

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(LAND DIVISION)

MISCELLANEOUS APPLICATION NO.2175 OF 2021
(Arising out of Civil Suit No. 578 OF 2021)

AND

MISCELLANEOUS APPLICATION NO.2176 OF 2021
(Also Arising out of Civil Suit No. 578 OF 2021)

1. **BIGAMBO ANANIYA**
2. **ANDERA KAPARISI YOSAM:.....APPLICANTS**

VERSUS

1. **LWANGA MIKE**
2. **KAKWENZIRE DAVIS:.....RESPONDENTS**

Before: Hon. Alexandra Nkonge Rugadya.

RULING.

Introduction:

The applicants brought this applications by notice of motion under the provisions of **Section 82 of the Civil Procedure Act Cap.71 and Order 46 rule 1 of the Civil Procedure Rules SI 71-1**, seeking an order for review and setting aside the consent judgement and decree in **Civil Suit No.578 of 2021**; as well as costs of the application.

Based on their fears that the respondents were in the process of executing the decree, they also filed **MA No. 2176 of 2021** for orders that the execution of the consent decree be set aside until the determination of their application for review and setting aside of the decree. The prayers sought under the two applications can be comfortably dealt with under one ruling.

Background of the application.

The background of the main application is that the 2nd respondent Kakwenzire Davis instituted **Civil Suit No.578 of 2021** against the 1st respondent, Lwanga Mike, seeking among others; a declaration that he (2nd respondent) was the equitable owner of land comprised in **Bulemezi Block 1021 plot 45 measuring approximately 59.232 hectares & plot 48 & 49 measuring approximately 58.207 hectares** (hereinafter referred to as the 'suit land'), having purchased the same from the defendant/1st respondent; an order of

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specific performance against the defendant to give vacant possession to the plaintiff/2nd respondent; an order to open boundaries as well as a permanent injunction restraining the defendant/1st respondent), his agents, servants or employees or any other person claiming under them from any further trespass or laying claim to, and carrying out any other activities on the suit land.

In that suit, the plaintiff claimed that by agreement dated 6th May, 2021, he purchased the suit land from the defendant for a consolidated sum of **Ug.x 800,000,000 (Uganda shillings eight hundred million only)**, 50 % of which had been paid upon execution of the agreement.

It was also agreed that upon receipt of the monies, the defendant would not only cause the opening of boundaries of the said land but also mobilize the neighbors as well as the local leaders to enable the plaintiff to carry out the boundary opening. Despite several reminders however, the same did not happen.

Grounds of the application.

The grounds supporting the application are contained in the affidavit in support of the 1st applicant, which was sworn on behalf of the 2nd applicant. The grounds are mainly that the applicants have since 3rd November 2015 been the registered proprietors of land comprised in **Private Mailo Block 1026 plot 46** and **Private Mailo Block 1021 plot 45 measuring approximately 59.2 hectares** which they have been, and are still in possession of.

That on 9th September 2021, the applicants learnt that this court issued a decree in **Civil Suit No.578 of 2021** by which the 1st respondent was to grant vacant possession to the 2nd respondent and yet the 1st respondent has never been in possession of the suit land despite the fact that according to the record in **Miscellaneous Application No.1874 of 2021**, the 1st respondent claims to be in possession of the title of the suit land described as **Private Mailo Block 1021 plots 45 measuring 59.232 hectares and plots 48 & 49 measuring 58.297 hectares respectively**.

In addition, that while the 1st respondent was registered on the certificate of title on the 10th June, 2019 as the administrator of the estate of the late Yosia Kibuyaga, the said estate is unknown to the applicants and that there is no evidence of the deceased or their estate and it is the applicants' belief that the title possessed by the 1st respondent was obtained fraudulently.

Further, that not has the 1st respondent never been in possession of the suit land, but he is also not known to the applicants and, that the respondents in 2021 entered into the sale agreement and subsequent consent judgement well aware of the ownership and possession of the suit land by the applicants.

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That while the entire transaction is tainted with gross illegality and fraud, the applicants cannot go unheard since they have demonstrated proprietorship of the suit land, a fact which was deliberately omitted from the proceedings in the main suit therefore, there is sufficient ground warranting the review and setting aside of the said consent judgement as well as the
5 decree in **Civil Suit No.578 of 2021**.

The application is opposed through the affidavit in reply of the 1st respondent and a supplementary affidavit deponed by the 2nd respondent. The respondents strongly objected to the validity of the application stating that the affidavit in support thereof is not only fundamentally defective, but is also false.

10 That the 1st respondent being the administrator of the late Yosiya Kibuyaga is the registered proprietor of the land comprised in **Bulemezi Block 1021 Plots 45, 48 & 49 land at lulenge Nakaseke District** and that the certificates of title in respect of **plots 45 & 46** in the applicants' are forgeries as they have glaring inconsistencies including the fact that the
15 certificate of title in respect of **Bulemezi Block 1021 plot 46** does not exist at the Bukalasa Land registry as per the copy of the search report attached tom the affidavit marked **Annexure 'B'**.

The 1st respondent further admits the fact that upon being sued by the 2nd respondent, the two entered into a settlement which was endorsed by this court and the vacant possession
20 agreed on by the respondents was premised on the fact that cattle keepers also known as balalo tend to drive their cattle on the suit land.

The 1st respondent also admitted that he is in possession of the certificate of title for land comprised in **Bulemezi Block 1021 plots 45, 48 & 49 land at Lulenge** and that they are genuine. He further averred that while the applicants herein claim the ownership of the
25 disputed land, the subject of **Civil Suit No.578 of 2021** dates back to the late Yosiya Kibuyaga, the 1st respondent's grandfather who obtained the same from the late Temutewo Bali Okwabe who owned land described as **Bulemezi Block 1021, plot 13** from which the suit land emanated.

In addition, that the 1st respondent obtained interest in the suit land without committing any
30 kind of fraud as he was registered as the administrator of the estate of the late Yosiya Kibuyaga, and that by virtue of holding the certificates of title, he qualifies to have legal possession of the same and has the authority to sale the suit land as he had done, to the 2nd respondent; and therefore lawfully entered the consent judgement. He maintained that there is no evidence to show any form of illegality or fraud.

35 In rejoinder, the applicants averred that the respondent's reply was general and that he deliberately neglected to affirm whether or not he was in possession of the suit land which he purported to give vacant possession. They maintained that the consent judgement was

5 entered under fraudulent misrepresentation and that there is sufficient cause to review and set aside the same since there is proof that there are serious matters for investigation and adjudication in the main suit. The consent judgement is tainted with fraud as according to them it was entered without consideration of the applicants' interests which the 1st respondent was fully aware of.

The applicant is represented by **M/s Muhumuza Kateeba & Co. Advocates** while the respondents were represented by **M/s Kodili & Co. Advocates**. Both counsel submitted written submissions in support of their respective clients' cases as directed by this Court.

10 The issue for determination by this court is whether or not the application merits review and setting aside the consent judgement and decree in **Civil Suit No. 578 of 2021**.

Resolution of issues.

15 I will deal with the objection raised by the respondents on the validity of the affidavit in support. In paragraph 2 of the affidavit in support the 1st applicant purported to swear the affidavit on behalf of the 2nd respondent but without attaching any written authority to support that averment.

Relying on the authority of **Lena Nakalema Binaisa & 3 others vs Mucunguzi Myers MA No. 0460 of 2013** his argument was that an affidavit is defective by reason of being sworn on behalf of another without showing that the deponent had the authority of the other.

20 Counsel for the applicants in rejoinder relied on the decision in **Bankone Ltd. vs Simbamanyo Estates Ltd. MA No. 645 of 2020**, where court ruled that in what is required in affidavits is the knowledge and belief of the deponent, rather than authorization by a party to the litigation. Counsel however did not avail to court a copy of the decision.

25 In the current application, he added and court duly acknowledges that fact, that the 2nd applicant had confirmed and/or did not deny the due authorization by him in his accompanying affidavit. That objection is accordingly overruled.

Now I proceed to the merits of this application.

30 **Order 46 rule (I) of the Civil Procedure Rules SI 71-1**, provides that any person considering himself or herself aggrieved by decree or order from which an appeal is allowed but from which no appeal has been preferred, or from which no appeal is allowed may apply for a review of the judgment to the court that passed the decree or made the order. **[See also: Section 83 CPA]**.

It is a well settled principle that a consent decree cannot be set aside save for the reason that would entitle a court to set aside an agreement on such grounds as fraud, mistake, misapprehension or contravention of court policy.

This principle is premised on the fact that a consent decree is passed on terms of a new contract between the parties to the consent judgment. (*Refer to; Attorney General and Uganda Land Commission v. James Mark Kamoga*, S.C. Civil Appeal No. 8 of 2004; also see: *Hirani v. Kassam* [1952] EA 131;; *Brooke Bond Liebig (T) Ltd v. Mallya* [1975] 1 EA 266; *Edison Kanyabwera v. Pastori Tumwebaze* [2001 – 2005] HCB 98 and *Babigumira John and others v. Hoima District Council* [2001 – 2005] HCB 116)

In the case of *Hirani Vs Kassam* (1952) 19 EACA 131, the court citing *Seton of Judgments & Orders*, 7th Edition. Vol 1 p. 124, had this to say:

“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 those 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 the instant case, the decree was entered before the Registrar of this court, His Worship Kintu Simon Zirintusa on 26th August, 2021, in the presence of the plaintiff and his counsel, Mr. Seryazi Wilberforce and the defendant in the presence of his counsel, Mr. Kitimbo Simon. On the face of it therefore it was binding onto the parties.

The terms of the consent decree were:

- 1) *The boundary opening of the suit land comprised in Bulemeezi Block 1021, plot 45 measuring approximately 59.232 hectares and plots 48 and 49 measuring approximately 58.207 hectares land at Lulenge , Kinoni Nakasongora district be carried out by the plaintiff.*
- 2) *That the defendant and/or his agents give vacant possession of the same to the plaintiff.*
- 3) *That the plaintiff pays to the defendant Ugx 400,000,000/= (shillings four hundred million) within four months from the date of boundary opening and vacant possession.*
- 4) *That the suit against the defendant is hereby withdrawn.*
- 5) *That each party bears its own costs.*

It was the applicants' argument that the consent in issue granted vacant possession of the suit land to the 2nd respondent by the 1st respondent, the administrator of the estate of the

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late Yosia Kibuyaga who has never been in possession of the land. The 2nd respondent in the main suit had filed for specific performance of a contract of sale for the same land.

Furthermore that the certificate of title that he possesses was fraudulently obtained and that the applicants entered into the said transaction and subsequent consent fully aware of the applicants' interest and possession of the suit land.

The applicants attached to their application for stay, a copy of the plaint for the suit which they and two other plaintiffs to whom the land had been transferred intended to file against both respondents and the Commissioner, Land Registration. They also attached a copy of their notice of intention to sue them, dated 26th September, 2021, receipt of which had been acknowledged. Court also noted that none of the plaintiffs as listed in that plaint had been party to the suit under which the decree had been made.

In their pleadings they indicated that they had an earlier legal interest created as early as 30th November, 1993 on **Bulemeezi Block 1021 plot 13, private mailo, vide Inst. No. BUK 50906**, over that same land and therefore sought cancellation of the titles that had later been created in respect of the land comprised in **Block 1021 plots 45, 48, 49**, land at Lulenge., measuring approximately **59.232 and 58.207 hectares**, respectively, registered in the names of the 1st respondent..

That the subdivisions were made in 2015 creating **plots 45, 46 and 47** (the residual title) only to discover later that **plots 45, 48, 49** were created from the subject land but with no history, and were transferred in favour of Mr. Lwanga Michael, the 1st respondent in the year 2019. The 1st respondent's contention was that his grandfather had interest in the original **plot 13**. The land was later subdivided and sold by him to the 2nd respondent who has since threatened them with eviction as the pleadings indicated.

The plaintiffs/applicants claimed that they were in physical occupation over **plots 45 and 46**, overlapping with the plots which had been fraudulently created by the defendants/respondents. Hence the intended suit against the defendants/respondents.

The respondents in their response however denied the claims and attached to their affidavits in reply a copy of a search request authored by the Nakaseke RDC, on the several **plots 45-49 Bulemeezi Block 1021**, which were the subject of the dispute.

The office of the Commissioner Land Registration received the request on 31st August 2021 and indicated that **Plot 46** did not exist as the same had been subdivided to create **plots 48 & 49**, which according to **Annexure B1** was registered in the names of Lwanga Michael, as the administrator of the estate of the late Yosiya Kibuyaga.

Plot 45 was also in the names of the same person. As for **plot 47** it could not be traced on the system although it did exist in the *kalamazoo*.

In the sale agreement dated 9th April, 2021, Lwanga the 1st respondent, registered in the 1st respondent's names as the administrator of the late Yosia Kibuyaga, as of 10th June 2019, had sold **plots 48 and 49** to the 2nd respondent and the decree, which is the subject of the application had been entered in August, 2021, for land comprised in **Bulemezi Block 1021 plots 45, 48 & 49**.

The application thus raises pertinent issues as to how subdivisions had been made, duplication of titles and third party interests created, whether by design or sheer inadvertence through the office of the Registrar, which in any case had not been party to the main suit under which the decree was passed.

It is also crucial for court to establish whether or not the illegalities/irregularities as detected which had resulted in the duplication of titles, had been done with the knowledge and consent of any of the parties.

An illegality once brought to court's attention overrides all manner of pleadings and cannot therefore be sanctioned. (**Makula International Ltd vs His Eminence Cardinal Nsubuga & Anor Civil Appeal No. 4 of 1982**).

Section 59 of the Registration of Titles Act Cap. 230 stipulates that a certificate of title is conclusive evidence of ownership of the land. Save where fraud is proved, a registered proprietor therefore has indefeasible title against the whole world. In this case it was difficult to establish which of the parties had lawfully obtained registration.

Thus while it is established from the application that the applicants may be aggrieved parties under the consent, a review procedure will not be conclusive or sufficient to establish which of the parties in this application and in the intended suit had acquired earlier/valid interests in the suit land.

Fraud must be specifically pleaded and proved through a trial, where all affected parties must be accorded a proper and fair hearing and where orders for cancellation may be made. All in all. The application raises triable issues which therefore enjoins this court to subject all evidence presented in this application to a proper test.

But secondly, as established from the intended suit attached to the application, a fresh cause of action arises which calls for serious investigations and adjudication by court, and which may require the respondents/defendants to file a defence different from what they filed in the main suit under which this application arises.

Section 98 of the CPA gives power to this court to grant orders to meet the ends of justice or prevent the abuse of court process. Based on those powers, and in the interest of justice, I would grant this application and a stay of the execution of the consent decree, pending the conclusion of the matters arising under the fresh suit.

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Miscellaneous Application No. 2176 of 2021 for a stay of execution of the consent order in **Civil Suit No. 578 of 2021** pending the review is accordingly disposed of.

Each party to bear its own costs.

5 **I so order.**

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Alexandra Nkonge Rugadya

Judge

10 **17th January 2022.**

*Delivered by email
Alexandra J
18/1/2022*