

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MASAKA
MISC. APPLICATION NO. 240 OF 2023
(Arising from Miscellaneous Cause No. 103 of 2022)

GRACE BITAMALE:.....APPLICANT

VERSUS

1. EMMANUEL KAMIHINGO:..... RESPONDENTS

2. THE COMMISSIONER LAND REGISTRATION

Before: Hon Lady Justice Victoria Nakintu Nkwanga Katamba

RULING

This application is brought under Order 46, Order 52 Rules 1 and 2 of the Civil Procedure Rules SI 71-1, Sections 98 and 82 Civil Procedure Act Cap 71, and Section 33 of the Judicature Act Cap 13 seeking orders that the Consent Order of 3rd November 2023 in Miscellaneous Application No. 103 of 2022 compelling the Commissioner Land Registration to vest property described and comprised in Mawogola Block 46 Plot 12 in Kyambogo Sembabule District to the 1st Respondent be reviewed, set aside and or annulled, and costs of the application.

Background of the Application:

The application is brought on the grounds that:

The Applicant, Grace Bitamale, is aggrieved by the Consent judgment and order endorsed by this Court on the 3rd day of November 2023 in Miscellaneous Application No. 103 of 2022 compelling the Commissioner Land Registration to vest property described and comprised in Mawogola Block 46 Plot 12 in Kyambogo Sembabule District which the Applicant is registered owner, to the 1st Respondent. Further, the 1st Respondent is fraudulently trying to attain registration of the said land despite the pending suit at the High Court Vide High Court Civil Suit No. 4 of 2020 touching the same subject matter and pending determination by this Honorable Court.

In his affidavit in reply, the 1st Respondent opposed the application and stated that the Application is incompetent and should be struck out since the Application has no grounds for this court to grant an interim order restraining any party from effecting the proprietorship of the suit land.

The 2nd Respondent never filed their Affidavit in reply to this matter and, therefore, not on court record.

Submissions:

Both Parties filed written submissions, and they are on court record.

Counsel for the Applicant submitted that the Applicant is aggrieved in so far as he is the registered proprietor of the said land and is also the holder of the Certificate of Title, which is the subject of Litigation in Civil Suit No. 4 of 2020, and this Application is bolstered by the Provision of the subsisting laws under Section 33 of the Judicature Act, Section 82 of the CPA and Order 46 Rule 2 of the CPR.

Counsel further submitted that Civil Suit No. 4 of 2020 was filed following the direction of the court to determine the substantive issues pertaining to the suit land. That the impugned consent order was obtained in utter disregard of the pending suit and as such was obtained erroneously, and spells errors on the face of it. Counsel cited and relied on the case of A.G & Anor VS James Mark Kamoga & Anor SCCA NO. 8 of 2004 on reviewing and or setting aside consent judgments and submitted that executing the consent order in MA No 103 of 2022 to circumvent the procedure of the court is an abuse of court process and a contravention of court policy that should not be warranted by the court and warranting the setting aside of the consent order. Counsel prayed that this Honorable court allows this Application and awards the costs thereto to the Applicant.

In response, Counsel for the Respondents argued that the Applicant has no locus standi to apply for review as he is not an aggrieved party since there was no remedy sought against him in the application that resulted in the consent order being challenged. Counsel relied on Section. 82 of the CPA and also cited the case of Associated Drivers and Operators Institute for Taxi And Travelers Agencies VS UTODA & Anor HHCMA NO. 451 OF 1998 to argue that the Applicant is not an aggrieved party and has no grounds for the grant of a review. Counsel prayed for Application to be found incompetent and sought to be dismissed with costs to the 1st Respondent.

Determination of the Application:**Whether the Applicant has proved the grounds of the application:**

Before considering the grounds of the application, I have to observe that the 2nd Respondent did not file an affidavit in reply to the application, and as such, this application is proceeding against the 2nd Respondent unopposed.

Further, the Respondents challenged the Applicant's locus to file this application. Counsel for the 1st Respondent submitted that the Applicant has no locus standi to apply for review of the consent judgment since he is not an aggrieved party in consideration of ***Section 82 of the Civil Procedure Act***.

This application for review seeks to challenge the consent order arising from HC MA No. 103 of 2022 between the 1st and 2nd Respondents, to which the Applicant was not a party.

Section 82 of the Civil Procedure Act Cap 71 provides that:

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

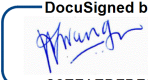
(b) by a decree or order from which no appeal is allowed by this Act,

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

The question to determine is whether or not the Applicant is an aggrieved party in the instant application and in consideration of the application from the impugned consent order originated.

The wording of Section 82 as to who can bring an application for review refers to “**Any person who considers himself or herself aggrieved....**”. To this end, is the Applicant aggrieved by the consent order being challenged in the instant application?

Counsel for the 1st Respondent argues that the Applicant is not an aggrieved party since he was not a party to the application from which the consent order originated, and neither was any order sought against him to warrant him being an interest party.

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The Supreme Court has already settled the matter as to who can be considered an aggrieved party in applications for review, specifically determining that even a third party who was not a party to the order or decree being challenged can be an aggrieved party. The Supreme Court in ***Mohamed Alibhai v W.E. Bukenya Mukasa & Anor (Civil Appeal No. of 1996)*** stated that an aggrieved party within the meaning of section 83 of the CPA means a person who has suffered a legal grievance. The court further agreed with the holding in ***Re Nakivubo Chemists (U) Ltd and In the matter of the Companies Act (1979) HCB 12, where Yusuf v Nokrah (1971) EA 104*** was cited with approval that an aggrieved party includes any party who has been deprived of his property. As to whether a third party can bring an application for review of a judgment as an aggrieved person, the Supreme Court, in finding that the Applicant had no locus to apply for review, relied on the fact that in addition to not being party to the proceedings that resulted in the consent judgment sought to be reviewed, there were no facts at the material time from which he could be considered as an aggrieved party within the meaning of Section 83 of CPA and Order 42 r 1 so as to clothe himself with a right to present an application for review.

In the instant case, the consent order sought to be challenged resulted from MA No 103 of 2022 between the 1st and 2nd Respondents in which they agreed that the 2nd Respondent implements the vesting order issued by the court in MA No 22 of 2012. Although MA No. 22 of 2012 was between the 1st and 2nd Respondents, the vesting order issued therein was challenged in MA No 158 of 2019 by the Applicant against the 1st and 2nd Respondents, in which this court directed the Parties who are the same parties herein to file a civil suit in which the issues raised would be heard and determined.

In consideration of the decision of the Supreme Court in ***Mohammed Allibhai V W. E. Bukenya (supra)***, I find that there were facts at the material time when the consent judgment and order were entered warranting the Applicant to be an aggrieved party. In addition, the land that is subject to the vesting order sought to be implemented by the consent order being challenged is not disputed to be registered to the Applicant; hence, implementing the consent order would deprive him of his interest unheard, making him an aggrieved party.

I, therefore, find that the Applicant has *locus standi* as an aggrieved party to bring this application for review of the consent order between the 1st and the 2nd Respondent.

Grounds of the Application:

Whether the Applicant has proved sufficient cause for the grant of the application:

The grounds for review of a consent order have been settled by the Supreme Court. In the case of *Mohammed Alibhai V W. E. Bukenya(supra)*, the Supreme Court observed that a consent judgment may be set aside for fraud, collusion, or any reason that would enable the Court to set aside an agreement. The court further cited and relied on the Case of *Hirani v Kassam (1952) 19 EACA, 131*, where similar views were expressed by the Court of Appeal for Eastern Africa quoting the following passage from *Seton of judgments and Orders 7th Ed. Volume 1 at page 124* with approval:

"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 these 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."

In consideration of the above observation of the Supreme Court and passage, a consent judgment is like an ordinary contract that can be reviewed or set aside on the same grounds as vitiating factors of a contract. The grounds for review of a consent judgment in consideration of the Supreme Court's observation are:

- a) Fraud or collusion.
- b) Agreement contrary to the policy of the court.
- c) Sufficient material facts.
- d) Misapprehension or ignorance of material facts.
- e) Any reason that would enable the Court to set aside an agreement.

In the instant application, the consent order sought to be reviewed was entered to implement the vesting order issued in MA No. 22 of 2012 touching the land to which the Applicant is a registered proprietor. The Applicant seeks to rely on the ground of fraud, claiming that the 1st Respondent fraudulently tried to attain registration of the land that rightly and legally belongs to the Applicant. Counsel for the Applicant further argued that the 1st Respondent's act of filing MA No. 103 of

2022, from which the consent order arose, to circumvent the set procedure of the court is an abuse of process and a contravention of court policy warranting the setting aside of the impugned consent order. Counsel for the Applicant cited and relied on the case of *A.G vs. Jamea Kamoga & Anor SCCA No. 8 of 2004* to buttress their argument on the grounds of review of a consent judgment and the definition of abuse of court process being the use of court process for an improper purpose for which the process was not established.

Counsel for the 1st Respondent challenged that the Applicant has not explained how the actions of the 1st Respondent amount to abuse of court process and further that the vesting order in MA. No. 12 of 2012 has never been set aside, yet this application is disguised as an application seeking to review the vesting order.

I have carefully considered the application, the evidence, and submissions of both Parties, as well as the different records from which the consent order sought to be challenged arises.

The Consent Order that is the subject of this application was entered into between the 1st and 2nd Respondents and endorsed by this Court. The said Order arose from a vesting order granted in MA No. 22 of 2012 between the 1st and 2nd Respondents. The Applicant, however, applied for a review of the vesting order vide MA. No. 158 of 2019, an application that was before this court.

The ruling of this court in MA No. 158 of 2019 established that there was indeed a mistake and error on the face of the record, having granted the vesting order without considering the interest of the Applicant herein as he was not a party to MA. No. 158 of 2019. The court further noted that a review would not resolve the substantive error and advised the Parties to file a civil suit in which the issues would be heard and determined. Although the application was not allowed, the ruling of the court clearly shows that there is an imminent and substantive issue touching the land that is subject to the vesting order in MA No. 22 of 2012 that ought to be determined and settled on its merits. This was the reason that the court directed the parties to file a civil suit to resolve the merits of their grievance. Indeed, the 1st Respondent proceeded to file Civil Suit No. 4 of 2020, to which the Applicant and 2nd Respondent in the instant application were Parties. This suit was, however, withdrawn following this application.

Despite having complied with the direction of this court which was intended to do justice, the 1st Respondent filed MA No.103 of 2022 without involving the Applicant in the instant case, seeking


to enforce the vesting order in MA. No. 22 of 2012 in utter disregard of the Applicant's interest, grievance, and the direction of this court. I find that this was done in bad faith. The case of ***Fredrick Zaabwe vs. Orient Bank & Others SCCA No. 04 of 2006*** referred to the ***Black's Law Dictionary 6th Edition page 660***, and defined, "***Bad faith and fraud to be synonymous, and also synonymous with dishonesty, infidelity, faithlessness, perfidy, unfairness.***" It was unfair and an act of bad faith for the 1st Respondent to file an application disregarding the direction of this court, which was intended to do justice and determine the substantive issue pertaining to the contested land. The 1st Respondent's action was, therefore, in contravention of this court's direction, and the consent order resulting from the action amounts to an agreement reached contrary to the earlier direction of the court. I am in agreement with the Applicant that using the court process to obtain an order contrary to the direction of the court was an abuse of the court process. Therefore, the Applicant has proved that there is sufficient reason warranting the review of the consent judgment and order in MA No. 103 of 2022.

In the final result, I find merit in the application in as far as the consent order resulted in an agreement that was contrary to the policy of this court as the court had directed the Parties to file the civil suit to determine their grievance on its substantive merits. I find that there is sufficient reason warranting the grant of review of the Consent Order granted by this court in Misc, Application No. 103 of 2022, granted on the 14th day of November 2023.

The Consent Order resulting from the consent judgment in Miscellaneous Application No. 103 of 2022 dated the 2nd day of November, 2023 is hereby reviewed and set aside. Costs of the application are awarded to the Applicant.

I so order.

Dated at Masaka this 15th day of February 2024.

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Victoria Nakintu Nkwanga Katamba
Judge

