

THE REPUBLIC OF UGANDA
IN THE HIGH COURT AT KAMPALA

LAND DIVISION

MISCELLANEOUS APPLICATION NO. 318/ 2021

ARISING FROM CIVIL SUIT NO. 2022 OF 2016

MUGERWA JOHN SURVEYAPPLICANT

VERSUS

1. VINCENT LUBEGA..... RESPONDENTS
2. AKETA FARMERS & MILLERS LTD

Before: Lady Justice Alexandra Nkonge Rugadya

RULING:

Introduction:

This application seeks to review and set aside a consent order granted on the 25th day of January 2021. The grounds are set out in the affidavit of Mr. Mugerwa John Harvey, the applicant.

Grounds of the application:

The grounds of the application are laid out in detail in the supporting affidavit of the applicant of John Harvey Mugerwa, the applicant, and the supplementary affidavit of, Mr. Luwambya Musa, an advocate with **M/S Sserunjoji, Mwebaze & Co. Advocates.**

The applicant is the registered owner of the land comprised in **FRV 1342 Folio 18 Busiro, plot 600, block 404 land at Namugonde** which falls within the boundaries of the land described as **Busiro Block 415 plot 15, land at Bwerenga.**

The applicant seeks to challenge the consent of 13th October, 2020 entered between the learned counsel for either side regarding a joint survey of the suit land, pending the hearing of the main suit.

5 The consent which according to him was mistakenly arrived at by counsel Wetaka Andrew since he had no instructions and was merely holding brief for counsel Musa Luwambya who was in personal conduct of the matter.

10 The applicant claims that counsel Wetaka who was appearing for the first time lacked proper instructions. Counsel for the respondent took advantage of him to enter into a consent which had been previously rejected by other judicial officers on account of the parties' divergent interests. That without proof of ownership by the respondents there was likelihood of prejudicing the merits of the main suit.

15 In the supporting affidavit by Mr. Luwambya Musa an advocate with the applicant's firm, he depones that on the date of 13th October, 2020 the day when the consent was made he had travelled to Jinja to attend to another case and counsel Wetaka had stood in for him, to represent the applicant.

According to Luwambya, the order has stalled the trial and progress of the suit, given that the respondents have not been able to produce their alleged certificate. He claimed that although Mr. Wetaka had been party to the consent, the same was entered without instructions from the applicant.

20 Furthermore, that the applicant could not attend the hearing on that day given that he had been bed-ridden following an accident.

That the consent was prejudicial to the interests of the applicant and should therefore set aside.

Reply by the 2nd respondent:

25 The affidavit in reply was filed by Mr. Luganda Fred, who holds powers of attorney for *Aketa Farmers and Millers*, the 2nd respondent. He objected to the application, contending that the consent order has already been executed after the appointment by the Deputy Registrar of a surveyor.

The surveyor has since surveyed the plots in issue and even filed a report that is already on record. Accordingly, the orders sought have been overtaken by events.



By way of a brief background, the 1st respondent who had filed the action for trespass against the applicant later withdrew the suit. He did not file any reply to this application. The 2nd respondent was added as a party based on the applicant's counterclaim.

Representation:

5 For the applicant, a notice of joint instructions was filed in court by **M/S Sserunjoji, Mwebaze & Co. Advocates**, jointly instructed with **M/S Wetaka, Bukenya & Kizito Advocate**. The notice of instructions is dated 24th February, 2021. Another notice of instructions was on 30th March, 2021 filed by **M/S Najjuma, Nakalule & Co. Advocates**.

10 **M/S Sserunjoji, Mwebaze & Co. Advocates** filed the application on 24th February, 2021; while **M/S Najjuma, Nakalule & Co. Advocates** filed the written submissions. The applicant however did not file any rejoinder.

The 2nd respondent on his part was, and has been at all material times represented by **M/S Kintu Nteza & Co. Advocates**.

Consideration of the issue:

15 I have had occasion to study the pleadings and arguments raised by either side and I need not repeat each point or matters raised in detail. I have however taken each of these into consideration.

20 Suffice to note and state here that the order sought to be reviewed was granted by court following a consent of the lawyers representing both parties on 13th October, 2020. On 22nd January 2021 counsel for the applicant, Mr. Wetaka had orally moved court to set aside the consent order for a for joint survey, of which he had been part.

25 Court had reserved its ruling until 25th January 2021. It gave its reasons for rejecting the oral application by the very counsel who was there to represent the applicant on that day. A surveyor was later appointed by the Registrar of this court as per the order of this court. It was the 2nd respondent's claim that the surveyor's fees had been agreed upon and paid, which claim was not challenged. The exercise was conducted and a report was filed on 15th March, 2021. The conduct of the survey exercise was clear indication that the order had been fully executed.

In those circumstances therefore as highlighted, it comes as no surprise that the applicant did not file a rejoinder to challenge the points raised by the 2nd respondent.

30 Court also took particular note of the fact that Mr. Wetaka had been duly instructed as early as 20th June, 2020, to represent the applicant. Those instructions were never withdrawn.

As a matter of fact when on 24th February, 2021, (months after the consent had been filed) joint instructions were issued by the applicant to **M/S Sserunjoji, Mwebaze and Co. advocates** and **M/S Wetaka, Bukenya & Kizito Advocate**, this was sufficient confirmation that Mr. Wetaka's firm remained with instructions, even after he had endorsed the consent.

- 5 There is nothing on record to show that prior to 13th October, 2020 when the consent was made, **M/S Sserunjoji, Mwebaze and Co. advocates** had obtained instructions to represent the applicant.

Both the supporting affidavit and the supplementary affidavit filed on 24th February, 2021 therefore contain falsehoods. It is trite that an affidavit which contains untruths taints an application, thus making it incurably defective.

Also noted in passing was the fact that although the application had been filed on 24th February, 2021, the survey was conducted on 26th February, 2021 and the survey report was filed in court on 15th March, 2021.

- 15 The directives of court to parties to file written submissions in respect of this application were made on 18th March, 2021 after the report was already filed, which information was never brought to the attention of court at the time at the material time.

- 20 The matters raised in this application, as correctly pointed out by the counsel for the 2nd respondent have in any case already been addressed by this court. Thus going by the provisions of **section 7 of the Civil Procedure Act, Cap. 71** this court is barred from trying any issue which has been directly and substantially in issue in a former issue between the same parties and finally determined.

An order seeking to set aside an already executed order would be an order made in vain.

The application in its form appears as a veiled attempt to appeal to the same court against its own order.

- 25 In light of the above, I therefore dismiss the application with costs.



Alexandra Nkonge Rugadya

Judge

8th June 2021

Delivered by email
Anhang J
16/6/2021