THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

LAND DIVISION

MISCELLANEOUS APPLICATION NO. 726 OF 2015

(Arising out of Misc Application No. 1409 of 2014)

(Arising out of Civil Suit No. 425 of 2012)

1. **GEORGE FENEKANSI SEMBEGUYA**
2. **SAMSON KYAMAGGWA::::::::::::::::::::::::APPLICANTS**

VERSUS

MULINZI MOSES::RESPONDENT

BEFORE: HON. MR. JUSTICE BASHAIJA K. ANDREW

RULING

The Applicants herein brought this application under Section 82 and 98 CPA; Order 50 r.2; and Order 52 rr. 1 and 2 CPR seeking orders that a consent order in HCMA No. 1409 of 2014 be reviewed and or set aside, and costs be provided for.

The grounds of the application are set out in the application but more amplified in the affidavit sworn by the 1st Applicant, George Fenekansi Sembeguya. In brief, he states that the Applicants are the Administrators of the Estate of the Late Edward Mugalu and the registered proprietors of land comprised in Kyadondo Block 103 Plot 38 at Kawanda measuring approximately 4.02 hectares. They were the plaintiffs in HCCS No. 425 of 2012 and obtained judgment in their favor dated 10th November, 2014 and are holders of a decree dated 13thNovember, 2014. That following the extraction of the decree the Applicants applied for execution against the Respondent who was duly served with a notice to show cause why execution should not issue; dated 25th November 2014. That on 4th December, 2014 the court issued a warrant for vacant

possession in favor of the Applicants and the Respondent and all persons claiming under him were evicted from the suit land.

That, however, the Applicants' former Advocates *M/s.Kavuma Kabenge & Co. Advocates* fraudulently and through an illegality colluded with the Respondent and unduly influenced the Applicants to execute a consent order in HCMA No.1409 of 2014. That the Applicants are aggrieved by the said consent as it wrongfully deprives them of their legal interest in the suit land and the fruits of the judgment and decree in HCCS No. 425 of 2012. That the said consent was obtained in collusion between the Applicants' former Advocates and the Respondent through an agreement contrary to the policy of the court as it was executed without giving sufficient material facts, or in misapprehension or in ignorance of material facts and its effect to the Applicants. That it is in the interest of justice that the said consent order be reviewed and set aside.

The Respondent filed an affidavit in reply. However, Mr. Mukiibi Counsel for the Applicants successfully objected to the affidavit in reply for having been filed outside time set by law.

Mr. Mukiibi submitted that following the judgment the Respondent had no further claim in the suit land. That therefore to allow the consent order in HCMA No.1409 of 2012 to stand would be indirectly amending the judgment and a decree in HCCS No.425 of 2012; which is not the procedure. Counsel submitted that judgments of court are either set aside by a court that passed a decree or on appeal by a higher appellate court. For this proposition Counsel again cited a number of decisions in ***Attorney General & Uganda Land Commission vs. James Mark Kamoga & Another SCCA No.8 of 2004; Hirani vs. Kassam [1952] E.A 131.*** In all these cases, the considerations under the law for setting aside a consent judgment were restated. Mr. Mukiibi noted that based on those considerations the consent contravenes the terms of the judgment which had declared the Respondent's interest as illegal.

Mr. Mukiibi further submitted that after passing the judgment in HCCS No.425 of 2012, court became *functus officio* and could not issue another order on top of the judgment. For this proposition Counsel relied on the case of ***Attorney General & Uganda Land Commission vs. James Mark Kamoga & another (supra)***

In reply, Mr. Mugerwa, Counsel for the Respondent, submitted that the consent that was entered into by the parties is in respect to a claim in HCMA No. 1409 of 2014 (arising from HCCS No.425 of 2012) and that it has nothing to do with a judgment of court. Counsel noted that the consent never amended the judgment of court, in any way because it never declared that the transactions of the defendants were lawful. That the only effect the consent had was disposing of the claim in HCMA 1409 of 2014 and nothing else.

Mr. Mugerwa also submitted that the Applicants' affidavit evidence shows that there was no successful eviction of the Respondent from the suit land. Also, that the dates that were put in the affidavit on the letters show that it was prior to the date the consent order was signed. Counsel also noted that *Annexture I,* which is a letter written by the court bailiffs to the Registrar indicating that there was a successful eviction of the defendants, was written on the 10th December, 2012 and was received on the 11thDecember, 2012 by this court, but it was received by the Execution Division on the 1st November, 2014 and that this cannot be presumed to be a mistake.

Opinion:

The Supreme Court in the case of ***Attorney General & Uganda Land Commission vs. James Mark Kamoga & Another (supra)*** stated the criteria for setting aside consent judgments. It was held that consent judgments may be interfered with only on limited grounds, such as illegality, fraud or mistake. The Supreme Court cited with approval the case of ***Hirani vs. Kassam (1952) EA 131*** where it was held, inter alia, that;

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

In the instant application, the Applicants were plaintiffs in ***HCCS No.425 of 2012 (George Fenekansi Sembeguya and Samson Kyamaggwa vs. Segawa Israel and Moses Mulinzi)***. The terms of the court order are that;

1. ***It is declared that the sale transaction between the 1st and 2nd defendants is illegal and invalid.***

2. ***The defendants forfeit the Kibanja interest; part of land comprised in Kyadondo Block 103 Plot 38 land at Kawanda, and the Kibanja reverts to the plaintiffs.***

3. ***The 1st and 2nd defendants be evicted from the Kibanja on the suit land.***

4. ***A permanent injunction is issued against the defendants and or their agents from further interfering with the plaintiffs' quiet possession of the land.***

5. ***The plaintiffs are awarded costs of the suit."***

M/s Kavuma Kabenge & Co. Advocates represented the plaintiffs in that suit.

According to the consent in HCMA No.1409 of 2012 that was entered into by the parties before the Assistant Registrar on 10th December, 2014 it was agreed that;

1. ***The plaintiffs (applicants) shall surrender 1 acre out of the suit land to the 2nd defendant (respondent) in satisfaction of the 2nd defendant's claim.***

2. ***The 2nd defendant shall relinquish any claim on the suit land and shall give vacant possession of any land earlier taken or dealt with over and above the one acre mentioned in 1 above."***

From the above quoted respective extracts, it clear enough that the consent had the effect of varying, altering, changing and even setting aside the orders of court which had declared that the sale transaction between the 1st and 2nd defendants was illegal, null and void. The consent was contrary to the policy of court in respect to judgments which can only be varied and or set aside by a court that passed the decree or on appeal by a higher appellate court. The consent is therefore an illegality. As was held in ***Makula International vs. His Eminence Cardinal Nsubuga [1982] HCB 11*** an illegality once brought to the attention of the court cannot be condoned or sanctioned.

Mr. Mugerwa, Counsel for the Respondent made attempt in his submissions to show that the consent was in respect only to a claim under HCMA No. 1409 of 2014 (arising from HCCS

No.425 of 2012) and that it has nothing to do with a judgment of court. That the consent never amended the judgment of court in any way because it never declared that the transactions of the defendants were lawful.

Mr. Mugerwa, however, could not pin point what the nature of that claim was or distinguish the purported claim in the application and the main suit from which the application arose. This rendered the argument quite unsustainable that there was any claim under HCMA No. 1409 of 2014. Similarly the submissions are also not sustainable that the consent did not amend or alter the judgment of court because it never declared the actions of the defendants lawful. The consent did not have to have the wording in it to the effect that the defendants were now lawfully on the suit land for it to have the effect of amending or modifying the judgment in HCCS No.425 of 2012. For as long as it had that effect, as it did, the consent would squarely fall within the ambit of amending and or altering the court judgment /decree.

In addition, the reading of the title – head of the HCMA No. 1409 of 2014 dispels any notion that it had nothing to do with the judgment. The consent shows that it arises from HCCS No.425 of 2012 in which the court had pronounced itself on the rights of the parties in relation to the suit land. The effect of the consent was to alter such the status of the rights of the parties as pronouncement by court and wrongfully to deprive the Applicants of their legal interest in the suit land and the fruits of the judgment and decree in HCCS No. 425 of 2012. The consent cannot be separated from its direct and intrinsic effects on the judgment. It was intended by the parities thereto to circumvent the orders issued by court in HCCS No. 425 of 2012 as found above.

It is emphasized that the moment the court passed a judgment declaring the transaction between the defendants as illegal, null and void; the decision became an issue of law. The parties could, not subsequently consent to reverse the orders of court that had declared defendant's acts as illigal. Parties in any proceedings cannot consent to defeat a judgment of a court of law or any provision of the law. This position is well reflected in the case of ***Edith Nantumbwe Kizito &3 Others vs. Miriam Kutesa CAC Appl. No. 294 of 2013*** that it is not open to parties to enter into consent on terms of a court judgment, and issues of law cannot be subject to consent orders.

The other point to take into account is that after it had passed the judgment in HCCS No.425 of 2012, the court became *functus officio.* Therefore, it was not entitled to revisit the matter to issue another order on top of the existing judgment which had not yet been set aside or successfully appealed against. Revisiting the case could only be done under circumstances of review pursuant to Section 82 of CPA and Order 46 CPR by the same court that issued the order. Appeal against the order would be made to a higher court. None of these options was exercised by the parties, and hence the purported consent had no any foundation in law.

Also worthy of note is that the consent was entered into before the Assistant Registrar. HCMA No. 1409 of 2014 sought, inter alia, to have the judgment and decree in the main suit set aside. The Applicant therein apparently seemed to have deliberately omitted to cite Section 82 CPA as the enabling provision of the law for review and only choose to hide under Section 98 CPA by invoking the inherent power of court. Yet the Applicant therein knew or ought to have known that there was no way the judgment could be set aside without reviewing it. I say "deliberately" because the Advocates in that case knew very well that the Assistant Registrar before whom the consent was made had no power to review a judgment of Judge in an application for review. This finding is fortified by the case of ***Attorney General & Uganda Land Commission vs. James Mark Kamoga & another (supra)*** at page 16 -17 where it was held that;

> ***"Clearly, the power to review judgments or orders of the High Court (including those entered by the Registrar) is not among the powers delegated to the registrar."***

Therefore, the consent in HCMA No.1409 of 2012 amounted to an agreement of the parties contrary to the policy of the court. This was besides being executed without having sufficient material facts, or in misapprehension or in ignorance of material facts and its effect to the Applicants. As the Applicants later came to realize, it deprived them of their rights under the judgment. In the interest of justice the said consent order ought to be reviewed and set aside.

The 1st Applicant stated in his affidavit that their former Advocates *M/s. Kavuma -Kabenge & Co. Advocates* fraudulently and through an illegality colluded with the Respondent and unduly influenced the Applicants to execute a consent order in HCMA No.1409 of 2014. There was no particular reply to this issue on the Respondent's side.

After giving due consideration to this issue in relation to the law applicable, this court is reluctant to premise its decision on the allegations of collusion and fraud by the Applicants' former lawyers with the Respondent. It is now settled that fraud raised serious issues of law and fact and cannot be properly resolved in an application of this nature based on affidavit evidence. It requires proper pleadings upon which evidence would have to be adduced in a full trial for a court to properly determine such issues. See: ***Hajji Numani Mubiakulamusa vs. Friends Estate Ltd. CACA No. 0209 of 2013.***

The last point concerns submissions regarding the inconsistencies in the dates on *Annexture I* to the affidavit of the 1st Applicant. It is a letter that was dated 10th November, 2014 and received by the Registrar of this court on 11th November, 2014. However, the received stamp for the Execution Division has the date of 1st November, 2014, creating an impression that it was received in the Execution Division before it was even written. Counsel for the Respondent seemed to attach much importance to this discrepancy. Nevertheless, the only value one can attach to the Annexture; the discrepancy in dates notwithstanding is that it suffices to show that the eviction of the defendants from the suit land as ordered by court in the main suit was done and completed. No contrary facts were sworn to rebut the Applicants' depositions to that effect. On the authority of ***Massa vs. Achen [1978] HCB 297,*** the 1st Applicant's averments are taken as admitted and the truth. The submissions of Counsel, however strong, cannot be a substitute for the party's evidence

The net effect is that this application is allowed with costs to the Applicants. The consent in HCMA No.1409 of 2102 is set aside in its entirety.

BASHAIJA K. ANDREW

JUDGE

19/12/2016

Mr. David Makumbi Counsel for Applicants in court.

Mr. Nsereko Denis holding brief for Mr. Isaac Mugerwa Counsel for Respondent present.

1st Applicant present

Respondent absent

Mr. G. Tumwikirize Court Clerk present

Court: Ruling read in open court.

BASHAIJA K. ANDREW

JUDGE

19/12/2016