THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(LAND DIVISION)

MISCELLANEOUS APPLICATION NO. 1018 OF 2015

(ARISING FROM HCCS NO. 1183 OF 1997)

1. ATTORNEY GENERAL

2. THE UGANDA LAND COMMISSION :::::::::::::::::: APPLICANTS

VERSUS

1. CHARLES JAMES MARK KAMOGA

2. JAMES KIMALA :: RESPONDENTS

BEFORE: HON. MR. JUSTICE BASHAIJA K. ANDREW

R U L I N G:

This application is brought by Notice of Motion under ***Order 52 rr.1 and 2 of the Civil Procedure Rules, SI 71 -1 (CPR)*** and ***Section 98 of the Civil Procedure Act (Cap.71) (CPA)*** seeking orders that;

a) The consent judgment entered into in HCCS No. 1183 of 1997 be set aside.

b) Cost of and incidental to this application abide the result of Civil Suit No. 1183 of 1997.

The grounds of application are that;

i. ***The Applicants were the unsuccessful parties in Supreme Court Civil Appeal No. 08 of 2004, Attorney General & Uganda Land Commission vs. James Mark Kamoga & James Kimala.***

ii. ***The background of this matter is that the Respondents instituted Civil Suit No. 1183 of 1997 against the two Applicants and 10 other persons, seeking inter alia a declaration that the Respondents are the lawful owners in freehold title of land, part of which was held by the 1st Applicant on lease, and other parts of which had been leased by the 2nd Appellant to the said 10 person in divers parcels.***

iii. ***Subsequently, however, Counsel for the 1st Applicant negotiated a settlement with Counsel for the two Respondents and on 31st August, 2001, and they signed a consent judgment which was filed on 24th September, 2001, and was duly entered by the Deputy Registrar on the same date and a decree dated the 26th October, 2001, was extracted.***

iv. ***The substance of the consent judgment and decree was that the Respondents were entitled to terminate the 1st Applicant's lease and re-enter the same, and further that the 2nd Applicant wrongfully and unlawfully granted leased on the Respondents' freehold land.***

v. ***However, six months after the consent judgment was entered, the 1st Applicant began the process to set aside the consent order having realised that it had been entered due to mistake and fraud on the part of the Respondents and this information only came to the Applicants after the consent judgment had been entered.***

vi. ***This challenge went up to the Supreme Court and resulted in Supreme Court Civil Appeal No. 08 of 2004. Attorney General & Uganda Land Commission vs. James Mark Kamoga & James Kimala.***

vii. ***That upon the guidance of Justice Kenneth Karuru of the Court of Appeal in the presence of all parties, the Applicants have subsequently carefully perused the***

Supreme Court judgment and have come to the firm conclusion that given the clear illustration of fraud, consent judgment entered into on the 26th October, 2001, can be set aside.

viii. ***That we have since perused the clear illustration of fraud in the report by the Uganda Police Force and are of the firm finding that the Respondents fraudulently acquired their alleged interests in the property in issue.***

ix. ***That this Application has a high likelihood of success in that there is substantial evidence of fraud on the part of the Respondents to illustrate that there are not the owners of the property in issue and the Applicants shall illustrate the detailed evidence of these events.***

x. ***That it is just and equitable and in the interest of justice that the consent judgment is set aside.***

The application is supported by the affidavit sworn by Mr. Denis Bireije, the Acting Director of Civil Litigation in the 1st Applicant's Chambers, and he states as follows;

1. ***That I am a male adult Ugandan of sound mind and the Acting Director of Civil Litigation in the Attorney General's Chamber and swear this Affidavit in that capacity.***
2. ***That I am well conversant with the facts arising out of HCCS No.1183 of 1997 and all the applications arising therefrom and depone as follows:-***
3. ***That I know that the Applicants were the unsuccessful parties in Supreme Court Civil Appeal No. 08 of 2004: Attorney General & Uganda Land Commission vs. James Mark Kamoga & James Kimala.***
4. ***That I know the background of this matter is that the Respondents instituted Civil Suit No. 1183 of 1997 against the two Respondents and 10 other persons, seeking, inter***

alia, a declaration that they were the lawful owners of freehold title of land, part of which was held by the 1st Applicant on lease, and other parts of which has been leased by the 2nd Applicant to the said 10 persons in divers parcels.

5. ***That subsequently, however, Counsel for the Applicant negotiated a settlement with Counsel for the two Respondents and on 31st August 2001, they signed a consent judgment, which was filed on 24th September, 2001, and was duly entered by the Deputy Registrar on the same date and a decree dated the 26th October, 2001, was extracted.***
6. ***That the substance of the consent judgment and decree was that the Respondents were entitled to terminate the 1st Applicant's lease and re-enter the same further that the second Applicants wrongfully and unlawfully granted leases on the Respondents' freehold land.***
7. ***That I know that six month later, after the consent judgment was entered, the Applicants began to process to set aside the consent orders having realised that it had been entered based on fraud and mistake that are all attributed to the Respondents and as a result the consent judgment had been entered in error.***
8. ***That I know that this process went up to the Supreme Court and resulted in Supreme Court Civil Appeal No. 8 Of 2004: Attorney General & Uganda Land Commission vs. James Mark Kamoga & James Kimala.***
9. ***That I am informed by one of my officers with conduct of this matter that upon the guidance of Justice Kenneth Kakuru of the Court of Appeal in the presence of all parties, the Applicants were advised to go back to High Court and illustrate the***

grounds of fraud in order to set aside the consent judgment entered into on the 26th October, 2001.

10. That I have perused and been briefed about the report by the Uganda Police Force and am of the considered opinion that the Respondents fraudulently acquired their alleged interests in the property in issue. (see Report marked and attached "A")

11. That this application for setting aside the consent judgment has been promptly brought without any unreasonable delay.

12. That the Applicants' pending Application has a high likelihood of success in that; there is substantial evidence of fraud on the part of the Respondents to illustrate that they are not the owners of the property in issue and the Applicants shall illustrate the detailed evidence of these events.

13. That I know that the application is not frivolous and present arguable grounds to set aside the consent judgment with a high possibility of success in that it illustrates a lot of fraud on the Respondents.

14. That I swear this affidavit in support of an application seeking to set aside the consent judgment extracted on 26th October, 2001.

15. That whatever is stated herein above is true and correct to the best of my knowledge."

The Respondent opposed the application and filed an affidavit in reply sworn by Mr. Mutyaba Najib one of the Respondents' Advocates. He states as follows;

1. That I am male adult Uganda of sound mind, one of the Respondents' Advocates herein and depone this affidavit as such.

2. That I have read and understood the Affidavit sworn by Denis Bireije and I reply thereto as follows;

3. ***That in the year 1997, the Respondents filed Civil Suit No. 1183 of 1997 in the High Court against the Applicants and 10 others for recovery of land comprised in FRV 306 F 220 and FRV 314 F. 13 land at Mbuya. (Copy of the plaint is annexed hereto marked "A").***

4. ***That on the 31st day of August 2001 the Respondents entered into a settlement with the Applicants where it was agreed that the leases which were granted by the Applicants to 3rd up to 12th Defendants in the main suit were unlawful and the Respondents should re-enter and again possession of their land. (Copies of settlement and decree are annexed hereto marked "B1" and "B2").***

5. ***That on the 5th day of March, 2002; the Consent Judgment was set aside by Justice J.B.A KATUTSI of High Court in Miscellaneous Application No. 0162 of 2002 upon Application by the Applicants. (A copy of ruling is annexed hereto marked "C").***

6. ***That on the 30th day of March, 2004; the Court of Appeal re-instated the consent judgment and set aside the order of the High Court vide Civil Appeal No. 734 of 2004. (Copy of judgment is annexed hereto marked "D")***

7. ***That on the 6th day of March, 2008 the Supreme Court put the matter to rest when it finally confirmed the consent judgment. (A copy of Jjdgment is annexed hereto marked "E").***

8. ***That in the year 2001, the Respondents applied to High Court to execute the consent judgment something which the 3rd to 12th Defendants in the main suit objected to but the High Court delivered a Ruling on the 31st day of March, 2011 sending the file to the Registrar for execution. (Copy of ruling is annexed hereto marked "F").***

9. ***That on the 21st day of April, 2011, the High Court is Warrant of Eviction against the Applicants together with the 3rd to 12th Defendants in the main suit. (a copy is annexed hereto marked "G").***

10. ***That on the 26th day of April, 2011; the 3rd to 12th Defendants in the main suit were evicted but they forcefully re-gained possession with the assistance of RDC Nakawa who purportedly halted the eviction. (See a copy of Bailiffs Return and RDC Letter marked "H1" and "H2").***

11. ***That the 3rd and 12th Defendants in the suit thereafter rushed to State House to fight the eviction but State House categorically told them that it cannot reverse judgments of Court and they should negotiate with the Respondents of compensation(See Annexture "I")***

12. ***That the 3rd and 12th Defendants in the main suit then filed Miscellaneous Application No. 631 of 2011 in High Court seeking to review the Consent Judgment or alternatively to be compensated but the application was dismissed by Judge on the grounds that the High Court has neither the competence nor the powers to overturn let alone review matters deliberated on by Supreme Court which is the final Appellant Court of this Country. (A copy of the Ruling and Application are annexed hereto marked "K")***

13. ***That the 3rd to 12th Defendants in the main suit filed a Notice of Appeal in the Court of Appeal intending to challenge the Ruling of the High Court. (See Annexture "L").***

14. ***That they also filed Civil Application No. 356 of 2012 for stay of execution which was later withdrawn by consent of all parties on understanding that parties would file a Consent where the 3rd of 12th Defendants in the main suit would vacate the suit land by***

31st of December, 2015 which Consent was not signed due to lack of co-operation by the said Defendants.

15. That I genuinely believe that this Application is incompetent and an abuse of Court process as he said Defendants are now using the Attorney General to continue staying on the suit land illegally.

16. That the Applicants have no interest in the suit land as they don't occupy the same and are only being used by the 3rd to 12th Defendants in the main suit.

17. That this application is res judicata as the matter to be decided has already been adjudicated for by Courts.

18. That I affirm this affidavit in opposition to the application.

19. That everything I have stated herein is true and correct to the best of my knowledge and belief save that is based on information the sources of which are disclosed therein."

At the hearing, the Applicants were represented by Mr. Kallemera George, a Senior State Attorney in 1st Applicant's Chambers, while Mr. Issa Kavuma represented the Respondents.

Mr. Kallemera submitted basically by outlining the background to the application. He pointed out that the 1st Respondent, Charles James Mark Kamoga, fraudulently claimed to be a son of the late Gangaram Tek Chand and his wife, who were Indian nationals who had leased their interest in the suit property comprised in Plot 10 Solent Avenue, Mbuya Hill, to the Uganda Consolidated Properties, which devolved its interest to the Uganda Advisory Board of Trade, which later was wound up and the property vested in the Uganda Land Commission.

Mr. Kallemera submitted that upon the land being vested in Uganda Land Commission; the Uganda Government offered a group of ten Civil Servants opportunity to purchase the properties

on the suit land under the Civil Servants Pool Houses Scheme. That as a result leasehold title were made and issued to the ten civil servants.

Mr. Kallemera also pointed out that it is after these events that the two Respondents, who are Uganda citizens, came up claiming to be of Indian descent and successors in title entitled to the properties of Gangaram Tek Chand and his wife, the Indian nationals. That the Applicants in error and without notice of the Respondents' fraud entered into a consent judgment that gave the suit property to the two Respondents.

Mr. Kalemera referred to the Police Investigation Report, *Annexture "A"* to the affidavit of Mr. Denis Bireije, and argued that the fraud of the Respondents is clearly pointed out therein and how they managed to hoodwink the Applicants into signing a consent judgment. Counsel stated that the matter was argued up to the Supreme Court, but that the Applicants lost it because it was argued purely on technicalities. That even the two superior courts noted that litigation in this matter has not been closed. Counsel argued that the Applicants' only shortcoming in the Supreme Court was that they had not illustrated evidence of fraud, which they are now bringing to this court. Mr. Kallemera further argued that since fraud unravels everything, the Respondents should not be allowed to benefit from it.

In reply Mr. Kavuma Counsel for the Respondents opposed the application that it an abuse of court process, and that it is also *res judicata* under *Section 7 CPA.* Counsel submitted that the same application and prayers were the subject of *Miscellaneous Application No. 162 of 2010* in the High Court which granted them, but that the judgment was set aside by the Court of Appeal whose decision was confirmed by the Supreme Court that varied the ruling. Mr. Kavuma further pointed out that the issue of fraud was illustrated in those judgments and as such it is not a new discovery as claimed by the Applicants now. Mr. Kavuma also submitted that discovery of new

fact can only be brought by way of review if conditions for review are met, but not by setting aside the consent judgment.

Regarding *Annexture "A"*, the Police Report, Mr. Kavuma submitted that it has been the subject of *Miscellaneous Application No. 631 of 2001*, which was an application for review of the consent judgment filed by the 3rd to 12th Defendants in the main suit also applying to review the consent judgment, but that it was dismissed by High Court because the issues had been adjudicated by the Supreme Court; the highest appellate court in the land.

Mr. Kavuma vehemently argued that allegations of fraud must be strictly plead and proved, and that a judgment cannot be set aside merely on basis of an annexture of the Police Report that has not been proved in court. He argued that this application lacks merits and litigation must come to an end.

Arising from this application, the following are the main issue for resolution;

(1) Whether the application is res judicata.

(2) Whether the consent judgment in HCCS No. 1183 of 1997 can be/should be set aside.

(3) What are the remedies available to the parties?

Resolution of issues

(4) Issue No. 1: Whether the application is res judicata.

The doctrine of *res judicata* is well encapsulated under ***Section 7 of the Civil Procedure Act (supra)*** which provides as follows;

> ***"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the***

same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has to be heard and finally decided by such court."

From the provisions, a matter can only be regarded as *res judicata* if it is directly and substantially in issue in the subsequent suit and was directly in issue in the former suit. See: ***Karsh vs. Uganda Transport Co. [1967] E.A. 774.*** Further, the former suit must have been between the same parties or between parties under whom they litigate or any of them claims. See: ***Gokaldas Laximidas Tanna vs.Sister Rose Muyinza [1990 – 1991] KALR 21.*** Furthermore, the court trying the former suit must have been a court competent to try the subsequent suit or suit in which such issue is subsequently raised. See: ***Ismail Dabule vs. Wildon Osuna Otwany (1992) I KALR 23.*** The other requirement is that the matter in issue in the subsequent suit must have been heard and fully decided in the former suit. See: ***Semakula vs. Magala & Or's (1979) HCB 90.***

It is also trite law that where a suit is dismissed on a preliminary point not based on merit, it is no bar to a subsequent suit on the same facts and issues and between the same parties. In short; a dismissal on a preliminary points not based on merits does not give rise to application of the doctrine of *res judicata*. This position is fortified by the decision in ***Koharehad vs. Jan Mogamod (1919 – 1921) 8 EALR 64*** which was cited with approval in ***Allen Nsibirwa vs. National Water & Sewage Corporation, HCCS No.220 of 1995.***

The test in the doctrine of *res judicata* is aptly summarised in the case of ***Lt. David Kabareebe vs. Maj. Prossy Nalweyiso. CACA No. 34 of 2003***, where it was held as follows;

"To give effect to a plea of res judicata, the matter directly and subsequently in issue in the suit must have been heard and finally decided in the former suit. It simply means

nothing more than that a person shall not be heard to say the same thing twice over in successive litigations."

When this test is applied to facts of the instant case, much as some issues partaining to the consent judgment under consideration were litigated upon and adjudicated up to Supreme Court, it is apparently clear from the reading of the successive and judgments and resultant orders that the superior courts dealt purely with preliminary points of law, but not the merits of the case.

The points of law dealt with purely concerned issues of the forum and the procedure. The superior courts never tackled the substantive issues of the alleged fraud of the Respondents. The same issues were raised by the Applicants but were never determined on merits by the successive courts. This is clearly discerned from the Supreme Court judgment in ***Civil Appeal No. 8 of 2004*** at page 23 -24 where Mulenga JSC (R.I.P.) stated as follows;

"As I indicated earlier in this judgment, the application was rejected not so much for lack of merit but more because in the court's view, the application was made through the wrong procedure and before the wrong forum."

The learned Justice went on to quote the concluding remarks on the issue in the lead judgment of the Court of Appeal (at page 24) that;

"This judgment does not close the chapter of litigation between the parties over the consent judgment."

The Supreme Court judgment, at page 24, after finding that the ground upon which review was sought was that the consent was given out of ignorance of the fact that the Applicants herein had pleaded fraud in the 2nd amended written statement of defence, held, at page 25, as follows;

"I therefore find that the consent decree was not shown to be vitiated in any way to warrant interference through review or otherwise…"

What the above finding simply meant was that the Applicants had not illustrated fraud, among other vitiating factors, to warrant the consent being reviewed or otherwise. The Supreme Court did not at any one time state that there were no vitiating factors. This is very clear from its judgement that issues touching on the alleged fraud of the Respondents in the consent were never determined on merits, where it concluded as follows, at page 25 – 24;

> ***"Before taking leave of this case, I am constrained to comment on the purpose and effect of the Court of Appeal decision. Although it held that the trial judge could have invoked provisions of Order 9 r.12 to entertain the application and set aside the consent judgment as he did albeit under different provisions, it allowed the appeal and dismissed the application as if the trial judge had no jurisdiction to dispose of it. That, in my view, is taking undue regard to technicalities too far contrary to Article 126 (e) of the Constitution."***

The above extract could only mean two things. The first one is that the Court of Appeal was wrong to have re – instated the consent judgment and dismissed the application which the High Court had the power to dispose of. The second is that by dismissing the application and re - instating the consent judgment the Court of Appeal never considered the substance, but only the formal requirements of the application. It is thus incorrect to claim, as was claimed in the affidavit in reply at paragraph 7, that the Supreme Court put the matter to rest when it finally confirmed the consent judgment.

Within the terms of ***Section 7 CPA (supra)*** therefore, and in the context of the decisons in the cases of ***Koharehad vs. Jan Mogamod (supra) and Allen Nsibirwa vs. National Water & Sewage Corporation (supra)*** the dismissal of the suit on technicalities or preliminary points not based on merits does not give rise to operation of the doctrine of *res judicata*. This is more so

within the context of the holding in ***Semakula vs. Magala & O'rs case (supra)*** that the matter in issue in the subsequent suit had not been heard and fully decided in the former suit. *Issue No.1* is answered in the negative.

Issue No.2: Whether the consent judgment in HCCS No. 1183 of 1997 can be set aside.

In the decisions in ***Hirani vs. Kassam (1952) E.A 131,*** and ***Broke Bond Liebig (T) Ltd. vs. Mallya (1975) E.A 266,*** the general rule and the exception to the general rule on setting aside a consent judgment were considered and applied. In the ***Hirani case (supra)*** which adopted a passage from ***Seaton on Judgements and Orders 7th Ed.Vol.1 at page 124,*** it was held as follows;

> ***"Prima facie, any order made in the presence and with consent of counsel is binding on all the parties to the proceedings or action, 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 a court to set aside an agreement."***

The excerpt quoted above is self - evident on the factors to consider, and when a consent judgment may be set aside. Therefore, the answer to *Issue No.2* above very much depends on whether the consent judgment sought to be set aside in the instant case meets the criteria applied in the ***Hirani case (supra).***

The Applicants allege fraud on part of the Respondent in obtaining the consent judgment. This is purely an unproven allegation. In ***Kampala Bottlers vs. Damanico [1990 – 1994] EA 141 (CA)*** it was held that fraud must be pleaded and proved, and that the standard of proof is beyond that required in ordinary civil cases but not beyond reasonable doubts required in criminal cases. It

would follow that the Applicants herein who allege fraud, which is a very serious allegation, must discharge that burden to the required standard.

Having stated as above, it is however, observed that the allegation of fraud made against the Respondents in this application in which it is sought to set aside the consent judgment is purely by affidavit evidence. The intended proof of the allegations is contained in a Police Investigation Report *(Annexture "A")* which is merely an attachment to the affidavit in support of the application. No Police Officer who made the report or investigated the allegations has sworn an affidavit or been called under provisions of ***Order 19 r.2 CPR*** to attest to the veracity of the report. It thus remains an unproven allegation against the Respondents.

The scenario creates the difficulty because court cannot at this stage delve into determining the issue of fraud based on affidavit evidence. Allegations of fraud being serious issues of law and fact cannot simply be disposed of in an application of this nature. The decision in ***Kampala Bottlers vs. Damanico (supra)*** is quite instructive on this point. The standard of proof in fraud cases is higher than in ordinary cases. That being the case, affidavit evidence would not be the appropriate type of evidence that would meet the requirements of that high standard. In this observation I am fortified by the decision of Court of Appeal in ***Haji Numani Mubiakulamusa vs. Friends Estate Ltd, CACA No. 209 of 2013,*** where it was held that issues of fraud raised in an affidavit could not properly be resolved in an application because they are serious issues of law and fact that require proper pleadings upon which evidence would be adduced.

When the principle in the case above is applied to facts of this application, it is in no doubt that the affidavit evidence supporting the application cannot be the type of evidence to prove the issue of fraud. The evidence has not been tested for its veracity through cross- examination or

otherwise by the Respondents, who in any case are also required to reply in similar manner by affidavit evidence.

I am acutely alive to the provisions of ***Order 19 r.2(supra)*** where a party may, upon application to court, require that a deponent of an affidavit in an application be summoned for cross – examination on his or her affidavit in court. That notwithstanding, this court is of a strong view that it still would not measure up to the standard beyond mere probabilities. This is more so because the court is not at this stage in possession of sufficient material to firmly determine the issue of fraud. Thus setting aside the consent judgment at this stage based purely on unproven allegations of fraud in an affidavit would amount determining the issue of fraud prematurely without all the parties being given a fair hearing on the issue, and without court being in possession of sufficient material regarding the particular allegations.

As I understand it, it is only after adducing sufficient evidence on the issue of fraud upon proper pleadings by both parties that court would be best placed to properly determine whether or not to set aside the consent on grounds of fraud. Merely attaching a Police Investigation Report to the affidavit in support of the application is not proof of the alleged fraud.

Since the Supreme Court and Court of Appeal found that litigation in this matter on issue of the consent judgment had not closed and gave guidance that the Applicants had not illustrated material facts illustrating or tending towards fraud, it meant that the Applicants still had opportunity to do so. As I have already noted, they could do so upon filing proper pleadings and adducing sufficient evidence on the issue of fraud. This gives opportunity to the Respondents who would also adduce evidence, which they have never done at any rate, to illustrate that they are actually the lawful owners of the suit property and hence discharge the allegations of fraud against them.

In the circumstances, the proper course of action is not to dismiss this application as urged by Counsel for the Respondents. This court is seized with wide discretion under ***Section 98 of the Civil Procedure Act (supra)*** and ***Section 33 of the Judicature Act (Cap. 13)*** to exercise its power meet the ends of justice. This is particularly so in this case where serious matters of law and fact have been drawn to its attention. Therefore, the Applicants herein are directed to file proper pleadings by plaint and serve the Respondents within one week from the date of this ruling for the sole purpose of pleading and proving the issue of the alleged fraud. The Respondents will file their defence if any, on the issue within the period fixed for filing a defence under the ***Civil Procedure Rules (supra)***. This is done to avoid having to determine the issue of the alleged fraud in the consent judgment on mere technicalities but on merits. In deciding as such, I am fortified by guidance on similar terms in the Supreme Court decision in ***General Parts (U) Ltd & Another vs. Non – Performing Assets Recovery Trust, SCCA 09 0f 2005*** (unreported) at page 10 -12.

In the meantime, the execution of the decree arising from the consent judgment is hereby stayed pending the determination of the issue of the alleged fraud one way or the other. This disposes of *Issue No.3* on the remedies available to the parties.

BASHAIJA K. ANDREW
JUDGE
05/02/2016

Ms. Adong Imelda holding brief for Counsel for the Applicants

present.

Mr. Najib Mutya Counsel for the Respondents present.

Mr. Godfrey Tumwikirize Court Clerk present.

Court: ruling read in open Court.

BASHAIJA K. ANDREW
JUDGE
05/02/2016