THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

MISC. APPLICATION NO.321,322,323,324,325,326,327,328, 329,331 & 332 OF 2019

(ARISING FROM MISC. CAUSE NO. 203, 245,246,253,254, 292,297, 416 OF 2017, 118,119,120 of 2018)

KAMPALA CAPITAL CITY AUTHORITY---------- APPLICANT

VERSUS

1.NABIMARA CHARLES
2.JOHN BOSCO BAMPABWIRE
3.GUMISIRIZA GODWIN
4.JUSTINE OLAL GUMTWERO
5.TWEHEYO JULIUS
6.MUGALYA ABEL NDOBOLI ---------- RESPONDENTS
7.BATEEZA JOSHUA
8.RUKUNDO CAROLINE BENDA
9.LEONARD KAKOOZA
10.BAKASHABA MUGARURA JULIUS
11.TEBESIGWA JAMES SSEKATAWA

BEFORE HON. JUSTICE MUSA SSEKAANA

RULING

The Applicant brought several applications by way of Notice of Motion against the respondents under Section 82 & 98 of the Civil Procedure Act and Section 14 & 33 of the Judicature Act cap 13 and Order 46 r 1,2 & 8 of the Civil Procedure Rules, for orders that;

1. The consent Judgment executed between the Applicant and the respondent be reviewed and set aside.
2. Provision be made for costs of this application.

The grounds in support of this application are set out in the Notice of motion affidavit of Engineer Andrew Kitaka the Ag Executive Director which briefly states;

1. That in 2012, an advert was run by the Public Service Commission calling upon suitable candidates to apply for jobs with the applicant.

2. That the applicants were among those that applied, were shortlisted and interviewed by the Public service commission and subsequently issued with letters notifying them of having been successful in the interviews and further informed to report to the Applicant for further instructions and /or appointment.
3. That the applicant unfortunately received inadequate funding from the Government and was unable to take on the services of the respondents and others due to lack of funds to pay their salaries.

4. The Respondents herein filed individual applications for judicial review seeking to be deployed with the applicant, payment of salary arrears and damages.

5. That Consent Judgments were entered into without the approval of the Management Executive Committee of the Applicant.

6. The parties appeared before the trial judge of the high Court a number of times seeking more time to allow the applicant's Management Executive Committee ample time to consider and take appropriate decision in respect of the respondent's court matter.

7. That there was no effective appointment of the respondents since they had not received any appointment letters and not resumed duty at the time the Consent Judgments were executed and thus could not be entitled to salary arrears or any other associated benefits like NSSF.

8. That the actions of the then Director Legal Affairs (a public officer) executing the Consent Judgments cannot fetter the Law.

9. That the Consent judgments were thus executed by the Applicant under the misapprehension that the Applicant's Management Executive Committee had approved the same whereas not.

10. That the Consent Judgments are irregular and premised on an illegality.

11. That the Consent judgments were procured by misrepresentation by the Respondents that they were not employed at the time of execution of the Consent judgments yet it has been discovered by the Applicant that the respondents at the time worked both in private and Government for the period they sought to be paid the salary arrears.

12. That the monies included in the Consent Judgments are subject to all relevant statutory deductions including Government tax.

13. That the Applicant is injuriously affected and greatly aggrieved by the partial consent judgments.

In opposition to this Application the every Respondent filed an affidavit briefly stating that;

1. That his appointment in the Public Service according to the Public Service Standing Orders is subject to availability of funds in the approved estimates and therefore the allegation that the applicant did not have funds to pay his salary is misconceived and ultra vires.

2. That it was the applicant's obligation to issue the respondent with an appointment letter within one month from the date of approval of his appointment under R.29 (1) of the Public Service Regulations.

3. That the matter was adjourned on several occasion in order to allow the applicants Management Executive Committee ample time to consider and take appropriate action in respect of the respondent's court matter, the Director Human Resource and Administration Mr Lule and the Director Legal Affairs Mr Charles Ouma appeared before court and confirmed the

signing of the Consent Judgments approved and this led to execution of the Consent with the applicant.

4. That the allegation that the consent was executed under misapprehension that the applicant's Management Executive Committee had not approved the same is baseless without any proof. The concerned Directorates directly involved in the case and are part of management committee duly signed.

5. That all the money was paid to the applicants and all the money was subject to relevant statutory deductions including government tax and the amount was attached in the execution proceedings and it was a NET PAY and not gross pay as alleged.

6. That the applicant has never paid or remitted PAYE and NSSF Remittances of 10% and 5% remittances as per the Consent Judgment.

7. That the Consent Judgment was neither irregular nor illegal as alleged. But the applicants are trying to be unprofessional in trying to run away from their consent judgement.

8. That the application does not disclose any grounds for review of the decision of the Consent Judgment.

When the matter came up for hearing on 11th July 2019, the court ordered a consolidation of these applications under Order 10.

In the interest of time the respective counsel were directed to make written submissions and i have considered the respective submissions. The applicant was represented by Mr. Byaruhanga Dennis and Ms. Mutuwa Rita whereas the respondents were represented *Mr Tusasirwe Benson, Mr. Deogratious Odokel* and *Mr. Kangaho Edward*

Whether this is a proper case to review the Judgment?

The applicant's counsel submitted that, the applicant herein is a party that is aggrieved and injuriously affected by the Consent judgments entered between it and the Respondents.

The applicant further contended that colossal amounts (UGX. 3,415,768,167/=) which are the subject of the partial consent judgments have been subsequently garnished and taken from the Applicant's accounts inclusive of the statutory deductions despite the fact that the said Consent judgments are illegal, irregular and based on misrepresentations.

His Lordship Justice Mulenga as he then was in the case of **Attorney General and Another v James Mark Kamoga and Another, S.C. Civil Appeal No.8 of 2004 concluded that** "… I have already held, in disagreement with the Court of Appeal, that the trial judge had power, and did not err, to entertain the application for review of the consent judgment under Order 46. Secondly, I also respectfully disagree with the notion that a party who consents to a decree cannot be aggrieved by it. A party against whom a consent decree is passed may, notwithstanding the consent, be wrongfully deprived of its legal interest if, for example, the consent was induced through illegality, fraud or mistake.''

Further, His Lordship Justice Stephen Mubiru in the **case of Koboko District Local Government vs Okujjo Swali Miscellanous application number 1 of 2016** while dealing with a matter of setting aside a consent judgment referred to the well established principles which were outlined by the Court of Appeal for East Africa in ***Hirani v Kassam*** **[1952] EA 131**, in which it approved and adopted the following passage from *Seton on Judgments and Orders***,** 7th Ed., Vol. 1 p. 124:

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 or collusion, or by an agreement contrary to the 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 a court to set aside an agreement."

The applicant's counsel submitted that the applicant's then Acting Director Legal Affairs, Mr. Charles Ouma, executed partial Consents with the Respondents which the Applicant states was done under a misapprehension or mistaken belief that the Management Executive Committee of the Applicant had approved the same whereas not. According to counsel there was never any management minute allowing execution of such consent Judgments.

The applicant's counsel submitted that, the Consent judgments entered into between it and the Respondents were based on misrepresentation that some of the respondents were not employed whereas not. The applicant lays down the particulars of the said misrepresentation.

Concealing information from the applicant showing that they were employed at the time of executing the partial Consent Judgment. The respondent relying on the same to enter into the said Partial Consent Judgment to the detriment of the Applicant.

It was their contention the Applicant that during the negotiations that resulted into the execution of the consent judgments, the Respondents in the above applications concealed or made a representation that they were not employed at the time of execution of the consent Judgments which induced the Applicant to enter the consent judgments.

The Applicant has provided evidence by way of police report on the employment status of the respondents as at the time of the execution of the said partial consents.

The applicant's counsel further submitted that the partial consent judgments entered between it and the Respondents are based on an illegality. Consenting to be paid salary arrears yet the applicant had not made any offer to the Respondents and the same accepted in writing and the Applicant had not effectively employed the respondent/s contrary to the provisions of the Uganda Service standing Orders, 2010.

The applicant's counsel submitted that, It is undisputed that the Respondents prior to the execution of the consent Judgments did not receive any appointment from the Applicant which would ordinarily render them as employees and public servants under the law and thus entitle them to receive salary or salary arrears in

that regard. We therefore submit that any payment of the salary arrears to the Respondents who did not offer any services to the Government was made illegally and we thus humbly invite this Honorable Court to find as such and review the Consent in respect to the salary arrears and or set them aside for being tainted with illegality.

The respondent's counsel in his submission citing *Stephen Mubiru J*, in ***KOBOKO DISTRICT LOCAL GOVERNMENT VS OKUJJO SWALI M.A.NO.1 OF 2016***, cited with approval the case of *Eleko Bahume & 2 Others Vs Goodman Agencies Limited & 2 Others HCMA No.12 Of 2012*, where court observed that "the misapprehension or facts that may form the basis for setting aside a consent judgment must relate to the state of mind of the parties to the Consent Judgment by which state of mind informed by the facts before them they were misguided into executing the consent Judgment.

According to the affidavits in reply filed by the respondents, paragraph 9 thereof, which has not been rebutted, the Directors for Human Resource Mr. Richard Lule and Legal Affairs Mr. Charles Ouma both of whom were part of the Management Committee for the applicant appeared before Court and confirmed that Management had approved the consent Judgments and following that the same were endorsed by the parties and court.

It is also on record that several adjournments were made to allow Management of the applicant to extensively discuss and comprehend the matters that were to make the said consent judgments. It is also on court record that meetings between the parties, their lawyers and the legal team of the applicant were held alongside discussions by the applicant's Management on the issue. The applicant's legal team included the current Acting Director Legal Affairs Mr. Caleb Mugisha, and yet the applicant wants to use the absence of Charles Ouma as an escape route for what was debated, discussed and agreed upon by the Management Committee of the applicant

The affidavit in rejoinder by the Ag. Executive Director, paragraph 16 thereof, he states that the actions of the Public Officer cannot fetter the law; if he is saying that all the officers of the applicant who participated in discussing and approving the impugned consent judgments were negligent , then their negligence should not be visited on the respondents. The same officers including the Director Human Resource, Mr. Richard Lule, the Ag. Director Legal Affairs Mr. Caleb Mugisha and

any other legal officer of the applicant that was involved in giving legal opinions to Management should be prosecuted for causing financial loss to the applicant. Otherwise, the state of mind of the parties to the Consent Judgments by which state of mind informed by the facts before them they were not misguided into executing the consent Judgment, and therefore, the issue of misapprehension/ mistake does not arise.

The respondents' counsel submitted that the applicant was aware of all the information concerning the respondents' previous employment, since all of it was contained in the Curriculum Vitae of the applicants **which are on the respondents' files kept by the applicant.** Even during the process of interviewing the respondents information about them was obtained by the Public Service Commission. As already indicated herein above, meetings were held between the respondents and the applicant's legal team which included the current Ag. Director Legal Affairs Mr. Caleb Mugisha, and all details of past and present employment of the respondents was discussed, but basing on the decision of ***TUSIIME DOREEN VS KAMPALA CAPITAL CITY AUTHORITY MC NO. 276 OF 2016***, where court awarded general damages equivalent to salary arrears she should have earned from the date of notification to the date of the ruling was the guiding authority.

In any case the Applicant has not proved that they exercised due diligence to establish what they allege is new and important matter or evidence before it entered the consent judgments. The police that the applicant has engaged to obtain annexture 'B' to the affidavit in support should have been engaged before signing the Consent Judgments, if the applicant had information that its officials wanted to know before signing the consent judgments. In fact the money spent on the so called investigation was wasted because there is nothing new that the police report has revealed since the report quotes the curriculum vitae of the respondents which are on the respondents files kept with the applicant.

Further still, the consents that the applicant is seeking to set aside have already been complied with by the Applicant in respect of deploying the Respondents and the Applicant is silent on the deployments. The applicant in its application has not stated that it is challenging part of the consent judgments, but rather the entire Consent Judgments. The applicant cannot therefore be seen to be challenging the consent judgments which it is going ahead to implement.

What should be noted by this honourable court is that neither the respondents nor court are part of the Management Committee of the applicant. They are not even privy to its decisions. Both the respondents and Court were notified by the applicant's officials during the court proceedings that the Management Committee had approved the consent Judgments and therefore anything beyond that is an afterthought. The applicants and Court cannot be blamed if the applicant's officials acted negligently. The applicant should be bound by its negligent officials' actions if at all and own the consent Judgments.

The respondents' counsel contends that the respondents were paid were damages equivalent to salary arrears they would have earned from the date of notification to the date of the consent in line with the decision in ***TUSIIME DOREEN VS KAMPALA CAPITAL CITY AUTHORITY (SUPRA)*** which decision is still binding as it has not been set aside. The applicant cannot now ran away from its actions. The applicant's officials were well aware that they had appealed the said decision and that the appeal had not been decided by the Court of Appeal, why then did they not wait until the appeal is determined in order to sign the consent judgments. I find the application itself illegal as it is trying to indirectly ask this court to declare the decision in ***TUSIIME DOREEN's*** case illegal as if it is a Court of Appeal.

The Applicant has therefore, not come to this court with clean hands. As a development of this principle of fairness, an applicant for an equitable remedy will not receive that remedy where she has not acted equitably herself. It is only important to look to the 'clean hands' of the applicant; the court will not necessarily try to ascertain which of the parties has the cleaner hands before deciding whether or not to award equitable relief. This leads us to another principle of Equity that he who seeks equity must do equity. A claimant will not receive the court's support unless she has acted entirely fairly herself.

My Lord, other than there being no new and important matter or evidence disclosed by the applicant, and also there being no fraud, misrepresentation or misapprehension proved by the applicant in this application. It should be pointed out that the reports of the Criminal investigations department of KCCA that the

Applicant relies on to allege the so called important new matter or evidence are full of false hoods, are biased and unconstitutional.

In respect of all the Respondents, only the net pay of the Respondents was attached contrary to what the Applicant is alleging as can be seen from the Garnishee Order Absolute on annexure B to the affidavit in reply Vis a vis the Consent Judgements on the court record which had the gross amount.

Determination

The law on review is set out in Section 82 of the Civil Procedure Act and Order 46 rule of the Civil Procedure Rules. The applicant has premised his application on ***" Mistake or error apparent on the face of the record"***

Review means re-consideration of order or decree by a court which passed the order or decree.

If there is an error due to human failing, it cannot be permitted to perpetuate and to defeat justice. Such Mistakes or errors must be corrected to prevent miscarriage of justice. The rectification of a judgment stems from the fundamental principle that justice is above all. It is exercised to remove an error and not to disturb finality.

Reviewing a judgment/ruling based on mistake or error apparent on the face of the record can only be done if it is self-evident and does not require an examination or argument to establish it.

His Lordship Justice Mulenga as he then was in the case of **Attorney General and Another v James Mark Kamoga and Another, S.C. Civil Appeal No.8 of 2004 concluded that** "… *I have already held, in disagreement with the Court of Appeal, that the trial judge had power, and did not err, to entertain the application for review of the consent judgment under Order 46. Secondly, I also respectfully disagree with the notion that a party who consents to a decree cannot be aggrieved by it. A party against whom a consent decree is passed may, notwithstanding the consent, be wrongfully deprived of its legal interest if, for example, the consent was induced through illegality, fraud or mistake*.''

Further, His Lordship Justice Stephen Mubiru in the **case of Koboko District Local Government vs Okujjo Swali Miscellanous application number 1 of 2016** while dealing with a matter of setting aside a consent judgment referred to the well established principles which were outlined by the Court of Appeal for East Africa in ***Hirani v Kassam*** **[1952] EA 131**, in which it approved and adopted the following passage from *Seton on Judgments and Orders***,** 7th Ed., Vol. 1 p. 124:

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 or collusion, or by an agreement contrary to the 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 a court to set aside an agreement."

This court does agree with the applicant's submission that the Management Executive Committee did not agree to have the consent filed in this matter. The matters in court had been filed in 2017 and the consents where filed in December 2018 after prolonged negotiations that had been guided by a similar case of Tusiime Doreen v KCCA which had been decided earlier by the same court.

The internal workings of the applicant are is business and any person dealing with the Institution could not ascertain whether the applicant's directors did not have any authority to sign. Indeed to show the same authority they all appeared in court and confirmed the position. It is absurd the applicant's current officials are dis-owning a consent negotiated from their own offices and presented to court.

The actions of the applicant's officials in filing this matter is an act of abuse of court process in order to please their supervisors. This is an act of abuse of authority or maladministration. Public officials are bound by decisions taken by their predecessors while in office and to entertain them to reverse every decision earlier taken would be an absurdity.

The applicant is estopped from denying authority of its Director for Legal Affairs and Director Human Resource Affairs who appeared in court and also concluded the negotiations with the respondents' counsel at their head office.

Estoppel is a rule whereby a party is precluded from denying the existing state of facts which he had previously asserted and on which the other party has relied or is entitled to rely on. The actions of the applicant are clearly barred by this principle since it would very detrimental to the respondents who have already taken benefit of the consent judgment. It is a bar to re-litigation of issues determined after a party has relied on actions or representation of another party. See ***Black's Law Dictionary page 691-693,11th Edition 2019.***

The applicant's assertion that there is an illegality is equally an afterthought. There was nothing illegal about the consent. The parties where guided by the earlier decision of *Tusiime Doreen vs KCCA* which was on all fours with the present case for the respondents who were denied employment by the applicant administration in total abuse of power. The excuse by the applicant's failure to give employment to the respondent was baseless and it is the very reason that they conceded to the respondents cases and they have since granted them employment.

The applicant agreed to employ all the respondents to the respective positions in accordance with the said consent. The use of the word salary was used to guide parties on the amount to be paid as general damages. Indeed when some of the parties (respondents) returned to court to seek general damages, the court out rightly rejected the claim and they were informed that what was to be paid as salary arrears was actually general damages in accordance with the decision of *Tusiime Doreen vs KCCA.* According to paragraph 5 of the consent it noted as follows*;*

"The parties undertake to agree on whether or not the respondent should pay the applicant general damages and if so, the quantum thereof, not later than the 14th day of January 2019: failing of which, the issue shall be submitted to Court for determination"

The applicant is merely trying to split hairs over the amount already paid and it was at all times within their knowledge that the said amount was general damages as it was in the case of Tusiime Doreen.

The applicant's counsel seems to be relying on discovery of new evidence and it is upon that alleged evidence that they are trying to ask this court to set aside the consent judgment.

The exercise of power of review upon discovery of new and important evidence must be done with utmost care, since it is very easy for the party who has lost a case to see the weak points in his case and he would be tempted to try and fill in gaps by procuring evidence which will strengthen that weak part of his case and put a different complexion upon that part. This appears to be the position in the present case, where the applicants are trying to find every reason to set aside the consent judgment at whatever cost.

They engaged police officers attached to their institution to try and find every fault upon which they could set aside the consent judgment. It was done in a loop sided or biased manner in order to achieve that set objective and hoodwink court to set aside the consent judgment. The evidence contained in the report is very inconclusive in order to be relied upon to set aside the consent or vary some of the orders. Where there is doubt whether the evidence even if produced would have any effect on the judgment, review cannot be granted. See ***Civil Procedure and Practice in Uganda 2nd Edition.***

Greater care, seriousness and restraint are needed in review applications since litigation must come to an end. It is neither fair to the court which decided the matter nor to the huge backlog of cases waiting in the queue for disposal to file review applications indiscriminately and fight over again the same battle which has been fought and lost. Public time and resources is wasted in such matters and the practice, therefore, should be deprecated.

The applicant did not have any justification for filing this application and the same was merely an abuse of court process.

Abuse of Court Process was defined in Black's Law dictionary (6th Ed) as

> "***A malicious abuse of the legal process occurs when the party employs it for some unlawful object, not the purpose which it is intended by the law to effect, in other words a perversion of it***."

Parties and their respective counsel should take the necessary steps to safeguard the integrity of the judiciary and to obviate actions likely to abuse its process. See ***Caneland Ltd & Others vs Delphis Bank Ltd Civil Application No. 344 of 1999 (Kenya Court of Appeal)***

Similarly, in the case of; **Benkay Nigeria Limited vs Cadbury Nigeria Limited No. 29 of 2006** (*Supreme Court of Nigeria*), their Lordships held:

> "*In Seraki vs Kotoye (1992) 9 NWLR (pt 264) 156 at 188, this court on abuse of court process held….the employment of judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. This will arise in instituting a multiplicity of actions on the same subject matter against the same opponent on the same issue.*

The Court further observed that;

> "*….to constitute abuse of court process, the multiplicity of suits must have been instituted by one person against his opponent on the same set of facts*"

This application fails and the same is dismissed with costs to the respondents

It is so ordered.

Dated, signed and delivered be email at Kampala this 8th day of May 2020

SSEKAANA MUSA
JUDGE