THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(Land Division)

CIVIL REVISION NO. 006 OF 2012

(Arising from Nakasongola Civil Suit No. 16 of 2007)

TIBAINGANA GODFREY ..... APPLICANT

VERSUS

KABWENDE STEVEN ……..... RESPONDENT

BEFORE: Hon. Lady Justice Monica K. Mugenyi

RULING

The applicant, Mr. Tibaingana filed Civil Suit No. 16 of 2007 in Nakasongola Chief Magistrates Court alleging that the respondent was liable in trespass to his land described as Buruli Block 155 plot 10. On 3rd September 2007 the parties purportedly executed a consent judgment before the Chief Magistrate of Nakasongola. The applicant now seeks to have the said consent judgment set aside on grounds that it was executed by counsel for the applicant without the knowledge or consent of his client. The application is premised on sections 83 and 98 of the Civil Procedure Act (CPA), as well as Order 52 rule 1 of the Civil Procedure Rules (CPR).

At the hearing of the application the applicant was represented by Mr. Gibbs Baryajunwa. Learned counsel argued that the consent judgment sought to be set aside was procured by fraud and collusion between the then counsel for the applicant and respondent counsel. In justifying recourse to an application for revision to set aside a consent judgment, Mr. Barayajunwa referred this court to the case of **Bameka vs. Nviri (1973) 1 ULR 136** where it was purportedly held that '*the High Court may intervene when a magistrate's decision appears to be unjust in a particular material which affects the merits of the case*.' Learned counsel further referred this court to the case of **All Sisters Ltd vs. Guangzhou Tiger Head Battery Group Co. Ltd Misc. Application**

No. 307 of 2010 (Commercial Division) in support of his view that a consent order can be impeached not only on the ground of fraud but upon any ground that will invalidate it.

Neither the respondent nor his advocate attended court when this application came up for hearing but this court did receive written submissions from the respondent filed by Messrs Frank Tumusiime & Co. Advocates. In his written submissions respondent counsel framed the following issues:

1. **Whether the consent judgment dated 3rd September 2007 can be revised by this court.**
2. **Whether there are justifiable or any grounds to warrant the setting aside of the consent judgment.**

Counsel argued the first issue as a preliminary point of law, the thrust of which was that a consent judgment was not open to revision as that judicial process was only applicable to faults attributable to a trial magistrate. It was counsel's contention that the trial magistrate in the present application simply read and endorsed a consent judgment agreed to by the parties in the presence of their counsel therefore there was nothing to warrant the calling of the record or revision thereof.

The law on revision by the High Court is stated in section 83 of the CPA. It provides as follows:

> **The High Court may call for the record of any case which has been determined under this Act by any magistrate's court, and if that court appears to have:**
>
> **(a) exercised a jurisdiction not vested in law;**
> **(b) failed to exercise a jurisdiction so vested; or**
> **(c) acted in the exercise of its jurisdiction illegally or with material irregularity or injustice,**
>
> **the High Court may revise the case and may make such order in it as it thinks fit; but no such power of revision shall be exercised:**
>
> **(d) unless the parties shall first be given the opportunity of being heard; or**
> **(e) where, from lapse of time or other cause, the exercise of that power would involve serious hardship to any person.**

The term revision is defined in **Black's Law dictionary (8th edition) p. 1346** as '**a re-examination or careful review for correction or improvement**.' Section 83 of the CPA mandates the High Court to undertake such re-examination in respect of a magistrate's court record with a view to ascertaining if the lower court has occasioned the 3 categories of misnomers outlined in sub-sections (a), (b) or (c) therein. The duty of court in that regard would be to '*revise the case* and make such order as it deems fit.' Therefore, the subject of re-examination by the High Court sitting in its revisional jurisdiction would be the lower court record for purposes of ascertaining whether or not such court did, in fact, perpetuate the misnomers spelt out in sub-sections (a), (b) and (c) of section 83. It is trite law that the High Court may undertake revision either on its own motion or upon being so moved. See **Hitila vs. Uganda 1 EA 219** (Court of Appeal, Uganda) and **Fatehali vs Republic (1972) 1 EA 158** (Court of Appeal, Tanzania).

In the case before me, a consent judgment was executed before and endorsed by the trial court on 3rd September 2007. Although, the specific provision of section 83 that the present applicant sought to invoke was not explicitly spelt out in his application; it does appear to me that the applicable provision would be section 83(c). Therefore, the present applicant seeks the re-examination of the lower court record by this court to determine whether or not in endorsing the consent judgment the trial court 'acted in the exercise of its jurisdiction illegally or with material irregularity or injustice.'

Section 98 of the CPA provides as follows on the inherent powers of the High Court:

> **"Nothing in this Act shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."**

'Abuse of process' or abuse of legal process has been defined in **Black's law dictionary (8th edition) p.11** to mean '**the improper and tortuous use of a legitimately issued court process to obtain a result that is either unlawful or beyond the process's scope.**' In that sense, abuse of court process is a perversion of justice. In **Hitila vs. Uganda** (supra) the duty of the High Court was expounded as follows:

> **"In exercising its power of revision the High Court could use its wide powers in any proceedings in which it appeared that <u>an error</u> material to the merits of the case or <u>involving a miscarriage of justice had occurred</u>."** *(emphasis mine)*

In my judgment, the endorsement of a consent judgment by a trial court without the consent of the parties would clearly constitute an error involving a miscarriage of justice if it later transpired that such consent from the parties had never been given. It does follow, therefore, that the inherent powers of the High Court as provided under section 98 of the CPA may be invoked to revise a consent judgment for the ends of justice. I would therefore dismiss the preliminary point of law raised by learned counsel for the respondent.

With regard to the substantive issue before this court, learned counsel adopted a two-pronged approach. First, he relied on the decision in **<u>Attorney General & Uganda Land Commission vs. Mark James Kamoga Civil Appeal No. 8 of 2004</u>** (Supreme Court) to advance his argument that the consent judgment in issue presently had not been proven to have been procured by fraud and therefore could not be vitiated. Secondly it was counsel's contention that an advocate was a lawfully recognised agent of a litigant that was authorised to act on such litigant's behalf; could and did, in the present case, bind his principal. Learned counsel relied on the provisions of Order 3 rule 1 of the CPR in support of this position.

With respect to counsel, I am constrained to state at the outset that Order 3 rule 1 of the CPR does not equate a party's advocate to an agent thereof as has been argued by learned respondent counsel. Order 3 rule 1 reads:

> **"Any application to or appearance or act in any court required or authorised by the law to be made or done by a party in such court may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his or her recognised agent, or by an advocate duly appointed to act on his or her behalf …."**

Reference to a party's advocate alongside a party's recognised agent does not render an advocate a recognised agent, let alone establish an agent/ principal relationship, as this court understood respondent counsel to suggest. Order 3 rule 2 does not define the term 'recognised agent' to include parties' advocates; neither does rule 1 of the same Order mandate an advocate to act on

behalf of a party without instructions. Parties' consent to the execution of consent judgments cannot be presumed. It should be expressly communicated to their advocates or, at the very least, indicated by their (parties') signing of the purported consent judgment. In the present case, it is clear from a reading of the consent judgment in question that such endorsement by the parties was not secured.

It is now well established law that a consent decree must be upheld unless it is vitiated for reasons that would mandate a court to set aside an agreement, such as fraud, mistake, misapprehension or contravention of court policy. See **Attorney General & Uganda Land Commission vs. Mark James Kamoga** (supra), **Brook Bond Liebig (T) Ltd vs Mallya (1975) EA 266** and **Mohammed Allibhai vs. W. E. Bukenya & Another Civil Appeal No. 56 of 1996**. In the present case it was the applicant's case that the consent judgment was procured by fraud and collusion between the then counsel for the applicant and respondent counsel. Affidavit evidence to that effect was presented in the applicant's affidavit dated 27th November 2011. In paragraph 3 the applicant stated:

> *'That before my case was heard the two lawyers in collaboration with the trial magistrate prematurely terminated the proceedings by entering a consent judgment without my knowledge, consent and or permission.'*

The respondent sought to rebut this evidence by his affidavit in reply dated 11th November 2013. In paragraph 4 of his affidavit, the respondent attested to both parties having been present when the matter came up for hearing and the consent judgment was executed. The deponent stated:

> *'On the 3rd day of September 2007, when the matter came up for hearing before His Worship Lubowa Daniel in the presence of parties and their counsel, the applicant sought to settle the case and after consulting my lawyer, I agreed to settle the matter. The court record bears me out.'*

This court has had occasion to peruse the short, hand written record of the lower court. It does reveal that on 3rd September 2007 counsel for both parties appeared before the trial court in this matter. There is no indication whatsoever on the record that the parties were present at that day's proceedings in person; neither is their any indication of the request for settlement by the applicant, as been alleged by the respondent in his affidavit. The trial magistrate clearly

recorded attendances in the right hand corner of the record. On 3rd September 2007 only the parties' counsel were recorded as having been present in court. Clearly, therefore, the respondent's affidavit evidence in that regard was not truthful.

The record reveals that the parties were ordered by the trial court to consider alternative dispute resolution. On the same day (3rd September 2007) the parties purportedly undertook mediation supported by the court and, as a result of the said mediation, a consent judgment was executed by the parties and allegedly read back to them. The mediation proceedings were not included on the court record. This court is unable to determine from the record whether the parties did participate in those proceedings. Meanwhile, the respondent did, in his affidavit in reply, attest to the parties engaging in negotiations in the absence of the trial magistrate and not mediation supported by court as had been apparently ordered by the court.

As this court did hold hereinabove, in revision proceedings before the High Court the trial court record is scrutinised against the parameters outlined in section 83. Where, as is the case presently, the evidence in support of an application for revision is not born out by the court record the said record would prevail. This court has already found the respondent's averment that the parties were present in court on 3rd September 2007 to be in conflict with the record. Indeed, the consent judgment purportedly arising therefrom was signed on the same day by both sets of counsel but was not signed by the parties themselves. This court has also established that the respondent's contention that the applicant participated in negotiations for settlement is not born out by the record.

Be that as it may, the applicant pleaded fraud and collusion as his grounds for the setting aside of the present consent judgment. The duty to prove the alleged fraud lay with the applicant. It is trite law that the burden of proof in fraud is higher than balance of probabilities but lesser than proof beyond reasonable doubt. This court does not find sufficient proof of fraud or collusion in this matter as alleged by the applicant, or at all. However, it is apparent on the face of the record that the applicant's advocate at the time did not have instructions, express or implied, to execute the consent judgment. In my humble judgment, it does follow that the endorsement of the said judgment by the trial magistrate constituted a mistake on his part.

In **Attorney General & Uganda Land Commission vs. Mark James Kamoga** (supra) evidence of a mistake was recognised as one of the grounds upon which a consent judgment may be set aside. In that case it was held that the principles underlying the setting aside of a consent judgment were rooted in the premise that a consent judgment is akin to an agreement between the parties therefore grounds that would vitiate a contract would similarly vitiate a consent judgment. Any agreement or contract is premised on some form of consensus by the parties thereof on specified terms, which terms are thereafter reduced into a formal agreement. The proven absence of such consensus or agreement prior to the formal execution of an agreement is fundamental enough to vitiate any purported contract or agreement. Similarly, in my view, the error of binding parties to a consent judgment without their consent is a material mistake that should vitiate a consent judgment. It is indeed an error material to the merits of the case that would warrant the exercise of the High Court's power of revision as clarified in **Hitila vs. Uganda** (supra).

In the result, I would allow this application and hereby set aside the consent judgment in respect of civil suit 16 of 2007 with costs in this and the trial court to the applicant.

I so order.

Monica K. Mugenyi
JUDGE

28th November, 2013