THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CORAM: HON. JUSTICE A. TWINOMUJUNI, JA
HON. JUSTICE C.N.B. KITUMBA, JA
HON. JUSTICE A.S. NSHIMYE, JA

CIVIL APPEAL NO.45 OF 2007

BANK OF BARODA (U) LTD …….APPELLANT

V E R S U S

ATACO FREIGHT SERVICES LTD……..RESPONDENT

[Appeal from the ruling and order of
the High Court at Kampala (Mukasa, J)
dated 20th April 2007 in HCCS No.448 of 2002]

JUDGMENT OF TWINOMUJUNI, JA:

This is an appeal against the ruling of the High Court of Uganda in which the learned trial judge dismissed a preliminary objection raised by the second defendant to the effect that it was improperly joined as a party to the suit.

The background facts to this suit which were agreed on in a scheduling conference by counsel for both parties are as follows:

"A. <u>AGREED FACTS:</u>

On 8th August, 2002 the respondent filed H.C.C.S. No. 448 of 2002 against Lanex Forex Bureau Limited inter alia for recovery of Ugshs.33,858,275/= allegedly paid from the respondent's account with the appellant without the respondent's lawful authority and based on stolen/forged cheques.

On or about 9th September, 2002 the respondent also sued the appellant in H.C.C.S. No.507 of 2002, inter alia, for recovery of US$15,060.29 and Ug.shs.8,560,325/= allegedly negligently paid from the respondent's account to Lanex Forex Bureau on forged cheques and without the respondent's authority.

By amended plaint filed on 12th November, 2002, the respondent joined the appellant as a defendant in H.C.C.S. No.448 of 2002. Subsequently, the respondent filed Misc. Application No.169 of 2003 for orders, inter alia, that H.C.C.S. No.507 of 2002 be stayed until further notice.

Following the filing of the amended plaint, the appellant and the respondent commenced negotiations with a view to amicably settling the matter out of Court. The parties subsequently agreed to a compromise and the same was recorded by Court on or about 6th July, 2004 in the following terms:-

a) **The respondent's suit against the appellant in H.C.C.S. No.448 of 2002 be withdrawn.**

b) **The respondent be given a further ten (10) months period from 6th July, 2004 within which to settle its outstanding loan obligation with the appellant.**

c) **Interest accruing on the respondent's loan account with the appellant for the period between 12th November, 2002 and 12th April, 2003 be waived.**

d) **Each party bears its costs.**

By further amended plaint filed on 28th July, 2006 the respondent yet again joined the appellant as a defendant in H.C.C.S. No.448 of 2002. When the suit came up for hearing on 21st March 2007, the appellant's advocate set up a preliminary objection to the effect that the appellant was wrongly joined to the suit since by the consent/compromise recorded by court on 6th July 2004, the respondent withdrew all the claims against the appellant. The appellant's said objection was rejected and dismissed with costs hence this appeal."

The Memorandum of Appeal contains four grounds of appeal and a prayer as follows:

1. **The learned trial judge erred in law and fact in holding that the respondent's claim in the sum of Ug.shs.33,858,275 against the appellant in the amended plaint filed on 28th July, 2006 was a fresh claim not covered by the compromise recorded by Court on 6th July, 2004.**
2. **Having found that a decree was passed in accordance with the compromise between the appellant and the respondent, the learned trial judge erred in law in holding that the respondent was not barred from filing a fresh suit on substantially similar facts and issues.**
3. **The learned trial judge erred in law and fact in failing to hold that the respondent's act of reinstating H.C.C.S. No.448 of 2002 against the appellant by way of amended plaint filed on 28th July, 2006 amounted to abuse of Court process.**
4. **The learned trial judge erred in law and fact in failing to discharge the appellant from defending the respondent's claim in the amended plaint filed on 28th July, 2006.**

<u>IT IS PROPOSED</u> to ask Court for orders that:

(1) **The appeal be allowed**

(2) **The ruling and order of the High Court be set aside**

(3) **The appellant be struck out as second defendant in HCCS No.448 of 2002.**

(4) **The respondent pays the appellant's costs in the High Court at this court."**

At the hearing of this appeal, the appellant was represented by Mr. Denis Wamala and the respondent was represented by Mr. Banard Tibeisgwa.

Before I consider, the merits of this appeal, it is necessary to define exactly what this appeal is about. Though the preliminary objection in the High Court was about whether the appellant was wrongly sued because of a compromise reached by the parties on 6th July 2004 the leaned trial judge went out to discuss other matters like resjudicata and causes of action resulting into the Memorandum of Appeal raising those issues. Here below, I reproduce the first part of the ruling of the learned trial judge to illustrate what I am talking about:-

"RULING:

When this suit was called before me for hearing Mr. Dennis Wamala, counsel for the 2nd defendant, Bank of Baroda (U) Limited, raised a preliminary objection that by a compromise between the plaintiff and the 2nd defendant recorded by this Court on 6th July 2004 the plaintiff withdrew all its claims against the 2nd defendant arising out of this suit.

On 6th July 2004 Mr. Francis Wazarwaki Bwengye, counsel for the plaintiff addressed court in the following words:-

'Plaintiff and 2nd defendant have come to some compromise. The terms of the compromise are as follows:-

1. ***Plaintiff be given a further period of ten months from the date of the compromise within which to settle its obligation with the bank.***
2. ***Interest accruing on the plaintiff's loan with the bank from 12th November 2002 to 12th April 2003 be waived by the bank.***
3. ***Suit against the 2nd defendant be withdrawn with no order as to costs.'***

The court made the following order:

'Suit against the 2nd defendant is hereby withdrawn in the terms of the above compromise."

Order 25 rule 6 of the Civil Procedure Rules on compromise of suits 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 wholly or any part of the subject matter of the suit, the court may on the application of a party, order the agreement, compromise or satisfaction to be recorded, and pass a decree in accordance with the agreement, compromise or satisfaction so far as it relates to the suit.'

Apparently that is what happened and on 24th September 2004 the plaintiff filed an amended plaint where the 2nd defendant did not future as a party. Thereafter the suit proceeded without the 2nd defendant until 11th July 2006 when by consent of both counsels for the plaintiff and the 1st defendant in Miscellaneous Application No.453 of 2006 this court granted the plaintiff leave to add Bank of Baroda (U) Ltd, as a defendant to this suit. On 28th July 2006 the plaintiff filed yet another amended plaint re-introducing Bank of Baroda (U) Ltd as a 2nd defendant.

It is the contention of counsel for the 2nd defendant that consideration had been furnished by the 2nd defendant for the withdraw. Further that the plaintiff had in its letter dated 31st January 2006 confirmed that there was no pending claim against the 2nd defendant. Counsel prayed that in the interest of justice the 2nd defendant be discharged.

In reply counsel for the plaintiff submitted that the cause of action against the 2nd defendant in the amended plaint was different from the cause of action in the original plaint which had been withdrawn under the compromise. Further that a withdraw of a suit does not act as resjudicata as judgment is not based on the merits of the case."

It will be seen that the above extract correctly captured what the preliminary objection was all about. However, the learned trial judge was misled into discussing other irrelevant matters by arguments of counsel for both parties. Also the learned trial judge was in error to assume that there was a compromise within the meaning of order 25 rule 6 of the Civil Procedure Rules, yet in my view, it was the compromise which was at the centre of the preliminary objections. He should have considered whether a compromise within the meaning of the law was concluded on 6th July 2004. It is the failure to do so which led him to discuss other matters such as causes of action and rejusidcata.

I consider it as our duty now to re-direct this appeal to the only issue which was raised by the preliminary objection, namely, whether a compromise within the meaning of Order 26 Rule 6 was reached on 6th July 2004. On that issue Mr. Denise Wamala learned counsel for he appellant submitted that the issue whether the agreement on 6th June 2004 amounted to a compromise in law was not in dispute. He contended that it was the respondent's advocate who announced to court that a compromise had been reached and he read its terms. In his view, the appellant was estopped from disputing the fact. Secondly, in the ruling of the trial court, the trial judge found as fact that there was a compromise between the parties in terms of 0.25 r. 6 of the Civil Procedure Rule. Thirdly, that the respondent should have filed a cross-appeal if he considered that there was no compromise reached between the parties on 6th June 2004.

In reply, Mr. Tibesigwa outlined the elements of a compromise within the meaning of order 26 rule 6 Civil Procedure Rule as follows:-

(a) It must be lawful.
(b) The parties must agree to it.
(c) It must relate to issues in the suit.
(d) A decree must be passed in respect of the same.
(e) It must be recorded.

Learned counsel for the respondent made the following concise submission, which I propose to adopt as correct, which I hope will dispose of this appeal:

"It is the respondent's submission that the proceedings of 6th July, 2004 did not amount to a compromise in law for the following reasons;

First, what was agreed upon by the parties as narrated by counsel for the plaintiff did not relate to the issues in the suit.

The main issue in the suit between the appellant and the respondent was whether the appellant was liable to pay to the respondent the following:-

a) **US$15,060.29**
b) **General damages**
c) **Costs of the suit**

(See amended plaint page 26 of the record)

The purported compromise of 6th July, 2004 did not adjudicate on whether the appellant was liable to the respondent as claimed. Instead what was recorded as a compromise related to issues not connected with those in the suit cannot compromise the suit. (See KHUSHALDAS & SONS LTD VS WEINSTEIN & ANOTHER [1964] E.A. 734).

Secondly, no decree was passed and recorded. Section 2 of the Civil Procedure Act defines a decree as:-

> **"a formal expression of an adjudication which ….conclusively determines the rights of the parities <u>with regard to all or any of the matters in controversy in the suit between the parties"</u> (emphasis mine). As I have already pointed out what the parties agreed upon were not in controversy between them in the suit. Apart from the judge allowing a withdrawal of the suit, he never passed any decree in respect of the liability of the appellant to the respondent, a matter which was in controversy between the parties."**

I agree with this submission. A look at the so called compromise of 6th June 2004 and the amended plaint which was before the court then will reveal the fact that there was no

compromise within the meaning of Order 26 Rule 6 of the Civil Procedure Code. Therefore there was nothing to bar the suit from proceeding. This appeal fails and since Hon. Justice C.N.B. Kitumba, J.A and Hon. Justice A.S. Nshimye agree, the appeal is dismissed with costs to the respondent. The file should be transmitted to the High Court for it to proceed with the hearing of the main suit.

Dated at Kampala this ……09th ……day of …September..2009.

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Hon. Justice Amos Twinomujuni
JUSTICE OF APPEAL.

JUDGMENT OF KITUMBA JA;

I HAVE READ THE JUDGMENT OF Twinomujuni JA. I concur that the appeal should be dismissed with costs.

Dated at Kampala this …9th ….day of ……..September…….2009

C.N.B.KITUMBA
JUSTICE OF APPEAL

JUDGMENT OF A.S.NSHIMYE, JA;

I have had the benefit of reading in draft, the lead judgment of my brother Hon Justice A.Twinomujuni, JA. I agree with his reasoning and that the appeal should be dismissed with costs.

Dated at Kampala this …09th day of ….September……2009.

A.S.NSHIMYE, JA

JUSTICE OF APPEAL