

THE REPUBLIC OF UGANDA

**IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL COURT DIVISION)**

HCT-00-CC-MA-185 OF 2010

**OCEN ROBERT:.....:APPELLANT
VERSUS
OGING JOSEPH:.....:RESPONDENT**

BEFORE: THE HON. MR. JUSTICE LAMECK N. MUKASA

Representation:

Mr. Dan Wegulo- Counsel for Appellant

Mr. Oging Joseph- counsel for the Respondent

Court clerk:

Mr. Makoha Ojambo

RULING:

THIS is an appeal against the Registrar's ruling brought by Notice of Motion under order 50 rule 8 of the Civil Procedure Rules. The rule empowers any person aggrieved by any order of a Registrar to appeal from the order to the High Court. The Appellant seeks orders that:

1. The order of the Learned Registrar in overruling the appellants' objection to taxation of the plaintiff's additional bill of costs dated 2nd January, 2008 be overturned.
2. Costs of the appeal be provided for.

The grounds of appeal are:

- (a) The learned Registrar erred in law in holding that Mr. Oging Joseph properly filed the Plaintiff's additional bill of costs after the plaintiff had withdrawn instructions from him.
- (b) The learned Registrar erred in law in holding that Mr. Oging Joseph could proceed and tax the plaintiff's additional bill of costs after the plaintiff had withdrawn instructions from him.

In his affidavit in support the Appellant, Ocen Robert, avers that the Respondent, Mr. Oging Joseph, was representing Dr. David Kitara in Civil Suit No. 980 of 2010 until the withdrawal of instructions around and about the 26th October, 2006. In a letter dated 6th October, 2008 to M/S Oging & Co. Advocates, Annexure "A" to the affidavit, Dr. David Kitara states:

".....
This is to formally withdraw whatever legal instructions that I had given to you in the pursuit of matter with Mr. ROBERT OCEN
.....".

And in an affidavit dated 15th August 2008, Dr. David Kitara avers:

"3. That upon the defendant paying all the monies as per court instructions to Mr. Oging Joseph of M/s Oging and Co. Advocates by 26th October 2007, I never gave him any more instructions thereafter as far as Civil Suit 980 of 2004 is concerned".

There is no indication whether the letter dated 6th October, 2008 was filed in Court. However the affidavit dated 15th August 2008 shows that it was filed in Court on the same day.

In paragraph 4 Ocen Robert avers:

“4. That the Respondent proceeded and purportedly filed a plaintiff’s additional bill of costs on 3.01.2008”.

In paragraph 5 he avers that when the bill of costs came up for taxation on the 26th day of November, 2009 his counsel raised an objection to the taxation of the same on grounds that the Respondent could not file a bill of costs for a client after withdrawal of instructions and the same counsel could not continue to represent the client in taxation of the clients’ bill. The learned Registrar, in her ruling dated 5th March 2010, overruled the objections and advised that taxation of the said bill does proceed. Thus this appeal.

Mr. Oging Joseph filed an affidavit in reply where he contends:

“4. That in specific reply to paragraph 2,3 and 4, the concerns of the appellant are res judicata. The same having been raised before His Lordship Anup Singh Choudry in Miscellaneous application No. 195 of 2009, Oging Joseph vs. Ocen Robert were rejected and/or dismissed with costs.

5. That in the said application, the issue as whether or not instructions had been withdrawn, taxation of the additional bill of costs were resolved by the Judge adding that the additional costs incurred by the counsel in execution of the

decree of the court are recoverable and the additional bill of costs be filed and be taxed.....”

He further contends that the application is frivolous, vexatious, an abuse of court process, and bad in law.

The Bill of costs was filed on 30th January, 2008 when Mr. Oging Joseph was still on record as representing Dr. David Kitara since the affidavit pertaining to the withdraw the instructions from him was filed in Court on 15th August 2008. Apparently at the taxation date of the bill of costs, i.e. 26th November, 2009, Mr. Oging Joseph had no further instructions to represent the beneficiary of the Bill of Costs, Dr. David Kitara. In this regard counsel for the Appellant cited Hansraj Raumal Shah vs. Westlands General Stores Properties Ltd. & Anor. [1965] EA 642 where one of the appellant’s arguments was that he was not bound by his advocates’ act. It was found that the appellant had not withdrawn his instructions from the advocate who retained full control over the conduct of the case and had apparent authority to compromise all matters connected with the action.

Order 3 rule 1 of the Civil Procedure Rules provides that any application to or appearance or action in any court may be made or done by an advocate duly appointed to act on his or her behalf. So an advocate has ostensible or apparent authority to represent a party until such authority is withdrawn by the client.

In her ruling, Her Worship Gladys Nakibule, Deputy Registrar, stated:

“ This court is bound by the Judge’s order....the learned trial Judge ordered that the bill for advocates costs should be re-submitted to assessment to the Registrar.

I am obliged to asses the resubmitted bill therefore I accordingly order the bill be taxed accordingly”.

Mr. Oging Joseph contends that the Applicant’s claim was res judicata having been decided upon by Hon Justice Anup Singh Choudry and that the Deputy Registrar had arrived at the right decision as she had no alternative but to re-assess and tax the bill as directed by the learned Judge. Otherwise she would have been in contempt of the Court order.

In Kamunye & others vs The Pioneer General Assurance Society Ltd [1971] EA 263, the then East African Court of Appeal set out the test for res judicata, thus:

“ 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 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 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 vs Mallard, [1947] 2 All ER 255. The subject matter in the subsequent suit must be covered by the previous suit, for res judicata to apply. Jadva Karsan vs. Harman Singh Bhagal [1953], 20 EACA 74”.

The same test was applied by the Court of Appeal of Uganda in Posiyano Semakula vs Susane Magala & 2 others [1979] HCB 90. See also Mbambali vs. Kiiza & AG [1992-1993]HCB – 243.

Counsel for the appellant, Mr. Wegulo, contends that the issue of competence of counsel appearing for a client after the withdrawal of instructions has never arisen in the previous applications. That this issue was coming up for the first time and had not been adjudicated upon previously.

I have carefully studied the proceedings in the Appeal before Hon. Justice AS Choudry and the proceedings before the Assistant Registrar out of which arises the said appeal. Miscellaneous application No. 195 of 2009, the appeal before Hon. Justice AS Choudry, was against the Assistant Registrar, His Worship Henry Haduli’s refusal to tax the plaintiffs’ (Dr. David Kitara) additional bill of costs and dismissal of the same.

In the affidavit in support of Misc. app No. 195 of 2009 Mr. Oging Joseph avers:

“.....

(2) That I was instructed by my client Dr. David Kitara and I did present an additional bill of costs for taxation on 3rd

*June 2008 before the Registrar of this Honorable Court
His Worship Haduli.*

(3) That the said costs were incurred by my client and ourselves (the Lawyers) while pursuing payment and satisfaction of the decree passed against the respondent on 18th September, 2005.

(4) That instead of the Registrar taxing the bill by allowing, disallowing or reducing the items claimed, he dismissed the entire bill omnibus with costs to the Respondent.

.....”

In his ruling, His Worship Haduli stated:

“The question now is whether the plaintiff can file in court additional bill of costs to be taxed between the parties for expenses in execution of warrant of arrest.....”

His Worship dismissed the bill of costs for the reasons given in his ruling. Thus the appeal, in Misc. app No. 195 of 2009, which came before my brother, Hon. Justice AS Choudry. His Lordship allowed the appeal. The issue before him is stated in the Head note to his Judgment, thus:

“Whether costs in enforcing judgment debt can be received and taxed under the judgment decree”

His Lordship ordered, inter alia, that:

“The bill for Advocates Costs should be resubmitted for assessment to the Registrar”.

Clearly the issue before the learned Assistant Registrar and His Lordship was regarding the taxability of the Additional Bill of Costs. The issue of Mr. Oging Joseph to represent Dr. Kitara David was not considered by any of the said learned Judicial Officers.

I have also found that the Taxation Ruling by His Worship Haduli was delivered on 19th February 2008 prior to the filing of the withdrawal of instructions from Mr. Oging Joseph on 15th August, 2008.

However, the Appeal in Misc. App No. 195 of 2009 was filed on 14th April, 2009 by M/s Oging & Co. Advocates. This was after the filing of the withdrawal of instructions from Mr. Oging Joseph. In paragraph 3(i) of his affidavit in reply to the appeal Ocen Robert raised the issue of Mr. Oging Josephs' lack of instructions. He states:

“THAT Mr. Oging has again filed this Application without instructions from Dr. Kitara. Dr. Kitara having withdrawn instructions from him on 20/12/2007. A copy of a letter withdrawing instructions is attached hereto and marked as Annexure “E”.

I must observe that the said Annexure “E” is dated 6th October 2008 and not 20th December 2007 as stated in the above paragraph.

Despite the above averment the Appeal was prosecuted by Mr. Oging Joseph. Apparently the issue of Mr. Oging Joseph's representation was not pursued at the hearing or if it was the learned Judge did not consider it. Yet on the authority of the Kamunye case (supra)

this is a matter which the parties, exercising reasonable diligence, should have brought forward at the hearing of the Appeal. The doctrine of res judicata is fundamental in that there must be an end to litigation. In the premises I find that the matter was res judicata. The learned Deputy Registrar had no alternative but to proceed as directed in the Decree by the Honorable Judge. The option open to the Appellant was to appeal to the Court of Appeal against the Decree in Misc. Appl. No. 195 of 2009 for the learned Judge's failure to consider the issue whether Mr. Oging Joseph had Dr. David Kitara's instructions to represent him.

In the final result the appeal is dismissed with costs.

LAMECK N. MUKASA

JUDGE

18/04/2011