THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
COMMERCIAL COURT DIVISION

HCT-00-CC-MA-0243-2009
(ARISING FROM HCT-00-CC-CS-040–2008)

BETUCO (U) LTD AND ANOTHER…… …….. APPLICANTS

VERSUS

BARCLAYS BANK OF UGANDA LTD & 3 OTHERS……..RESPONDENTS

BEFORE: HON MR. JUSTICE LAMECK N. MUKASA

RULING:

This is an application brought by Notice of Motion under section 98 of the Civil Procedure Act and Order 52 Rules 1 and 3 of the Civil Procedure Rules seeking orders:

1. To set aside the Consent Judgment dated 25th March 2009 in HCT-00-CC-CS-040-2008.
2. Provide for costs of the application.

The grounds for the application are briefly that:-

1. The Directors of the Applicants signed the Consent Judgment under a mistaken and/or misrepresentation as to the true contents of the judgment.

2. In signing the Consent Judgment the parties were not ad idem
3. The mediation proceedings were so fundamentally defective that they did not bind the Applicants.
4. It is fair and just that this application be allowed in favour of the Applicants.

Representation was Mr. James Muhumuza for the Applicants and M/s Kanyerezi-Masembe and Ernest Sembatya for the Respondents.

In *Peter Muliira Vs Mitchell Cotts Ltd CACA No. 15 of 2007* Hon Justice Kitumba, JA stated:-

> "The law regarding consent judgment is that parties to a Civil Suit are free to consent to a judgment. They may do so orally before a judge who then records the consent or they may do so in writing and affix their signatures on the consent. In that case still the Court has to sign that judgment. A consent judgment may not be set aside except for fraud, collusion or for ignorance of material facts."

The Consent Judgment in issue was reached through mediation proceedings. Mediation is governed by the Judicature (Commercial Court Division) (Mediation) Rules, 2007 (herein referred to as Mediation Rules). Rule 20 (I) provides:-

> "(I) If there is an agreement resolving some or all of the issues in dispute, it shall be signed by the parties and filed with the Registrar for endorsement as Consent Judgment "

A consent judgment once recorded or endorsed by the Court it becomes the judgment of the Court and binding upon the parties. It is however unique in that it is not a judgment of the Court delivered after hearing the parties. It is an agreement or contract between the parties. As such it can only be set aside for a reason which would enable the court to set aside or rescind on an agreement.

The principles upon which a consent judgment can be set aside have been settled and followed in a long line of cases. The leading East African case being *Broker Bond Liebig Vs Mallya (1975) EA 267*. In that case Law Ag P (as he was then) stated:-

> "The circumstances in which a consent judgment may be interfered with were considered by this court in *Hirani Vs Kassam (1952) 19 EACA 131*, where the following passage from Seton of Judgments & Orders, 7th Edn. Vol 1 p. 124 was approved:-
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> > "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 *Attorney General & Anor Vs James Mark Kamoga & Another SC CA No. 8 of 2004* Mulenga JSC stated:-

> "--- 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, misapprehension or contravermention 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 ----."

See also *Mohamed Allibhai Vs W.E Bukenya Mukasa & Another SCCA No. 56 of 1995*, *Tropical Commodity Supplies Ltd & Others Vs International Credit Bank (in liquidation) HCT-00-CC-MA647-2002*

As regards Alternative Dispute Resolution mechanism Justice Kiryabwire in *Buildtrust Construction (U) Ltd Vs Martha Rugasira HCT-00-CC-CS-288-2005* stated:-

> "—Court has a duty under Article 126 (e) of the Constitution of the Republic of Uganda 1995 to see that reconciliation between parties should be promoted. In effect this in my view means that if parties use alternative dispute mechanism, like in this case a reputable third party expert, to resolve their dispute then court will promote that reconciliation by giving effect to it unless there is good reason not to do so. ---"

I hold a similar view.

In his submission Mr. Muhumuza appeared, in alternative to setting aside the Consent Judgment, to pray for review or variation of the judgment. Order 46 rule 1 of the Civil Procedure Rules provides:-

> "Any person considering himself or herself aggrieved –
>
> (a) by a decree or order from which an appeal is allowed but for which no appeal has been presented, or
> (b) by a decree or order from which no appeal is hereby allowed,
>
> and who from the discovery of new and important matter or evidence which after the exercise of due diligence, was not within his or her knowledge or could not be produced by him or her at the

time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him or her, many apply for a review of judgment to the Court which passed the decree or made the order."

In *Attorney General & Another Vs Kamoga (Supra)* Hon Justice Mulenga held that the provisions of order 46 rule 1 are so broad that they are applicable to all decrees including Consent decrees. However, for the provisions to apply there must be sufficient reason for review as set out in the rule. That is discovery of new and important matter or mistake or error apparent on the face of the record or any other sufficient reason.

I now proceed to apply the above principles to the merits of this application. The avenues for mediation are provided for by Rule 13 of the Mediation Rules, which states:-

"(I) Mediation under these Rules shall be conducted by ---

(a) the Registrar Mediation or a person qualified and certified by CADER as a mediator and appointed by the parties from the CADER Roster of Mediators established and maintained by CADER or nominated by the Registrar Mediation in response to a request by the parties;

(b) a person appointed by the parties as the mediator;

(c) the Registrar or other official of the Court or any other person designated by the Court;

(d) a Judge of the Commercial Court chosen by the parties or designated by the Registrar."

Mediation in this case was initially conducted by the Registrar Mediation. Rule 20 (2) of the Mediation Rules provides that if there is no agreement, the mediator shall refer the matter back to Court. There was no agreement reached and the file was referred back to this Court. When the file came before me on 12th February 2009, for a scheduling Conference, the representatives and lawyers of the parties informed this Court that no mediation had actually taken place before the Registrar Mediation and requested for the file to be referred back to mediation before a Judge of the Commercial Court. They agreed on Hon Justice Geoffrey Kiryabwire.

Order 12 rule 1 CPR provides that Court shall hold a scheduling Conference to sort out points of agreement and disagreements, the possibility of mediation, arbitration and any other form of settlement. Where the parties reach an agreement, orders shall immediately be made in accordance with rules 6 and 7 of Order 15 of the Rules. Rule 2 (I) of the same order states:-

"(I)Where the parties do not reach an agreement under rule 1 (d) of this Order, the Court may , if it is of the view that the case has a good potential for settlement, order alternative resolution before a member or the bar of the bench, named by the Court."

This Court considered this case good for settlement so it accepted the parties request and referred the matter back for mediation before Hon Justice Geoffrey Kiryabwire.

The consent judgment in issue is the result of the mediation proceedings conducted by Hon Justice Kiryabwire on 25th March 2009. In his submission Mr. Muhumuza argued that it is fair and just that the Consent Judgment is set aside first because the directors of the Applicants had signed the judgment under a mistake or misrepresentation as to the contents thereof. Secondly, that the directors had not been properly advised. Thirdly that the mediation proceedings were fundamentally defective and did not bind the Applicants. Fourthly that the consent judgment was sealed and issued without payment of the requisite court fees.

This application is supported by the affidavits of Mr. Joseph Bahakanira and Mrs, Goodra Tumusiime Bahakanira, directors of the Applicants. The Respondents filed an affidavit in reply deponed to by Angelina Namakula Ofwono, the Head of Legal of M/s Barclays Bank (U) Ltd. Annexture F to Mr. Bahakanira's affidavit is a set of documents among which is the summary of the plaintiffs case filed pursuant to Rule 16 of the Mediation Rules. Rule 21 provides for confidentiality. It states:

> "(I) Every person, including associated persons, shall keep confidential and not use for any other purposes –
>
> (a) ------
>
> (b) all information, whether given orally, in writing or otherwise arising out or in connection with the mediation, including the fact of any settlement and terms.
>
> (2) The proceedings of mediation, whether oral or in the form of documents, tapes, computer discs or other media shall be privileged and shall not be admissible as evidence or be disclosed in any current or subsequent litigations or other proceedings.
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> (3) Sub-rule (2) does not apply to any information, which would in any case have been admissible or disclosable in proceedings in the main suit or an application arising out of the mediation.
>
> (4) ----."

In handling this matter I accordingly caution myself against taking into consideration matters barred by the above provisions. Particularly I will not consider annexture F, save for the documents already on Court record, prior to the mediation proceedings.

In paragraph 5 of his affidavit Mr. Bahakanira states that the mediation proceeded marathonly and the Applicants ended up making mistakes in signing the consent judgment. In paragraph 7

he states that the Applicants committed a mistake to sign a hurriedly concluded consent judgment. He avers in paragraph 13 that the Consent Judgment did not have the basis on how the figures for repayment of the loan were arrived at. He claims that the formula presented by the Applicants for calculation of the outstanding balances was refused or ignored and neglected by the mediation judge. He attached annexture D which is a Statement of Loan Position of Betuco (U) Limited as at 28th February 2008 prepared by Goldgate Certified Public Accountants. The statement shows a total balance of Shs2,246,398,089/= as opposed to the outstanding balance of Shs4,500,000,000/= indicated in the Consent Judgment with respect to the loan to Betuco (U) Limited. In arriving at their figures Goldgate states:

> "We have analysed the principle amount and computed the interest thereon for 2 months at 20% and subsequent 24 months at 10% on Compound Interest basis. The balance due is after deducting the respective installments that were paid ---."

In her affidavit Mrs Behakanira states that the Consent Judgment was arrived at without using proper calculations.

Counsel for the Applicant argued that the agreed outstanding amount of Ugshs4,500,000,000/= reflected on the Betuco (U) Ltd's loan in the Consent Judgment was arrived at by the mistaken or erroneous use of 20% as the interest rate for the entire loan period. That 20% was only for two months of the loan period and thereafter the rate should have been 10% which would have put the outstanding amount at Ughshs2,246,398,089/=. Counsel relied on the Goldgate's Statement (Annexture D) and the Facility Letter.

The facility letter dated 21st November 2005 provided:-

> "Facility - Development Loan of Ugs3.2 Billion (Uganda shillings Three Billion Two Hundred Million only)

Interest Rate - Interest will be charged at a rate of 2% above B.O. U. rate as may be advised at time of approval.

Mous Operandi - A bridge Finance of Ugx3.2 Billion will be given meantime the Apex loan is processed which shall be offset from disbursement of the Apex Funds and may be allowed at a rate of 2% above prime (currently at 18%) making a total of 20%."

No evidence has been adduced, by affidavit or otherwise, to show that the 20% interest rate was to apply for only the first two months of the loan period and there is no evidence of any advice of the BOU rate. There is no evidence of change of the interest rate. Ms Goldstate do not show the basis upon which they computed interest for two months at 20% and the subsequent twenty four months at 10%. In his submission in reply Mr. Muhumuza concedes that the 10% interest rate is not stated anywhere. I however, agree with the learned Counsel that the terms as provided in the facility letter with regard to the interest rate were not condusive. They were subject to the eventual advise of the BOU rate whereupon the rate would change from 20% to a rate of 2% above the advised BOU rate. But in absence of evidence of any such BOU advised rate the prevailing rate remains 20%. There is not evidence of any revision of the rate otherwise.

No such issue was raised as to the J & M Airport Road Hotel/Apartment & Leisure Centre Ltd loan. In the premises, the Applicants failed to show that there was a mistake in the interest rate applied to arrive at the outstanding amount with respect to the Betuco (U) Ltd Loan. I agree with Mr. Masembe's submission that the error put forward as to interest has not been substantiated.

Mr. Muhumuza took Court through the Ledger sheets and Bank Statements attached to the Audit Report by Goldgate and claimed that some payments made towards the loan to the tune of Ugshs 1,620,196,027 had not been deducted thereby giving wrong figures of
the balances due. I have found the audit report not helpful in this regard. It does not analyse the Ledger sheets and Bank Statements to show the payments made, the payments recorded and payments not recorded so as to show the amount of payments which were not considered in arriving at the outstanding amount. The Applicants failed to show a mistake as to payments which were not considered in arriving at the outstanding amount. Its a cardinal rule of evidence that he who alleges must prove.

By the Consent Judgment it was recorded that the agreed outstanding amount of Ugshs4,500,000,000/= was to be paid by paying the principal and interest thereon of Ugshs80,000,000/= per month based on an agreed amortization of six years beginning
31st day of May2009. In his submission Mr. Muhumuza argued that the effective date of the agreed six years should be revisited. Counsel stated that in arriving at the amortization period of six years consideration should have been given to the period when transaction on the loan was stopped. Court is not supposed to inquire into the parameters by which the parties came to an agreement. It is only required to consider whether there was a new or important matter or evidence discovered which was unknown at the time of the consent agreement or whether there was a mistake or error apparent on record. None has been shown and as was stated by Sir Newton Worsley *in Hirani Vs Kasam (1952) 19 EACA 131 at page 133* :-

> "--- In such a case, the decree is passed upon the new contract
> between the parties which supersedes the original cause of action."

Mrs. Bahakanira claims that she did not understand the technical law terms as she lucked proper interpretation. Mr. Bahakanira states that their advocates did not advise them properly as to the meaning and details of the consent. In the Respondent's affidavit in reply, Ms Ofwono avers that at the Mediation meeting the Applicants were represented by Mr. & Mrs. Bahakanira, directors of the Applicants and their joint lawyers Mr. Blaze Babigumira, Mr. Richard Mwebembezi and Mrs. Murangira. This averment on oath was

neither denied nor rebutted. In fact the consent agreement was signed for the Applicants by all the above named save for Mr. Mwebembezi. An advocate is under a duty to properly advise his/her client and in his or her client's interest. An advocate is his/her client's interpreter on technical legal matters. With three able advisers the Applicants' directors cannot be believed to say that they lacked proper legal advise. The Applicants have not alleged collusion on the part of their former advocates. As to misadvise, if the Applicants feel aggrieved they could take upon proceedings against their advocates for professional negligence in tort or disciplinary.

The Applicants complained that the mediation proceedings continued up to 8:30 pm beyond the court hours. Mr. Muhumuza argued that as Mediation is Court annexed it should be conducted within the court hours. The Mediation Rules, Rule 11 provide for time within which the mediation proceedings must be completed. The Rules are silent as to place where and time of the day when mediation should be conducted. Rule 14 (a) requires the Mediator to organize a suitable venue and date for the mediator session. My considered view is that place, date and time should be at the convenience and by agreement of the mediator and the parties to the proceedings. In paragraph 6 of the Respondents' affidavit Mrs. Ofwono avers that at the pre-medication meeting the parties agreed on a mediation time table fixing the mediation for 25th March 2009 for a full day and 27th March 2009 in the afternoon. In paragraph 9 she avers that on 25th March 2009 at about 5:30p.m, seeing that a lot had been achieved through the mediation process thus far, the parties and their lawyers agreed to stay on in a bid to have the matter concluded on that day. That the Mediator did not object to that proposition and accordingly the mediation proceeded. These averments on oath were neither denied nor rebutted. The two respectable directors and three distinguished lawyers of the Applicants cannot be believed to have hurriedly signed the consent judgment merely because they were tired and wanted to go home. They had all the right and freedom to demand or seek time to go home with the consent agreement, study the same overnight with a view to sign or not sign the same the following day or some other time agreeable to the parties and the mediator. It was not prudent for Mr. Bahakanira to first sign and then decide to scrutinize the Consent Judgment. Scrutiny should have come first and execution follow.

Mr. Bahakanira in his affidavit states that he has pressure and diabetes. He complains that mediation started at 9:00 a.m. and proceeded non-stop up to 8:30 p.m. That he did not have lunch and never took medicine for his pressure and diabetes. He states that by 4:00 p.m. he was already weak and could not comprehend what was going on in the mediation process. That he tried to beg for an adjournment but the Mediation Judge refused.

If true that would surely be very harsh and unfair conduct of the Mediator. But the Mediator's refusal to adjourn the proceedings is denied by the Respondents. As already stated proceedings after 5:30 p.m. were by agreement of the parties, their respective lawyers and the Mediator. In paragraph 8 Mrs. Ofwono avers:-

> "THAT in conducting the mediation, the Mediator held both joint and separate sessions with the parties. The mediation was broken off at 1:30 p.m. for a lunch break until 3:00 p.m. and it then continued for the rest of the day."

The above averment on oath was also neither rebutted nor denied on oath. Thus presumed truthful. I appreciate Mr. Behakanira's health condition but from 1:30 to 3:00 p.m. was sufficient break for the parties to have lunch and for him to take his medicine. He could also have used the periods when the Mediator was having sessions with the opposite parties.

In his affidavit Mr. Bahekanira claims that the Applicants' proposals were not included in the Consent Judgment. That the formula he presented on behalf of the Applicants for calculating the outstanding balances was not applied. Rules 14 and 16 require each party to file and exchange a summary of its case and all documents which he may refer to in the mediation. Annexture F to his affidavit is the Applicants' case summary and documents filed. As already stated such documents are confidential and should not have been filed with this application. So I will keep a

blind eye to them. My considered view is that the case summaries and documents so filed only serve as the working papers or documents to be referred to at the mediation proceedings. They do not necessarily become part and partial of the agreement, if any reached.

The Applicants contend that they are not bound by the mediation proceedings. The Applicants are corporate entities and as such they act through their officers like directors. Both Mr. and Mrs. Bahakanira in their respective affidavits, describe themselves as directors of the Applicants. The Applicants were represented by these two directors and the Applicants' three lawyers at the Mediation proceedings. It is these same officials who signed the Consent Judgment on behalf of the Applicants. Mediation Rule 15 states:-

> "(2) The person signing the mediation agreement on behalf of each party shall be deemed to have authority to bind the party represented by him or her."

As regards execution by Counsel the law is that so long as Counsel is acting for the party in a case and his instructions have not been terminated, he has full control over the conduct of the trial and apparent authority to compromise all matters connected with the action. See *BN Technical Services Ltd Vs Francis X Rugunda HCMA 75 of 1998, Buladina Nankya & Anor VS Bulsio Konde (1979) HCB 239*

In paragraphs 10 and 11 of the Respondents affidavit Ms Ofwono states that on the Mediation day at about 7:00 p.m. the parties reached an agreement and their respective lawyers in the presence and with the full involvement of both parties' representatives, jointly prepared the consent agreement. That the Mediator did not participate in the preparation of the Consent Judgment. That after the Consent Judgment had been so drawn the parties respective representatives and their respective lawyers signed the Consent Judgment in the presence of the Mediator Judge who sighed it too. The above averments on oath were neither denied nor rebutted.

When the agreement is so reached and signed the Mediator becomes functus officio and Rule 20 (I) requires the agreement to be filed with the Registrar for endorsement as a Consent Judgment. This is what happened and on 26th March 2009 it was sealed as a judgment of this Court.

Mr. Muhumuza in his conclusion remarks stated:-

> "--- We are not saying we don't want to associate ourselves with the Consent Judgment -------
> -----."

In the circumstances I find that all the parties are bound by the Consent Judgment.

Finally the Applicants contend that the Consent Judgment was a nullity because the requisite court fees were not paid on its filing. On this point Mr. Masembe argued that a Consent Judgment filed under Mediation Rule 20 did not attract filing fees. He submitted that such a Judgment is an agreement filed by the Mediator. He likened it to a Consent Judgment recorded before a Judge in Court. Alternatively, he submitted that failure to pay the requisite fees does not render the Consent Judgment a nullity. Court can order the necessary fees to be paid by the defaulting party. He cited *Lawrence Muwonge Vs Stephen Kyeyune SCCA No. 12 of 2001* wherein Tsekoko, JSC cited with approval Manyindo J's (as he then was) holding in *Yese Ruzambina Vs Kimbowa Builders and Construction Ltd (1976) HCB 278* in which the learned Judge stated:-

> "None payment of Court fees could not affect a Judgment entered by Consent and that the remedy for non – payment of fees was to rely on rule 6 of the Court Fees, Fines and Deposits Rules (Cap 41) to order the defaulting party to pay the necessary fees to the Court."

The Learned Justice also upheld Justice Engwau's holding in an earlier appeal before the Court of Appeal wherein he held:-

> "--- a complaint against non – payment of Court fees is a minor procedural and technical objection which does not and should not affect the adjudication of substantive justice as envisaged in Article 126 (2) (e) of the 1995 Constitution of Uganda. The remedy for non-payment of Court fees would have been the invocation of Rule 6 of the Court Fees and Deposits Rules (Cap 41) to order the defaulting party to pay the necessary fees to the Court."

Justice Tsekoko cited Rule 6 and held:-

> "The provision to Rule 6 gives discretionary power to Court to make orders for a defaulting party to pay the proper fees. Such an order is done in the interest of Justice and must be done judiciously."

It does not serve Justice for a judgment reached to be nullified merely for non payment of the Court fees. Justice would be defeated by just a mere procedural and technical anomaly which can be remedied by ordering the requisite fees to be paid.

I would have so ordered in the instant case but Mediation Rule 19 requires the Mediator when mediation is concluded to file a report to the Registrar. Such report will indicate the result of the mediation. It would indicate whether an agreement has been reached on some or all the issues in dispute or whether no agreement has been reached. Under Rule 20, if no agreement is reached the Mediator is required to refer the matter back to Court. When any agreement is reached the rules provide that it shall be signed by the parties and filed with the Registrar for endorsement as a Consent Judgment. My view is that such agreement is filed by the Mediator and as such would not attract filing fees. This is what happened in the instant case.

Considering all the above, I am enable to interfere with the Consent Judgment. The application is dismissed with costs.

Lameck N. Mukasa

JUDGE

21st August 2009