

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

**MISC. APPLICATION NO. 495 OF 2016**

**(Arising from Civil Suit No. 128/2009)**

**1. NAKITENDE SCOVIA**

**2. SSEMPAGALA PAULO ::::::::::: APPELLANT**

**VERSUS**

**1. JOHN KIGOZI SSEBAGGALA**

**2. MUTYABA BAZIRIO SALONGO ::::::::::: RESPONDENTS**

**3. KAMYA EDWARD**

**BEFORE: HON. JUSTICE J. W. KWESIGA**

**RULING:**

25/11/2016

This application was brought under the provisions of Order 9 rules 12, Order 46 rules 1 and 2 Order 52 Rules 1 and 3 of Civil procedure Rules and Section 98 of the Civil Procedure Act., seeking the following Orders;-

- (a) That the consent judgment or Order entered on the 29<sup>th</sup> day of January 2013 be set aside or reviewed or varied.
- (b) That costs of the application be provided for.

The consent judgment in High Court Civil Suit No. 128 of 2009 (At Nakawa) was concluded on 10<sup>th</sup> October 2012.

This was HCCS No. 128 of 2009 John Kigozi Ssebagala Versus IMutyaba Bazirio Salongo and Kanya Edward.

I will reproduce the terms of the consent judgment because they are fundamental facts that are the

basis of this application;-

***"1. That it is agreed by the parties that the suit land comprised In Busiro Block 303-305 LRV4068 Folio 17 Plot 142 Wakiso District measuring approximately 3.449 hectares is the property of the Fumbe Clan for the cultural Nakku of Gganda institution but the same is not hereditary to any sitting cultural Nakku.***

***2. That upon the signing of this consent judgment the Defendants relinquish all/any claim of any nature either equitable or hereditary or any interest of any kind in the suit/and of Gganda which is vested in the Plaintiff on behalf of Fumbe Clan".***

The pleading in the head suit clearly bring out the relationship of the two parties to the suit land. JOHN KIGOZI SSEBAGALA (Respondent) sued for the land in his capacity as a Prime Minister of Fumbe Clan of Buganda Kingdom. The suitland Block 303-305 Plot 142 was official Estate attached to the cultural post/position of NAKKU as a cultural wife of the Kabaka of Buganda - who was Late Naiumansi Nakku Christine.

On the other hand the Defendants were Administrators of the personal estate of Naiumansi Nakku Christina under Administration Cause No. 1725 of 2007.

The Administrators and beneficiaries of the personal Estate of Naiumansi claimed the suit land as her personal property hence the conflict.

The terms of the consent judgment reproduced above resolved the status of the suit land first as an official Estate of the cultural institution to which a living Nakku was entitled.

My understanding of the wider position is that upon demise of the person holding the position of Nakku, the land remains in the hands of the Clan for use of the next Nakku when appointed/assigned/declared or born as the Gganda Culture would resolve.

The above facts are the backgrounds to the instant application.

The grounds of the application are that the Applicants are beneficiaries of the Estate of Nalumansi Nakku Christine, formerly of Gganda-Busiro. That the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents connived with the 1<sup>st</sup> Respondent, entered a consent judgment which they are enforcing to evict the Applicants from the suit land. They would like to have High Court Civil Suit No. 128 of 2009 heard on merits after setting aside the consent judgment.

The Respondents' position is the claim that the land in dispute is being claimed fraudulently, erroneously and mistakenly as personal property of Nakku. That the suitland was fraudulently included in the inventory of the property forming part of the Estate of Nalumansi.

The above two conflicting views between the Applicants and the Respondents disclose a triable case between the parties to determine the status of this land. The questions that need to be resolved at this stage is;-

- 1. Whether the Applicants had a right to be heard in High Court Civil Suit No. 128 of 2009?**
  
- 2. Whether the consent judgment and decree can be set aside or varied on application of the Applicants who were judged to have committed contempt of the consent judgment under High Court Misc. Application No. 49 of 2015 which has never been set aside?**

will deal with the last part of the questions/sub-issues set out above, the Respondents<sup>7</sup> Advocates submitted that the Applicants deserve no audience of this Court because they were found to be in contempt.

***The legal position has been settled as follows;- "A party who knows of an Order regardless whether, in the view of that party the Order is null or valid, regular or irregular cannot be permitted to disobey it by reason of what that party regards that to be. That Order must be complied with in totality".***

However, in case there are impediments to the compliance the party brings it to the attention of Court and show reasons why he/she cannot comply.

***See: Housing Finance Bank Ltd. Versus Edward Musisi - Misc. Application No. 158/2010 fU.C.A). - Lord Penning and Lord Romer in Hadkison Versus Hdkison (1952) 2 ALL E.R held:- "If was the unqualified obligation of every person against or in respect of whom an Order has been made by a Court of competent jurisdiction, to obey it unless and until that Order was discharged that the mother in the present case had not brought herself within any of the exceptions to the general rule while debarred a person in contempt from being heard by the Courts whose Order he had disobeyed and that she being in continuing contempt-----her appeal could not be heard until she had taken the first essential steps toward purging her contempt by returning the child within the jurisdiction".***

No application to the Court by such person in contempt will be entertained until he has purged himself of his contempt. There are exceptions to the above general rule;-

- (a) The person found to be in contempt can apply to Court to purge his contempt.
- (b) He can appeal with a view to setting aside the Order which he is alleged to be in contempt.

***It was held further in the case of Hadkison Versus Hadkison (Supra); " A person against whom contempt is alleged will also be heard in support of a submission that having regard to all the circumstances he ought not to be treated as being in contempt, the only other exception in which could in any be regarded as material is qualified exception which in some cases entitle a person who is in contempt to defend himself when some application is made against".***

It is therefore, proper that the Applicant be granted audience in the application to set aside the Order he is alleged to have disobeyed. The Application under consideration is to impeach the consent judgment the Applicant is alleged to have disobeyed and in my view fair trial principle of the right to be heard justifies this application to fall within the exception to the general rule

that a party in contempt be denied Court's audience.

I have examined the submissions of both parties. The Applicants' submissions are that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondent entered a consent judgment that affected the Applicant's interests in the suit land without his/their knowledge.

That the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents had already distributed the land and they no longer had capacity to enter into a consent judgment. The Respondents submitted that the title of the suit land was in the name of J. B. Walusimbi and Semeo Walusimbi, the Trustees of Ffumbe Clan and not part of Nakku's Estate.

It would appear that there are two interests in the suit land that need to be determined namely;- Kbanja interests and Registered interests and if both were found to exist, it would follow that the Court would determine the Acreage of the kibanja vis-a-vis the registered land and

also address who has the right of occupancy which would cure the issue of eviction arising from the consent judgment.

A consent judgment cannot be varied or discharged unless obtained by fraud, collusion or in a manner contrary to the Court policy. A consent judgment is an agreement of the parties which can be rescinded on terms similar to grounds that govern rescinding of contract which include mistake, mis-representation, fraud or generally absence of freedom to contract or absence of consent of the parties against whom the contract is intended to be enforced.

***In the case of BROKE BOND LIE BIGCU VERSUS MALLY (1975) and ALLIBAI VERSUR NABUKENYA MUSA & ANOTHER 1996 SCCA NO. 56/1996, The Supreme Court of Uganda held that;- '!a third party who is affected by an Order of Court can under the 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 it's review and to set it aside"***

I have considered the fact that the Applicant's occupation of the suit land is not in dispute and it was not raised in the consent judgment. The issues regarding the appropriateness of succession to the land from Nakku Naiumansi is a matter of determination after hearing the evidence as a whole.

The other questions raised in the Respondent's Advocate's submissions belong to the trial of the head suit.

In view of the above it is hereby Ordered that the consent judgment entered in Civil Suit No. 128 of 2009 on 29<sup>m</sup> day of January 2013 shall and is hereby set aside together with the consequent Orders of contempt of Court made under miscellaneous application No. 49 of 2015. Each party shall be responsible for his/her costs in this application.

Dated at Kampala this 25<sup>th</sup> day of November 2016

J.W. Kwesiga

Judge

25/11/2016

- > Mr. Sebanja Abubaker for 1<sup>st</sup> Respondent
- > 1<sup>st</sup> Respondent is in Court
- > Applicants not present
- > Ms. Irene Nalunkuma - Court Clerk