THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA HOLDEN AT KAMPALA

CIVIL APPEAL No. 154 of 2014

(Arising from Miscellaneous Application No. 104 of 2012)

Coram of Justices:

Hon. Justice Catherine Bamugemereire, JA;
Hon. Justice Stephen Musota JA;
Hon. Justice Muzamilu Mutungula Kibeedi, JA.

1. **MARIA NAMUDDU**
2. **YOZEFANI BABIRYE**
3. **SAUDA NALUWOZA**
4. **YOSEFU TEBITENDWA**
5. **PAULO SENYONJO**
6. **ABDUL MUKIIBI::APPELLANTS**

VERSUS

COMPASSION INTERNATIONAL::::::::::::::::::::::::::RESPONDENT

Appeal arising from the Ruling/ Orders of the High Court of Uganda (Masaka) before Margaret Oguli Ouma, J in civil suit No. 41 of 2006 delivered on the 9th day of July 2014.

JUDGMENT OF CATHERINE BAMUGEMEREIRE JA

This is an appeal from a decision of Margaret C. Oguli Ouma, J, dismissing the Appellant's application to set aside a consent Judgment which had been entered between the Appellants and the Respondents compensating the Appellants for the loss of their relatives who died in a fatal accident involving the Respondent's vehicle.

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Background

The 1st, 2nd, 3rd, 4th and 5th Appellants sued as dependants of the deceased persons who died in an accident. The 6th Appellant is a survivor of the same accident. The facts that gave rise to the instant case are that on the 21st day of August 2014, Neriko Munyankindi, Isma Lubega, Yozefu Tebitendwa and Jastine Nantantle (deceased) were fare-paying passengers travelling in Motor Vehicle Reg. No. UAB 506J when it collided head-on with the defendant's Vehicle Reg. No UAB 442J. Four people passed on, the 6th Appellant sustained injuries, his car was destroyed beyond repair and was written off.

The beneficiaries of the deceased persons and the survivor of the accident instituted High Court Civil Suit No. 056 of 2005 against Compassion International for recovery of special damages, general damages, funeral expenses and cost of the suit. Subsequently, Counsel for both parties signed an out of court settlement in 2005, in which the Respondent gave the Appellants UGX 8,200.000/=. It is alleged that the Appellants never received the money, because their lawyer took it all.

The Appellants later instituted a fresh suit, High Court Civil Suit No.0041 of 2006, Maria Namuddu 7 & Others v Compassion International. The

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Appellants filled Misc. Application No. 104 of 2014, to amend the plaint. Before the commencement of the hearing, counsel for the Respondent raised a preliminary objection to the effect that counsel for the Appellants was proceeding without instructions from the Appellants. He produced a letter from the Registrar of the Court where he was expressing reservations on case. He also produced a letter from one of the Parties of the suit which stated that they had no other claims with the Respondent since they had been duly compensated. The Trial Judge subsequently dismissed both the Miscellaneous Application and the Civil Suit. It is this dismissal that the Appellants appeal against.

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

1. **That the learned Trial Judge misdirected herself in law and in fact when she failed to hear and determine the M.A No.104 of 2012 which had been fixed for hearing**
2. **That the learned Trial Judge further misdirected herself when she conducted an irregular trial by admitting evidence from the Bar other than orally or by affidavit.**
3. **That the learned Trial Judge erred in law when she dismissed the appellant's case without giving them a hearing**
4. **That the learned Judge misdirected herself when she ordered counsel for the Appellants to pay costs.**

It is proposed to ask Court for orders that:

a) **The Appeal be allowed and the ruling of the lower court be set aside**
b) **The case be remitted to the lower court for trial before another judge**

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c) **That costs of this appeal be provided for plus those in the lower court.**

At the hearing of this appeal, Learned Counsel, Herbet Wakabala of Asiimwe Namawejje & Co Advocates represented the Appellants while Counsel Walter Bwire of Bwire, Kalinaki & Co Advocates represented the Respondent.

Legal arguments

On the 1st Ground, Learned Counsel for the Appellants averred that the Trial Judge failed to hear Miscellaneous Application No. 104 of 2012. Counsel for the Appellant argued that instead of pronouncing itself on the Amendment the court simply dismissed the application and the main suit.

Counsel for the Respondent on the other hand averred that the Learned Trial Judge heard and determined the Application. He submitted that according to the record, Miscellaneous Application No. 104/2012 came up for hearing on 25th June, 2014 and both Counsel for the parties were present. At the hearing of the Application, Counsel for the Respondent raised preliminary objections of law that disposed of the Application and the suit. The Appellants' Counsel was granted an opportunity to respond

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to the objections and the Respondent as the applicant who raised the preliminary objection, was granted a right of rejoinder. The court then adjourned the matter for ruling on the 9th July 2014 upon which it found that the suit from which the matter before it arises was ***res judicata*** thus prompting it to dismiss both the Application and the Suit from which it arises.

Counsel argued that a preliminary objection on a point of law can be raised at any stage of proceedings, provided it can dispose of the suit. As the Court of Appeal guided in **Maniraguha Gashumba v Sam Nkundire CACA No. 23 of 2005,** an illegality once brought to the attention of court overrides all forms of pleadings including admissions thereon.

He contended further that the pleadings being ***res judicata*** is an illegality and no court ought to try the matter that fall within the ambit of ***res judicata.*** The trial court lacked the jurisdiction to entertain the Appellant's application for amendment of the plaint since the main suit from which the application arose was ***res judicata.***

Counsel submitted that ***res judicata*** is a statutory doctrine that bars a court from hearing a matter that has been determined in a previous suit. It would follow, therefore, that even if the trial court had considered the

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proposed amendment, the suit would still be *res judicata* given that it involved same parties, the same subject matter and substantially the same prayers.

In rejoinder, Counsel for the Respondent averred that the doctrine of *res judicata* does not apply to this case. According to counsel for the respondent, the main suit had never been adjudicated, heard and determined by any court of competent jurisdiction.

On Ground Two: Counsel submitted that the Trial Judge conducted an irregular trial. He allowed Counsel for the Respondent to tender evidence at the bar. Counsel averred that the Judge admitted documents which were never received in the court registry. A letter relied on by the respondent was not received and does not bear any court stamp. Counsel criticised the trial Judge for simply allowing this level of impunity to go on without let or hindrance.

He submitted further that section 66 of the Evidence Act provides that if the document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his or her handwriting." However, court allowed the respondent

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counsel to tender documents at the bar without proving the handwriting of the authors. Counsel contended that this was irregular and should not have been allowed because it was prejudicial to the Appellants who suffered injustice.

In reply, Learned Counsel for the Respondent submitted the Respondent's counsel did not at any time submit from the bar but rather pointed court to an illegality by raising a preliminary objection on law which court investigated and actually found merit in the allegation thus dismissing the Application and the suit.

Counsel further submitted that in regards to an illegality, it does not matter under what form it is brought to the attention of court. Once court is notified of an illegality, it should investigate it and dispose of it there and then. Counsel thus averred that the Learned Trial Judge did not misdirect herself on the law of admitting evidence as pointed out by the Appellants.

In rejoinder, counsel for the Appellant averred that he objected to the documents but all in vain.

On the 3rd ground, Learned Counsel for the Appellants averred that the Trial Judge condemned him to pay costs without any justification. It was

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counsel's contention that an advocate can only be condemned to pay costs of the suit if at all he is guilty of professional misconduct.

Counsel argued that the Trial Judge did not show any professional misconduct that counsel had exhibited in order for her to condemn the Appellant' counsel to pay costs.

In reply, counsel for the Respondent argued that counsel for the Appellants, Mr. Wakabala Herbert had on court record been stated as holding in brief for Mr. Peter Kusiima of Kusiima & Co. Advocates. However, it was pointed to court by the Respondent that Mr. Kusiima had actually stated in writing that he had no knowledge of the matter which was before the court. .

Counsel then invited the court to consider the possibility that Mr. Wakabala was actually acting fraudulently and could have filed the matter in the name of another law firm without instructions. The Appellants were never in court at all material times. The trial court found that Mr. Wakabala's conduct of the matter as counsel appeared suspipcious and professionally wanting. It is upon this basis that court ordered counsel to pay costs directly.

Counsel averred that court did not misdirect itself on any matter in as far as who was to pay costs was concerned since counsel seemed to have been acting without instructions and if with instructions, then misadvising his clients in filing a matter that was *Res Judicata*.

It was counsel's opinion that the Judge found it fit to punish counsel for his unwise counsel to his clients which below the standard ordinarily expected of an Advocate of the High Court.

In rejoinder, counsel for the Appellant argued that if a case comes up for hearing and the Advocate comes without a client, it does not mean that he is acting without instructions. The hearing was for an application to amend the plaint and it was not desirable to have the clients around.

He further contended that his firm and that of Ms Assimwe Namawejje & Co. Advocates had joint instructions to represent the Appellants.

Consideration of the Grounds of Appeal.

It is the duty of this court as a first appellate court to re-hear the case by subjecting the evidence presented of the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion (see **Father Nanensio Begumisa and three Others v Eric Tiberaga Supreme Court Criminal Appeal No. 17 of 2000.**

Ground No. 1

1. **That the learned Trial Judge misdirected herself in law and in fact when she failed to hear and determine the M.A No.104 of 2012 which had been fixed for hearing.**

In determining Ground No. 1 I note that the learned Trial Judge premised had refusal to hear and determine MA No. 104 of 2012 on the premise that it was re-opening a matter which had been agreed upon with finality, a consent entered and compensation received by the victims of the accident. This appeal is premised on an irregularity that counsel for the Appellant is heavily relying on to seek a retrial. It is the irregularity that the trial Judge declined to enter into the merits of MA o. 104 of 2012. However even if I were to delve into the alleged irregularities of the trial it is preeminent that I resolve the most pressing issue at hand, the elephant in the room: whether the primary suit, vide Civil Suit No 0041 of 006 is barred by *res judicata*. For effect and emphasis I will repeat the background of the original suit in order to understand what the trial Judge was dealing with.

The beneficiaries of the deceased persons and the survivors of an accident in which instituted High Court Civil suit No. 056 of 2005 against Compassion International for recovery of special damages, general damages, funeral expenses and cost of the suit. Subsequently, Counsel for

both parties signed an out of court settlement in 2005 in which the Respondent gave the Appellants UGX 8,200.000/=. It is alleged that the Appellants never received the money, because their lawyer took it all.

The Appellants later instituted a fresh suit, High Court Civil Suit No.0041 of 2006, Maria Namuddu 7 & Others v Compassion International.

The five beneficiaries of the five accident victims and one survivor of an accident in which the respondent's vehicle had a head-on collision with the vehicle in which the victims were travelling instituted High Court Civil suit No. 056 of 2005 against Compassion International for recovery of special damages, general damages, funeral expenses and cost of the suit. Subsequently, Counsel for both parties signed an out of court settlement in 2005 in which the Respondent gave the Appellants UGX 8,200.000/= as compensation to the victims. In 2005 this was considered fair compensation.

The Appellants later instituted a fresh suit, High Court Civil Suit No.0041 of 2006, Maria Namuddu 7 & Others v Compassion International. The Appellants filled Misc. Application No. 104 of 2014, to amend the plaint. Before the commencement of the hearing, counsel for the Respondent raised a preliminary objection to the effect that counsel for the Appellants

was proceeding without instructions from the Appellants. He also produced a letter from one of the Parties of the suit which stated that they had no other claims with the Respondent since they had been duly compensated. The Trial Judge subsequently dismissed both the Miscellaneous Application and the Civil Suit for being ***res judicata***. It is this dismissal that the Appellants appeal against.

The doctrine of *res judicata* is founded on Section 7 of the Civil Procedure Act, Cap 71 which provides that:

> *"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try the subsequent suit or the suit in which the issue has been subsequently raised, and has been heard and finally decided by that court".*

In **Semakula v Magala & Others [1979] HCB 90**, the Court of Appeal laid down the test for determining whether a suit was barred by *res judicata*, which is whether the plaintiff in the second suit was trying to bring before the court in another form a cause of action in a transaction which has already been presented before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon.

The basis of the rule of *res judicata* is that an individual should not be vexed twice for the same cause. A person should not be twice vexed in respect of the same contest as to his or her rights and on the other hand. Equally, the time of the Courts should not be unproductively causes by trying the same matter several times. The plea of *res judicata* is in its nature an *estoppel* against the losing party from again litigating matters involved in previous action but does not have that effect as to matters transpiring subsequently. (see **In the Matter of Mwariki Farmers Company Limited v Companies Act Section 339 and others [2007] 2 EA 185**).

For the doctrine to apply, a party must demonstrate that;

a) There was a former suit between the same parties or their privies, i.e. between the same parties, or between parties under whom they or any of them claim, or parties who claim through each other, litigating under the same title;
b) A final decision on the merits was made in that suit, i.e. after full contest or after affording fair opportunity to the parties to prove their case;
c) By a court of competent jurisdiction, i.e. a court competent to try the suit; and

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d) The fresh suit concerns the same subject matter and parties or their privies, i.e. the same matter is in controversy as was directly and substantially in issue in a former suit. see **Ganatra v Ganatra [2007] 1 EA 76** and **Karia and another v Attorney General and others [2005] 1 EA 83 at 93 -94.**

In **Ponsiano Semakula v Sasare Magala & Others 1993 KALR P.213,** the principle upheld was that the court before which the issue of *res- judicata* is raised must carefully study the judgment of the court in the previous suit and ascertain that the judgment exhaustively dealt with the issues raised in that case and as much as possible the whole court record should be carefully re-appraised for the court to acquaint itself with all matters raised in the earlier suit in order to decide whether the plea of res- judicata succeeds or not.

Learned Counsel for the Appellant averred *that* the suit was not barred by *res judicata* since it was not adjudicated upon.

From the record of proceedings, the Appellant first instituted a suit against the Respondent, before the suit was heard, both counsel signed a settlement agreement where the Respondent paid the Appellants UGX8,200,000/= as full and final settlement for damages and injuries

incurred in the accident. A consent Judgment in which parties agree on all the issues in contention substantially settles the whole suit.

The question before us was whether the settlement agreement between the parties the conclusively adjudicated the matters in the suit.

O.5 r. 2 of the Civil Procedure Rules which provides for compromise and agreements out of court states that:

> *'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 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.'*

The elements of a compromise or agreement within the meaning of Order 26 rule 6 Civil Procedure Rule as follows:-it must be lawful; the parties must agree to it, it must relate to issues in the suit, a decree must be passed in respect of the same and, it must be recorded. See **Bank of Baroda (U) Ltd v Ataco Freight Services Ltd Court Of Appeal Civil Appeal No.45 Of 2007.**

In the instant case, the agreement was lawful. On the second condition, the agreement was agreed upon by counsel for both parties. It has long been settled that *prima facie,* any order made in the presence and with the consent of counsel is binding on all parties to the proceedings and cannot be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to the policy of the court or if the consent was given without sufficient materials or in misapprehension or ignorance of material facts in general for a reason which would enable the court to set aside an agreement see: **East African in Brook Bond Liebig (T) Ltd v Mallya [1975] EA 266.** In the instant case, the agreement was signed by the Appellant's lawyers, it is *prima facie* valid, until it's discharged for fraud, which must be strictly proved, collusion or agreement.

On the third condition, the Appellants in the primary suit were seeking compensation for the negligence of the Respondent's driver, the settlement agreement was entered to compensate the Appellants. This condition was also fulfilled. On the fourth requirement, that the agreement must be recorded, the agreement was indeed recorded.

The fifth condition requires that the agreement be passed into a decree. A decree is defined by section 2(c) of the Civil Procedure Act as follows:

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'Decree' means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint or writ and the determination of any question within section 34 or 92, but shall not include----

(1) Any adjudication from which an appeal lies as an appeal from an order, or

(2) Any order of dismissal for default;

Explanation--- A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when the adjudication completely disposes of the suit. It may be partly preliminary and partly final."

In **Ataco Freight Services Ltd** (supra) The Appellant had raised preliminary objection in the High Court to the effect that the Appellant was wrongly sued because of a compromise reached by the parties on 6th July 2004. The leaned Trial Judge dismissed the preliminary objection.

On appeal, the issue before this court is whether a compromise within the meaning of Order 26 Rule 6 [now Order 25 Rule 6] was reached by an agreement of parties, it was agreed that apart from the Judge allowing a withdrawal of the suit, the parties agreed to file the settlement agreement in the High Court at Masaka. Their copy of the decree bares a certifying stamp of the Deputy Registrar of the High Court of Masaka. The Registrar of the High Court was certifying that the agreement was duly signed by parties' counsel after the parties had agreed to its contents.

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Order 25 rule 6 of The Civil Procedure Rules is to the effect that upon the parties reaching a compromise, or an agreement court's only role is limited to ordering the agreement, compromise, or satisfaction to be recorded, and thereafter pass a decree in accordance with the agreement, compromise or satisfaction so far as it relates to the suit, as guided by O.5 r. 2 of the Civil Procedure Rules.

We find therefore that in the instant case a decree was passed in accordance with the agreement and thus the agreement is in line with Order 25 rule 6 of the Civil Procedure Rules. Consequently, this matter was wholly dealt with in the consent agreement.

In the premise therefore, I find that Ground No. 1 has been answered in the negative. The trial Judge was correct in not considering **the M.A No.104 of 2012** which had been fixed for hearing since **Civil Suit No. 041 of 2006** was ***res judicata.*** I equally find that by disposing of Ground No. 1 upon which the rest of the three grounds stem, the remaining matters regarding amending a decided suit and taking down of evidence are resolved. This is due to the fact that the trial Judge was fully conversant with the record which proved that there had been a consent judgment in the earlier matter. The same trial Judge could not therefore hear a matter that had already been resolved and it's understandable when she ordered

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counsel to pay costs since, being aware of what had transpired earlier, they were attempting to smuggle a new trial in an already decided matter.

I find that this appeal has no basis.

In view of the above;

1. I find that Civil Suit No. 041 of 2006 was adjudicated upon so as to be barred by *res judicata*.
2. The Appeal is without merit and is therefore dismissed.
3. Considering that the appellants are simply unsuspecting victims of poor advice from their counsel, they shall not be penalised by way of costs. No order is therefore made as to costs. Any aggrieved person may consider approaching law counsel to penalise erring advocates.

Signed this ....27th..... day of .....July.....2022

Catherine Bamugemereire
Justice of Appeal

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

CIVIL APPEAL NO. 154 OF 2014

(Arising from the Ruling/ orders of Justice Margret C. Oguli Ouma, J in High Court Civil Suit No. 41 of 2014)

1. MARIA NAMUDDU
2. YOZEFANI BABIRYE
3. SAUDA NALUWOZA
4. YOSEFU TEBITENDWA
5. PAULO SENYONJO
6. ABDUL MUKIIBI

:::::::::::::::::::::::::: APPELLANTS

VERSUS

COMPASSION INTERNATIONAL :::::::::::::::::::: RESPONDENTS

CORAM: HON. JUSTICE CATHERINE BAMUGEMEREIRE, JA

HON. JUSTICE STEPHEN MUSOTA, JA

HON. JUSTICE MUZAMIRU MUTANGULA KIBEEDI, JA

JUDGMENT OF HON. JUSTICE STEPHEN MUSOTA, JA

I have had the benefit of reading in draft the judgment by my sister Catherine Bamugemereire, JA.

I agree with her analysis, conclusions and the orders she has proposed.

Dated this 27th day of July 2022

Stephen Musota

JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA HOLDEN AT KAMPALA

(Coram: Catherine Bamugemereire, Stephen Musota & Muzamiru Mutangula Kibeedi, JA)

CIVIL APPEAL NO. 154 OF 2014

(Arising from Miscellaneous Application No. 104 OF 2012)

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2. YOZEFANI BABIRYE
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VERSUS

COMPASSION INTERNATIONAL::RESPONDENT

Appeal arising from the Ruling/Orders of the High Court of Uganda (Masaka before Margaret Oguli Ouma, J in Civil No.41 of 2006 delivered on the 9th day of July 2014.

JUDGMENT OF MUZAMIRU MUTANGULA KIBEEDI, JA

I have had the opportunity of reading in draft the Judgment prepared by my sister, Hon. Justice Catherine Bamugemereire, JA. I concur and have nothing useful to add.

Signed, delivered and dated this...21st...day of....July.......2022

Muzamiru Mutangula Kibeedi 21/07/2022
JUSTICE OF APPEAL
21/07/2022