

**THE REPUBLIC OF UGANDA**

**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA CIVIL  
APPEAL No. 001 OF 2011**

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(Arising from a ruling of Hon. Lady Justice Faith Mwendha in Miscellaneous Application No 311, of 2009 delivered on 20<sup>th</sup>/1 1/2009 arising from Nakawa High Court Civil Suit No.37 of 2008

**APPELLANT**

**MUBANGIZI JULIUS**

**RESPONDENT**

**VS**

**UGANDA BAATI**

**CORAM: HON MR JUSTICE REMMY  
KASULE, JA 15 HON MR JUSTICE RUBBY  
AWERI OPIO, JA  
HON MR JUSTICE RICHARD BUTEERA, JA**

**JUDGMENT OF THE COURT**

**BRIEF FACTS**

The Appellant was an employee of the respondent in its factory as a roller man. While on duty, he got involved in an industrial accident that reduced his performance capacity and led to his eventual dismissal. He sued

the respondent by plaint seeking a declaration and orders for wrongful dismissal, terminal benefits and general damages.

The respondent did not file a written statement of defence within the statutory period and the appellant by letter applied to set down the suit for the hearing to proceed ex-parte under Order 9 Rules 10 and 11 of the Civil Procedure Rules.

The respondent was served with a hearing notice. At the hearing, Counsel for the appellant objected to the respondent's participation in the proceedings alleging that his written statement of defence was invalid, having been filed out of time, without leave of court and, therefore he was to be deemed to have admitted liability so that the court restricts itself only to assessing the quantum of damages. Counsel for the respondent in his reply contested the ex-parte hearing basing on his participation in the scheduling of the case and argued that filing a defence out of time did not prejudice the plaintiff.

Counsel for the respondent orally made an application for leave to file a written statement of defence out of time for which he sought an adjournment.

In his written ruling dated 10.06.2009, the learned trial judge then, Hon Justice Joseph Murangira, disallowed the respondent's objection and application and ordered the ex-parte hearing to proceed. The judge explained the right of appeal to the parties.

The trial Judge was transferred from the station thereafter. The respondent filed an application under S.98 of the Civil Procedure Act, S.33 of the Judicature Act, 0.8 20 r.2, 0 51 r.6 and 3 of the Civil Procedure Rules, to which the appellant's counsel made an affidavit in reply on a point of law objecting to the application. The subsequent learned trial judge Hon Justice Faith Mwendha, allowed the application and made no decision on the respondent's objection to the affidavit in reply sworn by counsel for the respondent, hence this appeal and the cross appeal.

## **Legal Representation.**

Learned Counsel, Mr Byrb Sebuliba appeared for the respondent. Learned Counsel, Mr Rukundo M.Henry, appeared for the appellant holding brief for Learned Counsel, Mr Muhwezi Eric .

Learned Counsel for both parties chose to proceed by written submissions, which the court allowed.

They agreed on the following issues to be resolved on appeal.

- 1. Whether the learned trial judge erred in law and fact in entertaining an application to enlarge time for filing a written statement of defence when the same application had earlier been made orally and refused by the same court and no appeal therefrom was preferred.**
- 2. Whether the learned trial judge erred in law and fact when she made a decision setting aside an order arising from an earlier oral application made and heard inter-parties and whether the issues and provisions of the law she based on for the decision were applicable.**
- 3. Whether the Cross- appeal is maintainable**

## **Submissions of counsel for the appellant**

### **Issue 1 and 2**

Counsel for the appellant submitted that the learned trial judge in Miscellaneous Application No. 311 of 2009 erred in law and fact in entertaining an application for leave to file a defence out of time or participate in the proceedings or proceed with hearing basing on the old invalid written statement of defence when issues upon the same had earlier been entertained by the same court, though by a different judge, between the same parties and had been concluded, which rendered the matter Res-judicata.

According to Counsel, Res-judicata, bars re-litigation of a cause of action between the same parties where there is a prior judgment. He referred this court to Black's Law Dictionary 6<sup>th</sup> Edition, where "*Res-judicata*" is defined as:-

**"a matter adjudged, a thing judicially acted upon or decided, a thing or matter settled by judgment. Rule that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action".**

Counsel submitted that for "*Res-judicata*" to be applicable, requires identity in the thing sued for as

well as identity of cause of action, of persons and parties to action, and capacity in persons for or against whom the claim is made.

Counsel further submitted that the substance of the whole rule is that a matter once judicially decided is finally decided.

Counsel for the appellant also referred this Court to the case of **Farook Aziz vs Abdulla Abdu Maruku in SCCA No 4 of 2002** and contended that in the instant case, the application for leave to file a written statement of defence out of time was heard inter-parte, the subject matter was the same, it had been argued by both counsel and a ruling was delivered and therefore the doctrine of res-judicata applied. The same court should not have entertained a fresh application of the same nature and between the same parties, more so when a right of appeal had been explained to the parties and the respondent had had the option to apply for leave for the purpose of appeal.

### **Submissions of Counsel for the respondent**

Counsel for the respondent submitted that the lower court did not either expressly or impliedly bar the respondent /defendant from filing Application No 311 of 2009. That in light of the above circumstances it cannot be said that the application No 311 of 2009 was res judicata within the meaning of Section 7 of the Civil Procedure Act, Since application No 211 of 2009 was never heard/nor disposed of by court but was withdrawn by consent on the later date of 27<sup>th</sup> August 2009, as the same had been overtaken by the ruling of His Lordship Justice Murangira.

He further submitted that following the ruling and withdrawal of Application No 211 of 2009, the Respondent filed Application 311 of 2009 seeking to file a defence outside time. By virtue of the withdrawal of No 211 of 2009 and the filing of application No 311 of 2009 res-judicata does not arise.

**He cited the cases of Boutique Shalizim Ltd vs Norattam Bhatia & Another CACA No 36 of 2007 and Lt. Ktibarebe vs Major Prossv Nalweviso CACA No 34 of 2003.**

### **Resolution by Court**

For resolution of this appeal we find it pertinent to put in proper perspective the two rulings of the learned trial judges at the High Court and clarify the impact of each.

The respondent had filed a written statement of defence out of time . He applied for leave to file it out of time orally. This was objected to by the appellant. Hon Justice Joseph Murangira then at the station gave a

ruling dated 19.06.2009. He found that the written statement of defence on record was filed out of time , was incompetent and he struck it out.

He ordered the trial to proceed ex-parte. He ruled that the plaintiff and its lawyer could be in attendance but without any participation in the proceedings.

The judge ordered that the costs of the application abide the results of the main we find it significant and note the following:

Hon Justice J. Murangira found and ruled that the written statement of defence was filed out of time. He struck it out and ordered for the main suit to proceed ex-parte.

Clearly, therefore, the judge had not finally settled the matter. The main hearing was still to proceed only ex-parte.

The respondent filed Miscellaneous Application No 311 of 2009 praying that the order granted by the court on the 10<sup>th</sup> of June 2009 for the plaintiff (respondent) to proceed ex-parte be set aside and that the matter be heard inter-parties. The application also prayed for time for filling a written statement of defence to be enlarged and the defence on file to be admitted as having been filed in time.

The application was heard by Hon Justice Faith Mwendha who had by then replaced Hon Justice J. Murangira at the station after the latter had been transferred.

We find that the application to set aside the order originally given by Hon Justice J. Mulangira was presented in the same court. The specific judicial officer that had handled it had been transferred. The one who presided over the court was exercising jurisdiction of the same court. The matter therefore was in the same Court. The new judge was exercising the same jurisdiction and it was not a different court because of the change of judicial officers.

The new High Court Judge at the station heard the application on its merits, and made a ruling on 20/11/2009 and held as follows:

***‘I am satisfied from the above that it will be in the interest of justice to set aside the order authorizing ex-parte hearing as this court is the same court which granted the order (interlocutory) and court doesn’t mean individual judge. Neither was the matter res-judicata as argued by counsel for the respondent for reasons already stated above. In the circumstances the order authorizing hearing of the suit ex-parte is hereby set-aside.’***

We now need to consider whether the matter before justice Faith Mwendha was res-judicata as submitted by counsel for the appellant.

**The Supreme Court had occasion to consider and state the law on res-judicata in Civil appeal No 4 of 2002 Farook Aziz(Administrator of the Estate of Salima Kabasingo) vs Abdalla Abdu Maruku(supra) Chief Justice Odoki, as he then was, held:-**

**“As Crabbe JA said in the case of Mandavia vs Singh(1965) EA. 118 at page 121 “Res judicata on the one hand is a matter of pleadings and can be raised only at the trial. The principles underlying the doctrine of**

**Res-judicata are “Interest reipublicae ut sit firus litium” and Nemo Debet bin rexari pro eadem causa.” The court before which the plea is raised is not deprived of jurisdiction to hear the case, the court only declines to exercise its jurisdiction to allow the parties to relitigate a matter when it is satisfied that the same parties are suing in the same capacity and that the issue before it is the same as that alleged to have been the subject of adjudication in previous proceedings.”**

**The Supreme Court again on res-judicata in Civil Appeal No.17 of 2002, Fr. Narsensio Begumisa and Others vs Eric Tibegaba held:-**

**The defence of *res judicata* is a bar to a plaintiff whose claim was**

**previously adjudicated upon by Court of competent jurisdiction in a suit with the same defendant or with a person through whom the defendant claims.”**

In the instant case, the dispute between the two parties had not yet been duly adjudicated upon. An order for the matter to proceed ex-parte had been given but the main suit was still pending.

The presiding judge determined that it was in the interest of justice to set aside the order for the matter to proceed ex-parte .

We do not find the matter that Hon Justice Faith Mwondha handled and determined was res-judicata.

This appeal therefore fails on grounds one and two.

Having found as we do on the grounds one and two of the appeal, we do not find it necessary to discuss ground three of the appeal dealing with the cross-appeal since



the outcome would in no way alter our position on the outcome of the resolution of the two substantive grounds which have disposed of the appeal.

The substance of the case as to its merits and/or demits will be handled by the High Court as the trial Court. Issues of witnesses and Advocates appearing before the High Court are matters to be handled by the trial court. This Court is interested in matters of substance and not in academic arguments on issues that do not alter the substantive position that the Court has ruled upon.

The original Civil Suit No.3 70 of 2008 should proceed in the High Court on its merits as ordered by Hon Justice Faith Mwendha.

This appeal is dismissed with costs to the respondent.

(Dated this day 2<sup>ND</sup> Day of June 2015.)

Hon. Justice Remmy Kasule

Justice Court Of Appeal

Hon. Justice Rubby Aweri Opio

**JUSTICE OF APPEAL**

Hon. Justice Richard Buteera

**JUSTICE OF APPEAL**