

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**[LAND DIVISION]**  
**MISCELLANEOUS APPLICATION NO.464 OF 2019**  
**(ARISING FROM CIVIL SUIT NO.433 OF 2016)**

**LINDA  
LUCIA:.....  
:APPLICANT**

**VERSUS**

**1. EDITH NAKANDI  
2. ADMINISTRATOR  
GENERAL:.....:RESPONDENTS**

**BEFORE: HON. MR. JUSTICE HENRY I KAWESA**

**RULING**

This application was brought by notice of motion under Section 98 of the Civil Procedure Act Cap 71, O.46 rr1, 2, 3, 4 & 8 and O.52 r1 of the Civil Procedure Rules SI 71-1 seeking for orders that;

1. The consent judgment between Edith Nakandi as Plaintiff and the Administrator General in Civil Suit No.433 of 2015 be unconditionally set aside.
2. The costs of the application be provided for.

The grounds of the application briefly are that;

1. The Applicant is the 2<sup>nd</sup> Defendant in Civil Suit No.433 of 2015 instituted by the 1<sup>st</sup> Respondent.
2. The terms of the consent judgment were prejudicial to the Applicant's interest as it is a judgement in rem until it is set

**MISC. APPLICATION NO. 464 OF 2019-LINDA LUCIA VERSUS EDITH NAKANDI  
(RULING)**

aside in so far as it declares that the root of the Applicant's title in the suit property was illegal.

3. The Applicant has not been afforded a fair hearing on the issue of legality of the transfer of the suit land to Naseme Sozi from whom she derived a legal interest.
4. That it is in the interest of justice that this application be allowed and the consent judgment be set aside and the issue of legality of the transfer of the suit land be heard and determined on its merits with all the parties being afforded a fair hearing.

Page | 2

The above grounds are supported by the affidavit of Kasule Peter Mpagi, the lawful attorney of the Applicant by virtue of powers of attorney. *A copy of the said powers was attached as annexure "KPI".*

It is deponed in the affidavit that the Applicant is the 2<sup>nd</sup> Defendant in Civil Suit No.433 of 2015 wherein a consent judgment was entered. A copy of the consent judgment was attached as "KP2". The deponent added that the terms of the consent judgment are prejudicial to the Applicant's interests in as far as it declares that the transfer of the suit land to Naseme Sozi, from whom the Applicant derived legal interest, is illegal. That he was informed by his lawyers that the said consent judgment is a judgment in rem that binds the Applicant until it is set aside. He avers further, that the Applicant was never afforded an opportunity to be heard on the terms of the consent judgment in relation to the legality of the transfer of the suit land to Naseme Sozi from whom the Applicant derived interest which she later transferred to the 5<sup>th</sup> Defendant, Umar Katongole.

The application was opposed by the 1<sup>st</sup> Respondent. In her affidavit in reply, the 1<sup>st</sup> Respondent averred that the application is intended to delay proceedings of the main suit to which the Applicant is a party. That the consent judgment is in no way

**MISC. APPLICATION NO. 464 OF 2019-LINDA LUCIA VERSUS EDITH NAKANDI  
(RULING)**

prejudicial to the Applicant's interests since the Applicant still has an opportunity to be heard in the main suit and; that the said judgment was legally executed on ground that no law bars parties from consenting. It was also her evidence that the application does not disclose any grounds to warrant setting aside the said consent judgment.

Page | 3

The 2<sup>nd</sup> Respondent did not oppose the application and as such, the application shall proceed *ex parte* against her. Both parties filed written submissions which I shall consider in determining the issue at hand.

In his submissions, the Applicant's Counsel submitted that the Applicant pleaded in her joint written statement of defence with Anne Birungi, the 3<sup>rd</sup> Defendant, that she derived her legal interest in the suit land from Naseme Sozi. That the Applicant also stated in the joint scheduling memorandum that the suit land formed part of the estate of the late Yosia Sempa, to which Naseme Sozi was a beneficiary, a fact which is denied by the 1<sup>st</sup> Respondent. He then argued that Court has to determine the issue whether the 3<sup>rd</sup> Defendant acquired the suit land fraudulently for the reason that the 1<sup>st</sup> Respondent's particulars of fraud against the Applicant and Anne Birungi are that they took the suit land despite not being beneficiaries to the estate of the late Kanoni Ntambi.

Further, Counsel also opined that this Court has to also determine whether the suit land formed part of the estate of the late Yosia Sempa or the late Kanoni Ntambi. Premised on this, he argued that the Applicant has sought to provide evidence from the records of the 2<sup>nd</sup> Respondent that the suit land was part of the estate of the late Yosia Sempa, but not Kanoni Ntambi which evidence the Respondents circumvented through the consent judgment. He then submitted that the said consent judgment is a judgment *in rem* and; that it is unlawful on ground that it declares

the root of the Applicant's title illegal, without hearing her on the issue.

In submitting that the said judgment is a judgment in rem, Counsel relied on the case of **Saroj Gandesha versus Transroad (Uganda) Ltd SCCA No.13 of 2009** wherein Court observed that such judgments are conclusive against all persons even when they are not parties to the proceeding, and are *estopped* from averring that the status of persons or things, or the right to title to property are other than what the Court has by its judgment declared it to be.

On the other hand, Counsel for the 1<sup>st</sup> Respondent argued that the application discloses no grounds for review and setting aside of the consent judgment. Counsel referred me to various authorities pertaining setting aside of consent judgments to wit **Attorney General & Anor versus James Mark Kamoga & Anor SCCA No.8 of 2004, Hirani versus Kassam (1952) EACA 131, Goodman Agencies Ltd versus Ag & Hassa Agencies (K) Ltd Constitutional Petition No.03 of 2008**; and those pertaining review of consent judgments to wit Section 82 of the Civil Procedure Act, O.46 r1(a) and (b) of the Civil Procedure Rules; **Kalokola Kaloli versus Nduga Robert Misc. Application No.497 of 2014; Mohammed Allibhai versus W.E. Bukenya & Anor CA No.56 of 1996; Fx. Mubwike versus UEB HCMA No.98 of 2005, Combined Services Ltd versus Attorney General HCMA No. 200 of 2009, and Joyce L. Kusulakweguya versus Haider Somani & Anor HCMA No.040 of 2007.**

Counsel also submitted to the effect that the application is an abuse of Court process for reasons he gave while referring me to the averments in the 1<sup>st</sup> Respondent's affidavit in reply.

Amongst the reasons is that the Applicant is a party to the main suit whose proceedings are still ongoing and; that as such, she

has the opportunity to be heard by defending her case against the 1<sup>st</sup> Respondent. In addition to that, he added that the said consent judgment is not binding upon the Applicant. He also contended that there is no evidence that the Respondents are circumventing the main suit as alleged by the Applicants.

I have had the benefit of appreciating the evidence on record and authorities cited by both Counsel in support of their respective cases and I shall now resolve as follows.

It is undisputed that the Applicant is not a party to the impugned consent judgment, a reason why he brought her application under O.46 of the Civil Procedure Rules SI 71-1. The said Order derives roots from Section 82 of the Civil Procedure Act which provides that;

*“A person considering himself or herself aggrieved-*

*(a) by a decree or order from which an appeal is allowed but from which no appeal has been preferred; or,*

*(b) by a decree or order from which no appeal is hereby allowed.....*

*may apply for a review of the judgment to the court which passed the decree or made the order.....”*

In addition to the Section, O.46 r1 of the Civil Procedure Rules provides that applications of this nature must be premised on;

*“the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his or her knowledge or could not be produced by him or her at the time when the decree was passed or the order was made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason...”*

The requirements under O.46 r1 of the Civil Procedure Rules are reiterated in the case of ***Fx. Mubwike versus UEB*** (*supra*).

Having considered the circumstances of the application, it is my observation that the Applicant's ground for review of the impugned consent judgment is premised on the element of "*any other sufficient reason*" as above which is a broader scope under which judgments, including the one at hand, may be reviewed though as noted in **Kalokola Kaloli versus Nduga Robert (supra)**.

Any other sufficient cause must be analogous to the other ground under O.46 r1 of the Civil Procedure Rules. It is now trite law that a consent judgment may be reviewed and set aside if 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 misapprehension or ignorance of material facts, or in general for any reason which would enable the Court to set aside an agreement. See **Supreme Court in Attorney General & Anor versus James Mark Kamoga & Anor (supra)**.

From the foregoing discussion, it can be deduced that the Applicant must satisfy the following criteria in order to succeed, that is;

1. That she is an aggrieved person.
2. That there is sufficient reason for setting aside the impugned consent judgment. Sufficient reason being any of the grounds for setting aside a consent judgment.

To begin with criteria one; according to the case of **Re Nakivubo Chemists (U) Ltd [1979] HCB 12**; it was held that;

*"an aggrieved person is "any person....who has suffered a legal grievance and, as such may be a party to the suit of any third party".*

The case of **Busoga Growers Co-operative Union Ltd versus Nsamba & Son Ltd HCMA No.123 of 2000** adds that such a person must show;

**MISC. APPLICATION NO. 464 OF 2019-LINDA LUCIA VERSUS EDITH NAKANDI  
(RULING)**

*“....that the decision pronounced against him by Court has wrongfully deprived of something or wrongfully affected his title in something”.*

In the instant application, the Applicant considers herself aggrieved for the reason that the impugned consent judgment affected the status of the suit land without being heard. The relevant terms of the impugned judgment between the 1<sup>st</sup> Respondent [Plaintiff] and 2<sup>nd</sup> Respondent [1<sup>st</sup> Defendant] are that;

Page | 7

- a) The 1<sup>st</sup> Defendant hereby concedes that the estate of the late Kanoni Ntambi was by law supposed to be distributed to; Ssewaya John, Beza Nassozi, Ruth Nankinga and Nakandi Edith, and widows.
- b) The 1<sup>st</sup> Defendant hereby concedes that the transfer of the suit land into the names of the now late Nassozi Seme (*sister to the late Kanoni Ntambi*) was illegal as she was not a beneficiary to the estate of the late Kanoni Ntambi.
- c) The 1<sup>st</sup> Defendant hereby concedes that the registration of Nassozi Seme was wrongfully procured as a result of the misrepresentation on the part of Nassozi Seme.

Having examined the law and the evidence, I now hold as follows:

1. Whether the Applicant is an aggrieved person.

In view of the decisions above, the Applicant has pleaded in the affidavit of Kasule Peter Mpagi in support of the application in paragraph 2,3,4,5 and 6, basically that the consent judgment is prejudicial to his interests since it declares the transfer of the suit land to Naseme Sozi from whom the Applicant derived a legal interest was illegal; and being a judgment in rem, it binds the Applicant unless it is set aside.

Counsel for the Applicant in his submissions elaborated the basis of the said averments, supporting a finding in the Applicant's

favour. The Respondent in reply and by the affidavit of Edith Nakandi averred that the said assertions are false. In paragraphs 5,6,7,8,9,10,11,12 and13, whose main crux is that the Applicant being a party to Civil Suit No. 433 of 2015, will have an opportunity to defend his claims, making it wrong to assert that he was not accorded the right to be heard.

Counsel for the Respondent argued at length in support of that position.

The law is that a consent judgment, according to ***Haruna Kassam it (1952) EACA 131 (approving Seton on Judgment and Orders; 7<sup>th</sup> Edn. Vol. 1 - page 124)***;

*“Prima facie any order made in the presence and with 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 policy of Court 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 Court to set aside an agreement”*

Court must bear the above in mind and limit its jurisdiction strictly within the boundaries of the legal perimeter above.

Further, Court is considering this application under Section 98 of the Civil Procedure Act and O.46 rr1 & 2 of the Civil Procedure Rules. The Applicant raises the application complaining that the judgment in Civil Suit No. 433 of 2015 be set aside and the issue of legality of the transfer of the suit be heard and determined on its merits with all the parties being offered a fair hearing.

The consent judgment can only be set aside if it is shown that it was either obtained by fraud, collusion, contrary to policy of Court, without sufficient material facts, in misapprehension or in ignorance of material facts or for any other general reason which would enable Court to set aside an agreement.

In this matter, it has been revealed through the affidavit in reply sworn by Edith Nakandi in paragraphs 3 - 14 - especially paragraphs 8, 9, 10 and 11 that issues between her late Nassozi Seme and the late Kanoni Ntambi are matters to which Civil Suit No. 433 of 2015 relate, and in paragraph 8, she concedes that the Applicant must prove her interest therein, yet for her and the 2<sup>nd</sup> Respondent, a judgment has been concluded by a consent settling their part of the bargain; (sic) See paragraphs 8, 9, 10 and 11.

When this revelation is considered alongside Kasule Peter's affidavit and averments in paragraphs 3,4,5 and 6; especially that he was not given a right to be heard on the matter, it then sends credence to the Applicant Counsel's submissions that the consent judgment finally determined the 4<sup>th</sup> issue in the main suit between all parties before Court, gives the parties a hearing.

I have looked at the scheduling memorandum, the plaint and the written statement of defence for the 2<sup>nd</sup> Defendant (Applicant) under Civil Suit No. 433 of 2015. I notice therefore that in the scheduling memorandum for the Plaintiff, 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants filed on 13<sup>th</sup> April 2016, the Plaintiff in paragraph 4 states their case against the 1<sup>st</sup> Defendant in the terms that; *"the 1<sup>st</sup> Defendant erroneously distributed part of Kanoni Ntambi's estate to non-beneficiaries thereto, including the suit land that ended up in the names of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.*

In paragraph 11, he states; *the Plaintiff holds the Defendant's jointly and severally liable for their aforementioned actions which were contravened and designed to deprive her of her beneficial entitlements in the suit land and were fraudulent in nature'.*

**MISC. APPLICATION NO. 464 OF 2019-LINDA LUCIA VERSUS EDITH NAKANDI  
(RULING)**

In the defence of the 1<sup>st</sup> Defendant in paragraph 5 of the scheduling memorandum, the 1<sup>st</sup> Defendant averred that; *“when he realised that there were mistakes....., he lodged caveats and handed them over to the actual beneficiaries....”*

Page | 10

He denied ever participating in any fraud. In their pleaded facts in the joint scheduling memorandum, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant state in paragraph 4 and 5; *“the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants have at all times since 2003 been in quiet possession ...and have no knowledge of the 1<sup>st</sup> Defendant’s consent on the suit land.”*

The issues framed by the parties under No.4 and 5 were whether the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants acquired the suit property fraudulently and whether the 1<sup>st</sup> Defendant fraudulently distributed the suit land to non-beneficiaries.

From the above facts as revealed above, it is clear that the consent entered between the Plaintiff and the 1<sup>st</sup> Respondent to the effect that;

*‘The 1<sup>st</sup> Defendant hereby concedes that the estate of Kanoni Ntambi was by law supposed to be distributed to wit that the estate of the late Kanoni Ntambi was by law supposed to be distributed to; Ssewaya John, Beza Nassozi, Ruth Nankiga and Nakandi Edith, and widows; and that the transfer to Nassozi Seme was illegal as she was not a beneficiary to the estate of the late Kanoni Ntambi’ inter-alia, went to the root of this dispute in as far as the Plaintiff’s rights viz-viz, the Applicant and the 1<sup>st</sup> Respondent.*

The consent judgment in essence answers and determines issues 4 and 5 in the joint scheduling memorandum before the hearing of the suit interparties.

All the submissions considered this Court finds that the Applicant is an aggrieved party in that, both the Respondents have attempted to short circuit the Court process of hearing the matter interparties by agreeing to disentitle him of his defence which is

**MISC. APPLICATION NO. 464 OF 2019-LINDA LUCIA VERSUS EDITH NAKANDI  
(RULING)**

hinged on the 1<sup>st</sup> Respondent's participation in the trial as a co-defendant, who is privy to information which the Applicant requested for, vide the Court order dated 4<sup>th</sup> October 2016, ordering the 1<sup>st</sup> Defendant (1<sup>st</sup> Respondent) to avail various documents to the Applicant by way of O.10 r5 & 16 of the Civil Procedure Rules before the hearing which was scheduled on 27<sup>th</sup> October 2016; though the said hearing is still pending.

Page | 11

This type of circumventing of the Court process is not acceptable. It is an attempt to avoid Court's inquiry into the question as to whether the suit land formed part of the estate of the late Yosia Sempa or was part of the estate of Kanoni Ntambi.

Court must investigate it there was fraud on the part of the 1<sup>st</sup> Respondent as pleaded by the 2<sup>nd</sup> Defendant and alleged by the Plaintiff.

I therefore find that this is a proper matter before Court for review, the Applicant, having proved that he is an aggrieved party.

I do not agree with the Respondent's averments especially that the Applicant is not aggrieved since they have a right to present their case during the trial.

With due respect, the arguments raised are academic to the extent that Counsel avoided the obvious effect of this judgment which rightfully falls under the definition of the judgment in rem "*binds all persons even when they are not parties to the proceedings*". See

**Mansukhlal Ramji Karia & Anor versus Attorney General;  
Civil Appeal No. 20 of 2002.**

The principle means that since a judgment, always a judgment till varied, set aside or annulled by another superior order. This judgment in essence, settles all the issues that were pending as between the Plaintiffs, 1<sup>st</sup> Respondent and the Applicant. If not

**MISC. APPLICATION NO. 464 OF 2019-LINDA LUCIA VERSUS EDITH NAKANDI  
(RULING)**

given leave to have this judgment reviewed since it tends to violate his right to be heard.

For reasons stated above, I do find that the consent judgement which provides that the root of the Applicant's title was illegal and procured by misrepresentation was arrived at in breach of the right to be heard, and in particular to the right for a fair hearing. It tends to short circuit the Applicant's right to challenge the conclusions reached therein at the trial and is hence lopsided for the sole benefit of the Respondents contrary to the law and spirit of the law.

I do find that;

1. This application succeeds for reasons stated above.
2. The application is granted and the consent judgment is set aside.
3. Parties are ordered to revert back to the position pertaining before such a consent judgment was entered to enable Court to determine all questions in issue interparties.
4. Costs be in the cause.

I so order.

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Henry I. Kawesa

**JUDGE**

11/06/2019

11/06/2019:

Achilles Lubega for the Applicants.

Applicants present.

**MISC. APPLICATION NO. 464 OF 2019-LINDA LUCIA VERSUS EDITH NAKANDI  
(RULING)**

Lukongo Innocent for the Respondents.  
Respondents present.

Achilles:

Matter for Ruling.

Court:

Ruling delivered to the parties above.

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Henry I. Kawesa

**JUDGE**

11/06/2019