

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

**MISCILLENOUS APPLICATION NO. 1237 OF 2013**

**(ARISING FROM HIGH COURT LAND DIVISION CIVIL SUIT NO. 284/2009)**

1. **KIZZA DANIEL**
2. **KAKEETO GERALD**
3. **KAKOBYA ISAAC**
4. **KYOMUGISHA JOYCE**
5. **LUKYAMUZI KOLOBA**
6. **OWORI JOHN**
7. **KIZITO TADEO**
8. **SEBWANA ALI**
9. **BASEMERA AMOOTI**
10. **KAWEESA IVAN**
11. **NANDOKHA JACKSON**
12. **KAKOOZA JOHN**
13. **KATUMBA GEOFFREY**
14. **LUBEGA JOTHAM**
15. **ZIRABA CHRISTOPHER**
16. **WESSUNE ABDUL**
17. **MASIKOMA ROBERT**
- S/A ABALEMA UNITED EFFORT**

:..... APPLICANTS

**VERSUS**

1. **UGANDA LAND COMMISSION**
2. **ABALEMA (DISABLED UNITED EFFORT (U) LTD**
3. **SALVATION ARMY :..... RESPONDENTS**

**BEFORE: HON. MR. JUSTICE BASHAIJA K. ANDREW**

**R U L I N G:**

The 18 applicants under the name *Abalema United Efforts Association*, a community based organization, (CBO) brought this application under *Ss.98 & 99*

*Civil Procedure Act Cap.71); Order 46 rr.1,2,4 & 8; and Order 52 rr.CPR seeking for orders that;*

*(a) Consent judgment in Civil Suit No. 284 of 2009 entered on 01/11/2011 and 19/09/2012 wrongly dated (to have been 19/09/2013) by this Honourable Court between the Respondents be reviewed, set aside and or stayed and Civil Suit No. 284 of 2009 be heard on merit.*

*(b) Costs of this application be provided for.*

The grounds of the application are set out in the affidavits of one Kizza Daniel, Masikoma Robert, and Kyomugisha Joyce, but generally are that;

- 1. The applicants are adult Ugandans of sound mind.*
- 2. That it has come to the attention of the applicants that the 3<sup>rd</sup> respondent in connivance with the 2<sup>nd</sup> respondent have deposited Ug. Shs.100,000,000/= (One hundred million) in this Honourable Court and are intending to enforce the orders in the varied consent and are also intending to evict the applicants from the suit land without resolving the issues as pointed out in the Judge's ruling dated 6<sup>th</sup> June, 2013.*
- 3. That the varied consent was erroneously placed before the Registrar for signature and was wrongly dated to read 19<sup>th</sup> September, 2012 instead of 19<sup>th</sup> September, 2013 which was contrary to the Judge's ruling.*
- 4. This mistake was later brought to the attention of the applicants when the said consent dated 1<sup>st</sup> November 2011 was faulted by the 3<sup>rd</sup> respondent and the 2<sup>nd</sup> respondent threatened to enforce it by evicting the applicants.*
- 5. The varied consent endorsed by the Assistant Registrar on 19<sup>th</sup> September, 2012 wrongly dated (to have been 19<sup>th</sup> September 2013) between the respondents was a ploy by the 2<sup>nd</sup> and 3<sup>rd</sup> respondent's Counsel to deny the applicants' interest which had been clearly articulated in the court ruling of Hon. Justice Murangira and subsequent meetings between parties.*

6. *There was error apparent on face of record as the applicant's known interests were not captured in the valid consent.*
7. *That there has been misinterpretation in court between the two groups of Disabled (Abalema) United Effort Ltd and Abalema United Effort (CBO) which need to be clarified before any transaction can be validated by this Honourable Court. (See copy of certificate of incorporation).*
8. *That it is in the interest of natural justice that an order for setting aside review and/or stay of the Consent Judgment in Civil Suit No. 284 of 2009 entered on the 1<sup>st</sup> day of November 2011 and 19<sup>th</sup> day of September 2012 wrongly dated (to have been 19<sup>th</sup> September 2013) be granted by this Honourable Court and Civil Suit No. 284 of 2009 be heard on its merit.*
9. *That we have been advised our Counsel Mr. Kavuma Geoffrey Bukko that if the consent judgment in Civil Suit No. 284 of 2009 entered on the 1<sup>st</sup> day of November 2011 and 19<sup>th</sup> day of September 2012 wrongly dated (to have been 19<sup>th</sup> September 2013) are not stayed, reviewed and or set aside, we shall suffer irreparable loss.*
10. *It is fair and equitable that the said consents in Civil Suit No. 284 of 2009 be set aside, reviewed and/or stayed and Civil Suit No. 284 of 2009 be heard on its merit.*

The 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, the **Uganda Land Commission, Disabled (Babalema) United Effort, and Salvation Army**, respectively also filed their respective affidavit in reply sworn by Kalimba Steven, a Director and Secretary of the 2<sup>nd</sup> Respondent and founder member thereof, Maj. Moses Ndege, the Property Secretary of the 3<sup>rd</sup> Respondent, Ms. Bwogi Justine, Lawrence Mukasa the Secretary of the 1<sup>st</sup> Respondent. In particular the affidavit of the 1<sup>st</sup> Respondent did not in fact oppose the application, and if anything supported it. It is the affidavits

sworn on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent that oppose the application. Several other supplementary affidavits in support and in rejoinder were also filed and are on court record. I will not reproduce their content, but will deal with the gist of their depositions in the resolution of the issues raised by this application.

M/s. *Bemanyisa & Co. Advocates* Counsel for the Applicants filed written submissions to argue the application, while the Ms. Mutesi, State Attorney from the Attorney General's Chambers Counsel for the 1<sup>st</sup> Respondent, and M/s *Okuku & Co. Advocates*, Counsel for the 3<sup>rd</sup> Respondent also filed submissions in reply.

The Applicants are seeking for orders of review and setting aside of the consent judgment signed amongst the Respondents on basis that the Applicants' interests in were excluded when a consent judgment was entered into in respect of the suit land comprised in ***Plot 175 Bombo Road***. The Applicants had had initially sought for a relief that the main suit be heard afresh *inter parties*, but abandoned the prayer and only sought the orders for review and setting aside the consent judgment dated 199/9/2012 and 8/11/2012 under ***Order 46 r.1 (b) CPR*** and ***Section 98 and 99 CPA***. From the application, there appears to be one main issue for determination, i.e.; ***Whether the case merits review should be?***

#### ***The Law.***

The law governing review and setting aside consent judgment was well articulated in the case of ***Ken Group of Companies Ltd. v. Standard Chartered Bank & 2 O'rs, H.C.M.A 116 of 2012 (Commercial Court)*** per Justice Madrama citing the case of ***Hirani v. Kassam 1952 EA at 131*** where the Court of Appeal held that;

***“A consent judgment cannot be varied or discharged unless obtained by fraud, collusion, or by an agreement contrary to the policy of court or if the consent is given without sufficient material facts or in***

***misapprehension or ignorance of material facts or in general for any reason which would enable the Court set aside an agreement.”***

It is essential to emphasise that a consent judgment derives its legal effect from the agreement of the parties, and may only be set aside on the same grounds upon which a contract may be set aside or rescinded because it is governed by the ordinary principles that govern a contract. Such grounds include collusion, fraud and any other reason that would enable the court to vary or altogether rescind the contract. See: ***Broke Bond Liebig (T) Ltd. v. Mallya [1975] EA 266***. Further, in the case of ***Mohammad Allibhai v. W.E. Nukenya Musa & A’nor, S.C.C.A No. 56 of 1996*** the Supreme Court held that a third party who is affected by an order of court can under inherent powers of court apply for review. It would follow that any party aggrieved who is not necessarily a party to the consent judgment can apply for its review and to set it aside

***Resolution.***

In the present application the Applicants allege in one of the grounds of the application that that there is an error on the face of the record. I have carefully read that the facts constituting this ground. They are basically that while the 3<sup>rd</sup> Respondent as the Plaintiff in ***HCCS No. 284 of 2009*** sued ***Abalema United Effort*** which refers to the Applicants herein in the heading of the suit, in the main body of the plaint, specifically in paragraph 2 thereof, he refers to Defendants as a limited liability company which refers to the 2<sup>nd</sup> Respondent.

A cursory look at the proceedings indeed confirm that the above is the existing state of affairs on the record. I however, find that it is more of a mistake or ignorance and or misapprehension of facts by the 1<sup>st</sup> Respondent while dealing with the 2<sup>nd</sup> Respondent than an error apparent on face of record. Evidence of the 1<sup>st</sup> Respondent, through the Secretary to the Uganda Land Commission, in paragraphs 1-11, shows that they were mistaken on the identity of the 2<sup>nd</sup>

Respondent as if dealing with Applicants. That misapprehension and or ignorance of facts borders on misrepresentation of facts and fraud by the 2<sup>nd</sup> Respondent to the 1<sup>st</sup> Respondent which on strength of the authority of *Muhammad Alibhai v. .E. Bukenya Mukasa (supra)* vitiates a consent judgment.

I find that there was misapprehension of facts by the parties in entering into the consent judgment. The 1<sup>st</sup> Respondent appears to have dealt with the 2<sup>nd</sup> Respondent on the genuine but mistaken belief that it was dealing with the Applicants, whereas not. This is clear from the affidavit of Lawrence Mukasa the Secretary of the 1<sup>st</sup> Respondent. Now that this has come to light, it constitutes a mistake and an error on face of the record which is so fundamental and goes to the root of the consent judgment thus vitiating it.

Apart from the above, the Applicants and 2<sup>nd</sup> Respondent claim to have interest in **Plot 175 Bombo Road**. This fact appears to be acknowledged by all parties as evidenced in the supplementary affidavit of Maj. Eliud Nabiswa, in paragraph 3, where 3<sup>rd</sup> Respondent insists that the Applicants and the 2<sup>nd</sup> Respondent are the same and one thing (preferably a limited liability company) which purported to sell the suit land to one Mr. Miraj Barot.

The Applicants for their part maintain that they were never a party to the consent judgment. That the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were engaged in acts of forging identity cards and signatures to insinuate that Applicants signed for compensation money proceeds of the suit land whereas not. I wish to observe that allegations of forgery constitute an independent ground on its own which would permit review of consent judgment as it would amount to fraud. Fraud ordinarily vitiates a consent and goes to the root of the matter. Allegations of fraud are quite serious and once they are raised they call for full and thorough investigation. This cannot be done in an application of this nature but by hearing evidence on the subject matter in the main suit. That would call for setting aside the consent judgment.

The other ground advanced by the Applicants for which they seek to have the consent judgment reviewed and set aside is that it was entered into contrary to the orders issued by Hon. Justice Murangira on 06 /6/2013 clearly directing the that no such consent should be entered into and validated by court before the identities of the two parties; the ***Disabled (Abalema) United Effort Limited*** and ***Abalema United Effort*** have been clarified. The Hon. Judge, at page 4 paragraph 2, directed as follows;

***“There is therefore a need for the two groups to sort out themselves before the consent judgment between the Plaintiff, Uganda Land Commission and 2<sup>nd</sup> respondent (Abalema United Effort) being disputed by the group allegedly being represented by Mugoya Kyawa & Co. Advocates is signed and sealed with seal of this honourable court.”***

The issue raised by the Hon. Judge was never resolved by any consent save for the back dated consent judgment dated 08/11/2012. After reading the affidavits in support of the application and those in reply and rejoinder, I find that they all seem to be agreed on the issue that the two parties are quite distinctive and that there was mistaken identity between the Applicants and 2<sup>nd</sup> Respondent. This appears to be more of the reason that the 1<sup>st</sup> Respondent recognises the Applicants as owners of the suit land comprised in ***Plot 175 Bombo Road***; which fact is contradicted by the impugned consent judgment herein.

I find that the consent judgment was entered into before the identities of the two groups could be clarified as directed by court. A cursory look at the consent judgment signed by the Registrar, erroneously back dated, shows that the concerns raised by the Hon. Judge as to identities of the 2<sup>nd</sup> Respondent and the Applicants were not addressed before entering into the impugned consent judgment. Since the lack of clarity as to identities of the parties brought about the confusion,

particularly in dealing with the 1<sup>st</sup> Respondent, such circumstances would be afford this court sufficient reason to set aside the consent judgment.

It also came to light in the Chief Registrar's letter dated 9<sup>th</sup> July, 2014 *Ref: A/267* that Mr. Augustine Semakula who commissioned the affidavits of the 2<sup>nd</sup> Respondents is uncertified to practice as an advocated and as a commissioner for oaths for 2014 having been suspended by the Uganda Law Council. In the case of ***Otim George William v. E C, Election Petition No.17 of 2011*** citing the case of ***Bankunda Darlington v. Dr. Stanley Kinyata, C.A No. 27 of 1996***, Musota J. held that documents commissioned by an advocate without a practicing certificate are invalid. This being the position, it leaves the evidence of the Applicants as regards evidence of forgery and their interest in the suit land unchallenged thus warranting the granting of their application. This is besides that fact that in the 2<sup>nd</sup> Respondent's application ***No. 821 of 2014*** the 2<sup>nd</sup> Respondent conceded that indeed Augustine Semakula commissioned their affidavits without a valid licence as commissioner for oaths which buttresses the finding that that the 2<sup>nd</sup> Respondent has no evidence to controvert the Applicants evidence.

There is further a plain admission by the 3<sup>rd</sup> Respondent, that Applicants never received purchase money of the suit land. In Major Moses Ndege's affidavit, paragraph 5(a) – (c) last Annexure, each of the Applicants was to exit the suit land against the 18 Applicants' individual photocopied identity card. This was never done which would have otherwise paved way for them to sign for the money and leave the suit land, which they did not.

On the whole the applicants have succeeded in their application which is granted. The impugned consent judgment is set aside. The case will be heard on merit. Costs will abide the outcome of the main suit.

**BASHAIJA K. ANDREW**



***JUDGE***

***05/11/2014***