IN THE SUPREME COURT OF UGANDA

AT MENGO

CORAM: ODOKI C.J., TSEKOOKO, MULENGA, KANYEIHAMBA, KATUREEBE JJ.S.C.

CIVIL APPEAL NO. 8 OF 2004

BETWEEN

ATTORNEY GENERAL &
UGANDA LAND COMMISSION::::::::::::::::::::::::::APPELLANTS

AND

JAMES MARK KAMOGA &
JAMES KAMALA::RESPONDENTS

[Arising from decision of the Court of Appeal (Engwau, Kitumba, Byamugisha JJ.A) at Kampala in Civil Appeal No.74/02, dated 30th March 2004.]

JUDGMENT OF MULENGA JSC.

This second appeal arises from an application the appellants filed in the High Court seeking review of a consent judgment entered by the Deputy Registrar in a suit instituted by the respondents against the appellants for recovery of land. The application was heard and allowed by a judge of the High Court. However on appeal by the respondents, the Court of Appeal reversed the decision and dismissed the application, principally on the ground that the judge had no power to entertain the application for review.

Background

The respondents instituted Civil Suit No.1183 of 1997 against the two appellants and 10 other persons, seeking *inter alia* a declaration that they were the lawful owners in freehold title of land, part of which was held by the 1st appellant on lease, and other parts of which had been leased by the 2nd appellant to the said 10 persons in divers parcels. The appellants defended the suit, and were jointly represented by legal officers in the Attorney General's Chambers, who amended Written Statement of Defence (WSD) twice. The first amended WSD was dated and filed on 13th November 1998, and the second was dated and filed on 15th September 2000.

Subsequently, however, counsel for the respondents negotiated a settlement with counsel for the two appellants alone, and on 31st August 2001, they signed a consent judgment, which was filed on 24th September 2001 and was duly entered by the Deputy Registrar on the same date. Surprisingly, the decree is dated the 26th October 2001 rather than the date of the judgment as required by law. The substance of the consent judgment and decree is that –

> ***"(a) Plaintiffs are entitled to terminate the 1st Defendant's lease…. And re-enter the same…***
> ***(b) The 2nd Defendant wrongfully and unlawfully granted leases on the Plaintiffs' freehold land to…..*** [the other 10] ***Defendants".***

Nearly six months after the consent judgment was entered, the appellants, by Notice of Motion dated 20th March 2002 applied for orders that –

> ***"1. This Honourable Court doth review the Consent Judgment/Order entered on the 24th September 2001.***
> ***2. The said Consent Judgment/Order be set aside."***

I should point out that both in the proceedings and judgments of the courts below and in counsel's written submissions to this Court, sections of statutes and rules of procedure were cited as numbered prior to the 2000 Revised Edition of the Laws of Uganda in which they were renumbered differently. The main ones mentioned are sections 83 and 101 of the Civil Procedure Act (CPA) and Order 9 r.9 and Orders 42 and 46 of the Civil Procedure Rules (CPR), which are reproduced in the Revised Edition and respectively re-numbered as sections 82 and 98 of the CPA, and Order 9 r.12 and Orders 46 and 50 of the CPR. For avoidance of confusion I will refer to the sections and rules as so re-numbered, even when quoting from the said judgments or submissions.

The application was made under Sections 82 and 98 of the CPA and Order 46 rr.1, 2 and 8 of the CPR, and was supported by the affidavit of Joseph Matsiko, a Senior State Attorney, who had consented to the judgment on behalf of the appellants. The gist of the grounds of the application was that when Joseph Matsiko consented to the judgment, he was not aware that the respondents' title to the suit land had been challenged for fraud in 2nd amended WSD as copy thereof was not on the file he perused in the course of negotiating the settlement. His attention was drawn to it and the pleaded particulars of fraud when the legal officer who handled the file prior to him returned from abroad and traced the amended WSD on a different file.

The respondents opposed the application. In an Affidavit in reply, Ezekiel Muhanguzi, the then counsel for the respondents averred that the allegation of fraud was not pleaded for the first time in the 2nd amended WSD but had been implied even in the 1st amended WSD, which Joseph Matsiko perused before signing the consent judgment. He also averred that the consent judgment was arrived at in consequence of a compromise settlement he proposed, to the effect

that in consideration of the 1st respondent conceding to the lifting of a court injunction in another suit, the 1st appellant should consent to judgment being entered in civil suits nos.1183/97 and 1349/99, in favour of the 1st respondent. At the hearing of the application, counsel for the respondents also submitted that the application was misconceived. He pointed out that the rule under which the application was made provides in mandatory terms that an application for review shall be heard by the judge who made the decree or order to be reviewed, and argued that it was a contravention of that rule for a judge to handle an application for review of a consent judgment entered by the registrar. In addition, counsel submitted that the application did not satisfy the conditions for a review, particularly with regard to discovery of new and important matter or evidence.

The learned judge held that the application was properly before him as the registrar who entered the consent judgment was not empowered to entertain contentious matters. He also held that the application satisfied the conditions for review as he believed that Joseph Matsiko discovered the challenge to the plaintiffs' title for fraud after he had consented to the judgment; and he found no negligence or derelict of duty on the part of Joseph Matsiko. Consequently he allowed the application and set aside the consent judgment.

The respondent appealed to the Court of Appeal on six grounds and filed written submissions. The appellants did not file any reply nor were they represented at the hearing. The Court of Appeal held that the trial judge had no power to entertain an application for review of a consent judgment passed by a registrar; and that the respondents were not competent to apply for review as they were not "aggrieved" for purposes of the law under which the application was made, and did not comply with conditions under that law.

The defendants' grounds of appeal to this Court may be paraphrased thus -

> ***"The learned Justices of Appeal erred in law and fact in holding –***
> 1. ***that the trial judge had no powers to review a consent judgment entered by the Registrar of the High Court***
> 2. ***that the appellants were not aggrieved parties***
> 3. ***that the consent judgment … could not be reviewed or varied"***

Both parties filed written submissions. At the hearing Mr. Tibaijuka, counsel for the respondents appeared but there was no appearance for the appellants..

Preliminary Objections

Before considering the grounds of appeal, I have first to consider two issues, which Mr. Tibaijuka raises in his written submissions in form of preliminary objections. First, he submits that the appeal is incompetent by reason of the appellants' failure to take the step of transmitting the Notice of Appeal to this Court, in contravention of r.73 of the Rules of the Supreme Court. I find no substance in this objection as r.73 imposes the duty of transmitting the Notice of Appeal to this Court, not on the intending appellant, but on the registrar of the Court of Appeal. I would therefore, summarily dismiss that objection.

Secondly, Mr. Tibaijuka submits that the appellants are precluded from bringing a second appeal because the first appeal having been heard in their absence, they did not apply, under r.100 (4) and (5) of the Rules of the Court of Appeal, for the appeal to be reheard. He contends that the sub-rules were designed to make an *ex parte* judgment finally binding on a respondent who, without sufficient cause, deliberately avoids appearing before the Court of Appeal; and to prevent such a

respondent abusing court process by coming to this Court to raise matters that could have been raised at a rehearing in the Court of Appeal. Counsel asks this Court to invoke its inherent jurisdiction to strike out the appeal, but cites no authority in support of the proposition. Oddly, counsel for the appellants did not reply to this submission.

The right of appeal to this Court is provided for under the ***Judicature Act*** (Cap.13) in section 6(1), which reads –

> ***"6. Appeals to the Supreme Court in civil matters***
>
> (1) ***An appeal shall lie as of right to the Supreme Court where the Court of Appeal confirms, varies or reverses a judgment or order, including an interlocutory order, given by the High Court in the exercise of its original jurisdiction and either confirmed, varied or reversed by the Court of Appeal. "*** (Emphasis is added)

Clearly, by virtue of this provision, any party to an appeal before the Court of Appeal, who is dissatisfied with a decision of that court confirming, varying or reversing the decision of the High Court from which the appeal arises, has an unqualified right to appeal to the Supreme Court.

The practice and procedure of appeals in the Court of Appeal are regulated by the ***Judicature (Court of Appeal Rules) Directions***, wherein rule 100 provides for *"Appearances at hearing and procedure on nonappearance"*. Sub-rules (4) and (5) of rule 100, so far as is relevant here, provide –

> ***"(4) Where an appeal has been allowed … in the absence of the respondent, he or she may apply to the court to rehear the appeal … if he or she can show that he or she was prevented by any sufficient cause from appearing when the appeal was called for hearing.***
>
> ***(5) An application for restoration under sub rule … (4) of this rule shall be made within thirty days after the decision of the court. .."***

To my mind, the purpose of these provisions is to give to a respondent who loses an appeal in which, for sufficient cause, he failed to participate at the hearing, a fresh opportunity to be heard. The provisions are permissive not mandatory. They cannot be construed as divesting any party, including a respondent who loses an appeal that is heard *ex parte*, of the right of appeal vested under section 6 (1) of the Judicature Act. Nor can they be construed as imposing a condition precedent for such a losing respondent to apply for a rehearing before exercising the right of appeal to this Court.

Lastly, I note that learned counsel's proposition is basically grounded on the argument that the appeal amounts to abuse of court process because the appellants raise an issue on a second appeal, which could have been raised and disposed of in the first appeal. In my view, failure to adhere to a rule of procedure in instituting a court case does not necessarily amount to an abuse of court process. Abuse of court process involves the use of the process for an improper purpose or a purpose for which the process was not established. ***Black's Law Dictionary*** [6th Ed.] states –

> ***"A malicious abuse of legal process occurs when the party employs it for some unlawful object, not the purpose which it is intended by the law to effect; in other words, a perversion of it."***

In the instant case it has not been established that, either the failure to apply for a rehearing in the Court of Appeal or the institution of this appeal was for some unlawful object or to pervert the purposes for which the appeal processes were established. I would therefore also dismiss this objection.

Submissions on 1st ground of appeal

Counsel for the appellants submits on ground 1 that the review jurisdiction under Order 46 of the CPR is only vested in a judge of the High Court and not in the registrar. The judicial powers of the registrar are set out under Order 50 of the CPR and under the Practice Direction No.1 of 2002, neither of which include the review jurisdiction. Counsel argues that the registrar can only exercise powers vested in the registrar and that the provisions that confer review jurisdiction on a judge cannot be construed as conferring the same on the registrar. He contends that therefore, the application in the instant case was properly disposed of by a judge of the High Court.

In reply, learned counsel for the respondents submits that the Court of Appeal did not hold that the registrar had powers of review, but that the application should not have been for review but for setting the judgment aside under Order 9 r. 12. He contends that the decisions in ***Nicholas Roussos vs. G.H. Virani &Another,*** Civil Appeal No.9 of 1993 (SC); and ***Ladak A.M. Hussein vs. G.I. Kakiiza***, Civil Appeal No.8 of 1995 (SC), support that holding. He contends that the principles applicable to review are different from those applicable to setting aside a judgment under Order 9 r.12 similar to the holding in ***Nicholas Roussos Case*** (supra), in respect of rules 9 and 27 of Order 9. Counsel submits that the omission of Order 46 from Orders listed in Practice Direction No.1 of 2002, does not mean that the registrar cannot review a judgment he has entered, since the Direction stipulates that ***"the powers of Registrars shall include, but not be limited to entertaining matters under the… Orders and Rules"*** listed therein. That means that the registrar has more powers than are listed in the Direction. He stresses that the power to review a decree is given to the judge who passed it and to no one else, and argues that since a registrar sits as a civil court, a decree passed by that court can only be reviewed by it and not by a judge who did not pass it. Lastly counsel

refers to ***Ddegeya Trading Stores (U) Ltd vs. URA*** Civil Appeal No.44 of 1996, in which the Court of Appeal held that a judge of the High Court erred in law to invoke the power of revision under section 83 of the CPA, to set aside a taxation order made by a registrar. Counsel invites this Court to hold by analogy, that the trial judge erred in law to review a judgment entered by the registrar.

Vesting of review jurisdiction

I am constrained to say at the outset that the analogy the respondents' counsel draws from ***Ddegeya Trading Stores Case*** (supra) is misleading because there is a fundamental difference between the revision and review powers of the High Court. While section 83 of the CPA vests in the High Court supervisory jurisdiction to revise decisions of magistrates' courts, which are subordinate to it, section 82 of the CPA empowers the High Court to review its own decisions. The conditions on which the two jurisdictions are invoked are necessarily different; and so are the principles applicable to their exercise. The Court of Appeal holding in ***Ddegeya Trading Stores Case*** (supra) turned on the finding that the High Court's revisional power applies to decisions of the magistrates' courts only. The court said –

> ***"The Registrar, his deputy and/or assistant are officers of the High Court. They are not governed by the Magistrates Courts Act when they sit as a court. Under Order*** [50] ***Rule 4 of the Civil Procedure Rules a Registrar presides over a civil court when dealing with matters under Order*** [50] ***Rules 1, 2, & 3 of the Civil Procedure Rules. Under the Advocates (Remuneration and Taxation of Costs) Rules under which the proceedings, the subject matter of this appeal took place, the Registrar or taxing officer was not a magistrate's court. He proceeded to deal with the bill of costs as an officer of the High Court to which the bill of costs had been presented. We agree that the learned judge erred in law when he applied section*** [82] ***of the Civil Procedure Act which in the circumstances was inapplicable."***

The error in that case was to apply revisional jurisdiction to a decision in High Court proceedings, when that jurisdiction is only applicable to decisions of magistrates' courts. The same cannot be said of applying review jurisdiction to a High Court judgment because that jurisdiction is specifically applicable to decisions made in High Court proceedings. The precedent of ***Ddegeya Trading Store Case*** therefore, does not help the respondents' case.

In holding that the trial judge had no power to review the consent judgment the Court of Appeal placed reliance on two propositions, namely that –

- a judge can set aside a consent judgment entered by the registrar only under Order 9 r.12 or under the court's inherent powers;
- rules 2 and 4 of Order 46 provide that application for review shall be made to only the judge or court that passed the decree or made the order sought to be reviewed.

In the opinion of the court, the trial judge confused the role and powers of the registrar in holding that the application for review was properly before him because the deputy registrar who entered the consent judgment was not empowered to entertain contentious matters. The learned Justice of Appeal who wrote the lead judgment pointed out that when exercising powers vested in him/her, the registrar sits as a civil court and that though a judge sits on appeal from decisions of the registrar that does not confer jurisdiction to review the registrar's decisions. Although it was not expressly held that the registrar has powers of review, it seems to be implied that when sitting as a civil court the registrar could review his/her judgment.

In my considered opinion that is not correct. The provision in rule 6 of Order 50 that deems the registrar to be a civil court for purposes of exercising the powers vested under rules 1, 2, 3 and 4, should not be basis, as seems to be implicit in the lead judgment, for the view that the registrar has review powers. Though rules 7 and 8 respectively provide for the registrar referring any matter, and a person aggrieved by a registrar's decision appealing *"to the High Court"*, rule 6 does not create a subordinate court to the High Court. It rather underscores the special status of the registrar as an official of the High Court to whom some limited functions of that court are delegated.

In respect of the first proposition relied on in holding that the trial judge had no power to review the consent judgment, the Court of Appeal followed a holding in ***Ladak Abdulla Mohamed Hussein vs. Griffiths Isingoma Kakiiza and others*** Civil Appeal No.8 of 1995 (SC) (unreported). In that case, third parties to a consent judgment asked the High Court to set aside or to review the consent judgment. Their application was brought under Order 9 r.9 (now r.12) and in the alternative under Order 42 r.1 (now O.46 r.1). The trial judge granted the prayer for review and varied the consent judgment. On appeal, the Supreme Court held that the court may set aside a consent judgment under O.9 r.9. In the lead judgment, in which the other Justices concurred, Odoki JSC (as he then was) said –

> ***"It is significant to note that in the notice of motion in the lower court, the first order sought was for setting aside the consent judgment to the extent that it related to Plot 4B Acacia Avenue. The order for review was merely an alternative prayer. In my judgment this was not a suitable case for granting the order of review. The learned judge should have considered the application to set aside the consent judgment. This application had been brought under Order 9 r. 9 of the Civil Procedure Rules which provides –***

> ***"In uncontested cases and cases in which the parties consent to [judgment] being entered in agreed terms, judgment may be entered by the registrar."***
>
> ***Order 9 r. 9 is therefore not restricted to setting aside ex parte judgments but covers consent judgment entered by the registrar. It gives the court unfettered discretion to set aside or vary such judgments upon such terms as may be just. See Mbogo vs. Shah (1968) EA 93. Nor is it restricted to parties to the suit but includes any person who has a direct interest in the matter, who has been injuriously affected."*** (Emphasis is added)

There is an obviously accidental slip in this passage of the lead judgment. The in-set quotation is not the text of Order 9 r. 9 (now 12) as stated. It is rather the text of Order 50 r. 2. Secondly, I am constrained to observe with the greatest respect, that while it is correct to say that the rule *"gives the court unfettered discretion to set aside the judgments"* to which it refers, it is questionable if the unfettered discretion is applicable to consent judgments in view of the wealth of authorities to the effect that consent judgments may be set aside only on limited grounds. I cannot with certainty say what bearing these two factors had on the aforesaid interpretation placed on the rule. I think, however, that they justify a re-consideration of the holding with more focus on the text of the rule.

Order 9 rule 12 provides –

> ***"12. Setting aside ex parte judgment.***
>
> ***Where judgment has been passed pursuant to any of the preceding rules of this Order, or where judgment has been entered by the registrar in cases under Order [50] of these Rules the court may set aside or vary the judgment upon such terms as may be just."*** (Emphasis is added)

The rules preceding rule 12 pursuant to which judgment may be passed are rules 6, 7 and 8. They all provide for entering judgment or interim judgment where the defendant fails to file a defence within the prescribed time. Under Order 50 rule 2 the registrar may enter two categories of judgments, namely judgments in uncontested cases, and secondly, in cases where the parties consent to judgment on agreed terms. On the face of it, the expression *"where judgment has been entered by the registrar in cases under Order 50"* appearing in r.12 covers both categories of judgments. However, it is well settled, as I will elaborate later in this judgment, that unlike judgments in uncontested cases, consent judgments are treated as fresh agreements, and may only be interfered with on limited grounds such as illegality, fraud or mistake. Because of that, I am unable to agree that the unfettered discretion under r. 12, is intended to apply to consent judgments. In my view, the better interpretation is to apply the *ejusidem generis* rule, and hold that the judgments entered by the registrar under Order 50 that may be set aside under rule 12 of Order 9, are those similar to those passed under rules 6, 7 and 8 of Order 9, namely *ex parte* judgments. This view is fortified by the wording of the head note to rule 12 of Order 9, which specifically indicates that the rule relates to *ex parte* judgments. It is also significant to note that consent judgments are not always entered by the registrar. A trial judge may record a consent judgment where the parties agree to settle the case before him/her. Obviously, such consent judgment entered by a judge does not fall within the ambit of Order 9 r.12. I think it cannot be right to hold that in reviewing or setting aside consent judgments the court would have different considerations regarding those entered by the registrar and those entered by a judge.

As the consent judgment in the instant case is not an *ex parte* judgment I am inclined to disagree with the view of the Court of Appeal that the consent judgment

could not be reviewed but could only have been set aside under Order 9 rule 12. As I will indicate hereafter review jurisdiction is applicable to consent judgments.

Be that as it may, the clear holding of the Court of Appeal, which is the subject of the first ground of appeal, is embodied in the following excerpts from the lead judgment. The learned Justice of Appeal said -

> ***"To my mind the learned trial judge had no powers to review a consent judgment entered by the registrar since the power is confined exclusively to the court or judge who passed the decree or order. The provisions of rule 4 of Order*** [46] ***make this position clear."*** (Emphasis is added)

After citing the said rule 4, the learned Justice of Appeal then concluded –

> ***"I think the above rule puts the matter beyond debate in my view. The learned trial Judge with respect, was wrong to entertain an application for review of a consent judgment passed by a deputy registrar. It was a clear breach of the rules as I have just set them out. For that reason*** [I] ***agree with the submissions of Mr. Muhanguzi that the judge erred in doing so. This ground would succeed."***

The rules that confine the power of review *"exclusively to the court or judge who passed the decree or order"*, are rr. 2 and 4 of Order 46, which read -

> ***"2. To whom application for review may be made.***
>
> ***An application for review of a decree or order of a court, upon some ground other than the discovery of the new and important matter or evidence as is referred to in rule 1 of this Order, or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the judge who passed the decree or made the order sought to be reviewed."***
>
> ***4. Application for review to be to the same judge or judges.***

> ***Where the judge or judges, or any one of the judges who passed the decree or made the order, a review of which is applied for, continues or continue attached to the court at the time when the application for review is presented, and is not or are not precluded by absence or other cause for a period of six months next after the application from considering the decree or order to which the application refers, the judge or judges or any of them shall hear the application, and no other judge or judges of the court shall hear the application."*** (Emphasis is added)

It is clear from the excerpts I have just reproduced from her judgment, that the learned Justice of Appeal misconstrued these rules to mean that every application for review has to be made to the judge who passed the decree sought to be reviewed. With respect, that is not correct. Rule 2 envisages two categories of applications for review but provides for only one category, namely "*applications upon some ground other than* [the grounds listed in the rule]", to be made to the judge who passed the decree or made the order sought to be reviewed. It does not require the other category, namely "*applications upon the ground of discovery of new and important matter or evidence as referred to in rule 1 of the same Order, or of the existence of a clerical or arithmetical mistake or error apparent on the face of the decree"*, to be made to the judge who passed the decree or made the order sought to be reviewed. It follows that an application of that category may be made to any other judge. Obviously, this is because, for purposes of evaluating such new matter or evidence and/or correcting such clerical or arithmetical mistake, a judge who did not pass the decree or make the order is as equipped to do the necessary evaluation or correction as the judge who passed the decree or made the order. On the other hand, the essence of rule 4 is to prohibit a judge who did not pass the decree or make the order sought to be reviewed from entertaining the application for reviewing it as long as the one who did is available to hear the application within six months after its presentation. To my understanding, this prohibition

relates to only the first category of applications, since any other interpretation would render the two rules inconsistent with each other.

The application for review in the instant case was upon the ground of discovery of new and important matter, namely that in the 2nd amended WSD, the respondents' title had been challenged for fraud. On basis of that ground, irrespective of whether it would be upheld or not, under rule 2 the application fell in the second category of applications, which could be made to any judge, including one who did not pass the decree sought to be reviewed. However, whether it was subject to the prohibition under rule 4 depended on whether or not the registrar has powers of review, which is the issue that the trial judge answered in the negative and the Court of Appeal did not answer expressly, but implicitly answered in the affirmative.

I agree with submissions of counsel for the respondents to the effect that the powers of the registrar of the High Court are circumscribed. Unlike a judge of the High Court who exercises the entire jurisdiction vested in that court, a registrar of the High Court can only exercise such jurisdiction of that court as is delegated by or under legislation. The powers of registrars are set out in Order 50 of the CPR and enhanced in Practice Direction No.1 of 2002. I need not reproduce the detailed provisions here. It suffices to say that the former confers on the registrar powers to enter judgment in uncontested cases and consent judgments, to deal with formal steps preliminary to the trial and with interlocutory applications and to make formal orders in execution of decrees; and the latter empowers the registrar to handle matters governed by specified rules and Orders of the CPR, which do not include any rule of Order 46. 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. In the circumstances, the prohibition under rule 4 was not applicable since the registrar who passed the decree was not empowered to review it. I find, in respectful disagreement with the Court of Appeal, that by entertaining the application in the instant case the trial judge did not breach any rule. Accordingly, I would uphold the first ground of appeal.

Submissions on grounds 2 and 3

In grounds 2 and 3, the appellants complain that the Court of Appeal erred in upholding the consent judgment on the grounds it did. In the lead judgment, Byamugisha J.A., held that a consent judgment entered by a registrar can only be set aside under Order 9 rule 12, and that the trial judge erred in reviewing the consent judgment in the instant case. Further, the learned Justice of Appeal noted that an applicant for review under Order 46 r.1 must be a person who has suffered a legal grievance, namely one whose title was wrongly affected by the decree sought to be reviewed. She reasoned that a party cannot, within the meaning of that rule, be aggrieved by a judgment to which the party consents. By way of illustration and/or emphasis, she opined that it is for the same reason, that under section 67 of the CPA, no appeal is permitted from a consent decree. She concluded that because the judgment in the instant case was passed with the consent of the appellants' counsel, who must have had full instructions to compromise the judgment [sic], the appellants could not be aggrieved by the same judgment.

In his written submissions, counsel for the appellants, Senior State Attorney Mwaka, contends that the speculation that counsel who consented to the judgment for the appellants must have had full instructions to compromise the judgment was inconsistent with the affidavit evidence, which showed that if the said counsel had

known that the defence pleaded fraud, he would not have consented to the judgment. Further, he submits that a person suffers a legal grievance if the judgment given is against him or affects his interest, which is what happened to the appellants. Thirdly, he contends that under appropriate circumstances, a consent judgment may be lawfully set aside, and in support of that contention, cites the decisions in ***Hirani vs. Kassam*** (1952) EA 131, and ***Brooke Bond Liebig (T) Ltd. vs. Mallya*** (1975) EA 266. Lastly, he maintains that the fact that appellants' counsel consented to the judgment because he was ignorant of the defence plea of fraud, is sufficient ground for review.

Counsel for the respondents submits that the Court of Appeal decision was not based on speculation but on fact. Instead, according to him, it is the appellants' case that is based on two erroneous assumptions. He contends first that it is fallacious to assume that if Joseph Matsiko had known of the pleaded fraud he would not have consented to the judgment. Secondly, he contends that it is also fallacious to assume that having pleaded fraud the appellants could not have subsequently consented to the judgment. He argues that a litigant is not barred from entering into a consent judgment merely by reason of having pleaded fraud, and maintains that in the instant case the consent judgment was consciously entered into under a "trade-off" from which the appellants derived irreversible benefit. Learned counsel submits that where a suit is settled, the consent decree is passed upon a new contract between the parties, which contract supersedes the original cause of action. He too, relies on the decision in ***Hirani vs. Kassam*** (supra) and argues that in the instant case, the pleadings, including the allegation of fraud pleaded in the 2nd amended WSD, were superseded by the consent judgment.

In an apparent alternative argument, counsel for the respondents submits that even if it be accepted that at the time Joseph Matsiko consented to the judgment he was ignorant of the 2nd amended WSD, his ignorance would not be sufficient ground for setting aside the consent judgment. On authority of ***David Sejjaaka Nalima vs. Rebecca Musoke*** SCCA No.12 of 1985 (unreported), the knowledge of the legal officer who prepared the 2nd amended WSD is imputable on the appellants. When Joseph Matsiko took over conduct of the case, that imputed knowledge was not thereby extinguished. Consequently, the appellants cannot contend that when the consent judgment was entered they were not aware that they pleaded fraud in their defence. Lastly, counsel submits on authority of ***Petro Sonko &Another vs. H.A.D. Patel & Another*** (1955) 22 EACA 23, that the appellants are estopped from challenging the substance of the consent decree, which their counsel approved without any reservation.

Considerations in Review of Consent Decree -

Section 82 of the CPA provides –

> ***"Any person considering himself or herself aggrieved –***
> ***(a) by a decree or order from which an appeal is allowed by this Act but from which no appeal has been preferred; or***
> ***(b) by a decree or order from which no appeal is allowed…***
> ***may apply for a review of the judgment to the court which passed the decree or made the order…."*** (Emphasis is added)

Order 46 rule 1 of the CPR reiterates this provision but adds a condition to the effect that the applicant's desire to apply for the review is -

> ***"from 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….at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the***

face of the record or <u>for any other sufficient reason.</u>" (Emphasis is added)

In the instant case, the applicants considered that they were aggrieved by the consent decree because their counsel, Joseph Matsiko, thereby surrendered their legal interest in the suit property out of ignorance of the defence plea that the respondents' claim was based on fraud.

To my mind the crucial issue underlying the second and third grounds of appeal is not so much whether the court had power to review a consent judgment or a consent judgment can be reviewed, or whether the appellants were aggrieved. I have already held, in disagreement with the Court of Appeal, that the trial judge had power, and did not err, to entertain the application for review of the consent judgment under Order 46. Secondly, I also respectfully disagree with the notion that a party who consents to a decree cannot be aggrieved by it. A party against whom a consent decree is passed may, notwithstanding the consent, be wrongfully deprived of its legal interest if, for example, the consent was induced through illegality, fraud or mistake. Obviously, such party is aggrieved within the meaning of Order 46. Indeed, though in the lead judgment the Court of Appeal creates the wrong impression that a party who consents to a decree cannot be aggrieved by it, ultimately it correctly holds that the law permits consent judgments to be set aside in appropriate circumstances. Besides, it should be noted that the provisions of Order 46 r.1 are so broad that they are applicable to all decrees including consent decrees. In my view therefore, the crucial issue for determination in the instant case is whether there was sufficient reason for reviewing or setting aside the consent judgment.

The principle upon which the court may interfere with a consent judgment was outlined by the Court of Appeal for East Africa in ***Hirani vs. Kassam*** (supra) in which it approved and adopted the following passage from ***Seton on Judgments and Orders,*** 7th Ed., Vol. 1 p. 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 the 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 a court to set aside an agreement."***

Subsequently, that same Court reiterated the principle in ***Brooke Bond Liebig (T) Ltd. vs. Mallya*** (supra) and the Supreme Court of Uganda followed it in ***Mohamed Allibhai vs. W.E. Bukenya and Another*** Civil Appeal No.56 of 1996 (unreported). It is a well settled principle therefore, that a consent decree has to be upheld unless it is vitiated by a reason that would enable a court to set aside an agreement, such as fraud, mistake, misapprehension or contravention of court policy. This principle is on the premise that a consent decree is passed on terms of a new contract between the parties to the consent judgment. It is in that light that I have to consider the consent decree in the instant case.

In this connection I should first comment on the submission by counsel for the respondents that the consent judgment resulted from a trade-off, whereby the 1st respondent agreed to lifting of a court injunction in HCCS No.671/98 in consideration of the 1st appellant consenting to judgment in favour of the 1st respondent in two suits including HCCS No.1183/97 from which this appeal emanates. The only evidence of the trade-off is in paragraph 13 of the affidavit in

reply to the application, sworn on 12th June 2002 by Ezekiel Muhanguzi, the then advocate for the respondents. It reads –

> ***"13. As counsel for plaintiffs in HCCS No.671/98 Kabbs Twijuke & others vs. Uganda Investment Authority I was requested by applicant No.1 to concede to lifting a court injunction therein. In consideration of that request I in turn demanded of applicant No.1 by letter dated 24.08.2001…to consent to judgments in favour of respondent No.1 in two other cases, namely this one HCCS No. 1183/97 and another one HCCS No.1349 in both of which*** [respondent No.1] ***was plaintiff and applicant No.1 was defendant"*** (Emphasis added)

Although the averment was not denied or otherwise disputed by the appellants, I would hesitate to rely on it as a term of "the new contract" on basis of which the consent decree was passed. In his affidavit, Ezekiel Muhanguzi stops at indicating that his demand led to negotiations. I would have expected that upon settlement, that trade-off would be reduced into writing either as a recital in the consent judgment or in form of a separate memorandum, but it was not. In applying the principle to the instant consent judgment, therefore, I will not attach much importance to the said trade-off.

Despite the courts below having differed in their conclusions on the issues in this case, neither based its conclusions on the principle that a consent judgment can only be interfered with if it is vitiated on any of the aforesaid grounds. The learned trial judge allowed the application for review, solely on the premise of discovery of new and important evidence or matter, coupled with his finding that there was no negligence or derelict of duty by Joseph Matsiko in failing to discover the matter prior to the consent judgment. In the Court of Appeal on the other hand, though in the lead judgment several precedents in which the principle was applied were referred to, and the principle was flittingly alluded to in the summary of findings, it

was not applied to determine if there was or there was no merit in the application. As I indicated earlier in this judgment, the application was rejected not so much for lack of merit but more because, in the court's view, the application was made through the wrong procedure and before the wrong forum. Hence, after noting that the consent judgment can only be set aside under O.9 r.12 or section 99 of the Act, the learned Justice of Appeal's concluding remark was –

> ***"This judgment does not close the chapter of litigation between the parties over the consent judgment."***

It is not the appellants' case that the consent judgment was obtained through fraud, collusion, or agreement contrary to the court policy; nor is it suggested that consent was given without sufficient, or in misapprehension of, material facts. The ground upon which review was sought was, in effect, that consent was given out of ignorance of the fact that the appellants pleaded fraud in the 2nd amended WSD.

In my view, even if one believes Joseph Matsiko on this point, which the learned trial judge did, ignorance of what was pleaded is not *ignorance of material facts*. The ignorance that would vitiate consent as envisaged under the principle must be ignorance of a fact that is material to the merits of the case. Joseph Matsiko's ignorance of what was pleaded in the 2nd amended WSD is not ignorance of a fact material to the merits of the case. It may well have been different if the ground for review was that the evidence of the fraud committed by the respondents was discovered subsequent to the consent judgment. However, that was not the case as is apparent from a glimpse at the pleadings in the 1st and 2nd amended WSD.

The genesis of the plea of fraud is the following basic averment that is pleaded as paragraph 5 in both the 1st and 2nd amended WSD –

> ***"5. The 1st and 2nd Defendants shall contend that the Plaintiffs are not and never have been the proprietors of the suit premises as alleged in paragraph 8(a)…"***

The variation is in the detail that follows. In the 1st amended WSD the averment ends with the phrase: ***"and therefore have no locus to institute this suit"***, which is followed by paragraph 6 in which it is averred that ***"the Plaintiffs are not and never have been successors in title to the suit premises as alleged in para 8(b)"***. In the 2nd amended WSD the averment concludes with the phrase: ***"but rather purport to have acquired title therein through misrepresentation and/or fraud and therefore have no locus to institute this suit"***, which is then followed by particulars of alleged misrepresentation and/or fraud. To my mind, this change is more of style than of substance. I agree with the contention by counsel for the respondents, that fraud was sufficiently implied in the pleading in the 1st amended WSD, so that Joseph Matsiko who consented to the judgment with knowledge of that pleading, would have no justification to withdraw the consent and seek review merely upon becoming aware of the change in the latter pleading. I therefore find that the consent decree was not shown to be vitiated in anyway to warrant interference through review or otherwise. In my view therefore, grounds 2 and 3 must fail.

Before taking leave of this case, I am constrained to comment on the purpose and effect of the Court of Appeal decision. Although it held that the trial judge could have invoked provisions of Order 9 r. 12 to entertain the application and set aside the consent judgment as he did albeit under different provisions, it allowed the appeal and dismissed the application as if the trial judge had had no jurisdiction to dispose of it. That, in my view, is taking undue regard to technicalities too far contrary to Article 126 (e) of the Constitution.

In the result, notwithstanding that I uphold the first ground of appeal, I find that the appeal substantially fails. I would therefore dismiss it and award costs in this Court and in the courts below, to the respondent.

Dated at Mengo this 6th day of March 2008.

J.N. Mulenga
Justice of Supreme Court

JUDGMENT OF ODOKI, CJ

I have had the advantage of reading in draft the judgment of my learned brother Mulenga, JSC; and I agree with it that this appeal should be dismissed with costs here and in the courts below.

I wish to observe that I entirely agree with my learned brother's comments on my judgment in the case of **Ladak Abdulla Mohamed Hussein vs Griffiths Isingoma Kakiiza and Others** Civil Appeal No. 8 of 1995 (sc) regarding the scope of discretion exercised by the courts in setting aside **ex parte** judgments and consent judgments under Order 9 Rule 12 of the Civil Procedure rules. I agree that the discretion in setting aside ex parte judgments is broad and unfettered while the discretion in setting aside consent judgments is more restricted and is exercised upon well established principles.

There was clearly an accidental slip in my earlier judgment which quoted the text of Order 50 rule 2 instead of or the text of Order 9 rule 12 while dealing with setting aside ex parte judgments. I agree that Order 9 rule 12 applies to ex parte judgments only while Order 50 rule 2 applies to both ex parte judgments and consent judgments.

As the other members of the Court also agree with the judgment and orders proposed by Mulenga JSC, this appeal is dismissed with costs in this court and courts below.

Dated at Mengo this 6th day of March 2008.

B J Odoki
CHIEF JUSTICE

JUDGMENT OF TSEKOOKO, JSC.

I had the advantage of reading in draft the Judgment prepared by my learned brother, Mulenga, JSC, and I agree with it and with his conclusions that the appeal be dismissed with costs to the respondents here and in the two courts below.

Delivered at Mengo this 6th day of March 2008.

J.W.N Tsekooko
Justice of Supreme Court

JUDGMENT OF KANYEIHAMBA, JSC.

I have had the benefit of reading in draft the judgment of my learned brother, Mulenga, J.S.C and for the reasons he has given, I agree with his conclusions. This appeal substantially fails and ought to be dismissed with costs in this court and in the courts below to the respondent.

Dated at Mengo, this 6th day of March 2008.

G.W. KANYEIHAMBA
JUSTICE OF SUPREME COURT

JUDGMENT OF KATUREEBE, JSC.

I have had the benefit of reading in draft the Judgment of my learned brother, Mulenga, JSC, and I agree with it and his conclusions and orders proposed therein.

Delivered at Mengo this 6th day of March 2008.

Bart M. Katureebe
Justice of Supreme Court