus of both parties and their counsel, it was agreed and preferred that Civil Suit No. 265 of 2011: Nsubuga Guster (plaintiff) vs (1) Barclays Bank (2). Agnes Animo (3). Ogwado F.x be withdrawn because all issues in the suit were to be settled in HCCS No. 59 of 2011.**
- (4) Further to note and before the signing of the consent settlement, it was also agreed between the applicant and the respondent together with their counsel that monies which were previously received by F.X. Ogwado, husband and Counsel for the respondent amounting to Ug. Shs 26,000,000/= be deducted on the outstanding balance owed by the applicant.**
- (5) It was however disclosed prior to the signing of the consent settlement by the respondent to the applicant and his Counsel that the outstanding balance on the mortgage account in the Barclays bank was Ug. Shs 50,000,000/= (Uganda Fifty million only)**
- (6) The respondent has unlawfully and without clear justification secured a warrant of attachment and sale of immoveable property of the applicant known as Block 206, plot 2754 land at Mpererwe. It is not justifiable for the respondent to have obtained warrant of attachment and sale against the property the respondent claims to be hers when the applicant is in occupation.**
- (7) The respondent has through Zaaki Auctioneers & Court Bailiffs already advertised the above property in the Monitor Newspaper of 19th April 2012 and the Bailiffs are threatening to evict the applicant and his family from the said property.**
- (8) The respondent had prior to the signing consent settlement in 2010 wanted to defraud the same applicant's property by suing the applicant through the originating summons 08/2010; Agnes Animo vs Nsubuga Guster but was prevented by Court and the respondent is now turning around against to defraud the same property using a warrant of attachment and sale.**
- (9) The respondent's continuous acts of fraud to deprive the applicant of his hard earned property using the court process is an abuse of Court process.**

- (10) On 22nd March, 2012, the applicant complained against the intended execution to the Assistant Registrar, Land Division copied to Chief Registrar of Courts of Judicature, Legal Department Barclays Bank, Secretary Law Council, which was received by Court on 30th March, 2012 before the execution was applied for.**
- (11) The respondent's Counsel did not execute a decree out of the consent settlement and presented it to the applicant for approval thereby concealing the contents of the consent settlement.**
- (12) The applicant/defendant has not been served with notice to show cause why execution should not issue.**
- (13) The applicant/defendant has a plausible defence to the whole claim because the applicant/defendant/has settled almost a big part of the claim and the execution is illegal/unfair/unjust and an abuse of court process as the subject matter is surrounded by unsettled issues.**
- (14) It is in the interest of justice and in accordance with the principles of natural justice that the consent settlement be reviewed and execution stayed.**

1.3 The respondent through her lawyers F.X. Ogwado & Co. Advocates filed an affidavit in reply opposing the entire application and the applicant's affidavit evidence in support of his application. The respondent vehemently opposes this application.

In her affidavit in reply, the respondent raises in her evidence very pertinent matters that affect this application. It is equally important to note that the applicant never filed in Court an affidavit in rejoinder to his application and in rebuttal to the averments by the respondent in her affidavit in reply. It is trite law that when a party avers on particular matters in an affidavit and the other party fails or neglects or /and refuses to file an affidavit in rebuttal, such facts are taken to have been admitted by such a party. I, therefore, take it that the applicant admitted the facts averred to by the respondent in her affidavit in reply.

2.0 Facts of this case

The facts are briefly that the parties entered into a consent settlement/decreed on 15/12/2011, a copy of the same is on Court record and there is super added the Lordship's commanding hand and seal of the this Court, dated 19th December, 2011.

The applicant paid the sum of Ugx 10,000,000/= (ten million shillings) to Counsel for the respondent. Later on the applicant paid a further Ugx 4,000,000/= (four million shillings) in an attempt to fulfill the terms of the said consent decree.

The applicant unfortunately defaulted and was not remorseful at all. Instead, the applicant wrote complaints to offices he could possibly imagine and he was advised to fulfill his part of the consent before complaining. The respondent applied for execution in accordance with paragraph 5 of the consent decree. Hence this application.

3.0 The applicant framed three (3) issues for determination, namely:-

- a) Whether the applicant entered the consent judgment under the fraudulent misrepresentation by the respondent that she would use the money the applicant paid to her to liquidate her salary loan and retrieve the applicant's land titles.**
- b) Whether such consent judgment can be reviewed by the Court.**
- c) Remedies available to the parties.**

4.0: Resolution of the issues by Court

4.1: Issue 1: Whether the applicant entered the consent judgment under the fraudulent misrepresentation by the respondent that she would use the money the applicant paid to her to liquidate her salary loan and retrieve the applicant's land titles.

It is the submissions by Counsel for the applicant that the facts appear in the affidavit of the applicant and need not be repeated here. But that the main conclusions from the fact is that the applicant accepted to pay the respondent money so that she would use it to liquidate her loan account and retrieve the applicant's certificate of title from Barclays Bank. That instead, the respondent put the money to her own use thus putting the applicant's land title at risk. That this amounts to a fraudulent misrepresentation on behalf of the respondent.

In reply, counsel for the respondent does not agree with the submissions by counsel for the applicant. He submitted that the purported background to the application is unnecessary and that there was no misrepresentation of the consent decree. It is the law that where a consent or compromise is recorded under the law, the decree is passed upon a new contract between the parties superseding the original cause of action. See the case of **Ismail Sunderji Hirani vs Noorali Esmail Kassam [1952] EACA 131**

The said background was the original defence of the applicant and does not suffice in the circumstances since consent was recorded on 15/12/2011. Where a contract is reduced into writing, no party can rely on evidence of terms alleged to have been agreed which are not contained in the contract. (see the case of **Dr. Karuhanga vs N.I.C & Anor [2008] HCB 151**) Counsel for the applicant dwells much on allegations said to be agreed upon by the parties but are not contained in the consent and it is my finding that the reasons put forward by the applicant do not necessitate the varying or reviewing of the terms of the consent.

Further, it is important to note that the respondent is the registered proprietor and it is only after the payment of the entire sum of Ugx. 50,000,000/= (fifty million shillings) plus interest at the rate of 13% per annum from 5/12/2008 till

payment in full that the applicant would have an equitable right to call the land title his own.

I have critically read and analysed the application, its supporting affidavit and counsel's for the applicant's submissions and I have observed that the applicant's grievance is about the subsequent conduct of the respondent. He is alleging dishonesty and lack of trust on the part of the respondent and her advocates. The applicant is not challenging the consent settlement/deed that was sealed by this Court on 19th December, 2011. Therefore, issue no.1 is answered in the negative.

4.2: issue 2: Whether such consent judgment can be reviewed by the Court.

Counsel for the applicant submitted that generally, the law is that a consent judgment cannot be interfered with by the court unless the complaint would justify the setting aside of a contract. I agree with that submission. It is trite law that a fraudulent misrepresentation by one party to the other justifies the setting aside of a contract entered into by the parties as a result of such misrepresentation.

On the facts of this application, he invited court to find that the respondent misrepresented to the applicant that the money the latter paid to the former would be used to liquidate the salary loan and retrieve the applicant's land title. That this was not done. That, that is why the respondent's account has grown from Shs 50,000,000/= at the time of entering the consent judgment to over shs 90,000,000/= by the time of this application. That this is a proper case for the court to interfere with the consent judgment.

Counsel for the respondent in his arguments and submissions rubbished the above applicant's counsel 'submissions. It is important to note that counsel for

the applicant did not file his submissions in rejoinder. The respondent's submissions therefore remained unchallenged.

The applicant is not complaining about the consent judgment per se. The applicant is complaining about the terms which are not part of the consent settlement. The grounds raised by the applicant in this application do not at all challenge or affect the terms and orders in the consent judgment between the parties.

My brother Judge, **The Hon. Mr. Justice Christopher Madrama** in the case of **Eleko Balume & 2 others vs Goodman Agencies Ltd & 2 others HCMA No. 12 of 2012** had this say:

“The misapprehension or facts that may form the basis for setting aside a consent judgment must relate to the state of mind of the parties to the consent judgment by which state of mind informed by the facts before them they were misguided into executing the consent judgment”.

In this particular case above the liability or indebtedness of the applicant towards the respondent has not been disputed.

To understand very well the nature of this instant case, allow me to reproduce the consent judgment/decree, as I hereby do herebelow:-

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

CIVIL SUIT NO. 59 OF 2011
AGNES ANIMO PLAINTIFF
VERSUS
NSUBUGA GUSTER DEFENDANT

CONSENT SETTLEMENT/DECREE

By consent of both parties, their counsel and in full and final settlement of the above suit.

IT IS HEREBY DECREED THAT:

- 1) That the defendant pays the plaintiff or her counsel the undisputed sum of Ugs 50,000,000/= (fifty million shillings) being a refund of money received from the plaintiff in Civil Suit No. 59 of 2011 on or before the 7th day of March, 2012.
- 2) That Ug shs 10,000,000/= (Uganda Shillings ten million) shall be paid to the plaintiff or her counsel at the signing of this consent as a sign of commitment and settlement of the above suit.
- 3) That the defendant shall further pay interest upon the sum of Ushs 50,000,000/= (Uganda Shillings fifty million only) at 13% per annum from 5th December, 2008 to date and in any case not later than the 7th day of March, 2012.
- 4) That in consideration of paragraphs (1), (2) and 3 hereof, the plaintiff shall deposit in Court the certificate of title of Kyadondo Block 206 plot 2754 at Mpererwe free of any encumbrances together with duly signed transfer forms, two passport photographs and a copy of her identity card, in court for onward transmission to the defendant in the above suit .
- 5) That in default on either party, execution should issue against the defaulting party.
- 6) This settlement is made in good faith in bid to bring to mutual end all the claims and complaints relating to the matter/transaction.
- 7) That each party shall bear its own costs.

Dated at Kampala this 15th day of December, 2011.

Signed by: sgd
AGNES ANIMO PLAINTIFF

Signed by: sgd
NSUBUGA GUSTER DEFENDANT

We approve
Sgd sgd
F.X Ogwado & Co. Advocates Abaine Buregyeya & Co.
Advocates
[Counsel for the Plaintiff] [Counsel for the defendant]

GIVEN under my hand and the Seal of this Court this 19 day of December, 2011.

Sgd: Hon. Mr. Justice Joseph Murangira
JUDGE

Drawn & filed by
F.x. Ogwano & Co. Advocates
Plot 5115 Bombo Road,
Reev House Wandegeya,
P.O Box 3950
Kampala

”

In consideration of this consent judgment/decreed and the grounds upon which this application is based, the conclusion is that this application has no bearing with what the parties agreed to in the said consent judgment. The applicant is raising new matters in this application which in law is not allowed.

The applicant is not disputing the sum of Ugx. 50,000,000/= (fifty million shillings only) and the respondent is not denying receipt of Ugx. 14,000,000/= (fourteen million shillings only) so far. The fact that the period within which the applicant should have fulfilled his obligation under the consent decree dated 19/12/2012 lapsed is not disputed. The interest rate of 13% per annum from 5/12/2008 to the 7/3/2012 or until payment in full is also undisputed.

The dispute in this matter arises from an apprehension by the applicant that the respondent might not fulfill her obligation under the consent. It is my considered view that such an apprehension is speculative and premature and cannot be a ground to review the said consent decree. Court cannot interfere with a consent decree except in circumstances which would afford a good reason for varying or rescinding a contract between the parties (see the case of **Hassanali vs City Moto Accessories Ltd & Others [1972] EA 423**). A speculation cannot afford a ground to vary or rescind a contract. It's therefore my finding that Court should not interfere with the consent decree dated 19/12/2011.

Furthermore, the applicant is alleging breach of trust and breach of duty. It is unnecessary to review the consent basing on such speculative and premature allegations. The applicant is stopped from pleading breach of duty yet he is in breach of the consent decree.

More still, having failed to meet his obligations under the consent decree, the applicant is interested in having the suit heard a fresh. It is my finding that this Court should not condon these malafide intentions of the applicant as the consent judgment supersedes the original cause of action. No monies are in dispute since the date of execution of the consent, and it cannot be said that the applicant has been prejudiced by the consent itself.

It is settled law that the consent judgment/decree once super added the hand of a judgment and seal of the court is a court order and by failing or refusing to abide by its terms, the applicant has obviously defied the order and by failing or refusing to abide by the terms, the applicant has obviously defied the order of court. In the case of **Mugume Ben & anor vs Akankwasa Edward [2008] ULR 681**, justice **Arach Amoko** held that “**a person who defies Court orders cannot at the same time seek court protection for the unlawful activities....**”

It is my considered view that there is nothing meritorious in this application to warrant a review of the consent judgment as it offers the applicant remedy or option of execution against the respondent in the event that she neglected to fulfill her obligation in the said consent judgment/decree. It is also obvious that this application came after, the applicant having defaulted on the consent judgment way back in the month of March 2012 when he should have paid up in full.

In the premises, this issue no.2 is also answered in the negative.

4.3: Issue 3: Remedies

Counsel for the applicant submitted that the court reviews the consent judgment and orders that the applicant do pay the money under the consent judgment directly to the respondent's mortgage account in Barclays bank with the

knowledge of the employee's bank in order to protect the applicant's certificate of title

In the alternative, the applicant prays that the money under the consent judgment be paid directly to court instead of paying it directly to counsel for the respondent in order that the interest of the applicant are protected. Counsel for the respondent does not agree. He submitted that it is only fair and just for this Court, to dismiss the application with costs for lack of merit and execution proceeds by way of sale of the suit property to recover the amount of money owed to the respondent as quickly as possible.

Having made a finding on issues 1 and 2 hereinabove in the negative, obviously this application lacks merit. The applicant is not entitled to the remedies he is seeking for in this application. Wherefore, issue 3, too, is dismissed.

5. Conclusion

5.1 In the result and the reasons given in this ruling hereinabove, this application has no merit. It must fail. It is accordingly dismissed with costs to the respondent.

5.2 The respondent is free to level execution of the consent decree against the applicant, unless the applicant pays the monies due to the respondent as stipulated in the consent judgment/decree.

5.3 The execution against the applicant's land comprised in Block 206 plot 2754 land at Mpererwe shall proceed by way of sale to recover the decretal amount in the warrant of execution within thirty (30) days from the date of this ruling.

Dated at Kampala this 9th day of April, 2013.

sgd

**MURANGIRA JOSEPH
JUDGE**