

UGANDA / JUDGMENT

**Kare Distributions Limited v Commmercial
Bank of Africa (U) Limited (HC
Miscellaneous Application No. 1015 of
2018) [2021] UGCommC 38 (19 August 2021)
[2021] UGCommC 38**

COURT

Commercial Court of Uganda

BEFORE

Wangutusi, J

CASE / FILE NUMBER

HC Miscellaneous Application No. 1015 of 2018

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

**MISCALLANEOUS APPLICATION NO. 1015 OF 2018 (ARISING OUT OF CIVIL SUIT
NO. 637 OF 2018)**

**KARE DISTRIBUTION LTD::::::::::::::::::::::::::::::::::::: VERSUS COMMERCIAL BANK OF
AFRICA (UGANDA) LTD:::::::::::::::::::::::::::::::::::::**

BEFORE: HON. JUSTICE DAVID WANGUTUSI.

RULING:

This application is brought by Kare Distribution Ltd to be referred to as the Applicant against Commercial Bank of Africa (Uganda) Limited the Respondent herein after.

The Applicant seeks orders that a Consent Judgment dated 28th August 2018 issued by this Court in Civil Suit 637/2018 in which the Applicant was the Plaintiff be reviewed and or set aside by this noble Court and that costs of the Application be provided for.

This Application is grounded on the following;

- 1) That there is a fundamental mistake and or an error apparent on the said Consent Judgment that vitiates the whole purpose and intent of the Consent
- 2) That it is just equitable and in the interest of justice that the application is granted.

The background to the Application can be discerned from C. S \$637/2018\$ in which the Applicant was the Plaintiff. In that suit, the Applicant stated that on 11th March 2017, she entered into a loan agreement with the Defendant wherein she was advanced a facility of UGX: 6, \$300,000,000/= \$.

The purpose of the loan was to refinance a running overdraft of UGX:500,000,000/= at Barclays Bank Uganda Ltd, it was also to refinance a running loan of \$4,000,000,000/\$ = with an outstanding balance of UGX 3,800,000,000/= at Barclays bank Uganda Ltd for the period of 84 months, it was also for the issuance of a supplier guarantee of UGX: \$600,000,000/\$ = in favor of Mukwano Industries Ltd for a period of 12 months to facilitate fulfillment of contractual requirement for the supply of goods from Mukwano to the Applicant. Lastly it was to finance working capital requirements for purchase of stock from Mukwano Industries ltd.

By way of security the Applicant provided a specific debenture charge over 8 motor vehicles registered in the names of the Plaintiff and a third party legal mortgage charge over land and property comprised on Plot 749 and 751 Block 3 Makerere Kikoni, Kibuga County, Kampala registered in the names of Geoffrey Karegyeya in favor of the Respondent.

It was the Applicants claim in the Civil Suit aforementioned that the Respondent breached the loan agreement by pulling out of an agricultural partnership deal in which the Applicant had injected UGX: \$3,200,000,000/\$ = which frustrated the Applicants income and as such caused difficulty in financing the loan term facility. The Applicant further claimed that the action of the Respondent caused the recall of the bank guarantee by Mukwano Industries Ltd.

That further breach was occasioned by the Respondent intimating to the staff and potential clients of one of the properties which was a student's hostel that it intended to seize it because of nonpayment by the Applicant which in turn scared away all the tenants and potential tenants with the fear that the hostel was to be closed by Bank officials in the middle of the semester.

Lastly that the conduct of the Respondent interfered with the financial flow causing delays in repayment and the Respondent not taking into account the breach of the loan agreement, went ahead to recall the loan by issuing a default notice. The Respondent refused proposals for restructuring notwithstanding frustrations she had caused the Applicant.

The Applicant claimed that the Respondent was only interested in selling the secured property. The intension to sell was evidenced by the advertisement to sell secured properties.

The Applicant claimed that the conduct of the Respondent was in breach of professional conduct, the Bank of Uganda consumer protection guidelines and that the process of recovery was in contravention of the Mortgage Act and Rules.

For the reasons above the Applicant/ Plaintiff sought an order for recovery of Plots 749 and 751 Block 3 Makerere- Kikoni, Kibuga County, a permanent injunction against the Respondents from selling or dealing in the property aforementioned, general damages and costs.

The parties must have entered into a discussion because on the 29th Aug 2018 the parties filed a Consent Judgment which they had endorsed on the 28th August 2018 and which the Registrar endorsed on the 29th August 2018.

The Consent Judgment came up with various amendments and undertakings. I find it necessary to reproduce it here;

- "By consent of all the parties and with approval of this honorable court it is hereby agreed that the above suit be settled on the following terms;-
- 1. That Kare Distribution Limited agrees that Commercial Bank of Africa (Ltd) was a wrong party to the suit, and the parties have agreed, in the interest of ensuring that all matters before Court are finally resolved, that;-
- a) Commercial Bank of Africa (Ltd) be substituted with commercial bank of Africa (Uganda) Ltd as the Defendant in this suit.
- b) Geoffrey Karegyeya be added as the second Plaintiff to the suit, in his capacity as the mortgagor of the suit property and also in his capacity as guarantor of the credit facilities issued to the 1st Plaintiff by the Defendant, to enable all issues regarding the matter before this honorable Court to be finally resolved.
- 2. That the Plaintiffs admit that as of the 28th August 2018, the 1st Plaintiff is indebted to the Defendant in the sum to the tune of Ushs 7, 501,269,363/= (Uganda Shillings Seven Billion Five Hundred One Million Two Hundred Sixty Nine Thousand Three Hundred Sixty Three Only)
- 3. That the Plaintiffs jointly and / or severally agree, commit and undertake to pay the Defendant the said sum plus all interest accruing on the outstanding loan, and costs as follows;-
- a) 50% of the said sum being Ushs \$3,750,635,681/\$ = (Uganda Shillings Three Billion Seven Hundred Million Six Hundred Thirty Four Thousand Six Hundred Eighty One Only) shall be paid on or by the 6th December 2018.
- b) 50% of the said sum being Ushs \$3,750,634,681/\$ = (Uganda Shillings Three Billion Seven Hundred Fifty Million Six Hundred Thirty Four Thousand Six Hundred Eighty One Only) and all interest accruing on the outstanding loan shall be paid on or by the 31st January 2019.
- c) The Plaintiffs shall pay legal costs of Ushs 20,000,000/= (Uganda Shillings Twenty Million Only) to the Defendant. The Defendant shall immediately debit the 1st Plaintiffs account *with the said sum upon signing of this consent Judgment.*
- 4. The Defendant shall communicate to the Plaintiffs on or by 25th January 2019 the sum outstanding (including accrued interest)* that the Plaintiffs must clear by the 31st day of January 2019.

- 5. The Defendant shall cease all recovery processes against the Plaintiffs until such time that the Plaintiffs have defaulted on the payment terms herein. For the avoidance of doubt, the intended sale of the suit (mortgaged) property shall be stopped by the Defendant, and the Defendant shall stop any intended attachment and sale of any other mortgaged assets or collateral.
- 6. *The Plaintiffs jointly and/ or severally irrevocably undertake to* strictly comply with the above payment terms and in the event of default on any payment by the Plaintiffs, all sums outstanding as at the date of default shall become due and payable immediately to the Defendant.
- 7. In the event of any default by the Plaintiffs, the Defendant shall be free to immediately take possession and sale the suit property and to attach and sale all assets/ properties mortgaged to the Defendant for purposes of recovering any outstanding sums payable by the Plaintiffs to the Defendant.
- 8. For the period until 31st January 2019, or if there is any default, until such time that the default has occurred on the part of the Plaintiffs, the 2nd Plaintiff is free to market the suit (mortgaged) property comprised in Plots 749 & 751 Block 3 Makerere Kikoni, Kibuga County, Kampala, for sale to any person of his choice save that the written approval of the Defendant must be sought by the 2nd Plaintiff or both Plaintiffs and written consent must be given by the Defendant before any sale is concluded.
- 9. This consent Judgment shall be in full and final settlement of all claims in or related to this suit. Neither party shall have any further or other claims against the other, present or future, whatsoever and howsoever arising in respect of or related, in whatever manner, to the subject matter or claims in the suit."

This Consent Judgment was endorsed by all the parties namely; Goeffrey Karyegeya a Director of the Applicant/ 1st Plaintiff and as the 2nd Plaintiff respectively, Mr. Anthony Ndegwa the Chief Executive Officer of the Defendant, Pace Advocates as counsel for the Plaintiffs and Kyazze, Kankaka and Company Advocates as counsel for the Defendant.

The Applicant filed this Application seeking orders to review and/ or set aside the Consent Judgment.

In support of this application Mr. Karegyeya Geoffrey deposed an affidavit stating the reasons why it was a misrepresentation by his advocate.

He conceded that the Applicant had borrowed money and that by way of security the Applicant had put 8 motor vehicles and he had also provided two plots of land namely 749 and 751 Block 3 Kibuga by way of mortgage as security.

The Applicants' contention is that he signed the Consent Judgment due to misrepresentation caused by his advocate which in his words he stated:

"That the same was a settlement to set ground for the audit and payment of uncleared balances to the Respondent if any. And further more that the case papers would in that way be amended to reflect the proper names of the *Defendant who was now the Respondent."*

He states that he believed his advocate misled him into binding the Applicant to pay to the Respondent sums which he had contested in Civil Suit No 673 of 2018.

He averred that if he had not been misled by his advocates he would not have signed the Consent Judgment. He said in any case the parties and material in the pleadings in the suit is substantially different.

By way of reply Mr. James Mayanja who was the head, Credit Risk Management of the Respondent deponed that the Applicant was advanced money from the Respondent and did indeed service the loan for a few months when in November 2017 she stopped. This prompted the Respondent to issue notice of default to Mr. Geoffrey Karyegeya and the Applicant.

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He further stated that because the Applicant defaulted in its payment the guarantee that was provided in respect of Mukwano was called and Mukwano demanded that the Respondent pays UGX 545,710,685/=. In Mukwano industries letter to the Respondent, she wrote;

> "Please note that KARE DISTRIBUTORS LTD has an accumulated debt balance owed to us for the sum of UGX 545,075,685/= (Five hundred and Forty Five Million Seventy Five Thousand Six Hundred Eighty Five Shillings) see the statement here to attached. We therefore wish to demand that you make good the default and pay us a sum of UGX: \$545,075,685/\$ = (Five hundred and Forty Five Million Seventy Five Thousand Six Hundred Eighty Five Shillings) to our account detailed below, at the earliest."

This money was paid by the Respondent as demanded. There followed a series of communication in which the Applicant acknowledged indebtedness as shown in Annexure O1 where the Applicant wrote;

> "We do acknowledge that our account is in arrears and this position has negatively affected us."

In others like Annexure 04 the Applicant reiterated his willingness to look for the buyer for the properties namely a hostel to raise some of the money raised by the Applicant.

Mr. Mayanja further averred that the Applicant herself made proposals for payment in which she indicated that the outstanding sum would be paid in three installments. The Applicants Advocates wrote;

> "We hereby propose that our client will be in position to clear outstanding arrears from today. This is to be split

in three installments starting by \$2,600,000,000/\$ = due by 21st Aug 2018."

This seems to have been agreed upon by the Respondent because in Annexure S1 they wrote back to the Applicants Advocates in the following words:

> "As rightly indicated in your sent letter it was agreed that 1st installment the of clear *your* client will 2,600,000,000/= by 31st August 2018. It was agreed that the 2nd installment would be cleared on 31st November 2018 and the last installment would be cleared by the 31st December 2019."

The Respondent undertook not to sell the mortgaged properties unless the Applicant defaulted on the above terms which they themselves had proposed and which had been agreed to by the Bank.

From record all the communication came after the Consent Judgment, the Applicant can therefore not say that he was unaware of the implication of the Consent Judgment.

From the evidence on record there is no doubt that the Applicant defaulted and thus the Respondent proceeded to realize the loan money by advertising the sale.

The Applicant contended that there was a fundamental mistake and/ or an error apparent on the said face of the Consent Judgment which vitiated the whole intent and purpose of the Consent.

Counsel for the Applicant submitted that the matter in which the consent were entered into was not before court and did not address issues before.

Counsel submitted that there was no claim of UGX 7,000,000,000/= and that there was no counterclaim or defense in court, that these were imported into Court without an amendment. That since the parties were different, being a suit between Kare Distribution Ltd and Commercial Bank of Africa. The inclusion of Geoffrey Karegyeya who did not appear in the suit into the consent judgment as well as substituting Commercial Bank of Africa with Commercial Bank of Africa (Uganda) Ltd rendered the Consent Judgment nugatory.

The Applicants Advocate specifically submitted that there claim was not for money and that any consent entered for a matter which was not before court was an illegality and that courts have held that once an illegality is brought to the attention of court is a nullity.

With due respect, I do not agree that money was not involved in this matter. The affidavit in support itself clearly states that the Applicant had borrowed money from the Respondent and that the Respondent had demanded for security, that to meet this requirement the Applicant put forth 8 vehicles and her Managing Director Geoffrey Karegyeya provided his land comprised in Block 3 Plot 749 and 751 as security.

In the Plaintiff the Applicant demanded for the land titles, there is no way one would demand for land titles in a mortgage without money coming into the picture. The first question that would arise is whether the

Applicant had paid back the money borrowed so as the titles to be released.

Evidence is abundant on record in which the Applicant acknowledged indebtedness and several times requested for restructuring the loan. Therefore in a situation such as this one, a settlement that includes money is one that is obviously expected.

For those reasons one cannot say that the issues of money were importations that did not exist.

The Applicant also alleges that her Managing Director was not aware of the legal consequences when he signed the Consent.

With due respect I also do not agree with this, the Managing Director of the Applicant was very alive to the legal consequences of such a document and that is why he very much tried to stay the enforcement of the document by seeking restructuring and by actively participating in looking for buyers of the property so as to fulfill the terms of the Consent Judgment.

Counsel for the Applicant also submitted that what was being enforced was a document that was entered into outside court and therefore could not be enforced without a court order.

Again with due respect I do not agree with that position. The Consent Judgment was signed by the parties on 28th Aug 2018 and the parties took it for endorsement and the Registrar of Court entered it as Judgment on the 29th August 2018.

The moment the Registrar endorsed the Consent it seized being a private document and became a document issued by court and enforceable as such.

At the very beginning of the Application, Mr. Geoffrey Karegyeya told Court that he held a degree and could read and understand English very well. I have read letters written by him in which he discusses indebtedness, he discusses Mukwano Industries Ltd and the relationship between them, he discusses the calling of the guarantee by Mukwano all indicating not only his knowledge of English but his full knowledge of what the Bank loan involved.

One can therefore not say that he was an ordinary person, he mortgaged his land and he also took a personal guarantee for the credit facilities. Annexure D7. His being added in the amendment was not a matter farfetched but necessary to avoid duplicity of suits.

Lastly I consider the issue as to whether pleadings can be amended and a party added to a Consent Judgment without going through an amendment.

Court may at **any stage** of proceedings allow any party to alter or amend his pleadings in such a manner and on such terms as may be just and all such amendments shall be made necessary for purpose of determining real questions in controversy between the parties, Order 6 Rule 19 of the Civil Procedure Rules S. I 71-1.

The purpose of this provision is to promote ends of justice and not to defeat the law. In fact it is an obligatory direction to the Civil Court to

allow the amendment if it is necessary for the purpose of determining the real questions in controversy between the parties.

An Application for amendment will however be rejected where it is not necessary for determining the real question of controversy between the parties where it introduces a totally new case, where the Plaintiff is negligent, where the proposed modification or alteration is unjust, violates the legal rights or causes injustice to the other party.

Further where it will complicate the case, where there has been excessive delay by the parties or where it is made with mala fide intentions and lastly where the parties have been given chances to amend but have failed to do so.

It is therefore right to say that amendment of proceedings is to secure the ends of justice and prevent injustices to other parties.

Furthermore, it is necessary to determine the real questions in controversy between the parties. It is through these amendments that the parties correct their mistakes in the pleadings.

In short one can say that the amendment of pleadings protects the rights of parties and helps them to avoid punishment for the mistake made by them in the pleadings thus it will be open for the Plaintiff to seek amendment of his or her Complaint and the Defendant his or her written statement of defense and other pleadings at any stage as they arise.

In summary amendments may be useful for purposes of avoiding multiplicity of suits, when parties in the Complaint or written statement of defense are wrongfully described and when the Plaintiff omits to add properties or fails to name certain parties.

In the instant case the controversy was on whether Mr. Karegyeya Geoffrey who was the guarantor of this loan was liable. The Applicant gave his property comprised on Plots 749 and 751 Block 3, Makerere-Kikoni, Kibuga County, Kampala for mortgage as security towards the loan.

For that question to be resolved it required him to be made a party at some stage in the proceedings of this case, the parties found that it was necessary to properly rename the bank which was also party but had been misnamed. The sole purpose of these changes was to determine the real question which was in controversy and bring an end to litigation.

I have gone through the proceedings and it is not in dispute that the Applicant was advanced money. Nowhere in the Complaint does she claim that she paid back. Mistakes and misnomers were made but these were corrected in their discussion and properly described in the Consent Judgment. This is a consent judgment which was signed not only by the M. D of the Applicant but also his advocates.

Seaton on Judgments and Orders "⁷th" Edition Volume 1 Page 124 discusses the binding effect of the actions of an advocate upon his client. This position was discussed in Ismail Sunderji Hirani Hirani vs Esmail Kassam (1952) 19 E. A. C. A 31 at Page 134 wherein the Court observed:

> "prima facie any order made in the presence and with consent of the counsel is binding to all parties of the proceeding or action, and on those claiming under them-and cannot be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to the policy of the law, or that consent was

given without material facts, or in misapprehension or in ignorance of material facts or in general for a reason which will enable court to set aside an aareement."

The burden to prove fraud or collusion strictly lay on the Applicant. He has not adduced any evidence in that respect.

The consent was entered into on sufficient material facts. This is from the evidence of the Applicant herself wherein her Managing Director deposed that the purpose was to amend and put right the different parties namely; the Applicant herself and the Respondent.

The Managing Director also deposed that the purpose of the consent was to ascertain how much money was to be paid. These are indeed the very matters that were included in the Consent Judgment. That being the case one cannot claim that the Consent was given without sufficient material facts nor in miss apprehension or in ignorance of material facts.

The interesting thing with mediation and or settlement is that parties and facts may be added or subtracted. The end result of the settlement may even differ in some matters, it may even include reliefs that had not initially been prayed for.

As I have said earlier, the Consent Judgment was a result of a settlement reached after negotiations conducted between the which was representatives of all the parties to the suit. The wording of the Consent not only shows that the parties considered what was in the pleadings but also what might arise in the future and thus provided for them. Clearly from the Consent the parties settled by a compromise.

In such a situation the parties while dealing with what was in issue, also entered a new contract. This new contract would supersede the original cause of action. In such a Consent Judgment matters that were not specifically pleaded may be considered for the compromise to hold; Ismail Sunderji Hirani vs Esmail Kassam CA11 OF 1952 Per Windham J.

These all the same now form part of the Consent Judgment, a new contract arises from the Consent and it is enforceable. Amendments can be made even at a late **stage** if there necessary to enable justice to be done between the parties, Hodgers on pleadings and practice, 20th Edition at Page 170.

A Consent Judgment is one of the stages and therefore part of the process. So an amendment at this stage especially one with the Consent of parties cannot be faulted.

It is therefore my finding that the original suit underwent amendment albeit at the stage of entering Consent whose purpose at the stage was to resolve issues in controversy.

The sum total is that the Applicant has failed to establish any ground upon which the Consent Judgment may be set aside or reviewed. The Application is therefore dismissed with costs.

\$19\$ day of Dated this.....

STICE DAVID WANGUTUSI. JUDGE

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