

UGANDA / JUDGMENT

Annunciata v Mbabazi & 2 Others
(Miscellaneous Application 2316 of 2023)
[2024] UGCommC 261 (27 August 2024)
[2024] UGCommC 261

COURT
Commercial Court of Uganda

BEFORE
Harriet Grace Magala, J

CASE / FILE NUMBER
Miscellaneous Application 2316 of 2023

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5 THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLANEOUS APPLICATION NO. 2316 OF 2023

(ARISING OUT OF CIVIL SUIT NO. 250 OF 2023)

10 IMMACULATE ANNUNCIATA SSENOGA ::::::::::::::::::::::::::::::::::: APPLICANT

VERSUS

1. MBABAZI EVERISTO

2. MBEKE TRADERS LTD

3. EQUITY BANK UGANDA LTD ::::::::::::::::::::::::::::::::::: RESPONDENTS

Before Hon. Lady Justice Harriet Grace Magala

Ruling

Background

The Applicant sued the Respondents vide Civil Suit No. 0250 of 2023 for

- declarations that the mortgage between the 2nd 20 Respondent/Defendant and the 3rd Respondent/Defendant secured by land comprised in LRV 3460 Folio15, Plot 499 Block 273 Kyadondo has been discharged, the mortgage entered into by the Defendants/Respondents in respect of LRV 419 Folio 24 Plot 52 Block 269 ('suit properties') is fraudulent, void and illegal, that the 3rd
- 25 Respondent/Defendant releases the encumbrances on the suit properties and release the suit properties from sale, transfer the properties to the name of Ssenoga Henry Bruno Musoke, general damages and costs of the suit.
- On the 25th 5 day of May 2023, a compromise was reached between the parties and a Consent Judgment was entered with the Plaintiff/Applicant acknowledging that all the mortgages on the suit properties were lawfully executed and valid. The 1st and 2nd Defendants/Respondents agreed to pay the 3 rd Defendant/Respondent a total sum of UGX 342,000,000/- in installments
- and in the event of default the 3rd 10 Defendant/Respondent would exercise her rights over the suit properties as a mortgagee and each party bears its costs.

It is this Consent Judgment that the Applicant now contests and seeks the same to be reviewed and set aside.

The Applicant seeks orders that the Consent Judgment entered by the parties

and endorsed by this Court on 10 15 th May 2023 be reviewed and set aside, an order restraining the 3rd Respondents, its agents and/or employees from executing the Consent Judgment and costs of this Application be provided for.

This Application is based the following grounds:

- a) That the Consent Judgment signed by the parties was vague, ambiguous,
- 20 incapable of being executed as the same did not fully address and/or resolve the Applicant's claim raised in HCCS No. 250 of 2023.
- b) That at the execution of the said Consent Judgment, there was misapprehension of facts that vitiated the said Consent Judgment hence rendering it void and incapable of being enforced.

- 25 c) The Consent Judgment is invalid and should be set aside.
- d) This Application is brought without delay and it does not prejudice the Respondents.
- e) It is only fair, equitable and in the interest of justice that the said Consent Judgment is set aside.
- 5 The affidavit in support of the application was deposed by the Applicant and states that:
 - i) She is the lawfully wedded wife and currently the administrator of the estate of the late Henry Bruno Musoke Ssenoga.
 - ii) She filed HCCS No. 0250 of 2023 against the Respondents jointly and 10 severally for orders and declarations that the mortgages on the suit properties were fraudulent, void and illegal; and the 1st Respondent had fraudulently transferred the certificates of title of the suit properties from her husband's name.
 - iii) The 1st and 2nd Respondents never filed a written statement of 15 defence in the main suit.
 - iv) The 3rd Respondent's counsel advised her to try and settle the matter amicably and after persuasion and discussions, her former lawyers and the 3rd Respondent's lawyers drafted a consent judgment, and she was invited to the bank to sign it.
- 20 v) According to the Consent Judgment, she was to agree and recognize that all the impugned mortgages on the suit properties were legally executed and valid, and the 2nd Respondent was to continue servicing the loan by paying quarterly installments and in the event of default, the 3rd Respondent unreservedly exercise its rights over the suit 25 properties as a mortgagee.
- vi) In signing the Consent Judgment, she was under the misapprehension and actually informed by the 3rd Respondent that it would only formally recognize her as having an interest in the suit properties after signing the impugned Consent Judgement that she had 30 challenged the said transactions on the suit properties and she was
 - repeatedly informed by the 3rd 5 Respondent's counsel that signing the Consent Judgment was the only way to save the suit properties.
- vii) She has been advised by her lawyers, M/s Muwema & Co. Advocates and she verily believes the advice to be true that the consent judgment validated and legalized the fraud with which the impugned 10 mortgages had been placed and maintained on the suit properties and no reason would she allow the impugned mortgages as encumbrances on the suit properties knowing that the process of their registration was tainted with illegalities and fraud.
- viii) In executing the Consent Judgment, she was under the misapprehension that the 3rd 15 Respondent would not proceed to auction and sell the suit properties.

- ix) In the buildup to the execution of the consent judgment, she was not afforded appropriate legal counsel from either her former personal lawyers as the 3rd Respondent's counsel constantly reminded her of 20 how this was the best way to settle the matter and conclude it at the earliest and as such, she was not able to fully appreciate the contents of the Consent Judgment and the implications of signing it and as a result, she was made to sign a Consent Judgment that was vague and ambiguous, which court endorsed on 25th May 2023.
- 25 x) She has been advised by her lawyers, which advice she believes to be true that it was procedurally improper for her to sign a Consent with parties who had ousted themselves from the jurisdiction of this Honorable court when the failed or refused to file a response to the Plaintiff.
- 30 xi) Prior to signing the Consent Judgment, she was not availed to all relevant documents pertaining the impugned mortgages and
- 5 transactions, to enable her to make an informed decision regarding the Consent Judgment.
- xii) She has been advised by lawyers, which advice she believes to be true that the Consent Judgment which is deemed to be final determination and the resolution of the issues raised by the parties 10 did not conclusively resolve her claims as raised in the pleadings hence rendering the said consent inconclusive and incapable of enforcement.
- xiii) This Application is brought without delay, and it does not prejudice the Respondents and it would only be fair and in the interest of 15 justice if the consent judgment is set aside and HCCS No. 250 of 2023 is determined on merits.

Affidavit in Reply

Only the 3rd Respondent replied to this Application through its legal officer, Mr. Isiko Charles. He deposed that:

- a) He has been advised by the 3rd 20 Respondent's advocates whose advice he verily believes to be true that this Application is not tenable in law and ought to be dismissed with costs.
- b) The 1st and 2nd Respondents requested for a meeting with the 3rd Respondent, and the Applicant with her lawyer Richard Adubango, and the 3rd 25 Respondent's lawyer found them midway.
- c) After the meeting on 10th May 2023, the Applicant, her lawyer and the 1 st Respondent left the 3rd Respondent's board room to the Applicant's lawyer's chambers where they executed the Consent and the 1st Respondent returned with five copies for the 3rd Respondent to execute.

- d) The 1st and 2nd 5 Respondents have been servicing the loan, the Applicant is a literate and was at all material times represented by her lawyer M/s Lwere, Lwanyanga & Co. Advocates. She voluntarily agreed to all the terms of the consent.
- e) He is informed by the lawyers of the 3rd Respondent, whose information 10 her verily believes to be true that there is no evidence of misapprehension of any facts as the Applicant was well represented and advised by her lawyers and the Applicant's allegations are deliberate untruths and do not disclose plausible grounds for review or setting aside of a consent judgment and this Application is an abuse of court 15 process.
- f) He is informed by the lawyers of the 3rd Respondent, whose information her verily believes to be true that the Applicant was aware of the facts and the implication of the Consent Judgment having instructed her counsel to represent her in the suit and she voluntarily signed the 20 Consent Judgment in the presence of her lawyers and the same is
- neither vague nor ambiguous and is capable of being enforced.
- g) The 1st and 2nd Respondent's not filing a written statement of defence does not bar them from entering into a consent judgment.
- h) He is informed by the lawyers of the 3rd Respondent, whose information 25 her verily believes to be true that all the relevant documents pertaining the impugned mortgages were attached to the 3rd Defendant's written statement of defence as annexures A, B, C, D & E, and the consent judgment conclusively resolved and settled civil suit number 0250 of 2023.

5 Affidavit in Rejoinder

The Applicant in rejoinder stated that:

- a) She has never requested for any meeting with the Respondents after filing of HCCS No. 0250 of 2023, when she was the plaintiff challenging the legality of the mortgages created on their family and matrimonial 10 property, and any arrangements for an amicable settlement of this matter were initially proposed before the commencement of the suit.
- b) She was called to the Bank to sign the impugned Consent Judgment and neither the 3rd Respondent's lawyers nor her lawyers informed her of the implications of signing the Consent Judgment.
- c) At all material times, she was consistently told by the 3rd 15 Respondent's lawyers that she was not known in the transaction and the only way her concerns would be addressed would be to first acknowledge the validity of the impugned mortgages.
- d) That the advice she received from her former lawyers best suited the 3rd
- 20 Respondent to her detriment and she was only informed that the parties had reached a settlement, the contents of which were in the impugned Consent Judgment.

- e) This Application is meritorious, as the impugned Consent Judgment was executed under a misapprehension of facts and the 3rd Respondent
- 25 concedes under paragraph 11, that the impugned Consent Judgment was in very uncertain terms. This court enters judgment upon the 3rd Respondent's admission.
- f) The 3rd Respondent consistently referring to Consent Judgment as impugned, it conceded and admits calling into question the validity and 30 illegality of the Consent Judgment which calls for its setting aside.
- 5 g) The vagueness of the consent judgment is attributed to its failure to capture or address her claims as presented by in HCCS No. 250 of 2023.
- h) The 1st and 2nd Respondents failure to file a defence in HCCS No. 0250 of 2023 essentially ousted them from the jurisdiction of this court and they could not sign a Consent Judgment in respect of the same matter before 10 this honorable court.
- i) The 3rd Respondent did not disclose all the material information and documents pertaining to these impugned transactions.

Representation and hearing

At the hearing of this Application, the Applicant was represented by M/s

Muwema & Co. Advocates and Solicitors while the 3rd 15 Respondent was represented by M/s Kagera Advocates (formerly Akamba & Co. Advocates). The 1 st and 2nd Respondents never replied to this Application and were therefore neither present in court nor represented.

Both the Applicant and the 3rd Respondent filed their written submissions 20 which have been duly considered by court in determining the matter.

Determination

The issue for determination is whether the Application raises grounds for the review and setting aside the Consent Judgment entered on 25th May 2023.

In the case of ***Friedhelm Erwin Jost and another Versus Roko Construction Ltd***

25 *and 2 others HCMA No. 0089 of 2021*, the court observed that a consent judgment is a judgment of the court on the terms entered into by the parties to the litigation validated by Court under **Order 50 rule 2 and Order 25 rule 6 of the Civil Procedure Rules**. And once a consent judgment has been recorded or

5 endorsed by the court, it becomes the judgment of the court and binding upon the parties.

Preliminary point of law

The Applicant raised an issue of the **locus standi** of the 1st and 2nd Respondents/Defendants in signing the Consent Judgment, yet they never filed 10 a written statement of defense in HCCS No. 250 of 2023.

It is trite, that when a party fails to file a defence to a claim, they are taken to have ousted themselves from the jurisdiction of the court and therefore cannot be heard by the court (see **Order 17 rule 4 of the Civil Procedure Rules as amended**). In the case of **Stop and See (U) Ltd vs Tropical Africa Bank Ltd**.

15 HCMA 0333 of 2010, court held that:

"A reply or defence to an application has to be filed within 15 days. Failure to file within 15 days would put a defence or affidavit in reply out of time prescribed by the rules. The general rule is that where the defendant does not file a defence or file it within time, the court will* 20 *proceed in default of the defence...a defendant who fails to file a defence puts himself out of court and cannot be heard".*

A similar finding was made by Hon. Lady Justice Eva K. Luswata (as she then was) in **Emmanuel Tamale vs Nagalama Coffee Agency Misc. Application No. 0071 of 2013** where she found that:

25 "a party who fails to respond to a claim has voluntarily chosen to keep himself or herself out of the proceedings. He/she is deemed to have admitted the facts alleged against them".*

- 5 However, consent judgments by their nature are quite peculiar. A consent judgment is a compromise to a suit reached upon by the parties upon agreement between themselves, normally guided by the court. Once entered and sealed by the court, a consent judgment forms a new contract and supersedes the former cause of action and the pleadings. This agreement can
- 10 be reached upon negotiations between the parties to a suit on their own terms as they deem fit to end the litigation of the matter. The Court will then (depending on each case) participate in the endorsing and sealing of the agreement to make it a consent judgment or decree.

In the case of **Olora Denis Micheal Versus Omony Stephen Khesmodel** MA 1 of

- 15 2022, Hon. Justice Okello George observed that a defendant who is yet to lodge a defence does not lose the status of being a party to the suit. Counsel for the Applicant argued that that case is distinguishable since the time for filing a defense by the 1st and 2nd Respondents has elapsed, unlike in the **Omony** case (supra). I further note that in the **Omony** case (supra), the
- 20 applicant therein admitted liability in the consent judgment yet in this case there is no admission of liability.

But that notwithstanding, the point is, as rightly observed by the learned **Justice Okello**, in **Olora Denis Micheal Versus Omony Stephen (supra)** that **Order 25 rule 6 of the Civil Procedure Rules (as amended)** does not make it a prerequisite for the defendant before signing a consent judgment to first file a written statement of defence. Consent judgments are a mode of ending litigation at the motion of the parties, with the guidance of court. This minimizes wastage of court's resources and promotes maintenance of the parties' relations. Therefore, a procedural issue like failure to file a defence,

5 which, as I have observed is not restricted by the Rules should not be used to bar such a good motive.

Having observed so, I now turn to determining the application on its merits.

In **Attorney General and another Versus James Kamoga SCCA No. 08 of 2004 the* Supreme Court* explained the position on review or setting aside consent 10 orders. It stated that:

> **"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, 7 th Ed., Vol. 1 p. 124:**

15 *"*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* 20 *ignorance of material facts, or in general for a reason which would enable a court to set aside an agreement."**

Therefore, in absence of these vitiating factors, the consent judgment must be upheld by this court.

The Applicant contends that the Consent Judgment signed on 10th May 2023 and sealed by the Court on 25 25 th May 2023 should be reviewed and set aside on the ground that there was misapprehension of the facts i.e. that her interests in the suit properties would be recognized whereas this was never the case and the

5 fact that the Consent Judgment never addressed her claims and prayers in the main suit.

The Applicant's counsel vehemently submitted that there was collusion and conspiracy of the Respondents to defeat the Applicant's interests in the suit properties. That if the Court had knowledge of the fraudulent transactions, it 10 would never have endorsed the consent judgment.

In the case of **M. P Electronics Ltd and another Versus Dfcu Bank Ltd and others HCMA No. 510 of 2023**, the court observed that, *"*Collusion in judicial proceedings is a secret arrangement between two persons that the one should institute a suit against the other in order to obtain the decision of Court for some* 15 *sinister purpose."**

Collusion then would include conspiracy between parties to a suit, in this case amongst the Respondents to obtain judgment from the court with sinister motives i.e. to defraud the Applicant of her rights.

To prove that the Respondents colluded to obtain the Consent Judgment 20 against the Applicant, it must be shown through evidence that such collusion existed amongst the Respondents. According to the Affidavit in Reply, under paragraph 6, the deponent stated that the 1st Respondent, the Applicant and the Applicant's lawyers left for the Applicant's lawyers' chambers on the 10th May 2023 after the meeting at the 3rd Respondent's boardroom, where they 25 executed the impugned Consent Judgment.

The Applicant denied this and stated that she was invited to the 3rd Respondent's offices to sign the consent but does not adduce any evidence of collusion or conspiracy amongst the Respondents or otherwise that she never went to her lawyer's chambers to execute the Consent Judgment. Further, the

5 Consent Judgment was jointly extracted by M/s Lwere, Lwanyanga & Co. Advocates, the Applicants former advocates.

I find that there is no evidence on court record to show in what form or how the Respondents colluded to obtain the consent judgment against the Applicant. In the circumstances, I am inclined to find that there was no collusion amongst the

10 Respondents against the Applicant.

The Applicant contends that there was misapprehension of the facts surrounding the execution of the Consent Judgment i.e. that the 3rd Respondent's lawyers informed her that the only way to settle the matter and recognize her interests in the suit property was to execute the Consent

15 Judgment. That she was never availed any documents relating to the mortgage transactions before she signed the Consent Judgment.

The **Oxford Learners Dictionary** defines 'misapprehension' as a wrong idea about something or mistaken belief or interpretation of something. Misapprehension of facts may form the basis for setting aside a consent

20 judgment as observed in the case of **Cargo Freighters Agents Ltd Versus Attorney General HCMA No.783 of 2016.**

According to the case of **Eleko Balume and two others Versus Goodman Agencies Ltd and others HCMA No. 012 of 2012,* Hon. Justice Madrama Christopher J (as then he was)* observed that:

25 *"The misapprehension of facts that may form the basis for setting aside a consent judgment must relate to the state of mind of the parties to the consent judgment by which state of mind informed by the facts before them they were misguided into executing the consent judgment."*

- The Applicant states that she was informed by the 3rd Respondent's lawyers that executing the Consent Judgment would recognize her interest in the suit properties and would be the only way to settle her suit. Under paragraphs 12 and 13 of the Affidavit in Support of this Application she stated that:
- "12. THAT in signing of the consent judgment, I was under the* 10 *misapprehension and actually informed by the 3rd Respondent Bank that it would only formally recognize me as having an interest in the suit properties after signing the impugned consent judgment as I had formally challenged the said transactions made in respect of the suit properties between the 1st and 3rd Respondents.*
- 15 *13. THAT further to the above, I was repeatedly informed by the 3rd Respondent's Counsel that by signing a consent judgment under those terms was the only way I would be able to save the suit properties which are family properties including one where my family currently resides and give the 1st and 2nd Respondents more time to clear the loan obligations* 20 *that they had obtained using the suit properties."*

The 3rd Respondent in reply averred that there was no evidence of misapprehension and that the Applicant was always represented by lawyers.

In Rejoinder, the Applicant deposed that she was only called to the 3rd Respondent to sign the consent judgment and was never informed of the

implications of signing and was consistently told by the 3rd Respondent's lawyers that she was not known in the transaction and the only way her concerns would be addressed would be to first acknowledge the validity of the impugned mortgages.

- 5 The case of *L'Estrange Versus F Graucob Ltd [1934] 2 KB 394* established the principle that has been followed up to date, that when a document containing contractual terms is signed, then, in the absence of fraud, or misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not. However, when it comes to
- 10 misapprehension and misrepresentation, there arises the *doctrine of non est factum* i.e. "not his deed". In *Nilecome Ltd vs Kodjo Enterprises Ltd HCCS No. 0018 of 2018,* the court observed *Non est factum* is a defence which may be available to someone who has been misled into signing a document which is fundamentally different from what he or she intended to execute or sign,
- 15 where one party has signed a contract, believing it to be something different from what it actually is. The signatory must have made a fundamental mistake as to the nature of the contents of the document being signed, having regard to the intended practical effect of the document; and the document must be radically different from the one the signatory intended to sign.

- 20 It is clear from the record that the Applicant executed a document that did not reflect her intentions. She was misled into recognizing/acknowledging what initially she was contesting and thus, signing away her rights and interests in the suit properties.

The impugned consent judgment does not in any way cater for the interests of 25 the Applicant. It only mentions that the Applicant recognizes the impugned mortgages as legal. It appears as an agreement between the Respondents. The agreement was executed in bad faith and the Applicant was under misapprehension that her rights in the suit properties would be recognized.

5 Further, counsel for the Applicant submitted that the court cannot be used as an engine of fraud, in that the Respondents did fraudulent transactions on the suit properties and now are defeating the Applicant's interests through court.

Fraud has been defined in **Zabwe Fredrick Versus Orient Bank and others SCCA No. 4 of 2006** as the intentional perversion of truth for the purpose of inducing

- 10 another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right. Further, that it includes a false representation of a matter of fact, whether by words or by conduct or by false or misleading allegations or by concealment of that which deceives and is intended to deceive and is intended to deceive another so that he shall act upon it to his
- 15 injury. Fraud is a serious allegation that needs to be strictly proved and this is one of the issues for the determination of court in the main suit.

The 3rd Respondent misrepresented to the Applicant that it would recognize her rights in the suit properties by her executing the consent judgment. The 3rd Respondent does not deny these allegations but states that there was no

misapprehension. The 3rd 20 Respondent further avers that the Applicant was represented by lawyers throughout.

Whereas it is true that the Applicant was represented at the signing of the consent, the document she signed was way different from her intentions and actually to her detriment. I am at great pain in understanding why the lawyers

25 advised their client to execute such a document; which deprived her of all her interests. In my opinion, the lawyers did not ably represent the interests of the Applicant. Therefore, this misrepresentation and misapprehension of facts, in my opinion warrants the setting aside of the consent judgment in question.

- 5 The impugned consent judgment does not indicate the meeting of minds between both parties. There was no **consensus ad idem**, which invalidates the contract. In the instant facts, the Applicant thought she was getting her interests in the suit properties recognized but on the other hand, the Respondents were getting their mortgages validated.
- 10 For the reasons given above, the Consent Judgment is hereby reviewed and set aside.

The Application is allowed with costs to the Applicant.

Dated and signed at Kampala this 27th day of August 2024.

15 Harriet Grace MAGALA

Judge

Delivered online via ECCMIS this 28th day of August 2024.

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