THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

[COMMERCIAL DIVISION]

CIVIL SUIT NO 170 OF 2010

FROSTMARK EHF (suing through

Attorney John Kabandize}.....PLAINTIFF

VERSUS

UGANDA FISH PACKERS LTD}.....DEFENDANT

BEFORE HON. MR. CHRISTOPHER MADRAMA

RULING

The plaintiff's suit against the Defendant is for recovery of 699,950 Euros, and for general damages, interests and cost of the suit. In paragraph 5 (g) the plaintiff avers that it a settlement agreement was filed under commercial court companies cause no. 01 of 2008 which settlement was attached and marked **annexure "E".**

The plaintiff also avers that part payment was made under the court settlement but the balance thereof is Euros 577,823.5 which remains unpaid. The plaintiff further claims Euros 122,126.5 on account of accrued interest up to the 8th of April 2010. This brings the total claimed as special damages to 699,950 Euros which is the amount claimed in the suit together with general damages interest and costs.

When the suit came for scheduling Masembe Kanyerezi appeared for the Defendant while Patrick Alunga appeared for the plaintiff.

Counsel Masembe objected to the suit on the ground that it is res judicata having been fully and finally settled in a previously instituted suit namely Company Cause No. 01 of 2008. Counsel

referred to annexure “E” to the plaint relating to the same indebtedness as claimed in the suit. He submitted that the terms agreed by the parties was a final order entered by the court on the 19th of January 2009. There being no application brought or pending to set aside the order, the current suit is res judicata under section 7 of the Civil Procedure Act.

Section 7 of the Civil Procedure Act is clear in that under it the court does not exercise jurisdiction in vain and if the matter had been decided in a previous proceedings between the parties the issue of payment of the debt cannot against be brought as it has been done in this case. The order was a consent order and cannot be automatically set aside except on grounds that may vitiate a contract between the parties. He prayed that I dismiss the suit as being barred under section 7 of the Civil Procedure Act.

In reply Counsel Alunga disagreed that the suit was res judicata. He submitted that the consent order did not decide the question of indebtedness finally. He read clause 1 and submitted that the company cause had been stayed. Referring to clause 4 he submitted that the petition had been stayed. He emphasised that the petition was to be resumed if the defendant in this suit defaulted in payment. The respondent defaulted and the petition was revived but later withdrawn with no order as to costs. Counsel concluded that the effect of going back to court meant that there was no element of finality in the consent order. He contended that section 7 only applies to matters which have been finally settled. A withdrawal of the petition does not give finality to the order of the court. He referred to Stroud’s Judicial Dictionary where the words final judgment is defined to mean:

> “No order, judgment, or other proceedings, can be final which does not at once affect the status of the parties, for whichever side the decision may be given; so that if it is given for the plaintiff it is conclusive against the defendant, and if it is given for the defendant it is conclusive against the plaintiff”

Counsel concluded that the provisions of the settlement agreement were clear and specifically provided for stay of petition and for its revival in case of default and did not meet the requirements of section 7 CPA on finality of the matter. He contended that the company cause in Company Cause 1 of 2008 concerned itself with a winding up petition and not recovery of the debt. It was not an action for recovery of the same claim. He referred to **Boutique Shazim vs.**

Norattam Bhatia and another CA 36 of 2007 page 4 of the decision of Byamugisha JA. He concluded that the present suit was not finally concluded and prayed that I overrule the objection.

In rejoinder counsel Masembe submitted that his learned friend had issue on three points. He contended that the settlement agreement had three elements of finality in that:

It creates finality as to the debt under clause 2. It determines the amount. And it also who owes and who is owed. Clauses 4 and 5 of the agreement also create finality as to what happens in the event of default and also in the event of performance. Under clause 4 the parties contracted and agreed in the final order that the petitioner shall proceed with the petition. Under clause 5 the agreed that in the event that there was satisfactory payment of debt, the petitioner would withdraw the suit. He submitted that under clause 5 that if the petitioner for whatever reason was satisfied with the respondent's actions, he would withdraw the petition.

This petition was withdrawn in the face of this consent order which was still subsisting. It could only have been withdrawn in accordance with the agreement of the parties. The petitioner cannot come back and claim there is a cause of action arising from the same debt. If it was a situation of default the petition should have been pursued not withdrawn. As far as the subject matter was concerned counsel submitted that it was the same debt which was being claimed. Referring to the case of **Boutique Shazim** (supra) at page 4 from lines 20 – 30 of that page, it supported the objection.

> "essentially the tests to be applied by the court to determine the question of Res judicata is this: is the plaintiff in the second suit or subsequent action trying to bring before the court, in another way and in the form of a new cause of action which he/she has already put before the court of competent jurisdiction in earlier proceedings and which has been adjudicated upon? If the answer is in the affirmative, the plea of Res judicata if applies not only to points upon which the first court was actually required to adjudicate but to every point which belonged to the subject-matter of litigation and which the parties or their privies exercising reasonable diligence might have brought forward at the time"

I have carefully considered the submissions of the parties and perused their settlement agreement dated 7th of January, 2009 between the same parties to this suit in a company cause 001 of 2008.

The settlement agreement in company cause number 001 of 2008 annexure "E" provides in part as follows:

1. "The petition for winding up of the respondent shall be stayed and payment of the debt due to the petitioner from the respondent shall be in accordance with terms are set herein.

2. The respondent shall pay to the petitioner the total sum of 738,426 Euros subject to interest plus legal costs of Euros 10,000 as follows:…

3. For the avoidance of any doubt, the respondent shall have paid the entire debt inclusive of accrued interest by 1 May, 2013.

4. If the respondent fails to pay any of the instalments as agreed herein, the petitioner shall be entitled to proceed with the petition.

5. If up on the due and satisfactory payment of the debt plus accrued interest, the winding up petition/companies cause no. 01 of 2008 shall be unconditionally or wholly withdrawn."

It is not disputed that in the current suit the plaintiff is seeking payment for the same debt. The consent agreement was sealed as an order of the court on the 19th of January, 2009 by the Deputy Registrar of the Commercial Court. Firstly I agree with Counsel Masembe that a consent order is valid and remains subsisting as an order of the court unless set aside. Secondly it cannot be set aside unless there are grounds disclosed in an application to set aside which would vitiate a contract between the parties. In Brooke Bond (T) Ltd vs. Mallya [1975] EA 266 it has been held that *Prima facie,* any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them…*and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of court…* or if consent was given without sufficient material facts, or in misapprehension or ignorance of material facts, or in general for any reason which would enable court to set aside an agreement between the parties". (Emphasis added). This decision was approved by the Supreme Court of Uganda in **MOHAMED ALLIBHAI –VS- W. E BUKENYA MUKASA, DEPARTED ASIANS PROPERTY CUSTODIAN BOARD S.C.C.A 56 OF 1996** that a consent order may only be set aside inter alia on any ground that would invalidate an

Agreement/contract between the parties or for fraud or collusion or as being contrary to public policy. In **HASSANALI –VS- CITY MOTOR ACCESSORIES LTD AND OTHERS 1972 EA 423** It was held that a Court would not interfere with a consent judgment except in circumstances that would provide a good ground for varying or rescinding a contract between the parties. Last but not least so long as it is in subsisting, a consent order remains valid and operates as estoppels against a party to it, who wants to assert something contrary. This was held by **Lindley LJ in Huddersfield Banking Company Ltd vs. Henry Lister and Sons Ltd (1895) 2 CH D. P. 273 at page 280:**

> "A Consent Order I agree is an order and so long as it stands it must be treated as such, and so long as it stands it is as good an estoppels as any other order. I have not the slightest doubt that a Consent Order can be impeached, not only on the ground of fraud, but upon any ground that would invalidate it.

The second point is the settlement agreement conclusively determined the question of indebtedness of the defendant. It determined the amount and how it was to be paid. It provided that if there was a default in payment the Petitioner would resume the winding up petition of the company. It should be noted that receivership is a mode of execution under section 38 of the Civil Procedure Act cap 71 laws of Uganda. The terms of the consent order could be implemented by continuing with the winding up petition under clause 4 of the order. This does not reverse the order that the indebtedness of the defendant remained as settled by the consent order irrespective of whether the petition was resumed for default in payment. The petition was only to be withdrawn where there was a satisfactory payment of the debt. Withdrawal of the petition was at the peril of the party withdrawing if it did not comply with the terms of the settlement. It cannot be at the peril of the defendant. Nevertheless the plaintiff can still harness the machinery of execution to pursue its claim under the settlement agreement.

Res judicata is a statutory doctrine that bars a court from hearing a matter that has been determined in a previous suit. The matter barred must have been directly and substantially in issue in the former suit. I wish to highlight the relevant provision of section 7 of the Civil Procedure Act cap 71: *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...*"

The key words are whether the matter was *directly or substantially in issue*. To cut the long story short, the question of liability of the defendant for the sum claimed in the plaint was directly and substantially in issue in the consent order of the parties in Company Cause 001 of 2008. In fact the question of liability of the defendant for the same debt had been determined by the court order dated 19th of January 2009. The court of appeal in **SEMAKULA VS. MAGALA & OTHERS [1979] HCB 90** has held that in determining whether a suit is barred by res judicata, the test is whether the plaintiff in the second suit is trying to bring before the court in another way in the form of a new cause of action a transaction which has already been presented before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon. If this is answered affirmatively, the plea of res judicata will then not only apply to all issues upon which the first court was called upon to adjudicate but also to the very issue which properly belonged to the subject of litigation and which might have been raised at the time, through the exercise of due diligence by the parties. The legal position is further affirmed by **Kamunye and Others vs. The Pioneer General Assurance Society Ltd, [1971] E.A. 263,** where the Court of Appeal LAW, Ag. V.-P. with the concurrence of Spry Ag. P. and Mustafa J.A. at page 265 paragraph F – G give the test of whether a matter is res judicata as follows:

> *The test whether or not a suit is barred by res judicata seems to me to be – is the plaintiff in the second suit trying to bring before the court, in another way and in the form of a new cause of action, a transaction which he has already put before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon. If so, the plea of res judicata applies not only to points upon which the first court was actually required to adjudicate but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time* ***Greenhalgh v. Mallard, [1947] 2 ALL E.R. 255.*** *The subject matter in the subsequent suit must be covered by the previous suit, for res judicata to apply* ***Jadva Karsan v. Harnam Singh Bhogul (1953), 20 E.A.C.A. 74***

In conclusion the consent order of the court in miscellaneous cause No. 001 of 2008 between the parties to this suit with the plaintiff as petitioner and the defendant as respondent has remained valid and subsisting. The plaintiff cannot at this stage assert a different position to the effect that the liability of the defendant was not determined. He is barred by the doctrine of estoppels from

asserting a different position. What remained under the consent order of the court was only implementation or enforcement/execution. Secondly the plaintiff is barred by section 7 from litigating under the same title on an issue of liability of the defendant which was not only substantially but wholly in issue in Company Cause NO. 001 of 2010. Whereas it was a winding up petition, the parties under their own hand agreed to compromise it by settling the question of indebtedness of the defendant and how that indebtedness was to be settlement. When the defendant defaulted his indebtedness remained and was not cancelled by the resumption of the winding up proceeding. When the petitioner withdrew the petition, this did not cancel the settlement order. The settlement order remained part and parcel of the company cause. The winding up would have operated among other things as an enforcement of the indebtedness of the defendant under section 37 (e) of the Civil Procedure Act through the appointment of a receiver in bankruptcy and the order of the parties would be the proof of the indebtedness of the defendant/respondent to the petition. Last but not least other modes of execution of the settlement remained open to the plaintiff.

For the reasons stated above, the defendant's objection is upheld and I find that the plaintiff's suit is barred by section 7 of the Civil Procedure Act for being res judicata and it is accordingly dismissed with costs.

Ruling read, delivered and signed in open court the 15th of April 2011.

Hon. Mr. Justice Christopher Madrama

Ruling read in the presence of:

Hon. Mr. Justice Christopher Madrama