

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)
MISC. APPLICATION NO. 336 OF 2023
(ARISING FROM EMA NO. HCT-00-CV-EMA-0096-2022)
(ARISING FROM CIVIL SUIT NO. 516 OF 2019)

KIVIIRI JOHN MARK:..... APPLICANT

VERSUS

KAUSHIK ROY DAMANI:.....RESPONDENT

BEFORE; HON. JUSTICE SSEKAANA MUSA

RULING

This was an application brought under Section 34 & 98 of the Civil Procedure Act Cap 71, S.33 of the Judicature Act Cap.13, Oder 52 rule 1 and 3 of the Civil Procedure rules for orders that;

1. Execution of the Consent Settlement in HCCS No. 516 of 2019 consolidated with Company Cause No. 05 of 2019 vide EMA No. 0096 of 2022 (Lakeside Township Ltd vs Kaushik Roy Damani & Others) be set aside.
2. The Applicant be released from Civil prison immediately.
3. Costs of the Application be provided for.

The grounds upon which this application are set out in the affidavit of the applicant which briefly states as follows;

1. That Lakeside Township Limited has a claim of Ug Shs 5,511,487,736/= against Damanico Properties Limited. It authorized the applicant to recover the same from Damanico Properties Limited on its behalf.
2. That Damanico Properties Limited promised/undertook to pay to pay the said 5,511,487,736/= to Lakeside Township Limited through the Applicant.
3. That basing on the promises/undertakings of Damanico Properties Ltd to pay Lakeside Township Limited, the applicant was authorized to negotiate settlement of the respondent's claims in HCCS No. 516 of 2019 consolidated with Company Cause No. 05 of 2019 to ensure that all disputes are resolved once and for all.
4. That the applicant got involved in negotiations for the settlement of HCCS No. 516 of 2019 consolidated with Company Cause No. 05 of 2019 with the respondent as authorized by Lakeside Township Limited.
5. That on the 5th day of May, 2022, the parties in HCCS No. 516 of 2019 consolidated Company Cause No. 05 of 2019 entered into a Consent Settlement wherein the applicant represented Lakeside Township Limited as its agent.
6. That in the said Consent Settlement it was stated that the applicant would pay Ug Shs 1,350,000,000/= to the respondent on behalf of Lakeside Township Limited.
7. That the applicant would be able to pay the said 1,350,000,000/= to the respondent solely upon receipt of 5,511,487,736/= from Damanico Properties Limited.

8. That Damanico Properties Limited has failed or refused to pay and as a result Lakeside Township Limited has instituted HCCS No. 181 of 2023 at Commercial Court for recovery of 5,511,487,736/=.
9. That on 17th November, 2022, the respondent filed an Application for Execution against the applicant in his personal capacity vide EMA No. 0096 of 2022 instead of Lakeside Township Limited. On 31st day of May, 2023 the court issued a warrant of arrest in execution and the applicant was arrested and committed to civil prison.
10. That the applicant is not the principal debtor and that the agent cannot be personally liable for the principal's debts/liabilities.

The respondent opposed the application and filed an affidavit in reply briefly contending that;

1. That it not true that the applicant is a mere agent of Lakeside Township Limited but rather he was also sued as the 3rd Counter-defendant together with Lakeside Township Limited.
2. That the applicant received 3,196,757,264/= on behalf of Lakeside Township Limited out of which the respondent was entitled 1,350,000,000/=.
3. That on 1st June, 2020, this court issued an order that Bank Account No. 3100059305 in Centenary Bank, Rubaga Branch belonging to Kiviiri John Mark Kasasa (Applicant) be frozen in respect of Lakeside Township Limited's Ug Shs 3,196,757,264/= payable by Uganda National Roads Authority through court Order in Misc. Application No. 820 of 2019 and monies be deposited in court pending the determination of HCCS No. 516 of 2019.

4. That on 16th June, the respondent lawyers-Kasumba,Kugonza & Co Advocates wrote to Centenary Bank and requested that 3,196,757,264/= deposited on the applicants account be deposited on the applicant's Bank account be deposited in court.
5. The Bank responded that the applicant had already withdrawn the money from his Bank Account. The applicant is the one in custody of Lakeside Township Limited said funds amounting to 3,196,757,264/=.
6. That the applicant undertook to pay 1,350,000,000/= out of the funds he was holding of the company of 3,196,757,264/= which he received from UNRA as a guarantor and he is fully liable to pay in his personal capacity.
7. That it was difficult for the bailiff and police to trace and arrest the applicant for committal since he was evasive. If he is released without paying the respondent will suffer substantial loss.

Issues for determination

1. *Whether execution of Consent Settlement in HCCS No. 516 of 2019 consolidated with Company Cause No. 05 of 2019 vide EMA No. 0096 Of 2022 (Lakeside Township Ltd v Kaushik Roy Damani & Others) ought to be set aside.*
2. *What remedies are available*

The Applicant is represented by *Natukunda Jackline and Ogomba Issa* while the respondent was represented by *Kasumba Patrick and David Oloka*.

Determination

The applicant's counsel contended and submitted that the applicant received the said 3,196,757,264/= on his bank account on behalf of Lakeside Township

Limited as an agent. Immediately upon receipt of the said money he handed it over to Lakeside Township Limited through Javarhir Chandrakant Patel and Parul Chandrakant Patel who are Directors of Lakeside Township Limited.

The applicant contends that he a mere holder of a power of attorney who ought not to be held liable. He is a mere agent and cannot derive personal benefits directly from its exercise or the discharge of liabilities.

It was counsel's view that the applicant is not liable to the respondent as he is not indebted. In the execution of Consent Judgment in HCCS of 516 of 2019, the applicant acted as an agent of Lakeside Township and not in his personal capacity. He contended that the applicant is not personally indebted to the respondent and thus execution ought to be set aside and the applicant be released from civil prison immediately.

The respondent's counsel raised a preliminary objection in their submission to the effect that the application is barred in law and an abuse of court process. The basis for this preliminary is that the applicant filed an application to set aside the application for execution and the same was dismissed for want of prosecution under Order 9 rule 22.

According to counsel for the respondent, Order 9 rule 23 bars the applicant from filing a fresh suit but rather to apply for setting aside the dismissed suit.

The respondent's counsel submitted that the applicant was sued in his personal capacity as the 3rd counter-defendant together with Lakeside Township as the 1st Counter-defendant in HCCS 516 of 2019. The applicant is barred by estoppel from denying liability or claiming that he is not liable to pay the respondent the monies in the Consent Settlement/Judgment. It was counsel's contention that the applicant did not sign as an agent of Lakeside Township Limited.

Analysis

The respondent counsel contended the application was an abuse of court process since the applicant had filed an application to set aside the execution which was dismissed for want of prosecution under Order 9 rule 22. It is indeed true that the applicant filed miscellaneous application No. 99 of 2023 which was dismissed and the applicant as a result of that order of dismissal should have filed an application to set aside the dismissal.

Order 9 rule 23 (1) of the Civil Procedure Rules provides that:

Where a suit is wholly or partly dismissed under Rule 22 of this Order, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action; but he or she may apply for an order to set the dismissal aside, and, if he or she satisfies the court that there was sufficient cause for nonappearance when the suit was called for hearing, the court shall make an order setting aside the dismissal, upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

The above rule is quite clear and instructive on filing an application to set aside the order of dismissal and the applicant has no luxury of refile matters once the dismissal is made under Order 9 rule 22. Where an earlier application was dismissed for want of prosecution it is not open for the applicant to file the same application again unless the facts pertaining thereto are different, as to entertain the same would amount to a gross abuse of the court process. *See Nicholas Bongu Ng'ongu v Joseph Hannington Oluoch HCCS No. 2 of 2001*

An application can only be refiled if it is struck out. An application merely struck out without more can be properly refiled over and over again by the applicant.

In other words, except if an application is dismissed properly by the court, which may necessitate or require the applicant to appeal against such dismissal order, the applicant is not limited to a number of times he can bring

a particular application by way of refiling the application which was struck out but not dismissed by court. However, in exercise of the applicant's right to refile an application that was struck out but not dismissed, the use of such freedom or right to refile must not be abused by a party.

As a matter of public policy, the legal system does not generally permit the adjudication of matters which ought to have been resolved in earlier proceedings. This is intended to ensure the court's resources are properly used in the interest of the immediate litigants (who would otherwise have to suffer unending litigation) and potential litigants who are equally entitled to access to justice. Filing of several applications seeking the same order amounts to an abuse of the court process. *National Bank of Kenya Ltd v John Odawa Oluoch HCCC No. 205 of 1997*

The present applicant's remedy after the dismissal of the earlier dismissal would have been to set aside the dismissal under Order 9 rule 23. The subsequent filing of a fresh application was irregular with no basis in law and thus an abuse of court process. The court may respond to any misuse or abuse of the court's process by dismissing an action or making some appropriate order to prevent injustice or to protect the integrity of the legal system.

This application was incompetently filed and ought to be dismissed with costs. However, for completeness I will determine the merits of the application.

The applicant contends that he was merely an agent who signed on behalf of principal Lakeside Township Limited. The applicant was sued in personal capacity as a 3rd Counter-defendant and it is clear he not merely an agent when he signed the consent settlement. As a concerned party settling matter he was indeed trying not only to save the company but also himself as a named party to the proceedings. The applicant's argument that he was merely an agent of a disclosed Principal-Lakeside Township Limited cannot

hold since he was added as party who had received a sum of 3,196,757,264/= on his bank account at Centenary bank for and on behalf of company.

The applicant upon receiving the money on his account, he caused it to be withdrawn from the account in order to defeat the court order obtained by the respondent to have the said money deposited in court. By the time the respondent has obtained an order to have the same deposited in court, the bank clarified that the applicant has withdrawn the entire sum paid by UNRA.

The applicant duly executed the consent with the respondent as a party who was in possession of the money already paid in a sum of 3,196,757,264/=. The consent judgment never envisaged a future payment from UNRA but rather what was in custody of the applicant. The terms of the consent are set out herein as follows;

BY CONSENT of all parties, it is agreed as follows;

- 1. The third defendant (Kiviiri John Mark) in HCCS No. 516 of 2019 on behalf of Lakeside Township pays the defendant/Counterclaimant (Kaushik Roy Damani) UGX 1,350,000,000/= (Uganda shillings One Billion Three hundred fifty million only as final settlement of all the claims in the matter.*
- 2. Of the above sums, UGX 150,000,000/= (Uganda Shillings One hundred fifty million only) shall be paid to the defendant/counterclaimant in HCCS No. 516 of 2019 by the 18th day of June 2022. This money shall be paid on his bank account in Bank of Baroda Railway Branch vide A/C No. 95020100009610 in the names of Kaushik Roy Damani.*
- 3. The balance of UGX 1,200,000,000 (Uganda shillings One Billion Two Hundred million only) shall be paid on the same account on or before the 4th day of November 2022.*

The applicant signed for himself and also on behalf of Lakeside Township Limited and it clear the consent was made in respect of existing money paid by UNRA of 3,196,757,264/=. The first payment was to be done on 18th -June 2022 while the 2nd payment was to be effected on 4th November 2022. It is apparently clear that the said consent was never made subject to a new payment to be made by UNRA as the applicant wants this court to believe.

The applicant's argument that the consent was to be effected after the payment of the balance of the claim of 5,511,487,736/= is an afterthought and part of the grand scheme to defeat the respondent or the consent settlement duly executed by the applicant. The applicant's power of attorney to recover the said balance was made on 29th November 2022 which was way after the due date for the payment of the respondent on 18th June 2022 and 4th November 2022 as a way to 'cushion' the applicant from his intended default of payment.

The applicant has further aggravated his scheme by contending that the money he received was already sent to his principal and the same was duly received. This is also an afterthought since the applicant never pleaded this in the main application and the same has come in an affidavit in rejoinder as way to cover-up the money in his possession. Secondly, the alleged acknowledgement does not explain how the money was received by the alleged principals in United Kingdom.

The alleged acknowledgement of 3,196,757,264/= is backdated to have been signed on 8th June 2020 and yet the consent settlement is dated 18th June 2020 and 4th -November 2020. What is clear to this court is that alleged acknowledgment was only registered as a document t in Uganda on 18th March 2021 way after the last date for payment of the respondent on 4th November 2020.

The said acknowledgment does not explain how the said amount of 3,196,757,264/= or USD 867,505 was received by or sent to the directors of Lakeside Township Limited (Javahir Chandrakant Patel and Parul

Chandrakant Patel) who are both based in United Kingdom or how it was sent to them without any paper trail or e-banking trail. Was the money sent in cash as cargo or was it sent via banking system? Was it declared to the customs or authorities in Uganda or the United Kingdom? The acknowledgement was an amateurish way of trying to 'fool' or hoodwink court or the respondent and is rejected with all the contempt it deserves. Misleading the court is an abuse of the process and something that the court will not tolerate with impunity. *Samuel Karuga Koinange v Bullion Bank Ltd HCCC No. 951 of 2000*

The applicant duly signed as a party to HCCS No. 516 of 2019 as a counter-defendant and also for himself and on behalf of Lakeside Township Limited since he had received the money on his personal account and this imported direct liability on him for money had and received. Indeed, he executed the consent settlement with specific timelines to honour his obligations as a party and also as an agent who received 3,196,757,264/= for Lakeside Township Limited in trust for all shareholders including the respondent.

In addition, a non-party to a suit may be compelled or be subject to enforcement of a judgment in certain circumstances and especially if he is holding property in trust for the judgment debtor.

In summary, the application fails and is dismissed with no order as to costs.

I so order

Ssekaana Musa

JUDGE

8th September 2023