THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CORAM: ***HON. MR. JUSTICE G. M. OKELLO, JA***
HON. MR. JUSTICE S.G. ENGWAU, JA
HON. LADY JUSTICE C.N.B. KITUMBA, JA

CIVIL APPEAL NO. 15 OF 2002

PETER MULIRA:: APPELLANT

VERSUS

MITCHEL COTTS LTD.:::::::::::::::::::::::::::::::::::::: RESPONDENT

[Appeal from the judgment of the High Court in
HCCS No. 1471 of 1999 (Okumu Wengi J)
delivered on 15-5-2001]

JUDGMENT OF KITUMBA, JA

This is an appeal from the judgment and orders of the High Court in Civil Suit No. 1471 of 1999 delivered on 15-5-201. The appellant was ordered to pay to the respondent U.K. Sterling Pounds 216,151, interest of 10% p.a. from judgment till payment in full, and costs of the suit. All earlier decrees of the court in the same suit were set aside.

The facts leading to this appeal are rather involved but briefly they are as follows: The appellant is a practising advocate. In 1993 the respondent, a limited liability company instructed him, to recover money, which the Government of Uganda owed to the respondent. On 3/3/1998 the appellant received from the Government of Uganda on behalf of the respondent a cheque of Uganda shillings 1,202,629,155/=. This was equivalent to USD 1,002,191 at the then prevailing exchange rate of Shs. 1,200/= for one United States Dollar.

In June 1998 the appellant received another cheque. This cheque was in the sum of Uganda shillings 326,886,580/=

It was agreed between the parties that the appellant would pay various commissions totalling to 26.5% of the amount recovered to people who had played part in the process of recovering the money. The commission included 10% for the appellant. Disagreement arose between the respondent and the appellant whether the latter's commission was to be paid from the total sum recovered or after deducting 16.5% commissions of the other players in recovery of the debt. The parties also disagreed as to whether the appellant could earn a commission on the second cheque of Shs. 326,885,580/=. This cheque was not paid directly to the appellant. Out of the money recovered the appellant remitted to the respondent shillings 535,999,575/=. There was another controversy whether the appellant was to pay interest on the balance. The respondent demanded for payment but the appellant failed to pay.

In December 1999 the respondent filed Civil Suit No. 1471 of 1999 in the High Court under Order 33 of the Civil Procedure Rules whereby it sought for judgment to be entered against the appellant. It prayed for the following:

(a) *An order to pay to the plaintiff Shs. 1,030,842,526/= or equivalent in United States Dollars.*

(b) *Interest at 15% p.a. on the above sum from 9/11/1999 till payment.*

(c) *Costs of the suit.*

The plaint was supported by the affidavit of Klaus Andrew Eckhart, the managing director of the respondent.

The appellant filed Miscellaneous Application No. 52 of 2000 applying for unconditional leave to appear and defend the suit. The application was supported by the affidavit of the appellant.

After considering the written submissions filed by both parties the learned trial judge gave his ruling on 5/5/2000. He gave the appellant conditional leave to appear and defend part of the suit. The ruling decreed the following orders:

*"(a) **The defendant/applicant shall pay forthwith the sum of Ug. Shs. 500,000,000/= to the plaintiff/respondent.***

(b) ***The Defendant/Applicant deposit in court Shs. 253,575,819/= within 30 days. He was given conditional leave to defend that sum whose deposit was also a condition for defending the balance.***

(c) ***The Defendant/Applicant was granted conditional leave to defend the rest of the claim.***

(d) ***The issue of interest claim was to be subject of the trial.***

(e) ***The costs were to be in the cause in respect of (b) (c) and (d).***

(f) ***The Defendant/Applicant was to file his written statement of defence within seven days from the date of the ruling and***

(g) ***The trial of the suit was to be held on 22nd May 2000 by which time all pleadings will have to be closed and all interlocutory applications or pleadings would have been concluded.***

The appellant filed a written statement of defence, in which he denied owing the respondents Shs. 1,030,842,526/= with agreed interest as was alleged by the respondent in its plaint. However, in paragraph 7 of the Written Statement of Defence he admitted that he owed the respondent Shs. 1,202,629, 155 and in paragraph 8 he admitted also having received the second cheque amounting to Shs. 326,885,580/=. He disagreed with the distribution of the commission, as set out by the respondent in its pleadings. He denied having caused any loss to the plaintiff. He pleaded that he tried his best to remit the money to the plaintiff but the delay was caused by Capital Finance Corporation Ltd.

On 11th May 2000 the appellant filed Miscellaneous Application No. 611 of 2000 under Order 1 Rule 14 of the Civil Procedure Rules, seeking for third party notices to be issued against Capital Finance Corporation Ltd., Debt Recovery Consultancy Technology International Ltd. and Stephen Tindyebwa.

On 19th May 2000 the appellant filed Miscellaneous Application No. 617 of 2000 seeking leave to appeal against the ruling in Misc. Application No. 52 of 2000 which was delivered on 5th May 2000. He also sought for a stay of execution. Miscellaneous Application No. 617 of 2000 was fixed for hearing on 22nd May 2000.

On 22nd May 2000 Civil Suit No. 1471 of 1999 and Miscellaneous Applications Nos. 611/2000 and 617/2000 were before court apparently all for hearing. Mr. Walubiri, counsel for the respondent objected to the hearing of the applications on the grounds that they were out of time, because by the ruling, of 5th May 2000, all applications had to be disposed of before then. He argued that there was no evidence that the applicant had tried to fix the applications to be heard earlier. He informed court that he had witnesses from London who had come to testify. He prayed court to disregard the applications and proceed with the main suit.

Mr. Orach, counsel for the appellant, disagreed. He submitted that the application, which he was requesting the court to entertain, related to the substantive rights of the appellant to apply to appeal against the decision of the court and to bring third party proceedings. He argued that the court had the powers to enlarge time under Section 35 of the Judicature Statute so as to avoid multiplicity of the suits.

After listening to the submissions of both parties, the learned trial judge granted an interim order of stay of execution. That order was to be reviewed when Miscellaneous Application 617 of 2000 is disposed of. The judge indicated that the other application could also be heard. However, he was of the view that the court could proceed to hear the plaintiff's witnesses who were already in court. In case any party desired to cross-examine the witnesses they could be recalled at later date. He ordered that the suit would proceed at 11.00am on that day and indicated that the applications could be heard later.

At that juncture Mr. Orach, counsel for the appellant, complained to court that his client was not being accorded a fair trial as the judge had preferred hearing the main suit before disposing of the interlocutory applications. Counsel stated that he was unable to proceed with the case and sought leave to pull out. The court asked Mr. Orach whether he wanted the applications to be heard before the main suit. Mr. Orach replied that he had no further instructions in the case. The learned trial judge adjourned the hearing of the applications to 23/5/2000 and ordered the hearing of the main suit to proceed. The learned trial judge told Mr. Orach that he could choose to stay or to leave but warned him of the consequences of his choice. Mr. Orach left court. The appellant expressed surprise by the developments.

Klaus Andrew Ekhart, PW1, was called and gave his evidence in chief. Afterwards court asked the appellant whether he wished to ask question to which he replied that he had lots of questions. The case was adjourned to 23/5/2000 for further hearing. On 23/5/2000 Mr. Walubiri still appeared for the respondent and Mr. Kiryowa appeared for the appellant who was present. The appellant cross-examined PW1 at length and through that witness tendered in court 8 exhibits for the defence.

Mr. Kiryowa cross examined PW1. The appellant cross-examined the witness further. The hearing was adjourned to the following day.

On 24-5-2000 representations were as the previous day. Mr. Mohsen Mousari, PW2, testified and was cross-examined by the appellant in person and through him put in evidence defence exhibits namely: D9 D10 and D11. After re-examination by counsel for the respondent the respondent's case was closed. On 26/5/2000 there was appearance in court by both counsel and the appellant but the case was adjourned to 8/6/2000 for defence.

On 25th May 2000 the appellant filed Miscellaneous Application No. 696 of 2000 under Order 42 Rules 1 and 8 of the Civil Procedure Rules and Section 101 of the Civil Procedure Act. The application sought to vary the order given by the learned trial judge in the main suit. The main ground of the application was that the sums awarded by court to the respondents were erroneous. The evidence, which had been

given by Mr. Klaus Echart, had established the correctness of the calculation as given by the respondent.

The learned trial judge made a ruling on 14/7/2000 where he made the following orders.

"(a) That the decree for U.Shs. 500,000,000/= entered in this suit is varied and the defendant/applicant granted leave to defend part of this sum. A new decree in its place is however issued in the amount of U. Shs. 201,525,000/= which has been the minimum debt to have been admitted in various pleadings by the defendant including his affidavit in support of this application sworn on 25th May, 2000 paragraph 17 thereof.

(b) ***Interim stay of execution of this decree is ordered provided the defendant deposits his cheque for the same in court and or provides a bank guarantee at the time of filing the Written Statement of Defence. The stay will lapse in consequence of disposal of the suit.***

(c) ***The order that defendant deposits money in court is vacated.***

(d) ***The Defendant is to file his Written Statement of Defence and any amendment thereof within seven (7) days from today.***

(e) ***Costs of all these proceedings to be in the cause.***

(f) ***The plaintiff can opt to call additional witnesses if it so wishes.***

(g) ***The trial of the main suit will be conducted on the 7th and 8th September, 2001.***

(h) ***No other applications in the matter will be entertained."***

The appellant filed an amended written statement of defence, which was substantially similar to the original written statement of defence. He pleaded that the respondent

had assigned its debt absolutely to Project Investment Inc. of Jersey Channel Island Ltd and therefore had no locus to bring the suit against him.

Money was sent to Project Investment and various commissioners were paid off. He pleaded that he had recovered the respondent's money amounting to Shs. 1,202,629,155/= but disputed the prevailing dollar rate which the respondents were alleging. He pleaded that he had professional lien on that money amounting to Shs. 267,962,852/=.

According to the record of proceedings the case came up on 22/11/2000. On that day counsel informed court that they had had discussions with view to record a settlement. The matter was adjourned to 11.00a.m. Both counsel and the appellant appeared before court. After going through what had been agreed upon by both parties the learned trial judge recorded a consent judgment in the terms stated above. As both parties had not agreed on costs the learned trial judge directed them to agree on the matter and report to court on 14/12/2000.

On 14/12/2000 counsel for both parties reported to court that they had failed to agree on the issue of costs and wished to submit on the matter before court. The learned trial judge directed them to file written submissions. On the 8/5/2001 the learned trial judge delivered his ruling in which he awarded costs of the suit to the respondent.

Counsel for the respondent prepared a decree in HCCS No.1471/1999. Counsel for the appellant refused to sign it on the ground that the appellant had never consented to a judgment as entered by the learned trial judge.

The parties appeared before the learned trial judge under Order 18 rule 7(2) of the Civil Procedure Rules for settlement of the terms of the decree. Counsel for the respondent contended that a consent judgment had been recorded and the learned trial judge had made a ruling on the issue of costs. Counsel for the appellant disagreed contending that there had been a settlement by consent under Order 13 rule 7 and 8 of the Civil Procedure Rules of the facts. Legal issues like the advocates' lien had not been settled. The learned trial judge ruled that the case had been settled by consent between the parties. He approved a decree which was in the following terms"

"(a) The Principal sum due and unremitted to the Plaintiff by the Defendant is U.K. Pounds 216,151= and the Defendant shall pay this sum to the Plaintiff.

(b) ***The principal sum shall bear interest at the rate of 10% from the date of judgment till full realisation.***

(c) ***All earlier decrees of this court are set aside."***

10 Dissatisfied with the judgement and the decree the appellant has filed the appeal on the following fifteen grounds:

"1. The learned judge erred in law and in fact in finding that the defendant owned the plaintiff £216,151 whereas no evidence was called to prove this.

2. The learned trial judge erred in law and in fact when he held that the sum of £ 216,151 was due to the plaintiff without taking into account the sum of Shs. 267,962,852= the defendant claimed by way of a professional lien against the plaintiff as pleaded in paragraph 18 of the amended written statement of
20 **defence.**

3. The learned trial judge erred in law and in fact in issuing a decree in the absence of an application to amend the pleadings for the sum of £216.151 when the prayer in the summary suit was for Shs. 1,030,842,526/= together with interest at 15% p.a.

4. The learned judge erred in law and fact in finding that the plaintiff has locus standi to bring this suit.

30 **5. The learned judge erred in law and in fact in finding that the defendant should pay interest whereas no interest was agreed upon.**

6. The learned trial judge erred in law and fact when he held that the suit had been settled by agreement when what had been agreed upon were only the

figures and not the issues raised by the defences which the defendant raised his amended written statement of defence.

7. **The learned judge erred in law and in fact in hearing the evidence of the plaintiff and determining the matter without hearing the evidence of the defendant.**

8. **The learned judge erred in law and in fact in issuing three (3) decrees in the same unit.**

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9. **The learned trial judge erred in law and fact when he casually found that the agreement reached on the figures disposed of the earlier two decrees which had been issued in the same case and in the same proceedings.**

10. **The learned judge erred in law in failing to make a decision on the third party claim whereas it was specifically pleaded in the defence.**

11. **The learned trial judge erred in law and in fact when he found that the defendant owed any money to the plaintiff.**

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12. **The learned trial judge erred in law and in fact when he failed to hold a conference before the proceedings started.**

13. **The learned trial judge erred in law and in fact in proceeding to determine the matter without framing any issues.**

14. **The learned trial judge erred and fact in condemning the defendant in costs when it is clear from the record that the suit should not have been filed had it not been for the misleading figures and facts the plaintiff gave to his**

30 **counsel and the court.**

15. **The learned trial judge erred in law and fact when he issued a decree without giving a judgment."**

Counsel for the appellant argued grounds 1, 2 and 11 together, 3 and 5 together 4,7, 10 and 14 separately 6 and 9 together 8 and 15 together and 12 and 13 together. I will deal with grounds in the same order except that I will combine grounds 7 and 10. I will begin with grounds 1, 2 and 11.

The gist of the complaint in the three grounds is that the court ordered the appellant to pay £126,151 to the respondent whereas there was no evidence to support the claim. The appellant's learned counsel argued that according to PW1's evidence the appellant recovered Shs. 1.752 billion and 30 percent of that was payable in commissions. The witness authorised payment of £336,000 to a third party and shillings 535 million had been remitted to Project Investment Ltd. an assignee of the respondent. Counsel argued his case on these grounds in the following manner:

That if the exchange rate of 1,935 shillings for one pound is used, the sum of £ 1,071,756 which was recovered by the appellant would amount to a total of Shs. 2,073,847,560/=. The 30 percent commission of that would amount to shillings 622,154,358/= leaving a balance of shillings 1,451,693,503/=. The amount of £ 360,000/= would translate to shillings 650,552,805/= when this is deducted from 1,451,695,503/= the balance would be Shs. 801, 140,698/=. Then if you deduct the amount of Shs. 535,994,575 which was sent to Project Investment the balance would be shillings 265, 146,126. Counsel argued that this is the only money due and owing to the respondent. However, the appellant exercised an advocate's lien over that money. The lien amounted to Shs. 267,962,852/=

Counsel criticised the learned trial judge's ruling of 18/6/2001 when he settled terms of the decree. Counsel argued that the issue of the lien was raised and should have been deducted from the amount awarded. In support of his submissions, he relied on **Halsbury Laws of England Vol. 36 3rd Ed. P.202-205.**

In reply, Mr. Peter Walubiri, learned counsel for the respondent, contended that the judgment for £ 216,151 and the decree was not based on evidence given by witnesses but on the consent of both parties. He submitted that when the parties appeared before the judge on 22/11/2001 they reviewed the figures and recorded an agreement, which superseded the pleadings, defences and the evidence, which had been heard and

recorded in part. In counsel's view, there was meeting of the minds by all the parties. He submitted that the consent judgement is binding and can only be set aside in certain circumstances, like fraud, collusion or ignorance of material facts, which in this appeal are not raised in the memorandum of appeal. He implored the court to closely examine the record of proceedings of 22/11/2001. In support of his submissions he relied on **Hassanali V City Motor Accessories Ltd and Others [1972] EA 423 and Brooke Bond Liebig (T) Ltd. Vs Mallya [1975] E.A 266.**

The law regarding consent judgment is that parties to a civil suit are free to consent to a judgment. They may do so orally before a judge who then records the consent or they may do so in writing and affix their signatures on the consent. In that case still the court has to sign that judgment. A consent judgement may not be set aside except for fraud, collusion or for ignorance of material facts. **See Brooke Bond Liebig (T) Lt. V Mallya (supra).**

The appellant's counsel has strongly submitted that the appellant did not consent to the judgment and the issue of the advocate's lien was not settled. On the other hand counsel for the respondent has vehemently submitted that the appellant consented to the judgment as entered by the learned trial judge and there was meeting of the minds by both parties. The issue to be determined is whether there was a consent judgment properly recorded by the learned trial judge.

I have carefully perused the record of proceedings of 22/11/2000 and either party does not dispute its correctness. On that day Mr. Peter Walubiri for the respondent was present with the representative of the respondent. Mr. Kiryowa Kiwanuka, counsel for the appellant, was present in court together with the appellant. Mr. Walubiri applied for an adjournment for one hour to see documents and find out whether they could record a settlement. Mr. Kiryowa agreed with Mr. Walubiri and the court adjourned the case to 11.00 a.m.

When the court resumed at 10.55 a.m. Mr. Walubiri informed court that they had failed to reach an agreement. He said that on the previous night they had agreed on tentative figures the appellant would pay. They had not agreed on the costs and the appellant's claim to a lien for unpaid fees, which the respondent claimed, had been

paid. He further informed court that the bill should be taxed but the appellant had disagreed. Mr. Kiryowa confirmed what Mr. Walubiri had told court. The record of proceedings, which followed, is:

"Mr. Kiryowa: ***That is correct. We did raise an issue of interest and exchange rate differences being charged upon the defendant. We had evidence that defendant passed on the money but the 3rd party did not remit it. In the circumstances what we agreed on was what was recovered and what was paid out as follows:***

(1). The amount recovered was £ 1,071,756 that was in 1998.

(2). The commission payable to all the parties were as follows:

i) ***Debt Recovery 11.5%***

ii) ***Steven Tindyebwa 8.5%***

iii) ***Peter Mulira 10%***

(3) ***This amount was recoverable from the entire amount recovered of £1,071,756.***

(4) ***Also agreed that the plaintiff gave a way a further £336,203 to a third party. He wrote a letter directing a recovery of this sum from the Government.***

(5) ***It was not disputed that an amount of £535,994,575 was remitted to Project Investment.***

(6) ***The rate of exchange used then was 1£ to 1,935/=***

(7) ***We disagreed on interest and the issue of defendant's lien on moneys and foreign exchange difference and costs.***

(a) ***Interest: On our part the money was paid to a forex bureau for remittance to Project Investment but for some reason which were communicated to plaintiff the money was not transferred. First there was no interest agreed on and secondly the 3rd party cause should have been taken into A/C. The suggested 10% on both £s and Shillings. We thought £s could have a lower rate.***

(b) ***Exchange rate difference. By yesterday it was Shs. 2,610 to the £. At the time of transaction it was Shs. 1,935. The difference of Shs. 675/= should not be borne by defendant.***

(c) ***Lien*** ***There is a bill outstanding on legal services. We waited this to be deducted.***

(d) ***Costs*** ***My idea was that the plaintiff should pay my costs.***

Walubiri: ***My colleague has not been candid on this matter after we spent a lot of time and I took notes. We discussed six matters and we agreed on four of them, as a package, viz amount recovered, commissions payable, exchange rate differences and interest payable. We agreed as follows:-***

i) ***Amount recovered was £ 1,071,756.***

ii) ***Commissions payable were 30% after that figure***

iii) ***We also agreed that defendant had so far paid to plaintiff Shs. 535,994,575/=***

iv) ***The balance due at the Shs. rate of 1998 of 1,935 was Shs. 353,489,897/=. There is a small arithmetical error of Shs. 10,000/=***

v) ***We then agreed that as of 1998 that money was £ 175,447.***
Again fine arithmetic was not achieved by about £5.

vi) ***As of today it would be Shs. 457,916,670/=***

vii) ***Interest from 1998 up to today we agreed on interest from July 1998 to November 2000. The safest way we agreed on was in Pounds Stirling i.e. £ 175,447 and interest at 29 months and after a lot of haggling we agreed on 10% interest rate per annum on simple rate of interest which came to £42,400.***

viii) ***We then agreed on principal sum of £ 175,447 and interest of $ 42,400 payable in (U) Shs. Equivalent at the time of payment. There would be no interest on the £ 42,400 but only 10% would be charged on the £ 175,445.***

ix. ***We then hoped to discuss the lien and costs.***

Mulira: - ***It is true we met yesterday. I have tried on four occasions. What I pointed out is that I feel bad about Capital Finance. I paid money to Capital Finance who failed to remit the money.***

Kiryowa: - ***1) Amount recovered we agreed on it.***

2) ***Commission payable we agreed on***

3) ***We agreed we paid Shs. 535,994,575/=***

Walubiri: ***We converted the £1million to Shillings at 1,935/=***

i) ***Shs. 1,202,629,155/= and 326,885,580/=. These were recovered.***

ii) ***Include Shs. 650,552,806/=***

The total then came to Shs. 2,180,067,541=. It is from this total that you discounted it to 70% to remove the commission. Then we came to Shs. 1,526,047,000/=. From this we reduced the Shs. 650,552,806/= (Given to a third party) leaving a balance in 1998 of Shs. 875,484,472/=. From this we deducted the sum paid to Mitchell Cotts (remitted) of Shs. 535,994,575/=. This left a balance unpaid of Shs. 339,489,897/=. This is converted back into pounds making it £ 175, 47.00.

Kiryowa: - ***This is correct. The balance is £ 175,447 as of 1998. We would accept 8% interest on this w.e.f July 1998.***

Mr. Mulira: ***These were our calculations. They are correct. The outstanding balance is £ 175,447 as of 1998. My problem is that I should not pay interest at the rate. I think 8% will be okay.***

Walubiri: ***My clients for the record are agreeable to 8% interest for the 29 months. It comes to £ 40,704. We would need further interest on this sum till payment in full.***

Kiryowa: ***We can accept 10% on the total sum of £ 216,151.***

Walubiri: ***We agree. We propose to get costs on the above sum. Costs should follow the event. There is no reason to disentitle them to costs. This***

is still my view. I would not mind agreeing on costs with the other side.

<u>Kiryowa</u>: - ***What we have conceded above has been our case all along. These proceedings were brought unnecessarily due to the plaintiff's refusal to agree to the figures agreed upon.***

Mulira: ***I have always been clear on Mr. Ekhart's calculations, which were wrong. They should not get costs on this. (underlining mine.***

Court:- ***This suit has been settled by agreement that the sum due from and unremitted by the defendant to the plaintiff is £ 216,151 as the principal and this sum to bear interest at 10% till settlement. The costs will be agreed on by Mr. Walubiri and Mr. Mulira and parties to report back on 14/12/2000."***

The parties did not agree on the issue of costs and filed written submissions. After due consideration of those submissions the judge gave a ruling awarding costs of the suit to the respondent. From the record of proceedings it is very clear that the appellant himself and his counsel accepted that the outstanding balance was £ 175,447 as of 1998. The appellant and his counsel suggested the interest of 8% on the above sum. Mr. Walubiri accepted 8% interest, which came to £40,704. Mr. Kiryowa as quoted above said that they accepted 10% on the total sum of £ 216,151 and this was accepted by Mr. Walubiri. Mr. Kiryowa went on to state that what was agreed upon had been their case all along and the suit had been brought unnecessarily by the respondent who had refused to agree to the figures. The appellant said that he had been clear on the matter. Mr. Ekhart's calculations were wrong and for that reason they should not get costs. After counsel's submissions and the appellant's clarifications the learned trial judge entered a consent judgment.

From the proceedings outlined above I am unable to fault the learned trial judge for entering a consent judgment in the above terms. The issue of the lien was not agreed upon by the parties and the judge was right to disregard it.

I have carefully looked at both counsels' submissions on costs. It is quite evident from the submissions that the appellant had consented to the judgment as entered by court. Counsel for the respondent based his submission on that judgment. He submitted that the respondent's claim to recover 1,030,842,526/= had been reduced to 339,489,897 which was about 28%. At page 200 of the record the respondent's counsel submitted:

> **"In the instant case leave alone the conduct already dealt with, the plaintiff only stated their claim about 28% correctly and the defendant at all material times knew the correct amount owing, if at all or at least the calculation to arrive at it without prejudice to his legal rights as are stated in the defence. The defendant did not admit the sum as that would be prejudicial to their legal rights."**

I am of the considered view that if the appellant had not consented to the judgment as recorded by the learned trial judge, he should not have submitted on costs at all or in such a manner as he did. I find no merit in grounds 1, 2 and 11, which should, therefore, fail.

I now turn to Grounds 3 and 5

Ground 3 is a complaint that the learned trial judge erred in law and in fact in issuing a decree in the absence of an application to amend the pleadings for the sum of £216.151, when the prayer in the summary suit was for Shs. 1,030,842,526/= together with interest at 15% p.a. The gist of the complaint in ground 5 is that the learned judge was wrong to find that the defendant should pay interest whereas no interest was agreed upon.

Submitting on both grounds learned counsel criticised the judge for having allowed the suit to proceed under Order 33. He contended that the figure awarded was much lower than what was pleaded in the plaint. Further, there was no agreement on interest claimed and that was in effect the evidence of PW1.

Mr. Walubiri disagreed. He submitted that the appellant applied for leave to appear and defend the suit. In his application there was no prayer that the suit should be struck out for incompetence. In counsel's view, it would be unfair for the appellant

who had proceeded with the suit, by applying for leave to appear and defend, and finally consented to the judgment to turn round and plead that the suit was incompetent.

It is appreciated that the parties in this appeal had disagreement on the amount of money the appellant owed to the respondent. However, the appellant did not make a prayer to court to strike out the suit for incompetence. The learned trial judge found that the appellant raised some triable issues and allowed him conditional leave to appear and defend. In the circumstances he cannot be allowed to raise the issue that the suit should not have been brought under Order 33 of the Civil Procedure Rules, is therefore incompetent and should have been dismissed. If he wished the suit to be struck out he should have raised that at the earliest opportunity possible. I am of the considered view that his consent to the judgment sealed his fate on the matter. Grounds 3 and 5 also fail.

I now turn to ground 4, which is a complaint that the respondent had no locus to bring the suit.

Submitting on this ground, learned counsel for the appellant, contended that in paragraph 2 of the amended written statement of defence the appellant had pleaded that he would raise a preliminary objection under Order 6 rule 27 of the Civil Procedure Rules that the respondent had no locus to bring the suit. It had by its resolution assigned the debt to Project Investment Inc. of Jersey of Channel Island. This was a preliminary point which the learned trial judge should have heard and disposed of before hearing the main suit. Counsel relied on **Priamit Enterprises Ltd. Vs Attorney General Court of Appeal Civil Appeal No. 3 of 1999**(unreported).

On the other hand counsel for the respondent contended the question of assignment had been addressed in the application for leave to appear and defend. He argued that, in any case, if there was an assignment of the debt that in law does not take away the power of the assignor from instituting a suit against the debtor.

It is appreciated that the preliminary point of law should be set down and determined before trial. However the appeal before, this court is against a consent judgment that was recorded by court at the end of the respondent's case. The appellant by his very

consent agreed that he was liable to the respondent. I would like to observe that at the beginning of the trial the appellant was unrepresented as his counsel abandoned him. However, the appellant is a senior advocate who could and should have raised a preliminary objection that was pleaded but the judge had an inadvertently not set it down for hearing. Ground 4 also fails.

I now consider grounds 7 and 10. The gist of the complaint in both grounds is that the learned trial judge was wrong to determine the case without hearing the appellant's case, which included third party, claims. Counsel criticised the learned trial judge for failing to hear the appellant's applications and instead heard the main suit. He submitted further that the appellants' defence of advocate's lien was not entertained. According to counsel, the proceedings in the High Court were unfair. For a fair hearing counsel relied on **Administrative Law 5th Edition by N.W. Wade p.441.**

Counsel for the respondent contended that the trial was fair. In his view, fair hearing means that both sides are heard and are given a chance to cross-examine witnesses. However, before the appellant called any witnesses he chose to settle. Counsel argued further that though the appellant pleaded a lien in his written statement of defence in the sum of Shs. 267,962,852/= he did not ask the court to enter judgment in his favour by way of counterclaim or set off. He simply requested court to dismiss the entire suit. He submitted further that the appellant abandoned the lien on 22/11/2000. He contended that the issue of the advocate's fees is governed by the Advocates Act. He argued that an advocate must prepare a bill of costs and send it to his client. The bill of costs is taxed at the option of either the client or the lawyer. Before the bill of costs is taxed it is not binding and remains in balance. He submitted that the appellant should have prayed court to retain the money until his bill of costs had been taxed. Counsel argued that the complaint about the applications, which were not heard, is not justified. Application No. 617 200 was for leave to appeal against the judgment and stay of execution. The court granted the stay. Application No. 696/2000 was for review of the judgment he wanted to appeal against. The judgment was reviewed. Finally there was consent by the appellant, which overtook all applications.

I have looked at the record of proceedings. The learned trial judge allowed the appellant to cross-examine the respondent's witnesses. The appellant and his counsel

did so at length. Regarding the applications the court asked the then applicant's counsel Mr. Orach whether he wanted the applications to be heard there and then. Counsel did not reply but simply said that he had no further instructions in the case. The learned trial judge even told counsel that he was free to stay in court or leave but counsel chose to go away. Indeed in Miscellaneous Application No. 696 of 2000 the judge reviewed a judgment which the appellant wished to appeal against. As indicated in this judgment the appellant later on freely consented to settlement, which was recorded by the learned trial judge. Regarding the issue of the lien for his fees the respondent claim was that it owed nothing to the appellant. If the appellant wished to have his legal fees paid he should have followed the procedure laid down in the Advocates Act. I believe it is now not too late to do so. Grounds 7 and 10 should fail also.

Ground 14 is a complaint against the award of costs to the respondent. On this ground both counsel adopted their submissions in the lower court. The appellant had successfully resisted part of the respondent's claim, which was originally 1,030,842,526 plus interest and costs. In the settlement the respondent consented to receive Stirling Pounds 216,151 which was equivalent to Shs 547,961,660 at the exchange rate of Shs. 2660 per pound and 10% interest. The question which was set down for determination by the learned trial judge was:

"Whether a Defendant who successfully resists a claim to the extent that only part of it is allowed is entitled to costs or a bigger proportion there of."

In their submissions on the issue of costs both counsel correctly stated the law. According to section 27 of the Civil Procedure Act costs are within the discretion of the court. However, they differed in their submissions on who was the successful party. Counsel for the appellant submitted that the respondent had always been wrong in its calculations of what was owed to it. The appellant successfully applied for leave to appear and defend the suit and to review the original decree of the court. The respondent did not agree to amicably settle the matter before filing the suit whereas the appellant requested for such settlement. On the other hand counsel for the respondent submitted that his client had been 55% successful in the suit. He got the award of £ 216,151 which was equivalent to Shs. 574,961,660/= and interest of 10%.

The appellant had resisted the whole claim and prayed the suit to be completely dismissed.

The learned trial judge found that the suit was filed because of the appellant's persistent failure to pay. The appellant filed numerous applications and the respondent had to call two witnesses from London who travelled three times to give evidence. The learned trial judge ruled that the appellant was entitled to costs. He found that he had been the successful party by 50% of his original claim. The original decree, which he had given, coincided with the award of Shs. 574,961,660/=.

The law on costs is clear. Under section 27 of the Civil Procedure Act. Costs normally follow the event and are given at the discretion of the judge. An appellate court should not interfere with the discretion of the trial judge unless the judge exercised his or her discretion wrongly or acted on wrong principles. **See Mbogo and Another V Shah [1968] E.A. 93.** I am of the considered view that the learned trial judge properly evaluated evidence before him and the submissions of counsel. He applied the correct principles on costs. He judiciously used his discretion and awarded costs to the appellant. Ground 14 should, therefore, fail.

Grounds 6 and 9 are again a complaint against the judge for entering a consent judgment against the appellant and finding that the agreement reached on the figures disposed of the two decrees which had been passed earlier in the case.

On these grounds learned counsel attacked the learned trial judge for recording a consent judgment when the parties reported to him that they had disagreed. He submitted that according to Order 22 Rule 6 of the Civil Procedure Rules the judge must be satisfied that the parties have agreed before the consent or compromise is recorded. Counsel argued that this was not the case in this appeal. He submitted that the learned trial judge was wrong when he stated that the appellant chose to call no evidence in his defence. The appellant's counsel strongly submitted that in the circumstances of the case there was no compromise or settlement. He referred this court to the following authorities. **Neale Vs Gordon Lennox [1902] A.C. 465. Shepherd Vs Robinson [1919] K.B. 474.**

In his submissions counsel for the respondent maintained his earlier submissions that the appellant consented to the judgment and that there was meeting of the minds between both parties. He submitted that authorities quoted by the appellant are distinguishable from the present case because in both authorities the advocate exceeded his client's authority.

Order 22 Rule 6 of the Civil Procedure Rules provides:

> **"Where it is proved to the satisfaction of the court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit the court may, on the application of either a party, order such agreement, compromise, or satisfaction to be recorded and pass a decree in accordance therewith so far as it relates to the suit."**

It is the law that before recording a settlement a judge must be satisfied that the parties have agreed. In order to be satisfied the judge has to listen to what the parties say. When a party says that he has disagreed and later says that he has now agreed, the judge takes the latter that there is a change of mind and the party has agreed.

On 22/11/2000 when the appellant and his counsel appeared before court counsel for the respondent said at first that they had disagreed. Later on counsel for the appellant told court what they had agreed upon. He systematically narrated the figures they had agreed upon. They negotiated about interest and came to ten percent of the agreed sum. In the circumstances the learned trial judge was right to believe that the parties had reached a compromise.

I have looked at the authorities quoted by counsel for the appellant. **In Neal V Gordon Lennox (supra)** the plaintiff in an action for defamation of character had authorised her counsel to consent to a reference on condition that all imputations on her character were publicly disclaimed in court. Her counsel did not make the limitation of his authority known to counsel for the defendant. Both agreed to refer the action without any disclaimer of imputations. The court held that the counsel had exceeded his authority. The plaintiff was entitled to have the agreement to refer set

aside and the cause referred to the list for trial. Similarly in **Shepherd V Robinson (supra)** the petition for debt was called for hearing. Counsel for the defendant consented to judgment against his client for part only of the claim. This meant that the plaintiff had abandoned the balance. This was without the knowledge of counsel on either side, or of the solicitors for the plaintiff. The defendant had given instructions to her solicitors that the case was not to be settled. An application to restore the case to the list for hearing was allowed. These though highly persuasive authorities are clearly distinguishable from the present appeal where not only the appellants' counsel consented to the judgment, but the appellant was present and participated in framing the terms of the settlement. Grounds 6 and 9 have no merit and should, therefore, fail.

I now turn to grounds 8 and 15

In these grounds counsel's complaint is that the learned trial judge was wrong to issue three decrees in the same suit and to issue a decree when there was no judgment in the suit.

I note that the learned trial judge issued a decree on 5/5/2000 in respect of Miscellaneous Application No. 617 of 2000 and there was a subsequent decree arising out of miscellaneous application No. 696 of 2000. When the parties finally consented to the judgment only one decree was issued and two previous decrees were set aside. The consent judgment was a judgment. I am unable to fault the learned trial judge on the matter. Grounds 8 and 15 also fail.

Grounds 12 and 13

The complainant in both grounds related to the framing of issues and scheduling conferences. Counsel submitted that Order 10 B of the Civil Procedure Amendment Rules provides for scheduling conferences. In this case no scheduling conferences were held and this caused miscarriage of justice. It is the duty of the judge to frame issues. In this case no issues were framed.

While I appreciate that no scheduling conference was held as required by law and no issues were framed this did not prejudice the appellant in any way. He freely

consented to the judgment whose terms were, according to the record, carefully discussed by the parties. Grounds 12 and 13 should fail.

In the result I would dismiss this appeal with costs to the respondent.

Dated at Kampala this……3rd …day of……April…….2004.

C.N.B. Kitumba

Justice of Appeal