

UGANDA / JUDGMENT

# Musaazi and 9 Others v Lwasa Kaweesi (Miscellaneous Application No. 881 of 2022) [2022] UGHCLD 194 (29 September 2022) [2022] UGHCLD 194

## COURT

HC: Land Division (Uganda)

## BEFORE

Nassuna Matovu, J

## CASE / FILE NUMBER

Miscellaneous Application No. 881 of 2022

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| IN THE HIGH COURT OF UGANDA | T KAMPALA |

| (LAND DTVTSTON)&lt;br&gt;t)&lt;br&gt;MISC. APPLICATION NO. | - 9\_s91. |

| ARISING OUT OF CIVIL SUIT NO | 001 oF 2016 |

| 1. MUSAAZI GODFREY<br>2. KITOOKE ESAU BRIAN<br>3. KIKAATU STEPHEN<br>4.  
KIKONAGA FRED<br>5. KASIRYE WILLTAM<br>6. NAKYAGABA FIONA<br>7. ASIIMWE  
MAYTMUNA<br>8. NANKINGANORAH | |

| 9. NAKATO EDITH&lt;br&gt;10. BABIRYE BVA | APPLICANTS |

**VERSUS**

LWASA EMMANUEL KAWEESI RESPONDENT

**ASSUNA MATOVU BEFORE HON. LADY JUSTICE FLAVIA****RULING**

This was an application brought under S.82 of the Ci il Procedure Act and 0.46 of the Civil Procedure Rules. It was seeking for orders t at;

- 1. The Consent judgement and decree allegedly executed by the Applicants and the Respondent on the 13th of March 2016 in respect of Civil Suit No. 01 of 2016 be reviewed and set aside.
- 2 Civil Suit No. 01 of 2016 be reinstated and heard on its merits.
- 3 The Applicants' alleged written statement of defense in Civil Suit No. 1 of 2016 be expunged from the record and the Applicants be allowed to file a fresh defense.

The application was brought by Notice of motion which was supported by an affidavit sworn by one Asiimwe Mayimuna the 7th applicant. The grounds of the

application were laid in the Notice of motion and affidavit in support. Briefly they were that;

- a) The Applicants are aggrieved by the consent judgement on record in Civil Suit No. 1 of 2016 allegedly executed by them and the Respondent determining ownership of the property comprised in Kyaddondo Block 246 Plot 1839 land at Kyeitabya (the suit land);
- b) The impugned consent decree in the said suit was obtained by fraud since none of the applicants signed it and they are not aware of how signatures appearing thereon came about;
- c) The 7th Applicant as administrator of the estate of the late Lumanyo William Sentongo to which the suit land belongs has never entered into any transaction to sell land to the Respondent and the sale agreement relied on by the Respondent is unknown to her;
- d) The Applicants are not aware of and have never instructed M/s Muganga & Co. Advocates to file defense or to represent them in any matter concerning the said suit.
- e) The Applicants have a valid defense to the Respondent's claim in the said suit but have never been heard;
- f) The alleged consent judgement in the said suit is an error on the court record and it is in the interest of justice to have it set aside and be heard again;
- g) The Applicants stand to suffer irreparable loss if the consent judgement is not set aside.

The Respondent filed two affidavits in reply in which he called upon the court to dismiss this application. The affidavits were sworn by the Respondent himself and one Michael Kiwanuka. In the said affidavits in reply the Respondent maintained inter alia, that the 7th Applicant is well known to him and is one of the 10 people who signed the agreement of sale for the suit property at Ug. Shs. 400 million, and thereafter signed the consent judgement in Civil Suit No. 1 of 2016. That the Applicants are not truthful since they have always been aware of the said suit and they willingly signed the consent judgement. In the said consent judgement, the 7th Applicant signed a transfer of the suit land to the Respondent who is now the Registered proprietor. That the Applicants have never brought any application for recovery of land against the Respondent, they have never instituted any disciplinary proceedings against Counsel John Patrick Muganga and there is no error on court record that the applicant has shown.

When the application came up for hearing Counsel for the Respondent raised a preliminary point law which he sought to be disposed of before the application could proceed. The objection was to the effect that since the Applicants were seeking to set aside the consent judgement on allegations of fraud, matters of fraud have to be particularly proved and the proper procedure should be by plaint and not Notice of motion. 2ndly, that the application is misconceived as it offended the provisions of S. 35 of the Civil Procedure Act. That the matters raised in the application were matters of execution, a decree was passed and the Applicants contend that the same was procured by fraud and under S.34 of the Civil Procedure Act, these proceedings should be in a separate suit. That an application ought to have been brought under S.34 and the said section does not envisage a review emerging from a consent judgement. He further stated that S.82 envisages a court passing a decree after evidence has been heard. The section presupposes that the court has determined the case and a contention arises. That in the case before court the decree was entered by consent and not by court and for that reason a fresh suit should be filed. He therefore submitted that the application was misconceived and the same should be dismissed by court.

The Applicants filed written submissions in response to this objection to which the Respondent filed written submissions in rejoinder.

This court has carefully studied the pleadings on record, the submission of both counsel, the authorities cited by both counsel together with the relevant law.

The issues to be decided by this court are:

- 1. Whether fraud is a valid ground have a consent judgement or decree set aside and if so whether it can be pleaded in a notice of motion.
- 2. Whether the consent judgement in civil suit No.1 Of 2016 dated <sup>11/13/2016</sup> was entered in error.
- 3. Whether the applicants' alleged written statement of defense in Civil Suit No. 1 Of 2016 should be expunged from the court record.
- 4. What are the remedies available?

### **Background:**

Civil suit No. 1/2016 was filed at court on 5/11/2016. Summons to file defense were issued by court on 11/11/2016. A written statement of defense was filed at court on 25/11/2016. Consent Judgement was executed on 11/13/2016. Applicants who are the

defendants in the case allege that they had never instructed Ms. Muganga & Co. Advocates to represent them. They were equally not party to the consent judgement and that the same was entered in error. Hence they filed this application to review and set aside the said consent judgement.

**Law Applicable:**

The Application was brought under S.82 of the Civil Procedure Act and 0.46 of the Civil Procedure Rules.

S. 82 under which this application was brought provides

"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 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."

0.46 of the Civil Procedure Rules further clarifies the possible grounds upon which an application for review can be brought i.e.

- a) discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the Applicant's knowledge or could not be produced by him or her at the time when the decree was passed or order made;
- b) on account of some mistake or error apparent on the face of the record;
- c) any other sufficient cause.

The Applicant seeks to review and set aside the consent judgment and decree allegedly executed on 11/11/2016. The application is premised on several grounds which include inter alia fraud (Paragraph ii of Notice of motion) and that the alleged consent was an error on the court record (Paragraph vi of the Notice of motion.) The application is therefore proper before court.

**Issue 1**

Whether fraud is a valid ground to have a consent judgment or decree set aside and if so whether it can be pleaded in a notice of motion.

This application is also premised on the ground that the consent judgment was entered in error. In other words, that there is an error apparent on the face of the record.

Under 0.46 (b) of the Civil Procedure Rules a decision of court can be reviewed where there is an error apparent on the face of the record. In my view where there is such an allegation, the court is merely expected to study the court record and ascertain whether there are any obvious errors.

After carefully studying the record of proceedings I have noted as follows:

The suit was filed on 5/1/2016 by M/s. Seguya & Co. Advocates. A written statement of defense was filed on 25/1/2016 by M/s. Muganga & Co. Advocates.

The matter came for hearing before the Deputy Registrar on 10/3/2016.

On that day the following persons appeared i.e.

- i. Counsel Seguya,
- ii. Counsel Nandyose,
- iii. Lwasa (Plaintiff),
- iv. Musaazi (D1),
- Nakyagaba (D6) & V.

Court was informed that D8 was still on her way.

The case was accordingly adjourned to 11/3/2016.

On 11/3/2016 the record reads as follows:

**"Court as before" and Nankinga Norah (D8) is in court.**

Counsel Nandyose then informed court that parties had executed consent and requested court to adopt the same.

The Court stated as follows:

**"The consent is adopted accordingly. All parties have confirmed that is the true position. File is closed accordingly."**

It is definitely clear that not all parties were present. So how did they confirm that that is the true position before the Deputy Registrar? From the record it is only Counsel Seguya, Counsel Nandyose, Lwasa (Plaintiff), Musaazi (D1), Nakyagaba. It is a well-established principle that a consent judgement may be set aside for fraud. This was the decision of court in the cases of Muhammed Allibhai Vs. It. E. Bukenya Mukasa and Departed Asians Property Custodian Board SCCA56 of 1996 and Brooke Bond and Liebig (T) Ltd. Malya 1975 EA. 265 which were cited by counsel for the applicant in this case.

However, fraud must be specifically pleaded and proved. In the case of J. W. Kazoora Vs. Rukuba Civil Appeal No. 131/1992, the court held that allegations of fraud need to be fully and carefully inquired into and that fraud is a serious matter that must be specifically pleaded and proved. The degree of proof required is one of strict proof but not amounting to one beyond reasonable doubt. It must however be more than a mere balance of probabilities.

In the case of Hon. Justice Prof Dr. Geroge W. Kanyeihamba vs The Commissioner of Land Registration & Richardson Musinguzi HCCM 79/2011 Hon. Lady Justice Percy Tuhaise held that allegations of fraud require full and careful inquiry where witnesses can be cross examined and this would appropriately be through an ordinary suit rather than by notice of motion where evidence is mainly through affidavit evidence.

Indeed, the application before court had already started proceeding like an ordinary suit. Perusal of the record shows that when the matter came up on 11/4/2022, counsel for the Applicants requested leave of court to call 2 witnesses i.e Mr. Muganga John Patrick and Mr. Kintu Nteza. Witness summons were sent out and Mr. Muganga appeared before court on 29/11/2022. He then filed a witness statement on 11/11/2022. All this shows that the applicant had invoked a procedure that was not appropriate in proving fraud.

I have no reason to depart from the above mentioned decisions of court I entirely agree with submission of counsel for the respondent that the proper procedure to prove fraud should be by ordinary suit and not by Notice of motion.

I therefore find that whereas fraud is a valid ground for setting aside a consent judgement,, the procedure for proving fraud should be by way of ordinary suit and not by Notice of motion. For that reason, the issues of fraud alleged by the applicant in the instant application will not be considered by court.

## Issue 2

Whether the consent judgement in civil suit No.1 Of 2016 dated 11/3/2016 was entered in error;

The applicants maintained that they had never instructed Ms. Muganga and co. Advocates and for that reason the written statement of defense allegedly filed by him on their behalf should be expunged from the court record. In reply the Respondent maintained that since the Applicants have never reported Mr. Muganga to either Uganda Police or Law Council then they are estopped from denying that they gave him instructions.

However, from the pleadings it is clear that the Applicants lodged a complaint against Mr. Muganga John Patrick to the Secretary of law Council on 15/13/2022 (See Annexure K05 to Applicant's affidavit in rejoinder.

In addition, the Respondent also admits in paragraph 5 of his affidavit in reply that Counsel for the Applicants was Ms. Kintu Nteza.

Furthermore, a clear scrutiny of the alleged written statement of defense shows that the same is not a defense but an admission of facts as presented by the plaintiff.

Other than filing a "written statement of defense" which in actual fact is an admission and allegedly signing a consent judgement which has already been found to erroneous Mr. Muganga is not seen anywhere on the court record as having been counsel for the Applicants. There is nothing to show that Counsel Nandyose who subsequently appeared was acting on behalf of Mr. Muganga. The alleged written statement on the court record is accordingly hereby expunged from the court record for having been filed by an advocate without instructions.

The Applicants are hereby granted leave to file a fresh written statement of defense and this should be within 15 days from today.

### Issue 3

#### What are the remedies available?

Having found that the consent decree was entered in error the same is accordingly hereby set aside and the matter should be heard on its merits.

This application is hereby allowed with the following orders.

- a) The consent judgement/decree that was entered by court on 11/3/2016 in respect of Civil Suit No. 1 of 2016 be and is hereby set aside.
- b) The written statement of defense filed in court on 25/11/2016 be and is hereby expunged from the court record and Applicants should file written statement of defense within 15 days from date of this ruling.

(D6) and Nankinga D8 who were in court. It is not clear from which law firm counsel Nandyose came.

However, the Deputy Registrar endorsed a consent decree which indicated that all defendants were present. The document further shows that one Muganga John Patrick signed as counsel for the defendants yet he was not in court. Counsel Nandyose who was in court on that day did not even sign the document. Counsel Muganga who signed was not in court on that day.

Therefore, according to the court record, only 3 out of 10 defendants were present in court on the 11/3/2016. It is also clear that on that day Mr. Muganga never appeared before the registrar. It is Nandyose who appeared. Surprisingly she did not sign but Muganga who was absent signed. It is not possible that parties who were not present before the registrar on the 11/3/2016 endorsed their signatures before her.

There is therefore an error apparent on the face of the record, in that, the record reflects that parties /persons who were not in court on 11/3/2016, the day the consent judgement was allegedly executed, endorsed their signatures on the consent decree before the Deputy Registrar. In the case of *F. X. Mubuke vs. UEB HCMA NO.98/2005*, it was held that for a review to succeed on the basis of error on the face of record, the error must be so manifest and clear that no court would permit such an error to remain on the record. In my view the error on the record before me is so manifest and clear that court cannot permit it to remain on record. Parties who were not in court cannot be said to have signed before the Deputy Registrar.

I must also note that whereas I can reasonably guess that Counsel Seguya was from Ms. Seguya & Co. Advocates I cannot equally guess the law firm where Counsel Nandyose came from as it is not reflected anywhere on the court record. It is therefore good practice for judicial officers to always indicate the law firm where individual lawyers who appear before court practice from to avoid unnecessary confusion.

I therefore find that the consent judgment was entered in error because some of the parties who allegedly endorsed it before the Deputy Registrar 111312016, were apparently not in court on the said date.

### Issue 3

Whether the applicants' alleged written statement of defense in Civil Suit No. 1 of 2016 should be expunged from the court record.

- c) Civil Suit No. 1/2016 should then be heard on its merits.
- d) Each party shall bear their costs for this application.

Dated at Kampala this ... 3]. day of 2022.

FLA ASSUNA MATOVU

AG. JUDGE.

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