

THE REPUBLIC OF UGANDA,
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
CIVIL SUIT NO 486 OF 2007

KEN GROUP OF COMPANIES LTD}.....PLAINTIFF

VS

- 1. STANDARD CHARTERED BANK U LTD}**
- 2. NICHOLAS ECIMU}**
- 3. KAMUGISHA M. BERTTRAM}.....DEFENDANT**

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

RULING

This ruling arises from points of law set down for hearing during a pre-trial conference. The point of law is whether the suit is not barred by res judicata and/or the court is functus officio in light of a consent judgement of the parties to the suit.

The Defendant was represented by Barnabas Tumusingize of Messieurs Sebalu and Lule advocates while the Plaintiffs are jointly represented by Lukwago and Company Advocates through Counsel Chrysostom Katumba and Counsel Mohammed Bazirengedde. Counsels filed written submissions on a point of law. The nature of the point of law is that it is a preliminary objection to further trial of the suit.

Submissions of the Parties on the Defendant's objection

The Defendants Counsel submitted that the parties entered into a consent judgement on 3 March 2008 which consent judgement is not in dispute. It is further not in dispute that the terms of the consent judgement have been executed. Under the consent judgement an auditor was appointed rendered a report. Secondly the receivership was lifted. Thirdly two certificates of title were

returned to the Plaintiff and the monies were subsequently paid by the Plaintiff to the Defendant. The main contention on the Plaintiff according to the Defendants Counsel is that the consent judgement was not final because it never determined the legality or otherwise of the receivership. Secondly the consent judgement did not determine the level of the Plaintiff's indebtedness at the time of the appointment of the receivers. The Defendant's contention on the other hand is that the consent judgement was final in nature and determined all issues, and by the court proceeding to hear the case, it will be doing so without jurisdiction.

On the nature of the consent judgement, the Defendants Counsel submitted that the consent judgement was executed under the provisions of Order 50 rule 2 of the Civil Procedure Rules which provides that in uncontested cases and in cases in which the parties consent to judgement being entered in agreed terms, judgment may be entered by the registrar. Counsel submitted that the judgement was therefore on agreed terms. Without agreeing that the consent judgement did not address all the issues in the plaint, the Defendant's case is that the consent judgement need not address all issues in the plaint. The court is only called upon to give effect to what the parties have agreed upon. The consent cannot be reopened because the parties did not address certain issues. By the time the parties entered into the consent judgement, they were alive to their respective cases and preferred to address the issues which they deemed would address the concerns at the time.

Counsel compared a judgement delivered by a judge under the provisions of Order 22 rules 4 and 5 which gives the contents thereof as distinguished from Order 50 rule 2 of the Civil Procedure Rules. A judgement by consent does not have to be a determination of the issues framed as in the judgement. It is only upon agreed terms. The parties agree to what is to become the judgement and it is not open to anybody to complain that it did not address certain aspects of the claim. The remedy of an aggrieved party is to apply to the court to set aside or vary the judgement. A complaint that said matters were not addressed can only be valid if it was a judgement of a judge who is required to address all the issues.

The Defendants Counsel further submits that a consent judgement is a new contract between the parties. The fact that a consent judgement or decree passed on agreed terms is a new contract between the parties is supported by several authorities. In the case of Attorney General and Uganda Land Commission versus James Mark Kamoga and another Civil Appeal number 8 of

2004 Mulenga JSC cited with approval the Court of Appeal constitutional case of **Goodman Agencies Limited versus Attorney General and Hassa Agencies (K) Ltd Constitutional Petition Number 3 of 2008** where it was held that consent judgement are to be treated as fresh agreements and may only be interfered with on limited grounds. The Defendants Counsel further delays in the case of **Ismail Sunderji Hirani vs. Noorali Esmail Kassam civil appeal number 11 of 1952** being the judgement of the East African Court of Appeal reported in(1952), 19 E.A.C.A. 131. It was held in the above case that in such a case, the decree is raised upon the new contract between the parties which supersedes the original cause of action. Consequently the argument that the consent did not address the issue in the plaint is not sustainable. The consent judgement was a new contract which did not need to conform to the claim.

The Defendants Counsel further contended that no point was reserved by the parties for consideration in the consent judgement. He contends that had these been the case, the issue should have been the result and reflected in the consent judgement or in a separate agreement. Nothing could have prevented the parties from preserving some issues for consideration. In the case of **Attorney General and Uganda Land Commission versus James Mark Kamoga** (supra) Mulenga JSC rejected an alleged term of the consent on the ground that it had not been reduced into writing. Consequently any time or understanding between the parties ought to have been reduced into writing. There was no evidence of reservation of any matters to be determined and the consent judgement was final.

Counsel further submitted that a consent judgement is by its very nature consensual. A party is free to accept or reject any term of the consent without sanction of the court. All that the court does is to record the agreement of the parties to ensure that in future the parties do not depart from their agreement. On the other hand a judgement of the court is distinguishable on the ground that the parties have nothing to do with it. The distinction is critical in showing that a consent judgement is a judgement of the parties and all the court does is to give effect to the agreement of the parties. Finally the Defendants Counsel submits that the court has no jurisdiction to reopen the case unless in a proper application to set aside/vary the consent judgement.

In reply the Plaintiff's Counsel submits that there was no agreed preliminary objection although the court allowed the Defendants to submit on a preliminary issue on whether the suit is barred

by res judicata and/or the court is functus officio in light of the consent judgment entered into by the parties. Counsel submitted that the court should disregard the additional issue. Furthermore Counsel submitted that the audit report and the consent judgement are not part of the agreed documents/record. In miscellaneous application number 116 of 2011 the court ruled that a party cannot deviate from its pleadings. The issue submitted on was not pleaded and the court cannot justly conclude on the same without examining the contents of the judgement. Counsel contended that upon examination of the contents of the consent judgement, the matter would be fully concluded. The contention is that the consent judgement still continues until all its terms are fully executed. The contents and effect of the consent judgement are equally important in determining the issue now before the court. Counsel contended that this required the calling of evidence.

The appointment of the auditor, the lifting of the receivership and delivering of the certificate of title are not part of the defence pleadings. It was evidence adduced in civil suit number 486 of 2007. It was agreed that the recordings in this application number 116 is made part of the evidence to be adduced in the main suit.

The Plaintiff's Counsel further submitted that it is the Defendants claim that the consent judgement was final in that it determined the suit finally. Because the contention is not in the Plaintiffs pleadings, it is a matter of evidence to be proved by the Defendants. The court will have the opportunity to examine the consent not only as a judgement but also as a new contract to determine whether this resolved the Plaintiff's claims in the plaint.

Only question on the nature of the consent judgement, the Plaintiff's Counsels submitted that it has little or nothing to do with the issues raised for determination by the court. The Defendant referred to the consent judgement as a new contract between the parties. The Plaintiff's Counsel reiterated submissions that the consent document was not among the documents the defence sought to rely on in the pleadings or scheduling notes. It is also false claim that the judgement was entered pursuant to Order 50 rule 2 of the Civil Procedure Rules because the consent judgement does not disclose any such facts. The court will examine the consent judgement to conclude that it is not indicated written therein that it was a final disposal of the matter. The court ought to hear the parties to determine the true intention of the parties because prior to the

consent judgement, there were documented correspondences that clearly revealed that it was never intended to be conclusive.

Furthermore the Plaintiff's Counsel contended that the nature of the consent judgement entered by the parties is provided for under Order 21 rule 16 and 17 of the Civil Procedure Rules which enable the court before passing a final decree and make an order directing an account to be taken. The consent judgement is an agreement of the parties; it does not specify that the Plaintiff did not have any further claims under the suit. Counsel further submitted that the Defendants struggled to explain the difference between Order 22 rules 4 and 5 of the Civil Procedure Rules to exclude the suit of the Plaintiff from adjudication by this honourable court. Concerning the submission of the Defendants Counsel that the Plaintiff benefited from the consent in that they received money from the Plaintiff, Counsel argues that the reason for such payments and purpose will never be known if the case is not heard. It is the duty of the court to hear the parties and the conclusions after evaluation of the evidence.

The case of Attorney General and Uganda Land Commission versus James Mark Kamoga and another, establishes that consent judgement can be interfered with though on limited grounds. The court has not heard from the Plaintiffs and cannot be concluded that the court will interfere with the consent judgement. Furthermore judgement was entered under Order 21 rules 17 and 16 of the Civil Procedure Rules. Lastly the consent is not in any way preclude the court from hearing the issues which are not part of the agreed terms of the consent judgement. The issue of legality of the receivership was not expressly determined in the consent judgement.

In rejoinder and on the on the question of failure of the Plaintiff to plead the points of law submitted on in objection to further proceedings in the suit, the Defendants Counsel submits that points of law need not be pleaded and can be decided without the need of any evidence. By making reference to the consent judgement, Counsels were not adducing evidence.

The consent judgement is part of the court record and its existence is not in issue. The argument of the Defendants that the consent judgement is a new contract is based on fact that when parties enter into a consent judgement, the same was not necessarily address the claim as contained pleaded in the plaint and the parties are free to depart from them with a view of reaching an amicable position acceptable to both. The consent judgement supersedes the original cause of

action and therefore no party can be heard to suggest that the consent judgement did not address certain aspects of the claim. Furthermore section 79 of the Evidence Act provides for records of evidence in court. The consent judgement was entered by the registrar after the parties had agreed to its terms under Order 50 rule 2 of the Civil Procedure Rules. The provision gives the registrar jurisdiction to enter judgement.

On the other hand Order 21 rule 16 is not applicable for the following reasons. Firstly the registrar has no jurisdiction to enter the consent judgement of the parties under that rule. Secondly it was not a suit for an account between Principal and Agent. Thirdly it supposes that the court is enjoined to pass a preliminary decree before passing a final decree and the consent judgment cannot be termed as a preliminary decree. Even if it was to be argued that the rule was applicable, the order for the account was final and not preliminary as the consent judgement clearly indicates that the amount established was binding on the parties. Fourthly the consent judgement has nothing to do with the legality of the receivership because that is what the parties agreed. It was not agreed that the issue of the legality of the receivership was reserved to be handled in subsequent proceedings.

The consent judgement is arrived at pursuant to the agreement of the parties. It cannot be open court to enquire why the parties have not presented to court certain aspects of the suit. The only remedy available is to make an application to set aside the judgement in the event that one is dissatisfied with the same. In the case of Sarof Gandesha vs. Transroad (supra) the Supreme Court observed that the court could not be on the terms of the consent order. That the remedy of an aggrieved party aggrieved by the consent judgment lay with having it set aside. The Supreme Court further observed that the moment the parties reduced the agreement in writing then the consent judgement/order superseded or prior discussions, correspondences or agreements.

Res Judicata

The Defendants Counsel further contends that any further hearing is barred by the doctrine of *res judicata* because the court would be hearing matters in controversy which were either considered in the consent judgement or ought to have been the subject of the consent judgement. The issues which the Plaintiff proposes for determination of the remainder of the suit are as follows:

- Whether the Receivership was lawful;

- What the level of indebtedness as at the time of the Receivership was?

Firstly Counsel submits that the receivership was considered in the consent judgement. What was considered was an agreement to the effect that the receivership be lifted. If the Plaintiff had wanted this to be considered as part of the consent, there was opportunity to do so. The question would arise as to how the parties could consider the lifting of the receivership without considering its legality unless the Plaintiff as appears to be the case must have deemed it would be unnecessary. The court has never been shown any document reserving the specific issue of the legality of the receivership. Secondly the level of indebtedness was considered broadly when the auditor was requested to conduct an audit. The issues that the Plaintiff now wants to court to consider fall within the general ambit of the matters that the consent judgement touched on. To that extent, the matter is barred by the doctrine of res judicata is a matter which properly belonged to the subject of litigation which the parties exercising due diligence might have brought forward at the time of the judgement. The Defendant relies on the case of **Frostmark EAF versus Uganda Fish Parkers Ltd civil suit number 170 of 2010**.

In reply on the question of whether the suit is res judicata, the Plaintiff's Counsel relied on section 7 of the Civil Procedure Act and submitted that the provision anticipates two suits namely a former suit and a current suit. This is however not the case before the court. That is only one civil suit number 486 of 2007 which the Plaintiff wants the court to hear and conclude on the merits. It is further obvious from the issues raised by the Plaintiffs that the consent judgement did not address the whole claim and the court has unlimited jurisdiction to conclude on this matters without necessarily interfering with the consent judgement. The Plaintiff's Counsel relied on the case of **Trade Bank Ltd versus LZ Engineering Construction Ltd [2000] 1 EA 266** for a consideration of the doctrine of estoppels and res judicata. Consequently there was no issue in controversy that was determined in an earlier suit. That is only one suit and no other suit has been filed. The legality of the receivership and the claim for damages has never been decided upon. The consent judgement by its wording was not conclusive and its effect has not resolved the contention of the parties in the main suit.

In rejoinder the Defendants Counsel submitted that as far as res judicata is concerned, the reference under section 7 of the Civil Procedure Act to two suits has to be interpreted liberally to mean another suit which for all intents and purposes in the case of the Plaintiff has been

finalised. The jurisdiction referred to is the fact that the consent judgement has been delivered and the court would only have jurisdiction to entertain an application for setting aside and not to reopen the case on the ground that the consent did not address certain aspects of the case.

Functus Officio

The Defendants Counsel submitted that the court passed the consent judgement as a final judgement and the court is functus officio and cannot reopen the matter. The matter was finalised by the registrar upon endorsement of the agreement of the parties under Order 50 rules 6 of the Civil Procedure Rules. In the case of Goodman Agencies Ltd versus Attorney General and Hassa Agencies (K) Ltd the constitutional court observed that a consent judgement constructively acted as a final judgement and there was no evidence of illegality, fraud or mistake and the judge acted functus officio by adding Hassa Agencies as a party to the consent judgement. The judge had no further jurisdiction in the matter. Counsel submitted that the consent judgement entered into by the parties was a final judgement and the court has no jurisdiction to reopen the case to hear any further matters as it is functus officio.

Variation of the consent through the backdoor

The Defendants Counsel contends that the Plaintiff attempted to have the consent judgment set aside unsuccessfully in Civil Application Number 116 of 2012. It is only when a ruling was delivered that the matter was set down for hearing notwithstanding the fact that the consent was entered in 2008 and nothing has been done ever since. What the Plaintiff is asking the court could do is to interfere with or vary the consent judgement through the backdoor without necessarily applying to the court to set aside or vary the consent judgement. A consent judgement is to be treated as a fresh agreement according to the case of Attorney General of Uganda versus James Mark Kamoga.

Approbation and Reprobation

The Plaintiff has already derived a benefit from the consent judgement. The receivership was lifted and two titles were returned to the Plaintiff. The Plaintiff cannot turn round and challenge the very consent judgment from which it has derived a benefit. Counsel relied on the case of **Stephen Seruwagi Kavuma vs. Barclays bank (U) Ltd miscellaneous application number**

634 of 2010 for the principle that one cannot approbate and reprobate at the same time. This is based on the doctrine of election that nobody can accept and reject the same instrument and that a party cannot say at one time that a transaction is valid and thereby obtain some advantage from it to which it could only be entitled on the footing that it is valid and then turned round and said it is void for purposes of securing some other advantage.

Finally Counsel submits that the court has no jurisdiction to further try the case and that the consent judgement was the final judgement and therefore the preliminary objection should be allowed with costs.

In reply the Plaintiff's Counsel the question of whether the court is already functus officio pursuant to endorsement of the consent judgement Counsel submitted that this court has already pronounced itself on this matter in Miscellaneous Application Number 116 of 2012 arising out of the same suit. In that application, the court held that if the suit has some surviving part, it can be fixed for hearing. Counsel submitted that it was important for the auditors to be brought to account for the findings and terms of reference in the consent judgement. And that this is where the solution to the whole suit lies and until that process is completed, the consent judgement will never be effective. It would clearly be res judicata if the Plaintiff brings another suit under the consent judgement on grounds that the auditors failed in their duty.

The case of Goodman Agencies Ltd (*supra*) is distinguishable from the Plaintiff's case in that the court attempted to add a person who was not a party to this suit to the consent judgement and to the prejudice of the applicants. In the current case, the Defendant has not shown that it will be affected by hearing the case on its merits. The Defendant does not also demonstrate how the main suit has been resolved. The Defendant is supposed to show that the consent judgement resolved the Plaintiff's suit and there are no further issues for determination by the court.

Finally Counsel referred to a string of authorities on the doctrine of res judicata. In all the authorities, the matter for determination was whether the issues in the current suit were heard and finally decided by the court in a former suit. This is not the case in the Plaintiff's matter before the court. Furthermore the doctrine of functus officio is restricted to the decision of the court and not an agreement of the parties. Consequently the consent judgement is not an absolute bar as to

render the court functus officio. Each case should be determined on its own facts. The Plaintiffs therefore sought for dismissal of the Defendant's objection with costs.

In rejoinder the Defendants Counsel further does not agree with the interpretation of the ruling in miscellaneous application number 116 of 2012. In that proceeding the court did not order that the suit should be heard. The court was cautious in the usage of words hence it held "if" several times. The court held that when the suit is fixed for hearing, the Defendant would have an opportunity to raise its objections which it has done.

Counsel for the Defendant objected to the use of language by the Plaintiff's Counsel alleging that the Defendant did not want the Plaintiff to enjoy the privilege of being heard on the defence or being accused of being legally unethical. Counsel prayed that the court takes note and deals with the question of unethical and reckless words by the Plaintiff's Counsels.

Ruling

I have carefully considered the submissions of Counsel on the preliminary points. I have also considered the consent judgement, pleadings and authorities cited.

The primary issue in this matter is whether the consent judgement determined the suit finally. Objection is taken to the Plaintiff's position that the consent judgement did not determine the issue of whether the receivership was legal or illegal. Secondly there was no determination of the level of indebtedness of the Plaintiff at the time of appointment of the receivers. The Defendants Counsel submitted on the nature of a consent judgement and contended that the consent judgement is issued under Order 50 rule 2 of the Civil Procedure Rules as a judgement on agreed terms. Consequently because it is a judgement on agreed terms, it need not address all the issues in the suit. On the other hand a judgement entered by a judge using the prescribed procedure under Order 22 rules 4 and 5 of the Civil Procedure Rules deals with all the matters in controversy. A consent judgement does not have to determine the matters in controversy but only involves a judgement on agreed terms. The Defendant's position is further that it is a fresh agreement as held in the case of **Goodman Agencies Limited versus Attorney General and Hassa Agencies (K) Ltd** (supra) and also the East African Court of Appeal case of **Hirani versus Kassam [1952] 19 EACA**. Furthermore the Defendant's position is that no point was

reserved for determination by the court on the merits and that the consent judgement superseded every previous correspondence or agreement between the parties.

On the other hand the Plaintiff's case is that the court permitted the Defendant to proceed to argue a preliminary objection which was not pleaded. The Plaintiff's Counsel submits that parties cannot deviate from their own pleadings. Secondly the effect of the consent judgement required evidence such as on the appointment of auditors, the lifting of receivership and other matters. These matters were not pleaded in the Defendant's pleadings. It was evidence. The court required evidence to determine whether the consent judgement resolved the suit finally.

On the nature of a consent judgement, it is the Plaintiff's contention that the Defendant falsely claimed that the consent judgement was endorsed as a judgement of the court under Order 50 rule 2 of the Civil Procedure Rules. The Plaintiff's position is that the consent judgement was entered under Order 21 rules 16 and 17 of the Civil Procedure Rules. Furthermore upon the reading of the terms of the consent judgement, there is no indication anywhere that the Plaintiff cannot bring further claims. Consequently the court ought to hear the Plaintiff on various matters such as why they paid money to the Defendant (first Defendant) the effect of the consent judgement etc.

The first point that is to be determined is whether the consent judgement was entered under Order 21 rules 16 and 17 or Order 50 rule 2 of the Civil Procedure Rules. Order 21 rule 16 of the Civil Procedure Rules has a side note/head note which provides that it is a decree in a suit for account between principal and agent. It provides that:

"In a suit for an account of pecuniary transaction between the principal and agent, and in any other suit not hereinbefore provided for, where it is necessary, in order to ascertain the amount of money due to or from any party, that an account should be taken, the court shall, before passing its final decree, as a preliminary decree directing such accounts to be taken as it thinks fit."

The provision primarily deals with a suit for an account of a pecuniary transaction between a principal and agent. Secondly the court issues a preliminary decree directing such accounts to be taken as it thinks fit. In this case the court has not issued any preliminary decree and the matter proceeded with the consent of the parties. As far as rule 17 of Order 21 is concerned, it deals

with special directions as to accounts. It provides that the court may either by a decree directing an account to be taken or by a subsequent order, give special directions with regard to the mode in which the account is to be taken or vouched. It deals with directions on how an account is to be taken. It is definitely inapplicable to the Plaintiff's case. The matter before the court is simply put the consent judgement of the parties. I agree with the Defendant's Counsel that the applicable rule is Order 50 rule 2 of the Civil Procedure Rules. Whereas order 21 rules 17 and 16 deal with the kind of directions that the court may issue, order 50 deals with the jurisdiction of registrars. The first point to be made is that Practice Direction Number 1 of 2002 which amends order 50 of the Civil Procedure Rules does not include order 21 among the Orders which may be handled by a registrar. Secondly Order 50 rule 2 of the Civil Procedure Rules merely provides that:

"In uncontested cases and in cases in which the parties consent judgement being entered in agreed terms, judgement may be entered by the registrar."

The rule just confers jurisdiction on the registrar to enter judgement in a High Court case in which the parties consent to judgement being entered in agreed terms. What the Plaintiffs find objectionable in the rule is apparently the use of the phrase:

"In cases in which the parties consent to judgement being entered on agreed terms".

The fact cannot be wished away that the parties did agree to judgement being entered on agreed terms and the agreement was filed in court. It merely means that there is a judgement by consent of the parties which was endorsed by the registrar. The endorsing of the judgement by the registrar is not in dispute. The fact that there was an agreement to a consent judgement is also not in dispute. The use of the words "agreed terms" does not add any value to the controversy between the parties. This is because both sides are in agreement that there was an agreement between the parties which is embodied in a consent judgement dated 29th of February 2008 and endorsed by the registrar as an order of the court or a judgement of the court on 3 March 2008. The preamble of the consent judgment reads as follows:

"BY CONSENT OF THE PARTIES, it is hereby agreed that:"

The words used clearly indicate that the consent was an agreement of the parties and the registrar endorsed it as a judgement of the court as permitted by order 50 rules 2 of the Civil Procedure Rules.

Consequently the question is whether the consent judgement was a final judgement of the court. To consider whether it was a final judgement of the court which resolved all the issues, requires interpretation of the consent judgement itself. The consent judgment was considered in MA 116 of 2012 between the same parties by this court when the Plaintiffs sought to challenge the consent judgment. The ruling of the court on the nature of a consent judgment will be quoted in full between pages 28 – 30 of the ruling:

“Ground five asserts that the audit report arising out of the Consent Judgment and upon which execution is likely to be based does not conform to the terms of the Consent Judgment and the terms of reference given to the auditors. As we have established above, the auditors were appointed by the parties and their findings are binding. Any complaint with the auditors has nothing to do with the Consent Judgment. Such a complaint would arise from their written and agreed terms of reference for appointment of the auditors. The auditors can be made to account under their own terms of reference/appointment. That does not affect the Consent Judgment. *If the Applicant asserts that the suit has not been finally resolved, the solution is not to seek to set aside the Consent Judgment but to fix the case for hearing. The Respondent will therein have a chance to either raise the question of res judicata which it has done in its submissions or show the extent to which the Consent Judgment has resolved the suit.* It is an obvious fact and a point of law that the Consent Judgment does not refer to the appointment of Receivers other than that the Receivership shall be lifted. Secondly it is the first Respondent who appointed the Receivers. The Receivership was accordingly lifted and two title deeds were handed over to the Applicant. Generally the law is that a consent order cannot be set aside. In the case of **Purcell v F C Trigell Ltd (trading as Southern Window and General Cleaning Co) and another** [1970] 3 All ER 671 the parties entered into an interlocutory consent order and Lord Denning considered the effect of the order at 675:

“But there is no ground here so far as I can see setting aside this consent order. It was deliberately made, with full knowledge, with the full agreement of the

solicitors on both sides. It cannot be set aside. But, even though the order cannot be set aside, there is still a question whether it should be enforced.”

The question of whether a consent introductory order should be enforced arose in the context of the wide powers of courts in the enforcement and supervision of interlocutory orders. It may vary or set aside interlocutory orders even if made by consent of the parties. This however does not affect final orders made by consent of the parties which have contractual effect. The contractual effect of a Consent Judgment was considered by Buckley LJ in **Purcell v F C Trigell Ltd** (supra) at page 677 when he held:

“In my judgment, this order should be regarded as having a binding contractual effect on which the Plaintiff was perfectly entitled to insist.”

A consent order also operates as estoppels against someone trying to assert a different position from that stipulated in the agreement of the parties. See Lindley L.J. in **Huddersfield Banking Co. Ltd –Vs- Henry Lister & Son Ltd** (1895) 2 Ch D page 273 at page 280 when he said:

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.

The doctrine of estoppels acts as a shield against a party trying to assert a different position from that stipulated or represented. The doctrine of estoppels is incorporated by section 114 of the Evidence Act cap 6 laws of Uganda (revised edition). In the absence of any grounds for setting aside the Consent Judgment order/contract between the parties, the Consent Judgment can only be varied or set aside by another agreement of the parties.”

In the previous application between the parties, the court determined that the consent judgement had a binding contractual effect. This is consistent with the authorities relied upon by the Defendants Counsel that the consent judgement is a fresh agreement between the parties. The agreement is endorsed upon the terms which are reflected in the agreement itself. By endorsing

the agreement, the court gives it the solemnity of an order of the court. It can only be set aside on grounds for varying or setting aside a contract between the parties. There is nothing to be added to the proposition of law as far as this matter is concerned. It is therefore incumbent upon the court to determine whether the consent judgement in its terms determined the suit finally. In the previous application it was the holding of this court that if the Plaintiff considered that the consent did not determine the suit entirely, it should set the suit down for hearing and the Defendants would be given an opportunity to raise the objections on the ground that the consent judgement finally resolved the dispute. The Defendant accordingly has raised the objection that the consent finally determined the suit. This is a preliminary point of law that arose after the pleadings had been concluded and after the parties that entered executed a consent agreement. Its determination would depend on the terms of the consent judgement. I do not agree with the Defendant's submission which is to the effect that consent generally determines the suit finally. It just depends on the terms of the consent judgement. It is good practice to indicate whether the agreement finally settles the dispute between the parties to avoid a controversy such as in this case. Like every contract, it should be based on the interpretation of the agreement itself to discern whether it finally determines the suit. It does not require the adducing of evidence as submitted by the Plaintiff's Counsel. All that the court needs to do is to interpret the terms of the consent judgement in light of the pleadings.

The nature of the consent judgement based on the agreement of the parties is clearly a determination of the suit or part of the suit through reference to an expert or auditors. Reference of matters for trial by referees, arbitrators or auditors is specifically provided for by section 26 and 27 of the Judicature Act. Section 26 (1) of the Judicature Act provides as follows:

"(1) The High Court may, in accordance with the rules of court, refer to an official or special referee for inquiry and report any question arising in any cause or matter, other than in a criminal proceeding.

(2) the report of an official or special referee may be adopted wholly or partly by the High Court and if so adopted may be enforced as a judgment or order of the High Court."

The provision deals with the reference to a matter for inquiry and report by an official or special referee or on any question arising in any cause or matter. In this particular case, it was the parties

by agreement who chose to refer any question or cause or matter arising between the parties in the suit for determination by auditors. Section 26 of the Judicature Act is not applicable because it gives the High Court discretionary powers to adopt wholly or partly the report of an official referee or special referee. On the other hand section 27 (c) of the Judicature Act is the applicable provision. I will quote it in full because it provides as follows:

"the question in dispute consists wholly or partly of accounts, the High Court may, at any time, order the whole cause or matter or any question of fact arising in it to be tried before a special referee or arbitrator agreed to by the parties or before an official referee or an officer of the High Court."

Because the reference to an auditor was based on the consent of the parties, it is necessary to look at whether the parties intended the auditor's report to be binding. If they intend the auditor's report to be binding, then the reference falls under section 27 (c) of the Judicature Act. What is further important is to look at the head note of section 27 of the Judicature Act. Section 27 deals with trial by a referee or arbitrator. Once the matter falls under section 27 of the Judicature Act, it is not just a reference to auditors; it is a reference for trial by auditors whose findings would become binding and part of the judgement of the court. The consent of the parties did not have to indicate that the reference was made under section 27 (c) of the Judicature Act. When the registrar endorsed the consent of the parties, it became a reference for trial of specified matters by auditors by order of the court. The nature of the consent is therefore a reference for determination of a question of accounts. Therefore the question of whether the determination of the accounts between the parties namely the level of indebtedness determined the suit would depend on what the parties agreed upon establishment of the amounts in the reconciliation of accounts.

For purposes of a background to this matter, it is necessary to commence analysis of the submissions from the plaint of the Plaintiff. This would be to determine what the issues are that the Plaintiff wants determined after hearing of the suit and after the consent judgement of the parties. Paragraphs 4 and 5 of the Plaintiff's plaint give the Plaintiffs cause of action against the Defendants jointly and severally and are as follows:

"The Plaintiffs cause of action against the Defendants jointly and severally is for or arises as a result of the wrongful appointment of the second and third Defendants by the first Defendant as receivers/managers, the unlawful exercise of powers of receivers/managers by the second and third Defendants, defamation causing financial loss, breach of contract and is for a declaration that the appointment of the second and third Defendants by the first Defendant as receivers/managers of Ken Group of Companies Ltd was wrongful/unlawful, issuance of a permanent injunction against the second and third Defendants from purporting to exercise their powers as receivers/managers of Ken Group of Companies Ltd, issuance of a permanent injunction against the first Defendant from purporting to enforce the debenture dated 28th of September 2006, reconciliation of accounts, special and general damages, interest and costs."

In paragraph 5 thereof:

"The Plaintiffs cause of action against the second and third Defendants jointly and severally is for unlawfully exercising powers of A Receiver/Manager of the Plaintiff."

On 29 February 2008 the Plaintiff's and the first Defendant together with Counsel for the Defendants in the presence of Counsel for the Plaintiffs executed a consent judgement. The consent judgement was endorsed by the court namely the assistant registrar of the commercial court on 3 March 2008. There are 10 paragraphs in the consent judgement which I will also set out before dealing with the preliminary points. The consent judgement by the parties reads as follows:

- "1. The parties shall appoint an independent auditor within seven days from the date of this consent reconcile all the entries on the accounts which are now subject of the suit above, on which forms and facilities numbers 1 and number 2 were drawn down and repaid so as to verify the balance owing under the facilities.
2. Any balance owing shall be broken down to show the components i.e. the principal amount, interest, bank charges, legal fees and insurance charges.

3. The Auditor should clearly indicate the facility under which it drawing, entry or charge was made/arises, and against which the payments to service the indebtedness was made/effectuated.
4. The Auditors finding shall particularly spell out the level of indebtedness if any of Ken Group of Companies Ltd to the bank and such report shall subject to clauses 7 and 8 below be final and binding on the parties hereto.
5. The Auditors shall also ascertain the balance due to/from either party or the indebtedness of any other persons under the two facilities referred to in clause 1 above.
6. The cost of the audit exercise shall be borne by Standard Chartered Bank (U) Limited.
7. The Auditors shall issue a draft report to each party for the verification and reconciliation of the preliminary findings before issuing a final report. The auditors shall endeavour to produce the draft report within 14 days from the date of the appointment or within such further time as they may justifiably require.
8. The final report which shall be binding on the parties shall be issued by the auditor after affording each party seven days to comment on, and make any clarifications or queries arising in the draft report upon consideration of the same.
9. Upon execution of this consent judgement and appointment of an auditor, Standard Chartered Bank (U) Ltd shall lift the receivership and also return/handover 2 (two) certificates of title to the Plaintiff Company.
10. Pending the issuance of the Auditors final report referred to in clause 8 above, Standard Chartered Bank shall continue to hold the remaining 2 (two) certificates of title and any other securities (in the terms under which such securities were created) as security for any indebtedness under consideration by the debtor.”

The core elements in the Plaintiffs claim against the Defendants jointly and severally in paragraphs 4 and 5 of the plaint are as follows:

- There was a claim for wrongful appointment of receivers and corollary to that was the unlawful exercise of powers by the receivers/managers.
- Secondly there was a claim for defamation causing financial loss.
- Thirdly there was a claim for breach of contract in the relation to the alleged wrongful appointment of receivers/managers.
- Fourthly the Plaintiff seeks a permanent injunction in relation to the appointment of receivers and the exercise of powers of receivers/managers of the Plaintiff company.
- Fifthly there is a specific claim for reconciliation of accounts between the parties.

The above claims can be examined in light of the consent judgement endorsed by the court on 3 March 2008. It was executed by the parties on 29 February 2008. Under the consent judgement clauses 1, 2, 3, 4, 5, 6, 7, and 8, the agreement deals with the establishment or reconciliation of all the entries on the accounts which are the subject matter of the suit. It was one of the remedies claimed by the Plaintiff.

Clause 9 of the consent judgement specifically provides that upon the appointment of an auditor, Standard Chartered bank (U) Ltd shall lift the receivership and also return/handover 2 (two) certificates of title to the Plaintiff company. It is abundantly clear that there was an agreement to lift the receivership and handover part of the property of the Plaintiff. By agreeing to lift the receivership, the question of the appointment of the receivers/managers and the issue of the receivers managing two certificates of title of the Plaintiff was resolved. The question therefore remains whether in the circumstances the Plaintiff can claim an order that the appointment of the second and third Defendants by the first Defendant as receivers/managers of the Plaintiff was unlawful and that the receivership be lifted. Secondly the question that arises is whether the Plaintiff can claim an injunction to restrain the second and third Defendants jointly and severally from acting in their appointed capacities. It was by agreement that the receivership was lifted without giving the grounds for lifting it. The parties cannot go back to try the grounds for lifting the receivership and the application for injunction is rendered redundant due to the agreement of the parties to lift the receivership.

The question for the appointment of the receivers and the activities of the receivers was resolved by the parties in consideration of the appointment of an auditor to reconcile the accounts of the

parties. There was also a further consideration that dealt with any level of indebtedness of the Plaintiff as established by the audit exercise.

As far as clause 10 of the consent judgement is concerned, it is provided that pending the issuance of the auditors final report referred to in clause 8 of the consent judgement, Standard Chartered bank shall continue to hold the remaining 2 (two) certificates of title and any other securities as security for any indebtedness under consideration by the auditor. In other words if the auditor establishes a certain level of indebtedness of the Plaintiff, the securities would be used to secure the repayment of the outstanding sums to the first Defendant. Secondly if the audit report did not establish any indebtedness, the securities and the two land titles would be released to the Plaintiff. In other words, the Defendant still had the right to hold on to some securities against any possible indebtedness of the Plaintiff. The audit report would therefore be double edged. The outcome of the audit was going to determine what would happen in future. The outcome of the suit would be determined by the outcome of the audit report. The question of breach of contract on the other hand cannot be tried without interfering with the remedies provided for in clauses 9 and 10 of the consent judgment. To stretch the issue further, the remedy for breach of contract is damages. Yet the parties had determined how much money would be exchanged between the parties by agreeing that it would depend on the outcome of the audit exercise. In other words if the Plaintiff owed the bank some money, it would be obliged to pay that sum. To make a counter claim based on the claim for damages on breach of contract would upset the agreement that the Plaintiff would pay money established by the audit exercise.

Secondly the question of appointment of receivers/managers cannot be tried. They were resolved by the agreement of the parties. To argue the above matters afresh would have the effect of overriding the agreement of the parties. The Defendants agreed to lift the receivership and therefore the appointment of the receivers/managers was no longer an issue for trial.

The matter is not resolved by arguing that the suit is res judicata. A strict interpretation of section 7 of the Civil Procedure Act, demonstrates that it bars a subsequent suit. The only argument that the Defendants Counsel made is that a subsequent suit cannot be brought on the same subject matter. However though there is an element in the principle of finality of the agreement, there is no subsequent suit. The objection that the remainder of the suit, if any, would be res judicata

therefore has no merit. The only matter is whether the consent judgement finally resolved the dispute between the parties and no subsequent suit can be filed on the same facts.

Secondly on the question of whether the court is *functus officio*, this deals with the exhaustion of the powers of the court. The way I understand the term *functus officio* is that a judicial officer or an administrative official acting in a judicial or quasi judicial capacity exhausts his or her jurisdiction upon carrying out the functions on a particular matter. This is made clear by the dictionary definition of the term. Osborn's Concise Law Dictionary 11th edition at page 196 defines *functus officio* as follows:

"[Having discharged his duty]. Once a magistrate has convicted a person charged with an offence before him, he is *functus officio*, and cannot rescind the sentence."

Stroud's Judicial Dictionary of Words and Phrases 2000 edition defines the same term with the same effect as follows:

"Where a judge has made an order for a stay of execution which has been passed and entered, he is *functus officio*, and neither he nor any other judge of equal jurisdiction has jurisdiction to vary the terms of such stay (Re V.G.M. Holdings Ltd [1941] 3 All E.R. 417).

An arbitrator or umpire who has made his award is *functus officio*, and could not by common law alter it in any way whatsoever; he could not even correct an obvious clerical mistake"

The terms therefore used give the meaning that once the official has acted; he or she has exhausted his or her jurisdiction to act in the matter.

The parties have already submitted that a consent judgement is an agreement of the parties. All the authorities support the view that a consent judgement is an agreement between the parties. To call it a fresh agreement only excludes previous agreement not in consonance with it. It is a solemn agreement endorsed by the court as a judgement. Following the argument of the Defendants Counsel, the court will only be *functus officio* if it pronounced itself on matters in controversy between the parties. Matters in controversy are determined by the pleadings under order 15 rules 1 and 2 of the Civil Procedure Rules. Where there is a consent agreement, there is

no matter in controversy between the parties concerning the agreement except that the matters in controversy in the suit may be resolved by consent and not necessarily on the merits of the suit. The parties agreed to resolve the matters in controversy using the method prescribed by the consent agreement and not through resolution of the issue by the court. All that the court did was to endorse the agreement of the parties and issue it as a judgement of the court. The judgment determined how the dispute would be resolved. If the parties agree to something else, the registrar can still endorse it as a judgement of the court and he would not be functus officio. In other words the parties can revoke or vary their own agreement. The court will not on its own motion interfere with the agreement of the parties unless of course it is illegal or void or for any reason that would render an agreement inoperative or unenforceable through the court process. Consequently submissions on the doctrine of the court being functus officio has no merit and is also overruled

Thirdly the question of jurisdiction does not arise. The question of jurisdiction is founded on the doctrine of functus officio and res judicata. Functus officio means the jurisdiction is exhausted while res judicata means that the court has finally determined the matter and has no further jurisdiction in the case. There is no subsequent suit. The court has not exercised any functions with regard to the consent judgement and it merely endorsed the consent of the parties as a judgement of the court. The question was referred for trial by an independent auditor and the parties agreed on what to do pursuant to the outcome of the audit exercise. The matter before the court is not on a question of jurisdiction but one in which the Defendant has sought interpretation of the consent in light of the suit.

In conclusion the problem is generated by the parties themselves. In the previous proceedings between the parties, it was apparent that the Plaintiff had some misgivings about the audit exercise. The court was emphatic that issues with the auditors cannot be a ground for setting aside the agreement of the parties. The consent judgement was for execution in the manner agreed upon. This ruling has further clarified that the parties agreed that the audit exercise would be binding and the consent amounted to a reference for trial by an independent auditor appointed by the parties under the terms of the consent. Any other matter in the line of dissatisfaction with the audit exercise has nothing to do with the consent or the judgement of the court.

The Plaintiff strongly submitted that the court should admit evidence of what happened in the audit exercise. Under section 27 (c) of the Judicature Act, the court is only entitled to receive the audit report to complete the record because it is binding. The parties have agreed on what would happen if the audit report comes out. Those matters are matters of execution and do not belong to this Division of the High Court but to the Executions and Bailiffs Department. In the circumstances questions arising from execution of the consent judgment are matters arising from execution.

The suit in this court has been determined by the parties agreeing on what was to happen after the audit exercise agreed to which reference to auditors falls under section 27 (c) of the Judicature Act. As far as the trial of the suit is concerned, let the matter rest. Each party shall bear its own costs of the preliminary points as it involved interpretation of the agreement of the parties.

Ruling delivered in open court on the 11th of October 2013

Christopher Madrama Izama

Judge

Ruling delivered in the presence of:

Bazirengedde Muhammad for the plaintiff

Plaintiff represented by Mafabi Michael holding brief for Tumusingize

Christopher Madrama Izama

Judge

11 October 2013