

UGANDA / JUDGMENT

Waibale and Others v The Attorney General (Miscellaneous Application 428 of 2017) [2024] UGHCCD 62 (2 May 2024)

[2024] UGHCCD 62

COURT

HC: Civil Division (Uganda)

BEFORE

Boniface Wamala, J

CASE / FILE NUMBER

Miscellaneous Application 428 of 2017

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT KAMPALA (CIVIL DIVISION) MISCELLANEOUS APPLICATION NO. 428 OF 2017 (ARISING FROM MISC. CAUSE NO. 153 OF 2015) (ARISING FROM CIVIL SUIT NO. 164 OF 2004)

1. HENRY WAIBALE

2. JEFF KIWANUKA

3. JAMAL KITANDWE AND 500 OTHERS ::::::::::::::::::::::::::: APPLICANTS VERSUS
THE ATTORNEY GENERAL ::::::::::::::::::::::::::: RESPONDENTS

BEFORE: HON. JUSTICE BONIFACE WAMALA

RULING

Introduction

- [1] The Applicants brought this application by Notice of Motion under Section 34(1) & 98 of the Civil Procedure Act and Order 52 rules 1 and 3 of the CPR seeking orders that;
- The Respondent is liable to settle and satisfy the decree in HCCS No. 164 of 2004 by paying all the awards under the said decree.
 - The sums of money so far paid by the Respondent under the memorandum signed are part of the sums due to the plaintiffs under the decree.

- c) The Auditor General computes all the outstanding allowances and pensions with accrued interest due to the plaintiffs/ Applicants and the Respondent pays the said amounts together with the balance outstanding.
- d) The Respondent and any other agency of Government have no right to stop nor interfere with the process of execution of the decree in HCCS No.

164 of 2004 and neither does the Respondent nor its agents, or assigns have the right to stop nor interfere with any agreement or arrangement of the applicants to settle their legal fees, expenses and or commission incurred in the pursuit of the fulfillment of the decree in HCCS No. 164 of 2004, with their lawyers, commission agents and or any person either as individuals or collectively as beneficiaries of the decree.

- e) All payments due to the Applicants under the decree be paid directly to the beneficiaries' accounts of HCCS No. 164 of 2004 after deducting the agreed lawyers' fees, commissions and paid to the lawyers directly namely a joint account of M/s Kampala Associated Advocates and M/s Matovu & Matovu Advocates.
- f) Costs of the application be provided for.

[2] The grounds of the application are set out in the Notice of Motion and in an affidavit in support of the application deposed by **Jeff Lawrence** one of the Applicants/ judgment creditors in HCCS No. 164 of 2004. Briefly, the grounds are that the Applicants filed HHCS No. 164 of 2004 against the Respondent seeking recovery of pension and other terminal benefits. The suit succeeded and judgment and decree were entered in their favour for payment of the sum of UGX 42,758,359,000/= exclusive of interest. Subsequently, the Applicants filed HCMA No. 153 of 2015 in a bid to collect the fruits of their judgment. During execution proceedings, the Respondent expressed interest in settling the matter provided the Applicants agreed to abandon some of the awards in the decree like pension allowances and interest. The deponent averred that considering the amount of time the Applicants had remained unpaid, they reluctantly agreed to abandon the said awards hoping their benefits would be paid expeditiously. A consent order was thus entered for payment of the sum of UGX 39,000,000,000/= (Thirty-Nine Billion Shillings only). After the computation, a memorandum of understanding for payment due to the Applicants was executed between the Respondent, the Applicants together with officials from the Ministry of Finance and the Applicants received part payment of UGX 10,000,000,000/=. However, no subsequent payments were made in line with the understanding.

[3] The deponent averred that the Respondent has no right to alter an order of court and the consent and subsequent memorandum entered is an illegality and the Applicants are entitled to all benefits under the judgment and decree in HCCS No. 164 of 2004. He further averred that the Applicants have not enjoyed the fruits of their judgment and are encountering inconvenience from the Respondent's agents who keep stopping payments without legal basis. He also stated that he is aware that the court has powers to order the Respondent to satisfy the decree and pay to the Applicants all their dues.

- [4] The Respondent opposed the application through an affidavit in reply affirmed by **Kakande Yunus**, the Secretary Office of the President. He stated that the parties entered a consent where it was agreed that the Respondent pays the Applicants the full sum UGX 39,189,499,715/= and the consent order was endorsed by court on 17th March 2014. On 21st May 2014, a memorandum of understanding was signed with the Applicant's lawyers and the Government of Uganda represented by the Permanent Secretary/ Secretary to the Treasury regarding schedules for payment of the full sum of UGX 39,189,499,715/=. On 17th December 2014, the Applicants wrote to the Attorney General endorsing the terms of the memorandum of understanding signed on 21st May 2014 which position was reiterated by the Applicants and their lawyers in letters addressed to the Permanent Secretary Ministry of Finance, Planning and Economic Development dated 12th and 13th May 2014. The deponent stated that the first payment of UGX 10,000,000,000/= was made in the Financial Year 2013/2014 and receipt of the monies was confirmed by M/s Matovu & Matovu Advocates for and on behalf of their clients.
- [5] The deponent stated that subsequently, the Inspector General of Government (IGG) received a complaint from a group of the beneficiaries

concerning mismanagement of the paid sums. The IGG wrote to the Permanent Secretary Ministry of Finance, Planning and Economic Development halting the payments under HCCS No. 164/2004, carried out investigations and made a report citing mismanagement of the terminal benefits by the court appointed leaders/representatives. The court appointed representatives were eventually prosecuted in the Anti-Corruption Court vide Criminal Case No. 2 of 2017: Uganda vs Jeff Lawrence Kiwanuka, Jamal Kitandwe and Kamugisha Bernard; for embezzlement of monies paid to them for disbursement. Later on, the Ministry of Finance further released a total of UGX 29,000,000,000/= in two installments of UGX 14,500,000,000/= in the FY 2018/2019 and 2019/2020 to the beneficiaries and the only outstanding amount now stands at UGX 189,499,715/=. He finally averred that the former ISO employees have written several letters to court challenging the instructions to bring the present application and, in HCCS No. 330 of 2019 Garia Mathew & 5 Ors vs Kasasa Bill Galiwango and 24 Others, they entered a consent judgment acknowledging that the negotiated payment of the decretal award in HCCS No. 164 of 2004 is UGX 39,189,499,715/=. He concluded that it is in the interest of justice that the orders sought in the application are not granted.

Representation and Hearing

- [6] At the hearing, the Applicants were represented by **Mr. John Matovu** and **Mr. Kakenga Emmanuel** of M/s Matovu & Matovu Advocates while the Respondents were represented by **Mr. Geoffrey Madete** from the Attorney General's Chambers. It was agreed that the hearing would proceed by way of written submissions which were filed by Counsel for the Applicant in time but the Respondent Counsel took unduly long to file. However, I have found it in the interest of justice to adopt and consider all the submissions on record in the determination of the matter before Court.

Submissions by Counsel for the Applicant

- [7] Counsel for the Applicant cited the case of **Ken Group of Companies Ltd v Standard Chartered Bank (U) Ltd & 2 Others, HCCS No. 486 of 2007** to the effect that a consent judgment cannot be varied or discharged unless obtained by fraud, collusion or by an agreement contrary to the policy of court or if the consent is given without sufficient material facts or in misapprehension or ignorance of material facts or in general for any reason which would enable the court to set aside an agreement. Counsel submitted that the consent decree entered into on 13th March 2014 can be rightly vitiated as its consideration was illegal and against the policy court. Counsel argued that the decree in HCCS No. 164 of 2014 was already a policy of court as it was at the stage of execution when the consent decree was made and that it ought to be respected to the fullest than be varied by the parties.
- [8] Counsel also cited the case of **Gaira Mathew and 6 Others v Jeff Lawrence Kiwanuka and 4 Others, HCMA No. 261 of 2016** to the effect that a judgment of a court can only have its terms altered through a competent appeal process and under supervision of a competent court of law, otherwise it must be obeyed and fulfilled in its entirety. Counsel submitted that the variation of the court decree through the memorandum and consent judgement was a nullity since it was commanding the Applicants to waive the terminal benefits which they are legally entitled to. Counsel concluded that the Applicants are entitled to all the benefits bestowed upon them under the judgment and decree in HCCS No. 164 of 2004 and prayed that any payment made under the consent decree of UGX 39,825,956,860/= is part payment of the decree and that all the other benefits dropped by the consent order of execution be calculated by the Respondent and paid to the Applicants with interest as awarded by Court in the decree.

Submissions by Counsel for the Respondent

- [9] In reply, Counsel for the Respondent relied on the case of **Hirani v Kassam 1952 EA 313** to the effect that a consent judgment derives its legal effect from the agreement of the parties and may only be set aside on the same grounds upon which a contract may be set aside or rescinded because it is governed by the ordinary principles that govern a contract. Counsel argued that the present application is misconceived for lack of authorization of the former ISO employees. To support this position, Counsel referred the Court to copies of letters dated 28th October 2020, 11th November 2020 and 11th October 2021 marked as OP 9, OP 10 and OP 11 annexed to the affidavit in reply.
- [10] Counsel also submitted that the moment the consent order was made in the presence of the parties and with the consent of counsel; and the same was endorsed by Court, it became a judgement of court and is binding on all parties to the proceedings and all those claiming under them and they are estopped from asserting different positions from the stipulated agreement. Counsel stated that the Ministry of Finance, Planning and Economic Development based on the consent order and made the first payment of UGX 10,000,000,000/

= in the Financial Year 2013/2014. Counsel further argued that the former ISO employees in the case of *Gaira Mathew & 5 Ors vs Kasasa Bill Galiwango & 24 Others* entered a consent judgment and acknowledged that the negotiated payment of the decretal award in HCCS No. 164 of 2004 is UGX 39,189,499,715/=. Counsel argued that there was no collusion, fraud and any other reason that would enable court to set aside the said consent. He stated that the Respondent has nearly satisfied the conditions of the consent order and the only outstanding amount that has not been released out of UGX 39,189,477,715/= is UGX 189,477,715/= for which the reason for the delay was communicated.

- [11] Regarding the contention that the IGG interfered in the execution process by causing investigations and arrests on private matters, Counsel submitted that the IGG acted on a complaint from a group of beneficiaries citing mismanagement of the terminal benefits by the representatives/leaders and wrote to the Secretary to the Treasury halting the payments. Counsel submitted that the transactions that led to the investigations involved funds released by government from the consolidated fund which brought the applicants under the ambit of Section 9 of the Inspectorate of Government Act which provides for the jurisdiction of the inspectorate to cover any other office or body that administers public funds on behalf of the public. Counsel concluded that the application does not meet the threshold for the remedies it seeks and prayed that it should be dismissed with costs.

Determination by the Court

- [12] The crucial question that arises in this application is whether the consent order that had an effect of varying the decree in HCCS No. 164 of 2004 can be vitiated and the said decree in HCCS No. 164 of 2004 be satisfied in the terms prior to the consent variation. The law on consent judgments/ decrees is now well settled. Parties to civil proceedings are free to amicably settle a dispute and consent to a judgment, decree or order being entered. The parties may do so orally before a judicial officer who then records the consent or they may do so in writing, affix their signatures and place the same for endorsement by the Court. See: **Order 25 rule 6 of the CPR** and the case of **Betuco (U) Ltd & Another v Barclays Bank & Others [2009] UGCommC 50**.
- [13] The law, however, provides that after a consent judgment has been entered, it may be vitiated, varied and/or set aside where it is proved that it was entered into without sufficient material facts or misapprehension or in ignorance of material facts, or if it was actuated by illegality, fraud, mistake, contravention of court policy or any reason that would enable court to set aside an agreement. See: **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** which cited with approval the following passage from Seton on Judgements and Orders, 7th Edition, Vol 1, page 124, thus;

"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 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*."

- [14] It is also the position of the law that a consent judgment/decree is passed on terms of a new contract between the parties to the consent judgment. See: *Brooke Bond Liebig (T) Ltd v Mallya (1975) EA 266* and *Mohamed Allibhai v W. E. Bukenya & Anor, SCCA No. 56 of 1996*.
- [15] On the case before me, the Applicants seek to vary a consent order that was entered into by the parties on 13th March 2014 and endorsed by Court on 17th March 2014, on account that it is against court policy and was based on an illegal consideration that commanded the applicants to waive their terminal benefits that were statutory and to which they were entitled. I am aware that it is part of the court policy to give effect to agreements freely entered into by each party with a full appreciation of its implications unless, in the circumstances, it would not be fair to the parties to the agreement. See: *Friedhelm Erwin Jost & Anor vs Roko Construction & 2 Ors [2022] UGCommC 110*. This policy of the court is well supported under our laws. Article 126(2)(d) of the Constitution of Uganda provides that when adjudicating cases of a civil or criminal nature, the courts are, subject to the law, enjoined to promote reconciliation between parties. Application of alternative dispute resolution (ADR) is currently part of our law and is deeply engrained in the policy of the court.
- [16] In the instant case, the consent order followed an agreement between the beneficiaries under the decree (through their representatives) on the one hand and the representatives of the Government on the other. There is no evidence of involvement in fraud, misrepresentation, collusion or any such factor as would vitiate a contract. The consent was entered under the supervision of the court. Contrary to the submission by the Applicants' Counsel, there is no law that bars parties from waiving awards that have been made by a court of law as long such agreement is not influenced by any vitiating factors. As such, no illegality has been shown to have affected the contract leading to the consent variation order. As submitted by Counsel for the Respondent, even the involvement of the Office of the Inspectorate of Government (OIG) in the process of payment of the decretal sum was well grounded both in law and on the facts.
- [17] I also find that there was no misapprehension of facts and, as already pointed out above, the agreement was not contrary to the policy of the court. It is, further, part of the policy of the court that there must be finality to litigation. Pursuant to the said agreement and consent order, and by effecting payments as per the consent order and memorandum of understanding between the parties, the Respondent had clear intentions of bringing this matter to finality. If the present argument by the Applicants was to be accepted, it will lead to results that are contrary to those intentions as it could have the effect of opening up a floodgate of litigation.

- [18] The other intrinsic point is that, having attained benefits from the consent order, it would be against the principle that guards against approbation and reprobation for the Applicants to jump out of an arrangement that was mutually concluded, endorsed by the court and acted on by both sides; to the benefit of the Applicants and to the detriment of the Respondent. In such circumstances, the Applicants would be estopped from reverting to the earlier position and would only be entitled to claiming the balance of UGX 189,000,000/= that has not been paid.
- [19] In the application, the Applicants also sought declarations to the effect that the agreements that were made by the Applicants with their lawyers and commission agents are legally enforceable and should not be interfered with by the Respondent. In law, champertous and maintenance agreements are prohibited by the law and thus unlawful. See: *Shell (U) Ltd & 9 Others v Rock Petroleum & 2 Others, HCMA No. 645 of 2010*. Champertous agreements include agreements that involve buying another's law suit, sharing the spoils of litigation and agreements where advocates make provision for taking a portion or percentage of the decretal sum upon successful litigation.
- [20] In this case, the facts allude to agreements with lawyers and commission agents for payment of legal fees, expenses, and commissions as being part of the sums to be defrayed from the decretal sum; which arrangement the Applicants do not want the Respondent to interfere with. In my view, the above arrangement and agreements amount to champerty and are thus illegal. This Court cannot aid their recognition and enforcement. The advocates that have duly represented the judgment creditors in HCCS No. 164 of 2004 and the subsequent matters that have not been paid will have to file their respective bills of costs for proper taxation by the Court. The dispute as to which advocates have instructions to represent the beneficiaries was not part of this application and I have not made any pronouncement in that regard.
- [21] In all, therefore, the application by the Applicants is not made out. The application is accordingly dismissed with orders that;
- a) The Respondent shall settle the outstanding decretal sum of UGX 189,499,715/= in favour of the beneficiaries under the decree in HCCS No. 164 of 2004 within a period of not later than one year from the date of this order.
 - b) The advocates' fees and costs in all earlier proceedings shall be determined in accordance with the Advocates (Remuneration and Taxation of costs) Rules.
 - c) Each party shall bear their own costs of this application.

It is so ordered.

Dated, signed and delivered by email this 2nd day of May, 2024.

Boniface Wamala JUDGE

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