

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
MISCELLANEOUS APPLICATION NO.039 OF 2018
(Arising from Misc Appn No. 850 of 2017)
(ARISING FROM Misc. Cause NO. 414 OF 2017)

BISHOP JANCITO KIBUUKA----- APPLICANT

VERSUS

- 1. THE UGANDA CATHOLIC LAWYERS FRATERNITY**
- 2. HON. SEWUNGU JOSEPH**
- 3. JUDE MBABALI----- RESPONDENTS**

BEFORE HON. JUSTICE MUSA SSEKAANA

RULING

The Applicant brought this application by way of Notice of Motion against the respondents under Section 82 of the Civil Procedure Act and Order 46 r 1,2 & 8 of the Civil Procedure Rules, for orders that;

1. The consent Withdrawal entered in Miscellaneous Application No. 850 of 2017 between the parties' lawyers on 08/01/2018 be reviewed and/or set aside
2. Costs of the application be provided for.

The grounds in support of this application are set out in the Notice of motion and affidavit of Bishop Jacinto Kibuuka dated 25th January 2018 of 31 paragraphs which briefly states;

1. That the applicant is a Bishop within the Eastern Rite of the Evangelical Orthodox Church and also a former Priest of the Roman Catholic Church aggrieved by the consent withdrawal signed by the parties' lawyers in Miscellaneous Application No. 850 of 2018.
2. That the applicant in his religion under the Evangelical Orthodox Church has been carrying out several religious activities, including celebrating the Divine Liturgy, praying for the flock, and carrying out sacramental duties and was consecrated as a Bishop of the Evangelical Orthodox Church.
3. That the respondents, their agents and persons acting under them, who confess to belong to the Roman Catholic Church, took issue with the applicant's religious activities and practices and publicly criticized the applicant and made insulting, demeaning and defamatory utterances and press releases.
4. That as a result of the said threats, the applicant instituted a suit in order to protect his right to freedom to practice his religion, manifest the same and also to belong to a religious organisation.
5. That during the pendency of the said application, the respondents sought an out of court settlement and their lawyers-M/s Ssemwanga, Muwazi & Co Advocates sent a draft of the terms of settlement for the applicant's consideration.
6. That the applicant's lawyer, Mr Wameli Anthony edited the said draft and forwarded the same to the applicant, who made changes and sent what he thought to be the final draft to his lawyer, who in turn forwarded the same to the respondent's lawyer.
7. That when the case came up before the Learned trial Judge directed the parties to edit the final draft in order to remove provisions for signatures of

the parties but the respondent's counsel substituted what the applicant had inserted in the draft and replaced with their own earlier proposal.

8. That the applicant's lawyers who appeared on that day signed the said consent withdrawal but in a different form the applicant had earlier rejected and edited.
9. The applicant shall suffer prejudice, injustice and irreparable injury if the said consent withdrawal is not reviewed and/or set aside.
10. The applicant neither agreed nor consented to the Consent Withdrawal terms therein signed by the parties' lawyers on 08/01/2018.
11. The terms that the applicant consented to and instructed his lawyers M/s Wameli & Co Advocates, to sign for are very different from the ones signed for under the consent.
12. The said consent withdrawal was, in the above regard, signed against the applicant's will and consent.
13. The effect of the said consent withdrawal is obviously to curtail and restrict the applicant's religious freedoms and practices.
14. This application has been made without undue delay on the side of the applicant.
15. That if the respondents are not willing to have the consent withdrawal as proposed by the applicant, the matter can as well be left for hearing and determination on the merits.

The applicant made a rejoinder to the affidavit of the respondents and contended that;

16. That the applicant never attended court because it was an omission on the part of his former counsel not to inform him to attend court on 8th January 2018 when the case came up for hearing.

17. That the mistake of his former counsel should not be visited on him as the litigant and he has never appended his signature on the said consent withdrawal and did not instruct the former lawyers to execute one in those impugned terms.

18. That the failure to represent the applicant's interests professionally amounted to professional negligence and the applicant has filed a complaint against the former lawyers at the Law Council.

In opposition to this Application the Respondents through Ssemwanga Fredrick for and on behalf of the rest of the respondents briefly stating that;

1. That on the 21st December 2017 when the suit first came up for hearing, the applicant through his lawyer Nandawula Catherine appeared in court and informed court about the desire to withdraw all he suits and asked for more time to discussions relating to the consent where after the matter was adjourned to 8th January 2018.
2. That the applicant sent another lawyer by the names of Richard Wananda with instructions to finalize the process of signing the consent withdrawal.
3. That the affidavit in support of the application does not at all indicate that a final consent was ever agreed upon by the parties and the same does not indicate that the alleged final draft was ever delivered to the respondent's lawyer.
4. That the said email was sent to his lawyer Anthony Wameli the applicant's advocate to Francis Bbosa and not the respondents' lawyer as the applicant wants to mislead court. The said communications were between the applicant's side only.

5. That the applicant always trusted his lawyers and he never appeared in court to attend court proceedings which is an indication that he had full confidence in the representation by his lawyers which he cannot deny at this stage and he is therefore bound by the actions of his advocates he instructed.
6. That Wananda Richard who appeared in court to finalize the consent withdraw never delivered any final draft to the respondent's counsel or Court and therefore the document he voluntarily executed duly binds him and he cannot run away from as it amounts to abuse of the process of court.
7. That a consent signed by advocates on behalf of their lawyers cannot be revised and/ or set aside and the applicant has not pleaded and proved any legal grounds that would warrant the revision or setting aside the consent withdrawal which his lawyer voluntarily executed from court on an informed point of view with interests of the applicant.
8. That the applicant's advocate was aware of all the facts and the applicant is bringing this application as afterthought and that is why he is not challenging the whole consent withdrawal but parts of it.
9. That it is clear from the applicant's affidavit that his hidden intention is to remain in violating, abusing, defiling the sacred objects of the Roman catholic church and Liturgy of the Roman catholic Church religion or copy, imitate, mimic, emulate, reproduce the liturgy yet he claims to have left the Roman catholic Church of the Eastern Rite of the Evangelical Orthodox Church.

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 Ssemambo Rashid whereas the respondents were represented *Mr Jude Mbabali who is also the 3rd respondent.*

Whether this is a proper case to review or set aside the consent withdrawal?

The applicant's counsel submitted that for the Applicant to succeed in this Application brought under Order 46 Rule 1 of CPR has to demonstrate to the satisfaction of court that on account there is **some mistake** that prevented him from none appearance in court when the Application came up for hearing.

The powers of this court to exercise its discretion to review and/or set aside the consent withdrawal are not in dispute. What is important to demonstrate to court is whether mistake of counsel is sufficient reason to warrant review and/or setting aside the consent withdrawal.

The term mistake of counsel has received wealthy of authorities relating it as constituting sufficient cause. In the case of ***Okurut Joseph & 2 Others vs New Bubajjwe Primary School & 2 Others; HCCA No. 632 of 2013***, Lady Justice Elizabeth Musoke held:

*"It is trite law that a procedural error, or even a blunder on a point of law, on the part of the advocate (including that of his clerk), such as failure to take prescribed procedural steps or to take them in due time, should be taken with humane approach and not without sympathy for the parties, and in a proper case, such mistake if the interests of justice so dictate because the door of justice is not closed merely because a mistake has been made by a person of experience who ought to have known better, and there is nothing in the nature of such as mistake to exclude it from being a proper ground for putting things right in the interests of justice and without damage to the other side. In addition, Hon Justice Mukasa Kikonyogo, DCJ in ***Andrew Bamanya vs Shamsherali Zaye CAC Application No. 70 of 2001***, observed that mistakes, faults, lapses or dilatory conduct of Counsel should not be visited on the litigant."*

In the instant Application, the Applicant by way of affidavit set out the matters which prevented him from attending court and the circumstances under which the Applicant's former lawyer appended his signature on the said Consent withdrawal that the Applicant did not instruct him to execute in those impugned terms.

It was the applicant's submission that the Applicant's former counsel mistake of not informing the Applicant to attend court when the case came up for hearing on 8th January 2018 should not be visited on the innocent Applicant. The Applicant has at all material times demonstrated his interest in the consent withdrawal.

In his affidavit in support of the Application, he clearly states in paragraphs 8, 9 and 10 of his affidavit his involvement in the drafting of the settlement. The Applicant exercised due diligence in the matter, however Counsel's mistake of not informing the Applicant of the hearing date is the reason the Applicant was unable to attend court.

The applicant's counsel further submit that the Applicant's former counsel Mr. Wananda Richard's failure to proof read the consent withdrawal before appending his signature amounted to professional negligence. The Consent withdrawal signed between the Respondent's Counsel and the Applicant's Counsel was materially different from what was agreed by both parties. The impugned consent order was procured by mistake and does not at all reflect the revised version of the consent order as corrected by the Applicant.

In the case of ***Banco Arabe Espanol vs. Bank of Uganda, SCCA No. 8 of 1998*** it was held that;

"A mistake, negligence, oversight or error on the part of counsel should not be visited on the litigant. Such mistake, or as the case may be, constitutes just cause entitling the trial judge to use his discretion so that the matter is considered on its merits."

The foregoing proposition of the law has been variously adopted by courts of law in **(CANSTER RAGS (U) LTD VS STANBIC BANK (U) LTD& ANOR MISC APPLICATION NO 401 OF 2014 (ARISING FROM HCCS NO 159 OF 2012).**

It was the counsel's contention that the same principle is applicable to the facts pertaining in this instant application. It was as a result of this inexcusable conduct by the Applicant's former counsel that drove the Applicant away from the seat of justice as he was condemned unheard. The right to a hearing has always been a well-protected right in our constitution and is also the cornerstone of the rule of law.

The applicant's counsel prayed that the court be pleased to find that mistake of counsel is the reason the Applicant was unable to attend court. Further, he

prayed that court finds it mistake of counsel for the applicant Mr. Wananda Richard to append his signature without proof reading the consent withdrawal that has resulted in the injustice and prejudice to set aside the consent withdrawal. This Honourable Court exercises its unfettered discretion in the interest of substantial justice and allows this application for review and/or setting aside the consent withdrawal signed on 08/01/2018.

The respondents' counsel submitted that law governing setting aside consent judgments or decrees has been correctly put in the Supreme Court case of ***Attorney General & Uganda Land Commission vs James Mark Kamoga*** where it was held that a Consent can only be set aside if the consent was actuated by illegality, fraud or mistake. A consent judgment can be set aside on limited grounds.

He further cited the case of ***Harani vs Kassam (1952) EACA 131***, in which it approved and adopted the following passage from **Seton on Judgments and orders 7th Edition Vol. 1 page 124**;

“prima facie, any order made in 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 policy of the Court.....or if the consent was given without sufficient material facts, or in misapprehension or ignorance of material facts, or in general for a reason which would enable court to set aside an agreement”

In the instant case, the ground for review and setting aside the consent judgment is that it was a mistake of counsel who failed to inform his client to come to court on the 8th January 2019 to be present when the consent was going to be signed and therefore his counsel ended up signing a consent with terms he did not agree with concluding that counsel did not instructions to act as he did.

Respondents' counsel contended that Counsel Richard Wananda who signed the consent judgment had full instructions from and that he cannot claim at this stage that his advocates did not have instructions.

He further buttressed his submissions by making reference to ***Ssekaana Musa and Salima Namusoby Ssekaana, Civil Procedure and Practice in Uganda*** at page 277 where it authoritatively stated that;

“ the court cannot set aside the consent Judgment when ther was nothing to show that counsel for the applicant had entered into it without instructions. Even if the advocate had no specific instructions to enter a consent judgment but only had general instructions to defend the suit, the position would not change so long as counsel is acting for a party in a case and his instructions have not been terminated, he has full control over the conduct of the trial and has apparent authority to compromise all matter connected with the action”.

That the said Ssemwanga stated that Mr Wananda Richard counsel for the applicant voluntarily signed the consent and there no was fraud at all on the part of the respondents’ counsel. The applicant who was not in court on day could not allege that Ssemwanga substituted a final draft with another document. There was no other document/draft other than the one signed in court and no dislikes where ever brought to the attention of the court or the opposite parties. That the application is an afterthought

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.

An error which has to be established by a long drawn out process of reasoning on points where there may conceivably be two opinions can hardly be said to be an

error apparent on the face of the record. *See Civil Procedure and Practice in Uganda by M & SN Ssekaana page 453*

In the case of *Harani vs Kassam (1952) EACA 131*, in which it approved and adopted the following passage from *Seton on Judgments and orders 7th Edition Vol. 1 page 124*;

“prima facie, any order made in 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 policy of the Court.....or if the consent was given without sufficient material facts, or in misapprehension or ignorance of material facts, or in general for a reason which would enable court to set aside an agreement”

A consent Judgment can only be set aside if the consent was actuated by illegality, fraud or mistake. A consent judgment can be set aside on limited grounds. See *Attorney General & Uganda Land Commission vs James Mark Kamoga & James Kamala SCCA No. 8 of 2004*

If the consent was given without sufficient material facts or in misapprehension or ignorance of material facts or in general for a reason which would enable the court to set aside such an agreement, a consent would be set aside.

Therefore, where a party obtains a consent judgment irregularly the opposite party may of course insist on its right to have such consent set aside.

In the present case, the applicant contends that the consent entered into by his counsel is not what they agreed upon and that it will cause him inconvenience and injustice;

- The applicant shall suffer prejudice, injustice and irreparable injury if the said consent withdrawal is not reviewed and/or set aside.
- The applicant neither agreed nor consented to the Consent Withdrawal terms therein signed by the parties’ lawyers on 08/01/2018.
- The terms that the applicant consented to and instructed his lawyers M/s Wameli & Co Advocates, to sign for are very different from the ones signed for under the consent.

- The said consent withdrawal was, in the above regard, signed against the applicant's will and consent.
- The effect of the said consent withdrawal is obviously to curtail and restrict the applicant's religious freedoms and practices.

For ease of reference, I will reproduce the two consents in dispute;

CONSENT WITHDRAWAL

BY CONSENT OF BOTH PARTIES; It is hereby consented as follows;-

- 1. The main cause and all applications therefrom or related be and are hereby withdrawn by the applicant.*
- 2. That the applicant Bishop Jacinto Kibuuka shall desist from vilification of the Roman Catholic Religion to wit; making religious insult, defamation of the Roman Catholic Church, offending religious feelings of Catholics or contempt of the religion and making hate speech against its leaders.*
- 3. That the Applicant desists from abusing, or violating any object which is held sacred by the Roman catholic church and or copy, imitate, mimic, ape, emulate, reproduce the liturgy of the Roman Catholic Church.*
- 4. The respondents, their agents and/or servants or persons acting under them shall forth with cease vilification of the applicant's faith, (The Eastern Rite of Evangelical Orthodox Church) to wit; making religious insult, denigration of that faith, offending Religious feelings of that faith or its members or the contempt of the religion and making hate speech against its leaders.*
- 5. Each party shall bear the costs of this application.*

Dated at Kampala this.....8thday ofJanuary2018

We Consent

Wameli & Co Advocates

Ssemwanga, Mawazi & Co. Advocates

The applicant's contends that this is proper version of the consent he intended to sign with his client.

CONSENT WITHDRAWAL

BY CONSENT OF BOTH PARTIES, it is hereby consented as follows:-

1. The Main Cause and all applications therefrom or related be and is hereby withdrawn.
2. The respondents, their agents and servants or persons acting under them shall forthwith cease vilification of the applicant's faith, (The Evangelical Orthodox Church of the Eastern Rite) to wit; making religious insult, defamation of that faith and/or its leaders, denigration of that faith, offending religious feelings of that faith or its members or contempt of the religion and making hate speech against its leaders.
3. That the applicant shall desist from vilification of Roman Catholic Religion to wit; making religious insult, defamation of the Roman catholic Religion and/or its leaders, denigration of the Roman Catholic Religion, offending religious feelings of Catholics or the contempt of the religion and making hate speech against its leaders.
4. Each party shall bear the cost of this application.

(It provided for signature of all the parties to the case including their counsel)

It is also clear that the applicant immediately after the said consent withdrawal had been signed, counsel for the applicant wrote a letter of protest dated 8-01-2018 and filed in this court on 9th January 2018 to the Presiding judge.

The letter by the applicant's counsel is reproduced as hereunder;

The Presiding judge,
High Court, Civil Division
Kampala
My Lord,

**RE; MISREPRESENTATION IN EXECUTION OF CONSENT UNDER MISC.
APPLICATION NO. 850 OF 2017 (ARISING OUT OF MISC.CAUSE NO. 414 OF
2017)**

**BISHOP JACINTO KIBUUKA VS UGANDA CATHOLIC LAWYERS SOCIETY, HON
SEWUNGU JOSEPH AND JUDE MBABALI**

"I write with ut most disappointment and in complaint about the way counsel for the Respondents, Fredrick Ssemwanga, tricked counsel Richard Wananda into signing a consent withdrawal in the above matter against our client's will.

My Lord this matter came up before you on 8/01/2018 at 10:00am for mention since the parties had indicated settlement was in sight. However, since I was not able to personally be in court, I sent my colleague Wananda Richard to hold my brief and witness the signing of a consent settlement which we had already printed.

During our correspondence with the respondents' counsel, Fredrick Ssemwanga I had forward the same draft consent on his e-mail address (semwangafredrick@gmail.com) and there was no indication from their side that they would divert from the draft.

When the two lawyers, Fredrick Ssemwanga for the respondents' and Wananda Richard for the applicant were before you, you guided that they should delete the provisions for the parties to sign and retain the provision where the lawyers were to sign.

Counsel Fredrick Ssemwanga took advantage of this and substituted consent withdrawal agreed upon by the parties with the one he had proposed in the beginning.

In the result my Lord, a consent withdrawal that was never agreed upon between the parties was signed by the said lawyers and endorsed by you.

As soon as I saw the signed consent, I right away contacted counsel for the respondents, Fredrick Ssemwanga about this misrepresentation and he only retorted that my colleague should have read it before signing.

The respondents have now taken advantage of this misrepresentation and have already circulated the same in the press.

My Lord I have instructions from my client to seek your indulgence so that you recall this withdrawal, revise it by setting it aside so that the parties either sign an agreeable consent withdrawal or the matter be fixed for hearing on its merits.

The respondents and their counsel are herein copied.

Your faithfully

Wameli & Co Advocates

It is clear there was no consensus id idem between the parties on what was signed and it is clearly reflected from the protest letter. Surprisingly, the respondents counsel Ssemwanga Fredrick did not respond to the above protest letter and in absence of any written response with such serious allegations they are deemed correct and admitted as a true reflection of the state of affairs surrounding the disputed consent withdrawal.

The respondent's counsel in his affidavit attempted to come up with a technical defence that the lawyer was duly instructed and he signed without availing any explanation to the letter that is marked "annexture E" and has not disputed ever receiving the same.

The consent judgment that was signed on 8th-January 2018 was actuated by, fraud or mistake. See ***Attorney General & Uganda Land Commission vs James Mark Kamoga & James Kamala SCCA No. 8 of 2004***

The applicant's counsel made a mistake to sign on behalf of a client without sufficient without sufficient material facts or in misapprehension or ignorance of material facts. That is why the counsel with personal conduct protested that the respondents counsel took advantage of his ignorance and appended signature on a consent with insufficient knowledge.

This court for the reasons herein above sets aside the consent withdrawal dated 8-01-2018.

This application succeeds and is allowed with no order as to costs

It is so ordered.

SSEKAANA MUSA

JUDGE

16th/08/2019