

UGANDA / JUDGMENT

Kasenke v Katambala & Anor (MISC. APPLICATION NO. 47 OF 2014) [2017] UGHCCD 204 (17 August 2017) [2017] UGHCCD 204

COURT

HC: Civil Division (Uganda)

BEFORE

Elubu, J

CASE / FILE NUMBER

MISC. APPLICATION NO. 47 OF 2014

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT JINJA

MISC APPLICATION No. 47 OF 2014 (ARISING FROM CIVIL SUIT No. 03 OF 2010)

EDINANSI KASENKE

APPLICANT

VERSUS

1. ABIAMU KATAMBALA 2. SAIDA JOGENDRA PATEL

RESPONDENTS

BEFORE HON. JUSTICE MICHAEL ELUBU

RULING

This is an application by Notice of Motion filed by, **EDINANSI KASENKE**, (the applicant) against the two respondents **ABIAMU KATAMBALA** and **SAIDA JOGENDRA PATEL**. It was brought under S.98 of The Civil Procedure Act, S.33 of The Judicature Act and O.52 rr 1-3 of The Civil Procedure Rules.

The Applicant seeks orders that:

- a) A consent Judgment entered into by the first Respondent (second Plaintiff in the original suit) and second Respondent (first Defendant in the original suit) dated the 2nd day of February 2017 be varied.

- b) Costs to be provided for.

The grounds of the application are well laid out in the Notice of Motion and particularised in the accompanying affidavit of the Applicant.

The applicant holds Letters of Administration of the estate of late KASENKE SEDULAKI. That in 1962 the said KASENKE SEDULAKI was allocated business premises at Plot 16D (now Plot 16A), Oboja Road in Iganga and signed a tenancy agreement with Ministry of Trade & Industry and has remained in peaceful occupation since.

That in April 2013 the second Respondent demolished premises owned by the first respondent and thereafter sought to demolish the applicant's premises as well. The IGG stayed that demolition.

It was then that the applicant discovered a consent judgment between the first and second Respondents where it had been agreed that upon execution of the consent judgment, one Anthony Kasenke, would lift a caveat that had been lodged on the Certificate of Title of the suit land.

The applicant avers that the second Respondent is using that clause of the Consent Judgment to evict her from the suit land.

It is the evidence of the applicant that the second Respondent is the registered proprietor of plots 14, 14A and 16 but not 16A. That Plot 16A, was not part of the suit land and the estate of the late Sedulaki KASENKE was not even party to the dispute leading to the consent Judgment.

The second Respondent in her reply states that the applicant was not the caveator but her son, Anthony Kasenke, filed a caveat on behalf of the family of the late Kasenke. That the Kasenke family interests had been recognised on humanitarian grounds and received money to that effect and were then supposed to vacate the

suit land. That the first Respondent was supposed to pay the applicants family some money as the family was alleged to have been a tenant of the first Respondent. It appears the first Respondent did not pay the applicant the stated moneys.

The respondent avers that the property was at all material times Plot 14, 14A and 16 and that Plot 16A is not a separate plot. Therefore the applicant is simply misleading the court.

That it is a surprise the applicant now makes this claim when she was paid through her son.

The applicant in rejoinder denied receipt of any moneys as the estate of the late Kasenke was not a party to the suit and did not instruct any lawyer to represent them as a result. The allegation that one Anthony Kasenke represented them is therefore denied.

The applicant also challenges the validity of the Consent Judgment considering that two of the parties in the suit, UGANDA LAND COMMISSION and IZID ABDU, did not append signatures to it. Thus the agreement is a nullity.

That the family of the late Kasenke is included in the consent agreement in paragraph 1 & 3 yet they were never part of the dispute.

The question here is whether the applicant is entitled to the orders prayed for.

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The respondent raised a preliminary point of law to the effect that this application offends S.82 of The Civil Procedure Act and O.46 of The Civil Procedure Rules. The basis of this prayer is that the applicant has moved court, in his submissions, under S.82 CPA and 0.46 of The CPR yet he did not base his motion on it.

This court finds on this issue that firstly, this is a court of justice enjoined by Art 126(2) (e) of The Constitution of The Republic of Uganda to do substantive justice and not be unduly fettered by technicalities. Secondly it has been held that the general rule is that where an application omits to cite any law at all or cites the wrong law, but the jurisdiction to grant the order sought exists, then the irregularity or omission can be ignored and the correct law inserted (see *Francis Bwengye V* Haki Bonera H. C. C. MA No.33 /09).

To this end therefore, as this application falls within this court's jurisdiction to grant, a failure to cite the appropriate provisions is not fatal. I shall dismiss the preliminary objection. The correct rule is considered inserted and I thus go on to the determination of the application.

The power of this court to interfere with a consent judgment terms from S.82 of The CPA which provides for review and states:

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 by this Act,

may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order on the decree or order as it thinks fit.

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Then the general position on challenging consent judgment is laid out in **Brooke Bond Liebig (T) Ltd v Mallya** [1975] EA 266,

Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings 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 court ... or if 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 the court to set aside an agreement.

It is in light of these provisions and the finding in **Brooke Bond Liepig (supra)** that I shall consider the present application.

I have also noted that there are a number of affidavits filed without the leave of this court long after pleadings should have closed. This court ignores all such affidavits and they shall not be considered in by determination of the application.

The contested paragraphs of the consent judgment are 1 and 3 and state as follows:

1. That the 1st Defendant shall pay Ug Shs. \$40,000,000/= (Forty Million Shillings Only) in full and final settlement within 2 (two) months from the date of executing this consent to the 1st Plaintiff and the representatives of Late Kasenke Sedulaki through their Advocate and the 1st Plaintiff in consideration of the 1st Plaintiff unconditionally withdrawing from the prosecution of H. C. C. S No.3 of 2010 and any other applications/ other cases hereto.
3. That the 2nd Plaintiff and Kasenke Anthony shall immediately upon execution of this consent remove the caveat that had been lodged on the Certificate of Title in respect of the suit land.

The applicant here has also adduced evidence that she has an interest in Plot 16A on which the estate of KASENKE (for which she holds Letters of Administration) has been in occupation since 1962. She contends that the second Respondent is fraudulently trying to include Plot 16A as part of the suit land by falsely alleging that it all forms part of one plot for which she is the owner.

In *Muhammed Allibhai vs W. E. Bukenya Mukasa & Anor* S. C. C. A. No. 56/1996 it was stated that a person aggrieved for purposes of S.82 CPA and O.42 of CPR is one who has suffered a legal grievance or a person who suffered a legal grievance if the judgment given is against him or affects his interests.

In the instant case the Applicant avers that the consent judgment affects her interests in the Plot 16 A which the second Respondent claim as hers.

On this score, as a person whose interest the consent judgement affects, the applicant has the locus to make this application.

Secondly the consent is said to have taken care of the interests of KASENKE's estate by involving one ANTHONY KASENKE. This court has seen no evidence from the respondents to show that the said Anthony Kasenke had authority to act for the late KASENKE or if indeed there is any proof of him receiving any money for or on behalf of that estate. As seen earlier there is also no evidence by the respondents to show that the estate instructed any counsel and that the respondents acted with the instructed counsel of the applicants in reaching the consent judgement here.

It is the finding of this court that the question of ownership of the plot 16A should be properly inquired into to determine what interest both sides to this application have.

Secondly the applicant has denied the provisions of Para 1 and 3 of the consent judgment which state that one Anthony Kasenke acted for the family of the late Sedulaki Kasenke or that they instructed Counsel to cater for their interests in the matter as is otherwise stated.

For these reasons the impugned consent judgment falls within the parameters in S. 82 of the CPA and principles laid out in the case of **Brook Bond Liebig** (Supra).

In the result this application is granted by setting aside parts of paragraph 1 and 3 of the consent Judgment in as far as they relate to the interests of the late KASENKE SEDULAKI.

The applicant shall have the costs of this application.

MICHAEL ELUBU JUDGE 17/08/2017

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