

UGANDA / JUDGMENT

Nakato nzalinda and Another v Mukasa and Another (Miscellaneous Application 39 of 2023) [2023] UGHC 100 (23 October 2023)

[2023] UGHC 100

COURT
High Court of Uganda

BEFORE
Wolayo, J

CASE / FILE NUMBER
Miscellaneous Application 39 of 2023

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT LUWERO

MISCELLANEOUS APPLICATION NO. HCT-17-LD-MA-0039-2023

(ARISING FROM LAND CIVIL SUIT NO. HCT-17-LD-CS- 293 -2022)

FORMERLY LAND DIVISION CIVIL SUIT NO. 264 OF 2018)

IN THE MATTER OF AN APPLICATION FOR REVIEW OF A CONSENT JUDGMENT/ ORDER.

- 1. NAKATO SUZAN NZALINDA
- 2. KIFUNFU ANDREAAPPLICANTS VERSUS
- 1. MUKASA MATHEW
- 2. SEGULANI DAVIDRESPONDENTS

BEFORE: HON. JUSTICE HENRIETTA WOLAYO. RULING

Introduction

1. By a notice of motion filed on 24.3.2023, the applicants Nakato Suzan Nzalinda and Kifunfu Andrea moved the court under section 82(b) of the Civil Procedure Act Cap 71 and **Order 46 rule 1(b) and 8** of the Civil Procedure Rules for the following orders; -

The Consent Judgement in Civil Suit No. 264 of 2018 entered between the first Respondent (Mathew Magomu) with the second respondent (Segulani) be reviewed and amended to exclude the said Mukasa Mathew.

2. The application is based on the grounds set out in the Notice of Motion and amplified by the supporting affidavit sworn by the Applicants Nakato Susan Nzalinda and Kifunfu Andrea on the 6th July 2022 respectively.
3. The Respondents filed an affidavit in reply deposed by Segulani David opposing the application by the Applicant. The application came up for hearing on 27th June 2023 and both parties were given a schedule to file written submissions which they did.

Background facts

- 4. On 25th May 2022, a Consent Judgment was entered in Civil Suit No. 264 Of 2018 between ten plaintiffs and the first defendant Segulani David. It is as a result of this consent judgment that the Applicants moved court to review and set aside the consent judgment.
- 5. The ten plaintiffs include: Musoke Auman (first plaintiff); Kakooza Tadeo (17th plaintiff); Kamulegeya Godfrey (19th plaintiff); Lutaaya Ronald(39th plaintiff); Mayambala Mustapha (42nd plaintiff); Mukisa/Mukasa mathew(46th plaintiff); Nakaye Eva (56th plaintiff); Nanyombi Goretti(70th plaintiff); Nassozi Forence(73rd plaintiff); Sewanyana Godfrey(93rd plaintiff).
- 6. The gist of the consent was that each of the plaintiffs had carried out a survey of their respective kibanja and that each would share their respective kibanja in equal portions with the first defendant who in turn would give the kibanja holder certificate of title.
- 7. The applicants Nakato anf Kifufu now claim that the two of them had an equitable interest together with Mukasa Mathew in the kibanja as beneficiaries of the late Kamuhanda Kaberuka and moreover, Mukasa did not have letters of administration to the estate of Kamuhanda, their predecessor.

Issue: whether the application has merits for review or setting aside of a Consent Judgment of Civil Suit No. 264 Of 2018.

The law

- 8. Section 82 of the Civil Procedure Act Cap.70 gives the circumstances under which a review order may be made:
- a) The person requesting a review must be aggrieved;
- b) The person must be aggrieved with a decree or order from which an appeal is allowed by this Act but from which no appeal has been preferred;
- c) Or from an order from which no appeal is allowed;

- d) Or there is discovery of new and important evidence which was not within the knowledge of the applicant and could not be produced at the time the order was passed;
- e) Or there is an error apparent on the face of the record;
- f) Or there is some other sufficient cause.

Submissions of counsel for the applicants

- 9. The Applicants' counsel argued that the consent judgment in Civil Suit No. 264 of 2018 was obtained on account of misrepresentation, nondisclosure and fraud on the part of the first Respondent, Mukasa Mathew.
- 10. Nakato deposed in her affidavit that at the time of execution of the said judgment on the 25th May 2022 in the head suit **Civil Suit No. 264 of 2018**, Mukasa did not have authority and consent of other beneficiaries to make decisions in respect to the estate of the late Kamuhanda Kaberuka John and neither was he endorsed by other family members to consent in respect to the kibanja interest.
- 11. Furthermore, that the applicants are aggrieved because they have a beneficial interest in the suit property and yet they were not a party to the said Consent Judgment. Lastly, that Mukasa shared the suit kibanja without taking into account the interest of the other two applicants therein by virtue of the Will of the late Kamuhanda Kaberuka John which amounted to fraud which deprived the applicants of their equitable interests in the suit kibanja.

Submissions of counsel for the respondents

- 12. The Respondents' counsel argued that the Applicants were not parties to the main suit vide **Civil Suit No. 264 of 2018** and apart from the 1st Respondent alleging to be a beneficiary of the late Kamuhanda Kaberuka John, both the Applicants have not demonstrated how they are connected to the suit land and/or how they all gain locus standi in the suit land.
- 13. Furthermore, that the applicants do not fit under the ambit of an aggrieved party since there is no evidence creating a nexus to the suit land and that the application is only intended to cause endless litigation to the detriment of the Respondent and should be struck out.
- 14. In **Attorney General & Anor Vs James Mark Kamoga & Anor (Civil Appeal No.8 of 2004)** [2008] UGSC 4(6 March 2008) ULII, the Supreme Court held that

"... It is a well settled principle therefore that consent decree has to be upheld unless it is violated by reason that would enable a court to set aside an agreement such as fraud, mistake, misrepresentation or contravention of court policy. This principle is on the premise that a consent decree is passed on terms of a new contract between the parties to the Consent Judgment...."

The import of this precedent is that the balance is in favour of upholding a consent judgment unless it is tainted by fraud, mistake, misrepresentation or contrary to court policy.

- 15. Bearing this principle in mind, the contention of the applicants that they have a beneficial interest in the kibanja that was the subject of the consent judgment is without merit because they were never party to the suit which makes their claim an afterthought as they ought to have joined the suit as early as possible.
- 16. Furthermore, Nakato sues as a widow of the late Nzalinda Christom who died on 27.12.2021. According to Nakato, Nzalinda was son of Kamuhanda who died on 3.9.2015 and that Nzalinda never got his share of the estate. As for Kunfufu Andrea, he deposed that Kamuhanda was his father and he never got a share of the estate. He relies on an alleged Will dated 26.2.2013 in which the testator gave one acre to Mukasa while the rest (not defined) was to be shared.
- 17. I am in agreement with the submissions of counsel for the respondents that the applicants had notice of the suit in court as it involved 97 plaintiffs and therefore cannot be heard to complain after a third party has acquired an interest in the kibanja from Mukasa who was anointed the heir, if we are to go by the Will. The fact that they waited to complain after the event is good evidence that their claim is on shaky ground and reinforces my finding that they do not have a legitimate claim to the kibanja.
- 18. Regarding the complaint that Mukasa did not have letters of administration, it is not tenable because Mukasa sued in his own right

as an owner. **Isreal Kabwa v Martin Banoba Musiga Supreme Court Civil Appeal No. 52 of 1995** discusses this point in reference to Banoba who sued to recover land as the heir of the estate wherein the Supreme Court held that he had locus standi in that capacity.

- 19. Regarding the claim that the consent judgment is tainted by fraud, misrepresentation and mistake, the facts do not disclose any of these grounds.
- 20. In the premises, the application is without merit and it is dismissed with costs to the second respondent Segulani since the first respondent did not participate in the proceedings.

DATED AT LUWERO THIS 23RD TH DAY OF OCTOBER 2023

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LADY JUSTICE HENRIETTA WOLAYO

Legal representation

M/S Twikirize & Co. Advocates for the applicant. Ambrose Tabyasa & Co. Advocates for the respondent.

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