

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

MISCILLENEOUS APPLICATION NO. 144 OF 2013

(Arising from H.C.CS. No. 168 of 2009)

- 1. MANSOOR NSIMBE**
- 2. MOHAMED LUMALA**
- 3. MAIMUNA NANTALE :.....: APPLICANTS**

VERSUS

- 1. CALTEX (U) LTD.**
 - 2. CHEVRON (U) LTD.**
 - 3. TOTAL MARKETING (U) LTD.**
 - 4. TOTAL (U) LTD. :.....:**
- RESPONDENTS**

BEFORE: HON MR. JUSTICE BASHAIJA K. ANDREW

RULING

This application is brought under *Order 51 rr.1 &3* of the *Civil Procedure Rules* (the correct is *Order 52*) and *Section 98 of the Civil Procedure Act*, for orders that the consent judgment executed on 23/05/ 2012 between the parties be set aside, and the main suit *H.C.C.S No. 186 of 2009* be determined on the merits. The grounds of the application are that;

- i) The consent judgment (which was executed between the parties' Advocates and not the parties themselves) was so executed with the mistaken belief that the 4th Respondent M/s Total (U) Limited now in possession and carrying on activities on the suit land known and described as LRV 2657 Folio Wakaliga Nateete Block 18 Plots 587 and 296 at Kampala measuring approximately 0.17 Hectares had any form of interest therein whereas not.*

- ii) *The consent judgment did not encompass the intention of the parties to wit: the Applicants whose intention was to sale their mailo rather than the reversionary interest in the suit land was mistakenly represented by their former lawyers M/s Abaine – Buregyeya & Co. Advocates.*
- iii) *That the mistake has hitherto been communicated to the Respondents and their lawyer who has since acknowledged the same by their participation in numerous negotiations but are yet to agree to new settlement proposals.*
- iv) *That henceforth, the 4th Respondent is in illegal occupation and use of the suit land thus the need to set aside the consent judgment to determine its rights in the same on the merits.*
- v) *That in the event of renewed settlement the Applicants would wish to know which proper party to deal with respect to the suit land, if at all.*

Evidence.

The Application is supported by the Affidavits of ***Mansoor Nsimbe*** the 1st Applicant, and ***Abaine Jonathan*** the Applicant's former lawyer. The 1st Applicant's evidence is that their said former lawyer deviated from the instructions given to him of selling the *mailo* rather than the reversionary interest in the suit land to the Respondents. Further that whereas the Applicants sought a variation of the consent judgment with the Respondents, the latter refused and instead insisted on execution of a transfer instrument in favour of the 4th Respondent hitherto unknown to the Applicants, hence the need to set aside the impugned consent judgment.

Mr. Abaine Jonathan, the Applicant's former lawyer also swore an affidavit confirming having deviated from his former clients' instructions, and admits the mistake. That all payments made by the Respondents were in respect to the *mailo* rather than the reversionary interest in the suit property which was clearly not the

Applicants' wish. Further, that it was during the period of renewed negotiations that he discovered from the Respondents' lawyers that the 4th Respondent which was in physical occupation and use of the suit land had no lease interest, hence the need to set aside the consent judgment and investigate the claims of the Applicants in a full trial.

In reply, **Suzan Namatovu** the Company Secretary of the 3rd and 4th Respondents swore an affidavit opposing the application. She confirms the execution of the consent judgment under the numerous change of names right from the 1st to the 4th Respondents. She maintains that what was essentially agreed upon between the parties was sale of the reversionary interest to the tune of Ushs.2 million, which was fully paid, and that the Applicants cannot run away from what they agreed upon under the guise of mistake of Counsel.

Submissions.

Counsel for the Applicants submitted that the said consent judgment was neither signed by the Applicants, nor the Respondents' representative Directors or Company Secretaries, and that the Applicants who were not a party to the consent judgment could not have footed a valuation bill for a reversionary interest of Ushs.2 million which they were vehemently opposed to, and could not have agreed to wholly and fully discharge the Respondents from all claims in the suit when the 4th Respondent has no lease interest in the suit land; if at all. Counsel cited **Order 46 r.1 CPR** which provides that;

“Any person considering himself or herself aggrieved by a decree or order which no appeal is hereby allowed and who from discovery of new and important matter or evidence which after due diligence and exercise was not within his or her knowledge...may apply for review of the judgment to the court which passed the decree or made the order.”

Counsel submitted that whereas the consent judgment reads “*by consent of both parties*”, the Applicants never blessed it as they did not sign it, and yet a consent judgment must always be executed by the parties. Counsel relied on ***Babigumira John & O’rs v. Hoima Council [2001 – 2005] HCB 116*** where it was held *inter alia* that a consent order can be set aside if it was given without sufficient material facts or in misapprehension or in ignorance of material facts or in general for a reason which would enable the court to set aside such an agreement.

Counsel contended that the new and important evidence as well as material fact of the case is the 4th Respondent’s purported interest in the suit property, which is sufficient reason to have the consent judgment set aside and the suit determined on the merits as to the rights of the 4th Respondent, which is in actual occupation and use of the suit property without a formal instrument of transfer or agreement with the Applicants.

Counsel also relied on ***John Nagenda & 53 O’rs v. Coffee Marketing Board [1997] KARL 15***, where it was held *inter alia* that for a consent judgment to be set aside the persons so moving court had to be legally aggrieved, and under the inherent powers of court such consent would be set aside. Counsel argued that the Applicants are clearly aggrieved persons within the meaning of the law as demonstrated by the reasons given, and cited ***Edison Kanyabwera v. Pastori Tumwebaze [2001 – 2005] HCB 98***, where the Supreme Court held *inter alia* that where sufficient cause was shown, then the consent judgment could be reviewed with the result of setting the same aside.

Counsel further submitted that the reason the consent judgment ought to be set aside is that it was entered by mistake by the former lawyer of the Applicants, and that mistake of Counsel should not be visited on innocent clients. To support this position Counsel cited ***Kasaala Growers v. Kakooza & A’nor [2001] HCB Vol. 1 at page 44***, and ***Dong Yun Kim v. Uganda [2008] HCB 15***, where it was held,

inter alia, that mistake or negligence of Counsel should not be visited by the court on his client. That in this case the Applicants' former lawyer's omission to clearly state in the consent judgment the Applicants' interest fundamentally affected the veracity of the said consent, and that the same be set aside as such mistake should not be visited on the clients.

Counsel argued that the 4th Respondent is a stranger to the Applicants and as such court ought to investigate these claims in a full trial. Counsel relied on ***Calvery v. Green (1984) 55 CLR at page 244 (HL); Kenya Commercial Finance Co. Ltd. v. Afraha Education Society [2001] 1 E.A (CAK) at page 89***, where it was held *inter alia* that a person without any registered land must lay out a *prima facie* case of ownership thereto. Further, that the Respondents have not demonstrated that they will suffer any prejudice were the application to be granted.

In reply, Counsel for the Respondents opposed the application and submitted that the main issue is whether there are sufficient grounds advanced by the Applicant to warrant the setting aside of the consent judgment. That the grounds upon which a consent judgment may be set aside are settled, and that in the *locus classicus* case of ***Hirani v. Kassam (1952) E.A. 131*** where the Court of Appeal for Eastern Africa approved and adopted a passage from ***Seton On 'Judgments and Orders' 7th Ed Vol. 1 page 124***, it was held that;

“A consent order made in the presence and with the 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 the public 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 any reason which would enable the court to set aside an agreement.”

That the same position was restated in *Attorney General v. James Mark Kamoga and A'nor, S.C.S.A No. 8 of 2004*, where it was held that the discretion in setting aside consent judgments is more restricted and is exercised upon well established principles. Further, that in *Huddersfield Banking Co. Ltd. v. Henry Lister & Co.Ltd. (1895) 2 Ch.D page 273* it was held that a consent order is an order and as long as it stands it must be treated as such, and it is good estoppel as any other order. Further, that the doctrine of estoppel as incorporated under *Section 114 of the Evidence Act*, would make the consent order to operate as estoppel as against someone trying to assert a different position from that stipulated in the agreement of the parties.

Counsel contended that it is not true that the Applicants did not intend to sell the reversionary, but the *mailo* interest, and that by mistake of Counsel the consent refers to the reversion. Counsel argued that the Applicants were at all times aware of the interest the Respondents held in the property, and that it was the Applicant's lawyer who actually introduced the terms of settlement. Further, that the sequence of events as stated in the affidavit of Susan Matovu shows the Applicants' knowledge of what was happening at all times. Furthermore, that in *Annexure "D" and "F"* to the affidavit of the said Susan Matovu, Counsel Abaine and the Applicants clearly indicated that the said Mr. Abaine had full instructions to handle the matter and to negotiate and reach a settlement.

To buttress their submissions, Counsel for the Respondents cited *Petro Sonko & A' nor v. H.A. D Patel & A'nor [1955] 22 (EACA) 23* where it was held that an advocate having approved the form of a decree he was stopped from questioning the form or substance thereof. Further, that a represented litigant is taken to have given all the requisite instructions before consent is entered, and that in this case the evidence clearly shows that Mr. Abaine had full instructions to enter the consent, and the Applicants needed not to sign the judgment themselves.

Counsel for the Respondents further submitted that the averment by the Applicants and their former lawyer regarding mistake of Counsel is unfortunate, because the said lawyer had full instructions, and at all times intimated as much without the objection of the Applicants. That all the said lawyer's letters addressed on the subject were duly copied to the Applicants and at no time then was such an issue raised.

Furthermore, that by definition the *mailo* and the reversionary interest are one and the same; because the reversionary interest in the property is the *mailo* interest and *vice versa*. That the interest was valued at Ushs. 2 million, which was paid for the lease in full, and that letter *Annexure "N"* to the affidavit of Susan Matovu from Counsel Abaine clearly indicates that the Applicants were at all times aware of the terms of the consent, which they had accepted as binding even though they later sought a fresh negotiation. Counsel cited ***Smith Mackenzie & Company Ltd. v. Wakisu Estates Ltd. [1967] 1 KALR No.38***, to the effect that in the absence of fraud or misrepresentation a unilateral mistake by one of the parties to a contract does not vitiate the contract.

Counsel for the Respondent also opposed the view that the Applicants were not aware that the 4th Respondent's lease on the property, because the Applicants at all times knew or ought to have known that the 4th Respondent did not have a lease interest in the property. That the essence of the claim in the suit is premised on a possible assignment of the property, which would require simple due diligence to ascertain. Further, that the suit was initially against the 3rd Respondent only, but that the Applicant filed ***Miscellaneous Application No. 507 of 2010*** seeking to join the 4th Respondent to the suit allegedly to settle all questions in the suit regarding assignment of interest in the suit property. That the said application clearly indicates that the lease belongs to the 3rd Respondent, and that the only issue is whether the lease was assigned by reason of the company's name changes. That

there has been no discovery of new and important matter of evidence which after due diligence was not within the Applicants' knowledge and/ or could not be produced at that time.

Counsel also called upon court to consider the issue of laches in that the consent judgment was entered into on 23/05/2012 and on 22/02/ 2013 ten months later the Applicants filed seeking to set it aside basing on an issue they were aware of even before the consent was entered. Counsel argued that this was inordinate delay and that under **Order 46 r.1CPR**, an application made after inordinate delay ought to be dismissed.

Consideration.

I have endeavored to reproduce the evidence and submissions in detail for ease of following. The all encompassing issue is whether the consent judgment in this case meets the criteria for review set under **Order 46 CPR**.

It is the established law, as was held in the land mark case of **Hirani v. Kassam (supra)** that a consent judgment derives its legal effect from the agreement of the parties, and can only be set aside or rescinded on the same principles and grounds as those a contract would ordinarily be rescinded or set aside. Further, in **Babigumira John & O'rs v. Hoima Council (supra); Broke Bond Liebig T Ltd. v.Mallya [1975] E.A. 266**, it was held that unless obtained by fraud or collusion, 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 the court to set aside such an agreement, a consent would be set aside. In addition, where a party obtains a consent judgment irregularly the opposite party may of course insist on its right to have such consent set aside.

Therefore, subject to well known exceptions, the court cannot set aside a consent judgment when there is no sufficient material to show that Counsel for a party

thereto had entered into such consent without the instructions of the client. Even if Counsel has no specific instructions to enter a consent judgment, but only has general instructions to defend the suit; for as long as he/she is acting for a party in a case and the instructions have not been withdrawn such Counsel has full control over the conduct of the case and has apparent authority to compromise all matters connected therewith. See: ***BM Technical Services v. Francis X. Rugunda [1997] HCB 75*** .A similar position was taken in ***Hirani v. Kassam (supra); Attorney General v. James Mark Kamoga and A'nor (supra)***.

The instant application was brought under ***Section 98 CPA*** and ***Order 52 rr. 1&3 CPR*** and the Applicants relied on ***Order 46 r.1 CPR*** on the review of judgment by the court which passed the decree or made the order on ground of discovery of new and important matter or evidence which after due diligence and exercise was not within the applicant's knowledge, or on account of some mistake or error apparent on face of the record. The Applicants contend that there has been discovery of a new and important matter of evidence previously overlooked. Further, that the consent was arrived at as a result of mistake of their Counsel, and also that they never blessed consent judgment because they did not sign it and yet a consent judgment must always be executed by the parties.

With due respect to the Applicants, I have found the submissions above to be quite lacking in merit all the way through. ***Order 46 r. 1 (supra)*** under which the application was brought provides for limited review in very specific circumstances which do not include those in the instant case. In ***Re Nakivubo Chemists (U) Ltd. [1979] HCB 12*** the conditions for review were held to be; firstly, that there is discovery of a new and important matter of evidence previously overlooked by excusable misfortune. Secondly, that there is discovery of some error or mistake apparent on the face of record; and thirdly, that the review ought to be made by court for any other sufficient reason. The expression "sufficient reason" however,

ought to be read as meaning sufficiently of a kind analogous to the first two. See also: ***Yusuf v Nokorach*[1971] E.A. 104.**

In the instant application, the alleged new evidence advanced by the Applicants is that the 4th Respondent is in actual occupation and utilisation of the suit land. However, this is actually not new evidence that had been overlooked and could not be available on due diligence at the time the consent was executed - because it was never there in the first place. As matter of fact, it came into existence much later with the re - assignment of the lease by the 1st to the 2nd to the 3rd and finally to the 4th Respondent. It is evident that all the parties, including the Applicants, acknowledge the fact that the 4th Respondent has no lease interest in the suit land; and hence the situation is not one that would be covered by ***Order 46 r.1 (supra)*** to warrant a review of the consent order.

In the same light as the above, there is need to re-examine the essence of ***Miscellaneous Application No. 507 of 2010.*** It was filed by the Applicants seeking to join the 4th Respondent as a party on ground, *inter alia*, that it would be necessary for the settlement of all questions in the suit, including the assignment of interest in the suit property. The inescapable implication is that the Applicants were aware of the 4th Respondent's status in respect to the suit property which compelled them to file the application to add the 4th Respondent as party. Besides, the Applicants state in the said application that the lease belongs to the 3rd Respondent; and that the only issue was whether the lease was assigned by reason of the company's change of names. This could not reasonably amount to discovery of any new and important matter of evidence which after due diligence was not within the Applicants' knowledge, or could not be produced at that time as required; which review unobtainable in the circumstances.

The other ground preferred by the Applicants is the alleged mistake of Counsel. The reading of ***Order 46 r.1 (supra)*** however, shows that mistakes of Counsel are

not contemplated therein. The only mistakes covered by the rule are “mistakes apparent on the face of record”. These too are limited to mathematical and clerical errors that can be corrected under **Section 99 CPA** under the “slip rule” only to give effect to the court’s intention (not the parties’) in a judgment.

At the same time, the alleged mistake of Counsel does not fall within the category of “any other sufficient reason”, because it is not sufficiently of a kind analogous to the other two. Therefore, the consent judgment in the instant case is not such as would call for review under provisions of **Order 46(supra)**.

I quite agree with the expressed view, by Counsel for the Respondents, that in this case *mailo* and the “reversionary interest” are one and the same, because the reversionary interest in the property is the *mailo* interest and *vice versa*. Since the interest was valued at Ushs. 2 million and paid for in full, there would be no more interest to pay for. This renders the argument of mistake of Counsel quite irrelevant in this case.

It is evident in letter *Annexed “N”* to the affidavit of Susan Matovu from Counsel for the Applicants Mr. Abaine, that the Applicants were quite aware of the terms of the consent, which they accepted as binding even though they then sought fresh negotiations. That being the position, the Applicants would not be allowed to approbate and reprobate the consent order until they get the result they want; for to do so would amount to abuse of court process which this court is enjoined to curtail under **Section 17(2)** of the **Judicature Act**, and **Section 98 CPA**

As was held in **Smith Mackenzie & Company Ltd v. Wakisu Estates Ltd. (supra)** in the absence of fraud or misrepresentation on the part of the other party a unilateral mistake by one of the parties to a contract does not vitiate the contract. Similarly, in the instant case, in absence of a plea or any evidence of fraud or misrepresentation on the part of the Respondents, the claim of a mistake on part of the Applicants or their Counsel is quite unsustainable nor can it vitiate the consent

order. It is trite law that any order made in the presence and with the presence of Counsel is binding on all parties to the proceedings or action unless it can be shown that it was obtained by fraud or collusion, 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 the court to set aside such an agreement. See: ***Babigumira John & O’rs v. Hoima Council (supra)***.

I also find unsustainable the argument that the consent judgment was neither signed by the Applicants nor the Respondents’ representative Directors or Company Secretaries. The consent shows that Counsel Mr. Abaine signed for the Applicants and *Annexure “D” and “F”* to the affidavit of Susan Matovu also show that Counsel Abaine had full instructions to handle the matter and authority to negotiate and reach settlement. It is the established law that an advocate having approved the form of decree is stopped from questioning the form or substance thereof. See: ***Petro Sonko and A’nor v. H.AD Patel and A’nor (supra)***.

At the same time, where the Applicants had given all the requisite instructions to the said lawyer before the consent judgment was entered, as in this case, they did not need have to sign it themselves since they were represented, and were actually present on the day the consent was formally entered. In effect they are estopped from trying to assert a contrary position from that clearly obtaining on the consent judgment.

Regarding the issue of laches, it is trite law that the time taken to lodge an application for review is an important factor to consider when determining an application for review. See: ***Combined Services Ltd. v. Attorney General, H.C.C.S. No. 200 of 2009***; and ***Muyodi v. Industrial and Commercial Development & Anor [2006] EA 243***. The consent judgment in this case was entered on 23/05/2012, and the application for review was not filed until 22/02/2013. Given the circumstances of this case, particularly the fact that the Applicants

were aware of the issue even before the consent was entered; ten months is considered inordinate delay. It would only serve to demonstrate that Applicants brought this application as an afterthought, and are just trying their luck in an apparent “fishing expedition”. The application fails the entire test under ***Order 46 r.1 (supra)*** and for the foregone reasons it is dismissed with costs.

BASHAIJA K. ANDREW

JUDGE

03/10/2013