**THE REPUBLIC OF UUGANDA**

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

**COMMERCIAL DIVISION**

**MISCEALLANEOUS APPLICATION NO.601 OF 2015**

**(ARSING FROM CIVIL SUIT NO.299 OF 2013)**

**GILBERT MUJOGYA ATWOKI**

**FRANKLIN JOCELYN KATO RUKIIDI**

**(ADMINISTRATOR OF THE ESTATE OF THE LATE SIR G.D.K RUKIIDI 111)::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::APPLICANTS**

**VERSUS**

**KILEMBE MINES LIMITED:::::::::::::::::::::::::::::::::::::::::::RESPONDENT**

**BEFORE THE HON. MR. JUSTICE HENRY PETER ADONYO:**

**RULING:**

1. **Background:**

This is an application brought by way of Notice of motion under **Section 14 and 33 of the Judicature Act**, **Section 98 of the Civil Procedure Act** andunder **Order 52 Rules 1, 2 & 3 of the Civil Procedure Rules** seeking for orders that the consent withdrawing High Court Civil Suit No.299 of 2013 be set aside with consequential orders that the said suit be re-instated and the costs of this application be provided for.

1. **Grounds of the application:**

The grounds upon which this application is based are stated in the application itself but are further expounded in the affidavit of the first applicant.

Briefly , however, they are to the effect that about two years ago High Court Civil Suit No 299 of 2013 was withdrawn on the basis of a consent arrived at by the parties thereto on the basis that the instant respondent then defendant and other stake holders particularly the Privatisation Unit of Ministry of Finance, Planning and Economic Development would in due course settle the applicants claim in that suit for they were considered an hindrance to the then Government of Uganda’s bid to divestit of its majority shareholding in the respondent company as the withdrawal of that suit was intended to save the said process. However, it is alleged that after the withdrawal the head suit, the respondent and other stake holders reneged on their undertaking to settle the applicant’s claim with the applicants’ claim in that suit remaining unsettled and therefore it that the earlier withdrawn suit by consent be reinstated in order for the applicants’ interests in the respondent/defendant to settled after thorough investigations as it was just and equitable and therefore this application ought to be granted.

The respondent on the other hand was of a different view and in an affidavit in reply deposed by one Kyakonye Fred termed this application as frivolous, vexatious and time barred and ought to be dismissed with costs for the applicants had not only taken an unreasonable delay in time of two and half years thereafter the fact in bringing this application to set aside the said consent withdrawal but that the consent withdrawal was done by the parties unconditionally without any duress, coercion or undue influence therefore urging this court to dismiss this application with costs to it.

1. **Submissions:**

On the 2nd day of October 2015 this matter came up for hearing with Mr. Emmanuel Baluti appearing for the applicants while Mr. Cornelius Mukiibi appeared for the respondents. On that date, learned counsels applied for and were granted permission which was in accordance with the acceptable practice to file written submissions to constitute arguments in favour and against this application. They subsequently put the same on record which have been considered by this court for the resolution of this application.

Of note is the applicant’s assertion which is correctly so that by procedure any consent of whatever kind including the present one which relates to the head suit can be impeached by an affected party on similar grounds like those used for for invalidation of an ordinary contracts with such grounds to include illegality, misrepresentation, non disclosure of material facts, duress, mistake, undue influence and abuse of confidence as was pointed out by Lindsey L.J in the case of **Huddersfield Banking Co. Limited versus Henry Lister & Son Limited (1895 ) 2 Ch 273 at 280** for in that case, the learned judge pointed out that a consent order could be impeached not only on the ground of fraud but upon any grounds which invalidate the agreement.

 Therefore in respect of the instant matter, it was argued on behalf of the applicants that since the respondent and those acting under including the Privatisation Unit of the Ministry of Finance, Planning and Economic Development failed to honour their part of the bargain which was used to conceive and concretised the demised consent, then they should be found to have acted dishonestly for having deceived the applicant into withdrawing the head suit yet it was done on the basis that their claim in the respondent would be settled but which was never and so the court should find that they acted dishonestly which amounted to fraud and therefore the consent withdrawal should be taken as cancelled as was held in the case of **David Ssejaaka Nalima v Rebecca Musoke CACA No.12 of 1985** with the court urged to invoke its unlimited jurisdiction under **Section 14 of the Judicature Act** and **Section 98 of the Civil Procedure Act** to have the applicants’ head suit reinstated and heard on its merits on the basis the role of court is to adjudicate over disputes in society as was held in the case of **Jim Muhwezi v Attorney General and Another Constitutional Petition No. 10 of 2008**.

In the view of the respondent, however, this instant application was without any merit at all for it was frivolous and vexatious and therefore should be dismissed with costs for not only was it belatedly brought in court after two years and a month after the fact with plea of any disability which prevented the applicant from bringing the same but was not being reasonable at all. In support of this contention, the respondent cited the case of **Lucas Marisa v Uganda Breweries Ltd [1988-1990] HCB 131** where court held that although the rules do not provide a time limit, an application to set aside an order or dismissal must be brought within a reasonable time. Furthermore the respondent informed the court that the parties herein did on the 24th July 2013 unconditionally consent to withdraw the head suit without duress, undue influence, coercion or inducement at all and thus there were no grounds to vitiate that consent for even a trial court such as this instant one had no unfettered discretion to set aside a consent judgment as was pointed out by Supreme Court in the case of **Attorney General v James Mark Kamoga and Another SCCA No 8 of 2004** and that if it wishes to do so then it could only do so based on a much more restricted ground which were lacking in the instant matter since the applicant had not raised any substantial reason to have the consent set aside which if were done so would unduly prejudice the respondent’s rights as such this application should be found wanting and thus should be dismissed with costs.

1. **Resolution:**

The perusal of this application and the relations of the same to the authorities cited show a matter of course that indeed the law governing the setting aside of consent judgments or decrees / orders is clear in that a consent if obtained as a result of an illegality, a fraud or a mistake of fact can be set aside upon these very limited grounds.

Indeed the Supreme Court of Uganda in the case of **Attorney General and Uganda Land Commission v James Mark Kamoga** **SCCA No.8 of 2004** gave guidance to the trial courts in regards to such situations for it categorically provided that a court may interfere with a consent judgment, decree or order in such limited circumstances as was outlined by the Court of Appeal of East Africa in**the case Hirani v Kassam [1952] EACA 131**  and **Seaton on Judgments and Orders 7th Edition Vol. 1 page 124** provides a pointer to such categories as follows;

**“prima facie, any order made in the presence and with a consent of counsel is binding on all parties to the proceedings or action and cannot be varied or discharged unless it was obtained by fraud or collusion, or by an agreement contrary to policy of the court … or if the 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 court to set aside an agreement.”**

From the holding of the court and the erudite quotation in **Seaton (above)** it would mean that for an applicant to move the trial court to set aside a consent judgment, such an applicant must prove that the consent was obtained by reason of fraud, mistake, misapprehension or contravention of court policy.

When the above principles are related to the instant matter, it can be surmised that the contention of the applicant after instituting ab High Court Civil Suit No 299 of 2013 in which they were claiming against the respondent the recovery of unpaid dividends in respect of the late Sir G.D. Rukidi 111’s , they were convinced by the Government of Uganda which had the majority share holder in the respondent company to abandon for the government had by then was engaged in the process of divesting its shareholding to another investor and it viewed the pending suit in court as a major stumbling block to its divesture efforts thus under the auspices of the Privatization Unit of the Ministry of Finance, Planning and Economic Development the government initiated talks with the applicant to secure that divestiture process with a promise to settle the Applicant’s interests and that the said promise led the Applicants to sign a consent for the withdrawal of the head suit but that the government upon successfully divesting its interests in the respondent through a concession to a company known as M/s Tibet Hima which is a Chinese based company reneged on its promise to the detriment of the applicant. To prove that fact the applicant attached minutes of meetings as Annexture ‘D’ to its application. The attached documents Annexture ‘D’, however, does not seem to corroborate the applicant’s claim for a thorough perusal of the same seems to [provide no clue to such an undertaking more so there the said the Annexture D stated to minutes of meetings held in that respect bear signature of either the person who chaired such a meeting nor even that of a secretary to those meetings yet the applicants offered the same as confirming the undertakings which convinced them to sign the consent for the withdrawal of the head suit . With the documents not being authenticated, it is highly doubtful to this court that the evidence adduced as signifying the acts proscribed which would convince the court to conclude that the consent was obtained within the parameters which the Supreme Court laid out in the case of **Attorney General and Uganda Land Commission v James Mark Kamoga** **SCCA No.8 of 2004 ( above),** that isfraud, mistake, misapprehension or contravention of court policy would seem to be lacking making the applicant’s to remain unfounded thus unconvincing .

Consequently this court would find o reason to doubt the fact the demised consent which led to the withdrawal of the head suit was freely entered upon by the parties to it and therefore it would not be within the powers of this court to set it aside since it was an agreement consented to by the parties thereto with no iota of illegality proven otherwise.

1. **Orders:**

Thus in the premises, I would find that this Application lacks merits and is thus dismissed with costs accordingly to the redpondent.

The Applicant is advised that it may seek other legal remedies to have its interests adjudicated upon if not time barred and are provided for that trying to denounce a consent which evidence show was freely signed.

I do so order.

**HENRY PETER ADONYO**

**JUDGE**

**13TH NOVEMBER, 2015**