**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**[COMMERCIAL DIVISION]**

**MISCELLANEOUS APPLICATION No. 14 OF 2014**

**(Arising from OS No. 09 of 2013)**

**HABIB BIN MUSA::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::: APPLICANT**

**VERSUS**

1. **GLOBAL TRUST BANK LTD**
2. **SHUFURAH TRANSPORTERS (U) LTD ::::::::::::::::::::::::::::: RESPONDENTS**
3. **ASA MANGENYI**

**BEFORE: HON. B.KAINAMURA**

**RULING**

The applicant brought this application by Notice of Motion under Section 82 and 98 of the CPA, Section 33 of the Judicature Act and Order 52 Rule 3 of the CPR seeking orders that;

1. The consent decree dated 29th November 2013 executed between the 1st and 2nd respondents with the aid of the 3rd respondent Vide HCT-OO-CC-OS No.9 of 2013, be reviewed and set aside.
2. The execution of the impugned consent decree be set aside, and the applicant’s possession be restored.
3. Costs hereof be provided for.

The major ground on which the applicant relies is fraud as set out in the Notice of Motion.

The grounds of application are set out in the affidavit in support of the application deposed by Mwene Kahima Mwesigye and briefly are that;

He is aware of the Mbarara High Court proceedings in which the applicant seeks to challenge the legality of the mortgage, foreclosure, sale and transfer of the suit property by the 1st and 2nd respondents.

On the 27th Dec 2013, the applicant’s children informed him that the applicant had been evicted from his property known as LRV 3639, Folio 6, Plot 48.

He rushed to the suit property and found the applicant’s spouse Monica Mwebaze with documents which included photocopies of a warrant to give vacant possession issued by the Execution and Bailiffs Division of the High Court of Uganda to a one Rogers Tubirabiremu ordering him to put one Musinguzi Sulait into possession of the suit property.

He noticed on the face of the warrant of execution marked AA4 that it arose from a consent decree sealed Vide High Court, Commercial Division, Originating Summons No.9 of 2013.

The Originating Summons lodged in September 2013 was lodged well after the applicant had lodged in Mbarara law suits challenging the mortgage, foreclosure and transfer of the same suit property.

The consent decree was executed by the respondents and sealed by the Registrar without a consent judgment being first recorded and sealed.

He also compared the Originating Summons and consent decree to the facts as pleaded by the 1st and 2nd respondents and Sulaiti Musinguzi and there were glaring falsehoods such as;

The 1st respondent exercised its right to foreclose and sold the suit property to Sulaiti Musinguzi at a valuable consideration of UGX 280,000,000/=

The 1st respondent claimed to have executed the sale agreement as far back as March 2013 and executed a transfer which the applicant still contests in court.

The 2nd respondent undertook to give Sulaiti vacant possession yet all the respondents knew it was the applicant who had full possession of and occupation of the suit property.

The 1st and 2nd respondents, their lawyer Asa Mugenyi and Sulait Musinguzi all contrived to defeat on-going Court process in Mbarara High court thus denying court the chance to pronounce itself on the matters before it and therefore, it is worthwhile that the consent judgment be set aside to enable the applicant to justify to the High Court in Mbarara why he sought to challenge the mortgage, foreclosure, sale and transfer of property and justify is reliefs.

Mr. Asa Mugenyi swore an affidavit in reply on behalf of the 1st Respondent and deposed that;

His firm M/S Mugenyi and Co. Advocates was instructed to defend the 1st respondent in Civil Suit No 0011 of 2013 where the applicant was challenging the use of his property comprised in LRV 3639 Folio 6, Plot 48 Markhan Street as security in a mortgage given to the 2nd respondent by the 1st respondent.

The time the applicant filed the suit the said property had been sold to Mr. Sulait Musinguzi in line with the mortgage agreement and transfers were also done.

The applicant filed an application for Interim order against Sulait Musinguzi seeking to prevent him from taking possession of the suit premises, which application was dismissed by court for luck of merit. The said Sulait Musinguzi is not a defendant in the main suit CS No 011 of 2013.

The applicant refused to vacate the premises and the 1st respondent instructed M/S Mugenyi and company to initiate legal proceedings to grant vacant possession of the mortgaged premises to the purchaser.

The 1st respondent filed Originating Summons against the 2nd Respondent and the applicant was not added as a party to the suit because he was not the registered proprietor of the premises. Additionally the powers of attorney was still valid and there was therefore no finding of fraud which court still had to determine.

Mr. Sulaiti Musinguzi being the registered proprietor of the suit property was entitled to possession both under the RTA and the Mortgage Act and the filing of the different suits in Mbarara did not stop the 1st respondent from handing over the property to its purchaser under the Mortgage agreement.

The 1st Respondent acted legally by filing the Originating Summons No 9 of 2013 because its purpose was to hand over the property to its rightful purchaser under the mortgage between the respondents. Additionally while CS No 011 of 2013 is a challenge to the mortgage, court has not established any fraud in the mortgage. The applicant is therefore free to pursue his cause in HCCS 11/2013 to its logical conclusion and in the event that court finds fraud, it would cancel the certificate of title and reinstate the suit premises to the applicant.

The application is misconceived as there was no undue influence, collusion, or coercion by the 1st respondent and fraud cannot be proved in this application but rather in the main suit in Mbarara.

The Legal Manager of the 1st respondent Grace Karuhanga also deponed an affidavit in reply that;

The 2nd respondent obtained a loan from the 1st Respondent and pledged as security land comprised in LRV 3639 Folio 6, Plot 48 Markhan Street which was in the names of the applicant who gave the 2nd respondent powers of attorney to mortgage the said land.

The 2nd respondent failed to pay the loan and the property was sold to Mr. Sulait Musinguzi and transfers made in his name but the applicant refused to vacate the premises.

The 1st respondent instructed Messrs Mugenyi and Company Advocates to initiate legal proceedings to grant the purchaser vacant possession.

The 1st Respondent filed Originating Summons seeking vacant possession and the 2nd respondent did not object to the application and a consent decree was entered to that effect.

The applicant has never served the 1st respondent with any court order or temporary injunction to stop it from granting vacant possession to Mr. Sulait Musinguzi.

The grant of vacant possession does not affect outcome of C.S 11/2013 in any way and the case can be heard on its merits.

The 2nd respondent’s director Mr. Abdul Katete deposed an affidavit in reply to the effect that;

The applicant gave powers of attorney to the 2nd respondent to get a loan of 130,000,000/= for his family’s benefit.

The money as received was given to the applicant and his family who later failed to pay back the loan which led to the sale of the property which was security for the loan.

The 2nd respondent was served with Originating Summons around 8th November 2013 and there was no objection and a consent decree was therefore signed without any fear, undue influence or coercion.

Angella Nambowa another director of the 2nd respondent deponed similarly that the applicant executed a power of attorney in respect of the premises comprised in LRV 3639, Folio 6, Plot 48, Mackhan Street to the 2nd respondent to enable it get a loan of UGX 130,00,000/= from the 1st respondent. She deposed further that the applicant and his family received the money but failed to pay it back which resulted in the sale of the property. She stated that this was the reason that they did not object to the application of the 1st respondent and signed a consent decree. Further, that the decree was signed without fear, undue influence or coercion and they are therefore not aware of any fraud whatsoever.

At the hearing Mr. Frank Kanduho represented the applicant while Mr. John Magezi represented the 1st respondent. The 2nd respondent was not represented though it had filed affidavit in reply through its Directors.

At the commencement of the hearing, the applicant applied to strike out the 3rd respondent as a party and the application was granted with no order as to costs.

Counsel for the applicant submitted that the consent order was procured through fraud. He submitted that the applicant’s case is that under Originating Summons No 09 of 2013 the 1st and 2nd respondents purported to be mortgagee and mortgager respectively whereas not and proceeded by way of Originating Summons which they were not entitled to. Counsel submitted that the applicant is therefore contesting the circumstances under which his property was mortgaged with the 1st respondent bank. Furthermore, Counsel submitted that the applicant is contesting circumstances under which the suit property was foreclosed and transferred. He added that at the time leave was given to the 1st respondent to proceed by Originating Summons; court had not been armed with facts that there was no longer any mortgage. Counsel prayed that the consent order be reviewed, set aside and the applicant restored into possession of the suit property.

Counsel for the 1st respondent submitted that the applicant being the registered proprietor of LRV 3639, Folio 6 Makhan Singh Street Mbarara executed a power of attorney in favor of the 2nd respondent to use the suit property as security for a loan from the 1st respondent. Upon default, the 1st respondent applied for foreclosure and sale of the suit property OS No.9 of 2013. Thereafter a consent judgment was entered between the 1st and 2nd respondent on the 29th Nov 2013 and the property was sold to Mr. Sulait Musinguzi. The applicant consequently filed Vide HCT-005-CV-CS No.11 of 2013 in the High Court Mbarara challenging the mortgage and sale.

Counsel raised the following issues to be addressed;

1. Whether cogent grounds exist in order to set aside the consent judgment
2. Whether the affidavits in support are validly before this honorable court
3. Whether the 1st respondent followed the correct procedure to foreclose the mortgage.

Addressing issue one; Counsel submitted that it is well settled that a consent judgment can be reviewed and set aside on grounds that vitiate a contract like fraud, mistake or illegality as decided in the case of ***Attorney General Vs James Mark Kamoga S.C.C.A No.8 of 2004***. Counsel submitted that the applicant alleges that the consent judgment was entered fraudulently by the 1st and 2nd respondent. Counsel stated that fraud according to the case of **K*ampala Bottlers Ltd Vs Domanico (U) Ltd S.C.C.A No. 22 of 1992*** is an act of dishonesty. He added that in **BEA Timber Co. V Gill [1959] EA 1005**, court held that the facts of fraud must be specifically pleaded. He added that the standard is more than a mere balance of probabilities though less than beyond reasonable doubt as held in***Fam International & Anor Vs Mohammed Hamird El-Fatih S.C.C.A No.16 of 1993.*** Counsel submitted that the applicant merely narrates allegations of fraud in the affidavit deponed by Mr. Mwene Kahima Mwesigye. Mr. Mwene Kahima deposed that the transfer was done fraudulently because there were proceedings pending in the High court in Mbarara over the suit property. Counsel argued that pending suits do not preclude one from registering or transferring land. **(**see ***J.W.R Kazoora Vs M.L.S Rukoba S.C.C.A No. 13 of 1992)***

Counsel further submitted that as was held in ***Hannington Wasswa Vs Maria Onyango Ochola [1994] IV KALR 98 at pg 100****,* it is not proper to commence proceedings to challenge acts of fraud by Notice of Motion because the standard of proof is high. Counsel argued that it requires an ordinary suit where witnesses may be cross examined.

Addressing issue two; Counsel submitted that the application is supported by affidavit deposed by Mr. Mwene Kahima Mwesigye who acts as the applicant’s Counsel at the same time. Counsel submitted that this is a breach of **Regulation 9 of the Advocates (Professional conduct) Regulation SI 267-2** which precludes an advocate from appearing in a matter where he has reason to believe that he or she may be required to give evidence. Counsel cited the case of ***Mugoya Construction & Engineering Ltd Vs Central Electricals International Ltd HCMA No. 699 of 2011***,where court held that an advocate is forbidden from swearing an affidavit in contentious matters and conducting the suit as well. Counsel further cited the case of ***Dr John Kiyimba Kitto Vs Sebunya [1992] KALR 327*** in which court applied Regulation 9 and held that such an affidavit deposed by Counsel is devoid of any value and should be struck out. It was Counsel’s conclusion that the affidavit in support of the application is incompetent and must be struck out.

On the last issue; Counsel submitted that Order 37 rule 4 enables a mortgagee to foreclose a mortgage using Originating Summons. Counsel cited the case of **Standard Chartered Bank (U) Ltd Vs Grand Hotel (u) Ltd [1997] H.C.B pg 50 at pg 51,** where court held that the correct procedure of a mortgagee claiming a relief of foreclosure and sale of mortgaged land is by way of Originating Summons. He added that the 1st respondent exercised its right of foreclosure.

Counsel further stated that by virtue of ***Section 59 of the RTA CAP 230*** and the holding ***in Katwiremu Vs Katwiremu [1977] HCB,*** the person named on the certificate of title is the proprietor of the land. Counsel stated that when Mr. Sulait Musinguzi became registered owner of the suit property, the applicant immediately became a trespasser. Counsel in conclusion contended that the application is incompetent and should be dismissed with costs.

In rejoinder, Counsel for the applicant submitted that Counsel for the respondent dodged the area of contention and raised his own issues which mandate under 0.15 Rule 3 CPR is the exclusive preserve of the trial court.

Counsel submitted that he had given the particulars of the fraud in regard to the inconsistencies in the loan money claimed to be advanced which is at one point UGX 130,000,000/=, 280,000,000/=, 164,000,000/= and 100,000,000/= and other major inconsistencies like the purpose of the loan as opposed to what was deposed and the sale of the suit property. Counsel submitted that there are applications in the High Court in Mbarara seeking to challenge the mortgage which the respondents sought to circumvent and brought Originating Summons before this court. He argued that this amounts to fraud as held in the case of ***Fredrick Zaabwe Vs Orient Bank & Others S.C.C.A No.4/06*** where court held that fraud includes the intentional perversion of truth and the failure to bring material facts before the court.

In response to the contention relating to procedure i.e whether it should have been by Notice of Motion or ordinary suit, Counsel argued that the instant application is for review and setting aside a consent judgment which under Order 46 Rule 8 of the CPR is by Notice of Motion.

With regard to the powers of attorney executed, Counsel submitted that the powers of attorney gave Monica Mwebaze the power which is not limited to but includes deponing an affidavit in respect of the instant application.

In conclusion, counsel submitted that the respondent’s submissions lacked merit and reiterated his earlier prayer that this application should be granted with costs to the applicant.

**RULING**

I have considered the argument of both Counsel. I have also perused the pleadings and addressed my mind to the fact that the consent decree sought to reviewed and set aside was between the 1st and 2nd respondents. The consent decree sought to be impeached read as follows:-

1. The plaintiff has exercised its right to foreclosure upon the security pledge.
2. The plaintiff has sold the mortgaged security upon foreclosure.
3. That vacant possession be granted to the purchaser of the mortgaged or suit premises.
4. Each party shall pay its costs.

Grounds for setting aside a consent judgment are well laid down. In the case of ***Hirani Vs Kassam (1952) EA 131*** the passage from **Seton on Judgments and Orders 7th Edn Vol.1 at pg 124** was approved and adopted, it says:-

***“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 collusion or by an agreement contrary to the policy of the court…………………or if the consent was given without sufficient facts, or in misapprehensions or in ignorance of material facts, or in general for a reason which would enable a court to set aside on agreement”*

Counsel for the applicant argued that the consent decree was procured through fraud to defeat the court process in Mbarara High Court in CS No. 5 of 2013, Misc Appl. No. 96 of 2013 and Misc Appl No 126 of 2013 which suits touch on the legality of the foreclosure, sale and transfer of the subject matter of O.S No 9 of 2013.

In the affidavit in support of the Notice of Motion dated 16th January 2014 one Mwene Kahima Mwesigye a lawyer of the applicant attached documents which I believe put in focus the crux of the matter in this application. Annexture AA1 is the amended plaint in CS No 11 of 2013 between the applicant and among others the 1st and 2nd respondents. Paragraph 6 thereof invites court to set aside the impugned sale/transfer of the suit property and to quash all transactions subsequent to the sale. One of the orders sought under paragraph 5 (IV) is for a declaration that the sale and transfer of the suit property to a one Musuguzi Sulait by the 1st defendant (1st respondent) through the instrumentality of the 5th defendant was a *nullity*. CS No 11 of 2013 was filed in April 2013. On 30th April 2013 the applicant filed Misc. Appl No. 96 of 2013 against Musiguzi Sulait as “Intended 6th Defendant” it was filed under O 1 r 13, O 41 r 7 of CPR S.33 Judicature Act and S.98 CPA.

It was for addition of Musiguzi Sulait as 6th defendant in CS No 11 of 2013 and preservation of the suit property by among others keeping the applicant and has family into possession of the suit property.

To my knowledge the suit and miscellaneous application have not yet been heard and determined by the High Court in Mbarara.

On their part the respondents filed OS No 9 of 2013 for determination of the question among others whether the plaintiff (1st respondent in this application) should be granted vacant possession of the suit property. To my mind this was necessitated by the fact that upon foreclosure and sale of the suit property to a one Sulait Musinguzi, the 1st respondent could not grant vacant possession of the suit property since the applicant was still in possession. A consent decree was obtained in O S No 9 of 2013 and it’s this decree that the applicant seeks reviewed and set aside ostensibly on grounds of fraud intended to defeat the outcome of the case/applications filed by the applicant first set out above.

It is instructive to note that OS No 9 of 2013 was filed under O 37 r 4 of CPR. The rule provides:-

1. ***Summons by a mortgagee or mortgagor.***
2. *Any mortgagee or mortgagor whether legal or equitable or any person entitled to or having property subject to a legal or equitable mortgage or any person having the right to foreclose or redeem any mortgage whether legal or equitable may take out as of course an Originating Summons returnable before a Judge in Chambers for such relief of the nature or kind following as may be by summons specified and as the circumstances of the case may require that is to say sale, foreclose, delivery of possession by the mortgagor, redemption, reconvegence or delivery of possession by the mortgage.*

Is the applicant justified in alleging that the 1st and 2nd respondent acted fraudulently in lodging OS No 9 of 2013 and representing themselves as mortgagee and mortgagor of the suit property whereas the were in fact not.

I see no basis for that.

As indicated above O 37 r 4 under which the application was made among others grants relief by way of delivery of possession by the mortgagor. In my view the 1st respondent was within its rights to institute OS No 9 of 2013 so as to take delivery of the suit premises notwithstanding the fact that it had already exercised its rights under Section 20 of the Mortgage Act, 2009. It’s my view therefore that the applicant has not been able to demonstrate any fraudulent intent in the 1st and 2nd respondents representing themselves as mortgagee and mortgagor while lodging OS No 9 of 2013.

The other act of fraud complained of by the applicant is that the respondents misled court by not disclosing to court that the subject matter of OS No 9 of 2013 was already subject of law suits pending before the High Court in Mbarara where they were parties. Indeed the applicant had already filed CS No. 11 of 2013 for orders/declarations *inter alia* that the sale and transfer of the suit property to Musinguzi Sulait by the 1st defendant was a nullity and Misc Appl No. 98 of 2013 for orders *inter alia* of keeping the applicant and his family into possession of the suit property. But the letter application was between the applicant and Musinguzi Sulait who at this stage was not yet a party to CS No. 11 of 2013 and to my knowledge is not yet a party to the said suit. Learned Counsel for the applicant relied on the case of ***Fredrick Zaabwe Vs Orient Bank and Ors SCCA 4 of 2006*** to support his case that the conduct of the respondents above in not disclosing to court in OS 9 of 2013 that the subject matter was already subject of two suits fraudulent.

I respectfully disagree.

As seen above, the respondents were not party to Mis Appl No. 98 of 2013 which sought to preserve the *status quo*. What the respondents sought to do was to actuate the foreclosure which the applicant was trying to set aside under CS no 11 of 2013 and there was no legal bar as of 12th September 2013 stopping the respondent from taking the course of action they took. To my mind their actions are a far cry from fitting in the elements of fraud set out in the ***Zaabwe Case (supra)***

 As already pointed out above by both Counsel and court, it is trite that a consent decree has to be upheld unless it is vitiated by a reason that would enable a court to set aside an agreement such as fraud, mistakes, misapprehension or contravention of court policy. Since as disused above the applicant has failed to satisfy court that the acts of the respondents complained of were fraudulent, this application must, but fail.

Before I take leave of this application it’s pertinent that I comment on procedure. Counsel for the respondent faulted the path taken by the applicant in seeking to set aside the consent decree in OS No 9 of 2013. Counsel relied on the case of ***Hannington Wasswa Vs Maria Onyango Ochola [1994] IV KALR 98*** where the Supreme Court held inter alia that.

*“It is not proper to commence proceedings to challenge the alleged acts of fraud by Notice of Motion because the standard of proof of fraud must be high. This therefore requires an ordinary suit where witnesses may be cross-examined”*

On his part Counsel for the applicant in reply set out a litany of the alleged contradictions which point to fraudulent acts on the part of the respondents and concluded that the contradictions quarely point to fraud on the part of the respondents. I also note that fraud is very central in CS No.11 of 2013. I am therefore inclined to agree with L earned Counsel for the 1st respondent that the applicant should pursue legal redress under CS No 11 of 2013. This will be consistent with the rationable of the holding in the case of ***Hannington Wasswa*** (supra)

In the result for reasons set out above without going into the other issues raised by the 1st respondent this application is dismissed with costs.

**B. Kainamura**

**Judge**

**02.12.2014**