

UGANDA / JUDGMENT

**Fredrick Kibedi and 4 Ors v Hon James  
Nathan Nandala Mafabi and 2 Others  
(Civil Miscellaneous Application No. 751  
of 2021) [2021] UGHC 45 (23 July 2021)  
[2021] UGHC 45**

## COURT

High Court of Uganda

## BEFORE

Musa Ssekaana, J

## CASE / FILE NUMBER

Civil Miscellaneous Application No. 751 of 2021

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## THE REPUBLIC OF UGANDA

## IN THE HIGH COURT OF UGANDA AT KAMPALA

## MISCELLANEOUS APPLICATION NO. 751 OF 2020

(ARISING FROM HIGH COURT MISCELLANEOUS CAUSE 192 OF 2020)

- 1. FREDERICK KIBEDI
- 2. RUTH DOREEN MUTEBE
- 3. HARRIET NABUUFU KIWANUKA:::::::::::::::::::::::::::::::::APPLICANTS
- 4. EDNA ISIMBA RUGUMAYO
- 5. CONSTANT OTHIENO MAYENDE

## VERSUS

- 1. HON. JAMES NATHAN NANDALA MAFABI T/A MTC ASSOCIATES
- 2. INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS OF UGANDA
- 3. THE REGISTRAR OF ACCOUNTANTS ICPAU:::::RESPONDENTS

**BEFORE: HON. JUSTICE SSEKAANA MUSA****RULING**

The applicants instituted this application to review and set aside the consent decree dated the 26th August, 2020 executed between the 1st respondent on the one hand and the 2nd and 3rd respondents on the other hand vide Miscellaneous Cause No. 192 of 2020. It was brought under the provisions of **Sections 82 and 98** of the Civil Procedure Act Cap 71 and **Order 46 Rule 1** of the Civil Procedure Rules S. I 71-1.

The application was supported by the sworn affidavit of the 5th applicant, **Constant Othieno Mayende**.

The 1st respondent filed an affidavit in reply opposing the application sworn by the 1st respondent.

On the 30th June, 2020 and the 16th July, 2020, the 2nd respondent through its Elections Committee conducted elections wherein 7 members including; CPA Ronald Mutumba, CPA Gloria Tuhaise Wakooba, CPA Constant Othieno Mayende, CPA Josephine Ossiya Okwakol Okui, CPA Laura Orobias Aseru, CPA Stephen Ineget and CPA Geoffrey Byamugisha were elected to the body's council for the term July, 2020 to June, 2022.

The 1st respondent being dissatisfied with the outcome of the elections instituted Miscellaneous Cause No. 192 of 2020 in the High Court of Uganda seeking inter alia; an order of certiorari quashing the decision of the Respondents to not declare him as a member of the Council and an order of mandamus directing the Respondent to declare the applicant as a Council member.

The parties entered into a consent judgment in the following terms;

The 2nd respondent's Council that was constituted for the term of July 2018 – June 2020 "outgoing council" was authorized to continue executing the 2nd respondent's statutory mandate pending the final constitution of the New Council and the election of the President and Vice President of the 2nd respondent by the New Council.

That the 2nd respondent's outgoing council was authorized to convene its council meetings and consider all matters that are by law under the mandate of Council including applications for membership and practicing certificates and license which is currently pending council's consideration shall also be considered at the meetings;

That the 2nd respondent agreed to contribute to the payment of legal costs of the applicant's counsel. The parties would agree on the amount payable.

By virtue of the consent order, the 1st respondent's claims in the cause were finally resolved and extinguished while Miscellaneous Applications No. 412 of 2020 and 413 of 2020, arising from this cause and seeking an interim order for temporary injunction were withdrawn.

It was against this background that the applicants brought this application seeking that the consent order be reviewed and set aside.

The applicants were represented by \*Arthur Ssempebwa\* while the 1st respondent was represented by \*Julius Galisonga\* and \*Olivia Kyalimpa Matovu\* and \*Frank Twongyeirwe\* represented the 2nd and 3rd respondents.

The parties were directed to file written submissions that were considered by this court.

### **\*Determination\***

The 1st respondent raised a preliminary point of law stating that the 5th applicant in their affidavit purported to represent the interests of all the applicants yet he bears no written authority authorizing him to act on behalf of all the applicants which offends Order 1 Rule 12 of the Civil Procedure Rules.

Counsel for the 1st respondent submitted that that rendered the affidavit in support of the application defective. Counsel concluded that as far as the application extends to matters that require evidence, the same is incompetent.

In response, counsel for applicants submitted that the 5th applicant deposed the affidavit in support of the application filed in this Honorable Court on the 28th October, 2020 in his own capacity as an applicant and aggrieved person and does not state or imply anywhere in the affidavit that he had deposed the same on behalf of the other applicants or any other person or entity.

Counsel further submitted that the provisions of Order 1 Rule 12 of the CPR did not apply to parties to a suit deposing affidavits in their personal capacity unless they state (in their affidavits) that they are doing so on behalf of another person.

Counsel concluded that where a party to a suit deposes an affidavit in its, his or her own capacity (as is stated in the paragraph 1 of the 5th applicant's affidavit), such a party would not be required to obtain authority from the rest of the parties.

I concur with counsel for the applicants; the 5th applicant swore the affidavit in his own capacity and therefore does not offend **Order 1 Rule 12 Civil Procedure of the Rules**. The preliminary objection is dismissed.

On perusal of the pleadings and submissions of the applicants, they relied on the ground of sufficient reason to warrant grant of this application owing to the illegality and impropriety of the consent order as well as the process leading up to and the manner of execution of the order.

In their submissions, the applicants summed up the sufficient reason to warrant review of the consent order as follows;

- a) The process leading up to and the manner of execution of the Consent Order on behalf of the 2nd Respondent was/is both improper and illegal.

- b) The terms of the Consent order itself are illegal and in contravention of the law.

It was the 5th applicant's evidence that there was never consultation of the 2nd respondent, any resolution of the 2nd respondent's Council to enter into the terms of the consent order therefore the signatories to the said consent did not have the legal power to execute the consent order in respect to such terms.

It was his evidence that it was not clear who signed the consent order whereas it is a requirement that all resolutions and documents intended to bind the 2nd respondent are authenticated by both the signatures of the President of the Council and the Secretary and in the absence of the President, the Vice President together with the secretary.

The 5th applicant under paragraph 18 of the affidavit stated that all resolutions and documents intended to bind the 2nd respondent were authenticated by both the signatures of the President of the Council and the Secretary and in the absence of the President, the Vice President together with the secretary.

Counsel cited **Section 3 of the Accountants Act, 2013**, which states the Institute is required to have a common seal which should be kept in the custody of the Secretary and which shall not be affixed to any document except by the **order of the council**.

Further **Section 3(2)** provides that the seal of the Institute shall be authenticated by the signatures of the president and the secretary or in the absence of the president, by the signatures of the Vice President and the secretary.

The applicants' counsel submitted that before endorsement by the court, the consent order should have been signed by the President and the Secretary of the 2nd respondent or in the absence of the President, the Vice President and the Secretary and the Institute's seal affixed thereon upon order of the 2nd respondent's Council.

Counsel for the applicant further submitted that that a consent agreement/ order takes the form of a contract and is therefore subject to the laws governing contracts as per **Goodman Agencies Limited v Attorney General & Another (Misc. Application No. 34 of 2011)**

Counsel cited the case of **Kawamara Sam v Richard Jjuko (HCT – 00- - CS – 294 – 2009)**, where it was held that the law may refuse to give effect to a contract on the ground of illegality that is because the contract involves the commission of a legal wrong or is in some other way contrary to public policy.

It was counsel's conclusion that the whole process and the manner of execution of the consent order on behalf of the 2nd respondent was both improper and illegal.

With regard to the illegality of the terms of the consent order, counsel for the applicants submitted that the terms of the consent order in question were inconsistent with **Section 9 of the Accountants Act, 2013** which provides that a member of the Council, other than an ex-officio member shall hold office for two years and is eligible for re-election for a further term of two years in as far as clauses 1, 2 and 3 of the order purported to extend the tenure of the 2nd respondent's council beyond 2 years contravened **Section 9 of the Accountants Act, 2013**.

On the other hand, counsel for the 1st respondent submitted that whereas it was the applicants' submission that the process leading up to and the manner of execution of the consent order on behalf of the 2nd respondent was/is improper and illegal, no law providing for the processes to follow when executing orders was cited hence without citing a law that was broken there was no illegality. Counsel submitted that each organization has its internal processes, which would require evidence to prove existence of and no such evidence is provided.

In reply to the absence of consultations to the 2nd respondent, counsel submitted that the 1st respondent led evidence to show that consultations with the 2nd respondent were conducted in as far as there were two physical meetings convened at Parliament attended by the 1st respondent,

Miss Olivia Kyarimpa counsel for the 2nd and 3rd respondents, the 2nd respondent's council members including Ssemugooma Godfrey, Charity Uwizera, Derick Nkanja, Simon P Oola and Kibedi Frederick, and a zoom meeting by Mr. Galisonga Julius counsel for the 1st respondent.

Counsel submitted that it was in these meetings that the terms were agreed on and the consent order was executed, signed and duly filed. That the terms of the consent order were implemented, including issuance of license and practicing certificates to the 1st respondent and his accounting firm.

Counsel for the respondent submitted that there was no allegation of forgery and any other fraud on the part of the persons who acted on behalf of the 2nd respondent by attending court, the meetings and executing the consent order, which pointed to the believable suggestion that actually they had the powers and authority to act as they did. That the court as well as the 1st respondent can't know the inner workings of the 2nd respondent, without evidence being led to prove the same.

In further response to the manner in which the consent order was executed, counsel submitted that there was no standard format and manner for executing court orders, the order was endorsed by the learned trial judge after having been endorsed by the representatives of the 2nd and 3rd respondents and their counsel.

Counsel submitted that **section 3 of the Accountants Act** cited by the applicants' counsel doesn't provide that all documents must be sealed or that for any document to purport to be executed by the Institute, the same should be sealed and signed as under the same section. That evidence would be required to show the documents, as a matter of practice within the institute require to be sealed which would include the consent order, however no evidence was laid before court to show that the court order required to be sealed.

Counsel concluded that no law was offended by the manner in which the consent order was executed.

With regard to the illegality of the consent order terms, counsel for the respondent submitted that the applicants' submissions failed to demonstrate the alleged illegality. Counsel submitted that at the time of signing the consent order, the applicants were in legal limbo and unable to make binding decisions unlike the ex officio members whose mandate can never cease or expire. That the signature of an ex officio member together with that of the Registrar of Accountants was binding on the applicants and the 2nd respondent.

Counsel submitted that with regard to the purported extension of the term of the council which contravened **S.9 of the Accountants Act** that stipulates the length of the term of office not when the term commences or ends and doesn't suggest that once an election occurs, so does the term of office commence/end. That as per paragraphs 16 and 24 of the affidavit in reply that court issued an order staying the inauguration of the new council and at the time of issue of the same, the purported new council had not sworn in and or assumed office, implying that the "old Council" was still in power. Counsel submitted that it was pertinent for the outgoing Council to complete all pending activities in preparation for hand over to the new elected council.

Counsel concluded that there was no evidence to prove that the mandate of the Council was extended by the consent order but rather simply compelled the applicants who were members of the outgoing council to complete the mandate before handing over to the new council.

In rejoinder, counsel for the applicant submitted that while the 1st respondent alleged that consultative meetings were done prior to signing the consent and that it is in those meetings the terms of the consent order were agreed upon, he did not adduce any evidence in form of minutes of those meeting, resolutions of those meetings or evidence from other attendees other than the 1st respondent hence the evidence ought to be treated with suspicion in the absence of the aforementioned evidence of council consultative meetings.

Counsel further submitted that with regard to the obligation of the outgoing council to handle all pending matters, even though the outgoing council had the powers to keep itself in office beyond its two (2) year mandate and "handle all pending matters", the applicants demonstrated through the evidence of the 5th applicant that there never was any meeting or resolution to do so.

The applicants counsel in their rejoinder to the respondent's submission of non-existence of a standard manner and policy of executing the consent order, submitted that the policy was that a court must satisfy itself that those who are supposed to execute documents on behalf of an entity

are the ones who did so. That those who would otherwise make decisions on behalf of and bind the 2nd respondent denied participation in the decisionmaking process leading up to and the participation of the execution of the consent order. That the 1st respondent who derives benefit from the order claims there was participation of the agents of the 2nd respondent Council but cannot offer evidence above mere allegations.

In rejoinder to the respondent's submission on the order lacking a seal, counsel submitted that the applicant's evidence on the manner in which documents that are intended to bind the 2nd respondent are executed was unchallenged by the 1st respondent in his affidavit.

On the 1st respondent's submission that the term of the "outgoing council" had not yet expired, counsel submitted that paragraphs 21 and 22 of the affidavit of the 5th applicant which were unchallenged by the 1st respondent illustrate the beginning and the ending of the respective terms and shows the 1st Respondent and his fellow executors could not by agreement extend the mandate of the "outgoing council"

Counsel reiterated their submissions that their case satisfied the legal requirements for this court to review or set aside the consent order vide Miscellaneous Cause No. 192 of 2020. Counsel invited the court to find that the actions of the signatories to the consent order together with the contravention of the law by the terms of the said consent order amount to sufficient cause for review/ setting aside the consent order vide Miscellaneous Cause No. 192 of 2020.

### **\*Analysis\***

It is a well settled principle that parties to a civil suit are free to consent to a judgment or compromise a suit in whatever terms they deem fit provided they are lawful and enforceable.

In this case, the 1st respondent being dissatisfied with the outcome of the elections of the 2nd respondent instituted Miscellaneous Cause No. 192 of 2020 which resulted into a consent judgment. The applicants filed this application stating that the consent order executed by the respondents was illegal, unenforceable and entered into in disregard of the law as a result of misapprehension of material. In the case of *\*Attorney General & Anor v James Mark Kamoga & Anor* SCCA No. 8 of 2004,\* the Supreme Court held that;

*\*A consent judgment has to be upheld unless it is vitiated by the fact that it was entered into without sufficient material facts or in misapprehension or in ignorance of material facts, or it was actuated by illegality, fraud, mistake, contravention of court policy or any reason which would enable the Court to set aside an agreement\* (See also \*Hirani v. Kassam (1952) EACA 131)\**

As stated earlier, the applicants summed up the illegality as follows;

- a) The process leading up to and the manner of execution of the consent order on behalf of the 2nd Respondent was/is both improper and illegal.
- b) The terms of the Consent order itself are illegal and in contravention of the law.

The 5th applicant stated that as a member of the 2nd respondent's council for the term of July 2018- June 2020, there were no consultations of the 2nd respondent and resolution of the respondent's council to enter into the terms of the consent order. He further stated that the consent order was not duly authenticated as all other documents intended to bind the 2nd respondent.

The 1st respondent on the other hand stated that prior to the execution of the consent order the 1st and 2nd respondent as parties to Miscellaneous Cause No. 192 of 2020 there were two physical meetings convened at Parliament attended by the 1st respondent, Miss Olivia Kyarimpa counsel for the 2nd and 3rd respondents, the 2nd respondent's council members including Ssemugooma Godfrey, Charity Uwizera, Derick Nkanja, Simon P Oola and Kibedi Frederick, and a zoom meeting by Mr. Galisonga Julius counsel for the 1st respondent where the terms were agreed on and the consent order were executed, signed and duly filed.

There is no evidence of minutes showing what was discussed at the meetings held between the parties that resulted into the terms of the consent order. There is no evidence that the 2nd respondent's internal policies were adhered in reaching the consent.

The applicants' evidence that all resolutions and documents intended to bind the 2nd respondent are authenticated by both the signatures of the president of the council and the secretary of the council and in the absence of the president, the vice president of the council together with the secretary was unchallenged by the respondents.

The 2nd and 3rd respondents in their submissions informed the court that during the negotiations of the consent judgment, the Elections Committee represented the respondents and that the consent was executed by chairperson of the Elections Committee who oversaw the conduct of elections of new council members as well as the registrar of accountants.

It contradicted the 2nd respondent's policies to have the Elections Committee and not the Council execute a document binding the 2nd respondent. The committee as well as its chairperson did not have powers to execute the consent minus consultations with the council which is the governing body of the 2nd respondent. The committee was mandated to conduct council elections and resolve any complaints arising from the elections but not act as a governing body of the 2nd respondent which is a preserve for the council. The chairperson therefore in executing the consent usurped powers not granted to him hence contravening the **Accountants Act, 2013, Section 9** which provides that \*a member of the Council, other than an ex-officio member shall hold office for two years and is eligible for re-election for a further term of two years.\*

From the reading of the terms of the consent order, the parties purported to extend the tenure of the respondent's council that was constituted for the term of July 2018 – June 2020. It was agreed that the council was authorized to continue executing the 2nd respondent's mandate pending final constitution of the new council.

I find this odd in as far as the 2nd respondent through the elections committee had completed elections and declared the successfully elected members that were to constitute the new council for the term of July 2020 –

June 2022 but proceeded to consent that the outgoing council was authorized to continue executing the 2nd respondent's statutory mandate pending the final constitution of the new Council and the election of the President and Vice President of the 2nd respondent by the new Council.

The 2nd respondent in their submissions stated that due to the COVID-19 pandemic that caused delay in elections and the term of office of elected members expired, the elections committee acting as a committee of council applied a purposeful approach to the Act to ensure that there was no vacuum and continuity in governance of the institute hence the consent judgment.

However, I find the approach having left a lot to be desired insofar as at the time of executing the consent, the new members of council had already been duly elected who ought to have assumed their new offices.

It is the duty of the court to satisfy itself with regard to the terms of the consent agreement that it is lawful and enforceable. The court should not act in a casual manner without satisfying itself with the legalities of the consent or compromise of a case. Where it is alleged by one party that a compromise or consent is not lawful, it is the duty of the court to decide that question. See *\*Banwari Lal v Chando Devi [1993] 1 SCC 581\**

In the present case, the consent executed between the 1st respondent and 2nd and 3rd respondent perpetuates a statutory illegality as submitted by the applicants counsel. There is contravention of the Accountants Act 2013, which limits the term of office of every council to two years and any agreement/consent purporting to circumvent the clear provisions of the law would therefore be illegal and void *\*ab initio\**. A court of law cannot sanction what is illegal, an illegality once brought to the attention of the Court overrides all questions of pleadings, including admissions thereof and the court cannot sanction an illegality. See *\*Makula International Ltd v\**

***\*His Eminence Cardinal Nsubuga and Rev. Dr Father Kyeyune CACA No. 4 of 1981 or [1982] HCB 11\****

This court should not set a bad precedent through which any council upon expiry of their term of two years may sue each other and consequently enter into such consent to get 'a new lease of life' by extending their term of office contrary to the spirit and letter of the Accountants Act, 2013. The Legislature never intended such to happen and the same should not be condoned, the relevant legislative intent can be achieved through a purposive approach towards the construction of the statute; that is words of a statutory provision is always to be interpreted in their context, including the object or purpose underlying the statute.

Therefore, the consent judgment entered between the 1st respondent on one hand and the 2nd and 3rd respondents on the other hand is hereby set aside for the reasons herein stated.

Each party shall bear its own costs.

I so order.

\*SSEKAANA MUSA JUDGE 23rd July 2021\*

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