

UGANDA / JUDGMENT

Mbale District Local Government v Samuel Wegoye Advocates (Miscellaneous Application 9 of 2024) [2024] UGHC 257 (3 May 2024)

[2024] UGHC 257**COURT**

High Court of Uganda

BEFORE

Lubega, J

CASE / FILE NUMBER

Miscellaneous Application 9 of 2024

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THE REPUBLIC OF UGANDA**IN THE HIGH COURT OF UGANDA HOLDEN AT MBALE****MISC. APPLICATION NO. 009 OF 2024****(ARISING OUT OF MBALE HIGH COURT MISC. CAUSE NO. 35 OF 2022)****MBALE DISTRICT LOCAL GOVERNMENT****VERSUS****SAMUEL WEGOYE ADVOCATES :::::::::::::::::::::::::::::::****BEFORE: HON. JUSTICE LUBEGA FAROUQ****RULING****1. Introduction:**

- 2. This Application was brought by way of Notice of Motion under section 83(a) of the Civil Procedure Act Cap 71 and Order 52 rule 1 and 3 of the Civil Procedure Rules S.1 71-1 for orders that-
- (a) The consent order entered on 12th April, 2023 between the Applicant and the Respondent in Miscellaneous Cause No. 35 of 2022 be reviewed and set aside;

- (b) Costs be in the cause.
- 3. The grounds of this application as contained in the affidavit in support sworn by Mukula Max Martin, the Chief Administrative Officer of the Applicant are that;
- The consent judgment was entered into illegally because; (a)
- The Respondent law firm's legal services were procured (i) without complying with the law;
- The service agreement between the Applicant and Respondent (ii) that led to advocate-client bills was illegal;
- The officials from the Applicants who executed the consent (iii) judgment had no legal mandate to do so;
- (b) The consent order was entered into under an honest reasonable but mistaken belief that there was a valid retainer agreement between the Applicant and the Respondent;
- The consent order was entered into under an honest reasonable but (c) mistaken belief that the amount consented to UGX \$382,000,000/= was the actual amount owed under the advocate client bills of costs while the true amount is UGX \$275,000,000/=;
- There was an error apparent on the face of the record since the (d) judicial officer entered the consent order on the court record without inquiring about the mandate of the officials of the Applicant to execute the consent;
- The Applicant will not suffer any undue hardship if the application (e) is not granted;
- It is in the interest of justice that the application be allowed. (f)
- 4. This application was opposed by **Nsubuga Diana** where she said that at the commencement of the hearing she will raise preliminary objections to the effect that; this application is incompetent, frivolous and vexatious and that the application is prolix.
- 5. She averred that Misc. Cause No. 35 of 2022 from which this application arises was not seeking leave for to file but rather to tax costs. That the Applicant has so far paid Ugx: \$30,000,000/= voluntarily and has committed to pay the balance;
- 6. The Respondent contended that the retainer agreement which was found in the records of the applicant in January 2023 was the basis of taxing the advocate client bills of costs between the Applicant and the Respondent herein which culminated into the consent judgement of 12th April, 2023 and the Applicant was bound by the Chief Administrative Officer who executed the agreement and further the consent judgment;
- 7. That it is not disputed that the Respondent represented the Applicant in the courts of law from April 2015 to May 2022 and is entitled to payment;

- 8. The Respondent added that there is no error apparent on the face of the record to warrant a review hence, it is not only an abuse of the court

process, unfounded, frivolous and vexatious but also devoid of merit as the same is full of material falsehood. Therefore, it is just and equitable that the application be dismissed.

9. Issues framed by counsel for the Applicant are-

- Whether the consent was entered illegally? \$(g)\$
- Whether the consent was entered into by mistake? \$(h)\$
- Whether there was an error apparent on the face of record? \$(i)\$
- What remedies are available? \$(i)\$

Legal representation 10.

Counsel Sserugendo Joshua represented the Applicant whereas 11. Counsel Wesire Yonah represented the Respondent.

12. Submissions

This Application proceeded by written submissions and they are 13. both on the court record. I will refer to them in this ruling as and when it is appropriate.

Submissions of counsel for the Applicant 14.

- 15. Issue No.1: Whether the consent was entered illegally
- (a) The retainer/service agreement between the Applicant and the Respondent that led to the advocate-client bills of costs was illegal
- 16. Counsel for the Applicant submitted that the retainer/service agreement between the Applicant and the Respondent led to the advocateclient bills of costs which resulted into a consent order of 12th April, 2023. He contended that the retainer agreement was an illegality as it did not comply with the law.
- Counsel cited section 50 (1) of the Advocates Act Cap 267 which is 17. to the effect that an advocate may enter into an agreement with his or her client as to his or her remuneration in respect of any contentious business done or to be done by him or her providing that he or she shall be remunerated either by a gross sum or by salary.
- He also cited section 51(1) of the Advocates Act Cap 267 which 18. provides that such agreements; (a) be in writing; (b) be signed by the person to be bound by it; and (c) contain a certificate signed by a notary

public (other than a notary public who is a party to the agreement) to the effect that the person bound by the agreement had explained to him or her, the nature of the agreement and appeared to understand the agreement. A copy of the certificate has to be sent to the Secretary of the Law Council by prepaid registered post.

19. Counsel further cited the case of **Byenkya-Kihika & Co. Advocates V. Gang Min HCMC No. 0052 of 2022**, where the court held that if any of the above requirements have not been satisfied, the non-complaint agreements are not enforceable under section 51 (2) of the Advocates Act. Court further noted that; "these *provisions exist in order to enable the court*" to scrutinize the terms of such an agreement so as to make certain that an advocate did not commit champerty or maintenance or any similar offence, or that such agreement was not oppressive. Their purpose is to regulate such relationship and to bring an advocate within the control, jurisdiction and embrace of the court....."
20. Following the above provisions of the law and the authority, counsel submitted that the retainer/service agreement which is annexure G to the affidavit in support of the Application was not witnessed by any person. He argued that one of the requirements of section 51(1) of the Advocates Act is that the retainer agreement between an advocate and a client must contain a certificate signed by a notary public (other than a notary public who is a party to the agreement) to the effect that the person bound by the agreement had explained to him or her, the nature of the agreement and appeared to understand the agreement and that a copy of the certificate has to be sent to the Secretary of the Law Council by prepaid registered post, which was illegal and could not be enforced by law per section 51 (2) of the Advocates Act.
21. Counsel cited **Makula International Ltd V. His Eminence Cardinal Nsubuga & Anor Supreme Court Civil Appeal No. 4 of 1981** and submitted that the consent order granted by court on 12th April, 2023 originated from an illegal retainer/ service agreement and it should be set aside.

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(b) The Respondent's law firm's legal services were procured without complying with the law

Counsel submitted that there is no proof on the file to show that the Respondent's legal services were procured in compliance with the Public Procurement and Disposal of Public Assets Act 2003. He cited sections 2(1) and 3 of the Act

Counsel further cited a number of cases which include; **Attorney General & Anor V. Uganda Law Society HCMC No. 321 of 2013**, **Finishing Touches Ltd V. Attorney General of Uganda HCCS No. 144 of 2010** and **Galleria in Africa Limited V. Uganda Electricity Distribution Company Limited SCCA No. 08 of 2017**, where the Supreme Court while making reference to the definition of a contract in section 3 of the PPDA Act held that the provisions of the PPDA Act "cannot be directory merely. They are *for all purposes and intent mandatory and non-compliance with

them makes* the proceedings fatal. Procurement and Disposal activities are processes one cannot move to another stage of the processes without fulfilling the first one."

- (c) The officials from the Applicants who executed the consent judgment had no legal mandate to do so.
- 24. Counsel submitted that the present consent judgment is illegal in its formation since it violated Article 119 (5) of the Constitution. Secondly, it is illegal because the purpose of the contract is to enforce an illegal retainer agreement that was procured without complying with mandatory statutory requirements under Advocates Act and the PPDA Act.

Counsel argued that a consent agreement is an agreement to 25. compromise a suit and such an agreement that is effected by a local government is one where the Government is interested in and can only be concluded with the approval of the Attorney General but no such approval was sought in this case and the consent agreement is therefore unconstitutional and illegal.

Issue No.2: Whether the consent agreement was entered into by 26. mistake

- 27. Counsel submitted that while the consent judgment was entered in the tune of Ugx: \$382,000,000/\$ = the actual amount owed under the advocate- client bills of costs was Ugx: \$275,000,000/\$ and that this does not include the amounts already paid of Ugx: 169, \$568,000/\$ = which is evidence that the consent judgement on the terms was erroneous.

28. Issue No.3: Whether there was an error apparent on the face of the record

- Counsel submitted that the consent judgement entered into between 29. the Applicant and the Respondent and consequently endorsed by court was illegal on the basis that the retainer/service agreement from which it was emanating from was illegal for offending the provisions of section 51 (1) of the Advocates Act Cap 267, the legal services of the Respondent were procured without complying with the PPDA Act 2003.
- 30. He added that the consent agreement entered into has no proof that the opinion of the Attorney General was ever sought before entering into a consent agreement which was later endorsed by court on 12th April, 2023. He contended that court ought to have first ascertained whether the consent agreement entered into was lawful.

31. Submissions of counsel for the Respondent

- 32. Counsel in his submission raised a preliminary objection which is to the effect that the Notice of Motion together with the affidavit in support of the Application sworn by the Applicant's Deputy Chief Administrative Officer do not disclose any element or facts of illegality, do not disclose any particular provision of the law that was not complied with and it does not disclose any inconsistency or opposition to the policy of court or that there is a term or close in that consent agreement that would ordinarily vitiate a contract.

- 33. He cited *Interfreight Forwarder (U) Limited V. East African Development Bank [1994-1995] HCB 54* where it was held that "Pleading" and particulars in detail is meant to define with clarity and precision as to

the issues or questions which are in dispute between the parties and are to be determined by court. If the pleadings fail to clarify the precise facts constituting a cause of action or if they prevent either party from knowing the cause of action, the Plaintiff will not disclose a reasonable cause of action *and if it is a defence, it will not offer a reasonable defence.*

Whether this is a proper case to review or set aside a consent 34. order?

- Counsel argued that the law is now settled on the conditions for 35. reviewing and or setting aside a consent judgment, decrees or orders. Parties to civil proceedings are free to amicably settle a dispute and consent to a judgment, decree or order being entered into and the parties may do so orally before a judicial officer who then records the consent or they may do so in writing, affix their signature and place the same for endorsement by court. He cited Order 25 rule 6 of the CPR and the case of *Attorney General & Another V. James Mark Kamoga & another* SCCA No. 8 of 2004 where the Supreme Court of Uganda laid down the principles upon which the court may interfere with the consent judgment.
- Counsel submitted that a consent judgment is passed on terms of a 36. new contract between the parties to the consent judgment or decree.
- On the issue of whether the consent judgment was entered into 37. under honest reasonable but mistaken belief that there was a valid retainer agreement between the Applicant and the Respondent and on the issue that the officials from the Applicant had no legal mandate to do so;
- Counsel submitted that the above argument is purely moot and 38. devoid of any merit. He contended that the position of the law is that a ground for vitiation of a consent judgment, decree or order must relate to the conduct of the parties at the time of execution of the consent. The rationale of this position is that a consent is a different agreement and a consent judgment/decreed is passed on terms of a new contract between the parties to the consent judgment.

Counsel submitted that in the view of the above argument, a defect 39. in the original agreement (retainer agreement) or dealings between the

parties which led to the filing of the Advocate-client bills of costs under Miscellaneous Cause Number 35 of 2022 will not vitiate a consent judgment that is properly entered upon the agreement of the parties. That the alleged vitiating factor must relate to the execution of the consent. He referred to *Chris Mubiru V. Joseph Mwanja Miscellaneous Application* No. 1092 of 2020

- 40. Counsel further submitted that once judgment was entered upon the terms in the consent order on the 12th day of April, 2023, the order sealed the compromise between the parties, it cannot be varied and it is therefore not open to the applicant to re-open the matter or reargue the terms of the consent judgment by relying on the same set of circumstances which were available to them at the time of executing the consent.
- 41. Regarding the allegation that the consent order entered into on 12th April, 2023 was executed by the officials from the applicant who had no legal mandate to do so;
- 42. Counsel submitted that the application does not adduce any evidence to prove the said allegation that the officials from Mbale district local government had no legal mandate to execute the consent. He contended that the application makes blanket allegation that the officials from the applicant who executed the consent judgment has no legal mandate to do so yet the consent was signed by the Chief Administrative Officer of the applicant, its Chief Finance Officer and their lawyer.
- 43. He cited section 64 (1) of the Local Government Act, which provides that; the Chief Administrative Officer is the head of the public service in the district and is the Accounting Officer of the district.
- 44. And the third schedule of the Local Government Councils Regulations, Regulation No. 29 (1) & (2) states that; all documents to be authenticated or executed by a local government shall be deemed to be duly executed by the Chief Administrative Officer.
- 45. Counsel argued that the Application does not state any facts that robbed the said officials of their legal mandate to execute the said consent

yet the burden of proof in this particular regard is on the applicant as it is provided for under Section 101 of the Evidence Act

- Counsel invited this court to be pleased and find that the Applicant 46. has failed to satisfy the court on any of the grounds upon which the consent order dated 12th April, 2023 could be vitiated since the consent order was validly executed and entered by court.
- Counsel for the Applicant also filed his submissions in rejoinder and 47. I have considered them in the resolution of this application.

Analysis of court 48.

- 49. Under this Application, the Applicant wants this court to review and set aside the consent judgment or order which was entered on 12th April, 2023 between the Applicant and the Respondent in Miscellaneous Cause No. 35 of 2022.
- 50. It is now a settled position of the law that a consent judgment may be vitiated, varied and/or set aside where it is proved 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 that would enable court to set aside an

agreement. The above principles were discussed in *Ismail Sunderji Hirani V. Noorali Esmail Kassam* [1952] EA 131; and *Attorney General & Uganda Land Commission V. James Mark Kamoga & James Kamala*, SCCA No. 8 of 2004.

According to **Seaton on Judgments and Orders, 7th Edition, Vol. 51. 1, page 124**, which was cited with approval in the above cited cases states as follows-

> "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."

52. It has also been held that a consent judgment/decree is passed in terms of a new contract between the parties to the consent judgment. See: *Brooke Bond Liebig (T) Ltd vs. Mallya* (1975) EA 266 and *Mohamed Allibhai vs. W. E. Bukenya & Another*, SCCA No. 56 of 1996.

53. To emphasize the above position, Justice Boniface Wamala in **HCMA No. 306 of 2019 Kerone Uganda Limited V. Keliree Investment Limited**, further stated that-

> "... the ground for vitiation of a consent judgment must relate to conduct of the parties at the time of execution of the consent. This is because a consent is a different agreement and a consent *judgment/decree is passed on terms of the new contract between* the parties to the consent judgment.... As such, a defect in the original agreement or dealings between the parties that led to the filing of the suit will not vitiate a consent judgment that is properly entered upon the agreement of the parties. The vitiating factor alleged must relate to the execution of the consent."

54. In the instant case, I note that the most of the Applicant's arguments are in relation to issues which occurred outside the consent judgment. However, as guided by the authorities above, a consent judgment is a new agreement between the parties and the parties to it, are bound by it. For that reason, I will only consider issues that arise from the consent judgment.

55. Whether the consent judgment was entered into by mistake?

56. The Applicant averred under paragraph 16 of the affidavit in support that the consent agreement was entered into under an honest reasonable but mistaken belief that the amount consented to of Ugx: \$382,000,000/\$ = was the actual amount owed under the advocate client bills of costs yet the true amount is Ugx: \$275,000,000/\$ and does not include the amounts that had already been paid of Ugx: \$169,568,000/\$ =

- 57. The above averment was not rebutted by the Respondent. The Respondent in his affidavit in reply only stated that the retainer agreement was the basis of taxing the advocate client bills of costs which culminated into the consent of 12th April, 2023. It should however be noted that a consent judgment is a new agreement with new terms independent of its own.
- The position of the law as already stated is that a consent judgment 58. be vitiated by reason of fraud, mistake, misapprehension or can contravention of court policy.
- 59. According to the affidavit evidence of the Applicant in the instant application, there was a mistake as to the amount of money which was agreed upon in the consent judgment. To the Applicant the correct figure ought to be Ugx: \$275,000,000/\$ = exclusive of the amounts already paid.
- 60. In light of the above therefore, there was a mistake in the consent judgment regarding the amount of money owed to the Respondent.
- 61. Whether the officials from the Applicant who executed the consent judgment had no legal mandate to do so and whether the consent judgment is legal?
- It was submitted for the Applicant that the person who entered the 62. consent judgment on behalf of the Applicant did not have the legal mandate to do so. Counsel referred this court to Article 119 (5) of the Constitution of Uganda.
- 63. Counsel further argued that a consent judgment is an agreement to compromise a suit and such an agreement that is effected by a local government is one where the government is interested in and can only be concluded with the approval of the Attorney General but no such approval was sought in this case and the consent judgement is therefore unconstitutional and illegal.
- Article 119 (3) of the Constitution of the Republic Uganda provides 64. that-

"The Attorney General shall be the principal legal advisor to Government"

Article 119 (5) of the Constitution of the Republic of Uganda provides 65. that;

> "Subject to the provisions of this Constitution, no agreement, contract, treaty, convention or document by whatever name called, to which the Government is a party or in respect of which the Government has an interest, shall be concluded without legal advice from the Attorney General, except in such cases and subject to such conditions as Parliament may by law prescribe.

66.

"*Every local government council shall be a body corporate with*" perpetual succession and a common seal, and may be sue or be sued in its corporate name"

67. Regulation 2 (1) of The Local Governments (Requirements for Seeking Technical and Legal Advice) Regulation 2007 provides-

Section 6 of the Local Government Act Cap 243 provides-

"A person holding a political or public office at a district or lower local Government Council shall, before directing or concurring *in the use of public funds or property whenever giving effect to* the direction that is likely to result in the decision being challenged in court or in the loss of public funds seek technical or legal advice"

68. Subregulation 3 of the Regulation provides-

> "*The legal advice shall be sought from the Attorney General* or a person approved by the Attorney General"

69. Subregulation 4 of the Regulations provides-

> "A person required to seek advice under subregulation (1) shall* act in accordance with the advice given under that *subregulation" (Underline emphasis is mine)*

70. Regulation 5 of the Regulation provides for a list of cases in which advise of the Attorney General should be sought which include among others any other contractual obligations.

- 71. In light of the above provisions, although a local government council is a body corporate which can independently manage its own affairs, a local government council is entirely part of central Government and perform delegated functions since their responsibilities and powers are devolved and transferred from the central Government to the people at appropriate levels where they can best manage and direct their own affairs. (See Article 176 (2) (a) of the Constitution and the National Objectives and Directive Principles of State Policy II).
- Therefore, seeking approval/clearance of the Attorney General who 72. is the Principal Legal Advisor to Government before entering into any agreement of whatever name like in the instant case is incumbent upon a local government council and the local government council must act in accordance with that advice. (See Bank of Uganda V Banco Arabe Espanol [2002] UGSC 3 (18 June 2002))
- In the instant case, officers of the Applicant executed the consent 73. agreement which gave rise to the consent judgment without approval/clearance of the Attorney General. They therefore had no legal mandate to do so and the consent agreement /consent judgment they entered into was illegal.
- In the circumstance, the consent judgment entered on 12th of April, 74. 2023 is accordingly set aside.
- 75. Costs of this Application shall be in the cause.

I so order

LUBEGA FAROUQ JUDGE

3nd MAY, 2024

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