

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**(COMMERCIAL DIVISION)**  
**CIVIL SUIT NO. 751 OF 2014**

**BRITISH AMERICAN TOBACCO UGANDA LIMITED.....PLAINTIFF**

**VERSUS**

**1. FRED MUWEMA**

**2. HERBERT KIGGUNDU MUGERWA**

**3. SIRAJ ALI**

**4. BRIAN KABAYIZA**

**5. TERRENCE KAVUMA**

**T/A MUWEMA AND MUGERWA ADVOCATES:.....DEFENDANTS**

**BEFORE: THE HON. JUSTICE DAVID WANGUTUSI**

**R U L I N G:**

These Preliminary Objections are raised by the Defendants in this suit British American Tobacco Uganda Limited referred to as the Plaintiff against Fred Muwema, Herbert Kiggundu Mugerwa, Siraj Ali, Brian Kabayiza and Terrence Kavuma all T/A Muwema and Mugerwa Advocates.

The objections are contained in the Joint Scheduling Memorandum as follows;

1. Whether the Plaintiff's suit is barred in law as a consequence of resjudicata.

2. Whether the Plaintiffs have an actionable claim in law and on facts of the case against all or any of the Defendants.
3. Whether the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants have any legal liability for acts of the firm of Muwema and Mugerwa Advocates in relation to this suit.
4. Whether the sum of UGX. 630,000,000/= paid was for the benefit of the Defendants reduction of liability or the 2<sup>nd</sup> Defendant only.
5. Whether the suit should be stayed pending taxation of costs in the ***High Court Civil Suit No. 268 of 2005; Sedrach Mwijakubi and Others vs British American Tobacco Uganda and Constitutional Petition No. 13 of 2015; Fred Muwema vs Attorney General*** and of Constitutional issues that arise in these proceedings.

At the time of hearing the objections, Counsel for the Defendants dropped the fourth preliminary issue and proceeded to submit on the remaining five.

The background to the suit leading to these preliminary objections can easily be discerned from the parties agreed facts as follows;

The Plaintiff had entered into a tobacco supply contract with farmers. In the course of their business relationship they disagreed on the terms of the agreement and payments for tobacco supplied. The farmers sued the Plaintiff in ***High Court Civil Suit No. 268 of 2005 Sedrach Mwijakubi and Others vs British American Tobacco Uganda Limited***. The farmers emerged winners and the Plaintiff appealed to the Court of Appeal whereat he lost again.

It is noted that during the hearing of the appeal the parties also held separate discussions out of court under the direction of the Defendant firm and a Deed of Settlement was reached wherein

the parties agreed that the Plaintiff would pay UGX. 4,600,000,000/= (to the Plaintiff then) which would be final settlement including costs.

Unknown to the court, the Plaintiff proceeded to pay. The Deed of settlement was not endorsed by the court. On the 12<sup>th</sup> of August 2010 the Court of Appeal gave its decision confirming the High Court in all save for the award of interest which it varied from 26% per annum to 15% per annum. The Plaintiff appealed to the Supreme Court and lost again. The Plaintiff then filed Misc. Application 7 of 2013 seeking orders that money paid out under the “Deed of Settlement” be declared money in satisfaction of the Decree.

The Supreme Court dismissed the Application. Attempts by the Defendants to pay to the farmers UGX. 1,000,000,000/= met resistance as the farmers and their lawyers were now only interested in the Supreme Court’s verdict. On 15<sup>th</sup> July 2014 the Defendants paid UGX. 630,000,000/= to the Plaintiff by way of partial refund. Further demands for refund were futile which prompted the Plaintiff to file this suit.

On whether the Plaintiff’s suit is barred in law as a consequence of res judicata Counsel for the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants submitted that the claim had been litigated before the High Court, Court of Appeal and the Supreme Court. He referred court to the decisions of Justice Engonda-Ntende in HCCS 268 of 2005, Civil Appeal 50 of 2008 in the court of Appeal and Civil Appeal No. 01 of 2012 in the Supreme Court.

He also relied on Misc. Application No. 7 of 2013. In Misc. Application No.7 of 2013 their Lordships mentioned the principle of res judicata when the Plaintiff who was then the Applicant had sought court orders that money already received by Muwema and Mugerwa Advocates be

redirected towards payment of the debt. The Supreme Court being of the view that it had already finished and made its orders against the Plaintiff to pay UGX. 14,364,358,042/= held that the matter was resjudicata. Their Lordships wrote;

*“This court cannot make an order against Muwema and Mugerwa Advocates to pay back the money to the Applicant as it was not part of the orders that were granted by this court. To do so would be to reverse the judgment and orders of this court which would violate the principle of resjudicata and finality of judgments.”*

I fully agree with this position because an order had already been made by the Supreme Court directing the Plaintiff to pay UGX. 14,364,358,042/= to the Respondents in that Appeal. It could now not turn round and change its orders which would breach the principle of resjudicata.

When they referred to resjudicata it was in respect of the Appeal before it arising out of the Civil Appeal 50 of 2008 and HCCS 268 of 2005. The High Court Civil Suit 268 of 2005 was in respect of goods supplied but not paid for. The present suit is different in that it is money given to an agent of the Plaintiff but was allegedly not passed over. The Defendants in the instant suit are appearing as such for the first time and were never a party in the suit before the High Court, in the Appeal before the Court of Appeal or in the Appeal in the Supreme Court.

In my view these are different claims and the principle of resjudicata cannot be invoked to insulate the Defendants in this case.

The Defendants also rely on the Deed of Settlement cum compromise stating that even if it was not endorsed by the court, it was still a contract between the parties.

This deed of settlement was never endorsed by court and was invalidated by the court. Even if it wasn't, the Plaintiff in the instant case has been ordered to pay the whole decretal amount and surely the payment of UGX. 4,300,000,000/= to the Defendants calls for an explanation. The only persons to explain are the Defendants without whom the Plaintiff would never know what happened to the money.

Counsel for the Defendant also submitted that this suit was wrongly instituted because the Plaintiffs have referred to the Defendants' conduct as unprofessional; it fell under the limb of professional misconduct which is governed by the Advocates Act. He relied on section 25 of the Advocates Act.

Section 25 of the Advocates Act deals with the matters of discipline after evidence in respect of the act complained of has been taken down by the Disciplinary Committee. Under that provision the High Court considers the evidence, the report of the committee and the memorandum of appeal. It also hears the Law Council's representative and the advocate to whom the complaint relates after which it refers the report back to the committee with directions of its finding. It may in the process confirm, set aside or vary any order made by the committee or substitute for that order such order as it may think fit.

In the instant case there is no disciplinary action referred to. There is no such appeal or report of the committee or anything that the High Court is expected to report back to the disciplinary

committee, confirm, set aside or vary. The instant case is for money given to Counsel to pass over to the judgment creditor and circumstances have dictated that it no longer has to go to the judgment creditor via the advocate and therefore the giver wants it back. In fact the Plaintiffs have not included a prayer seeking a declaration that the Defendants were in breach of professional misconduct.

This not being a matter of professional misconduct, I find that the Defendants' reliance on sections 25, 17 and 26 of the Advocates Act misplaced.

The 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants represented by Mr. Byenkya, submitted seeking court to discharge the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants. He contended as follows; that the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants were sued as parties for money had and received on or by 13<sup>th</sup> August 2010 and yet they were not partners until 1<sup>st</sup> February 2011. He submitted that since the matter happened before they were partners they could not be held liable for the money. He relied on Clause 10 of the Partnership Deed which provides for rights and liabilities in these words;

*“Rights and liabilities accruing to each Partner or jointly with any other person in their previous course of work or dealings before the signing of this Amended Deed, shall not be enjoyed by or visited on the new or old Partners as the case may be, except where the rights or liabilities accrue after signing this Amended Deed in respect of new work or work that has continued to be handled under the new Partnership.”*

Counsel also relied on section 19 of the Partnership Act which provides among others;

*“That a person coming into a Partnership was not liable to the creditors of the firm for anything done before he or she became a partner.”*

I fully agree with this provision because it would be unfair for a partner who had nothing to do with the activities that financially affected the partnership to be required to make good. This provision however deals with finished matters where the incoming partner can no longer influence the outcome.

In this case it was alleged that the money was given to the law firm. It is further alleged that not all of this money had been disbursed from the firm. The 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants are involved in the spending of monies that come onto the partnership account. In reaching that position I am buttressed by Clause 5 of the Partnership Deed. This clause provides,

*“ The bankers of the firm shall be DFCU Bank main branch, or such other bank as;*

*(1) The Partners shall from time to time agree upon and all cheques on the Partnership Bank account shall be drawn in the name of the Partnership and shall be signed by the Senior Partners as herein specified or jointly with any other Partners as may from time to time be determined by the Senior Partners in consultation with all the other Partners.”*

Since all the partners are involved in the administration of the finances that are on the firm’s account it is clear that the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants play a role in the firm’s finances. In this case therefore while the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants would not be held liable of financial matters that

happened before they joined the Partnership, they would certainly be expected to answer questions concerning monies that were on the firm's account at the time they joined.

On whether this money entered the Defendants' account is very clear in the Ruling of the Supreme Court in ***British American Tobacco (U) Limited vs Sedrach Mwijakubi, Mukitale Asimwe, Joshua Byangire, Fenekansi Babyesiza and Solomon Kiiza Supreme Court Misc. Application No. 7 of 2013.*** Their Lordships observed;

*“It should be recalled that the Applicant made payment to the former advocates of the Respondents M/s Muwema and Mugerwa Advocates, after the Applicant's former advocates had advised it not to do so.*

*As it is, the Applicant took a risk to make part payment of the decretal amount to Muwema and Mugerwa Advocates which money the advocates still hold, except for any part payment they may have made to the Respondents.”*

The learned Justices further wrote;

*“In our view, the Applicant is at liberty to seek to recover whatever money is due to it from former advocates of the Respondents or the Respondents themselves.”*

Finally the learned Justices maintained;

*“The Applicant should pay the Respondents the decretal amount of UGX. 14,364,358,042/= and then take steps to recover any money due to it from M/s Muwema and Mugerwa Advocates....”*



That being the case it is my finding that although at the time the money was paid the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants were not in the partnership, they became partners when the money was on the partnership account and going by clause 5 of the Partnership Deed they should be involved in the disbursement of the money.

The conclusion is that for this case to be resolved properly their presence is required.

The 1<sup>st</sup> Defendant also raised objections stating that the instant case was replicating another case between the same parties involving the same subject matter and therefore this case should be stayed. He relied on sections 6 and 7 of the Civil Procedure Act. Section 6 provides that;

*“No court shall proceed with the trial of any suit or proceeding in which the matter in issue in a previously instituted suit or between the same parties under whom they or any of them claim, litigating under the same or any other court having jurisdiction in Uganda to grant the relief claimed.”*

I have already earlier in this Ruling stated that there is no other suit in which these same parties are litigating and neither is there any claim between these parties similar to the one in the instant case. In my view, this objection is also misplaced.

The issue on res judicata has also been dealt with earlier in this Ruling.

On whether the suit should be stayed pending the taxation of costs in HCCS No. 268 of 2005 and Civil Appeal 50 of 2008. I have already held herein above that these are different suits and taxation of bill of costs in Civil Suit 268 of 2005 and Civil Appeal 50 of 2008 have nothing to do

with recovery of money allegedly given to the Defendants by the Plaintiff. The costs therefore from each of them would be independent of each other.

Even the instruction fees claimed by Counsel would be for different suits. Bringing the item of advocates' fees under a Party to party bill, did not make the advocates Plaintiffs, Defendants, Appellants or Respondents. They would only be party in a Client/Advocate Bill of costs and even then Section 6 of the Civil Procedure Act would only apply where the parties and the claim were the same.

For those reasons, the claims for costs in the earlier cases cannot be a basis of staying the instant suit.

On whether the suit should be stayed pending the ***Constitutional Petition No. 13 of 2015; Fred Muwema vs Attorney General***, Mr. Muwema submitted that the issue of costs regarding Advocate/ Client remuneration raises a contention as regards certain sections of the Advocates Act for example where it bars certain kinds of remuneration in contentious matters. Again here the Petition has nothing to do with the suit in court now and would not be affected by the claims that are in court, or were it to do so cannot be atoned.

In this matter we are dealing with a matter filed in 2014 but whose background is 2005. It is such that for court to stay it, it must be established that the parties will be put to embarrassment, prejudiced and undergo irrecoverable losses. It needs something not short of acts contrary to public policy or showing that the proceeding would be contrary to law.

The stay would also come into play if it was this court, while considering an issue in the instant case, referred the same to the Constitutional Court or in the absence of the above, the Constitutional court orders the stay.

On whether the trial court must stop proceedings because Counsel has petitioned the constitutional court was alluded to by the Hon. Justice Twinomujuni of the Court of Appeal in ***Jim Muhwezi vs Attorney General Misc. Application No. 18 of 2007***. He observed;

*“The sections of the Penal Code Act under which the Applicant is being prosecuted at Buganda Road Court are not being challenged. In such a situation, the prosecution can continue despite the challenge in the Constitutional Court of the truth and the manner of investigations leading to the charges in the criminal court. The trial court is capable of fairly and accurately pronouncing itself on the matter without prejudice to the accused.”*

I fully agree with the pronouncement of the learned Justice because if it were otherwise, then every litigant trying to delay proceedings would rush and file proceedings in the Constitutional Court. This would heavily clog not only the Constitutional Court where the petitions would be filed but also the High Court because the cases before it would be brought to a halt and yet filings continue daily.

In the Petition ***Fred Muwema vs Attorney General***, the Petitioner seeks the Constitutional court to declare the denial of sharing of court case proceeds with a client unconstitutional. And that this should prompt a stay of court proceedings in this case.

In the instant case the claim for refund of money is not being challenged in the Constitutional Petition. A decision in the suit will not in any way prejudice the proceedings in the Constitutional Court. Whatever the case, what is sought in the instant case is the refund of money and interest, which has nothing to do with the Client/Advocate bills of other cases.

For those reasons, the prayer that this court stays proceedings because there is a petition questioning the constitutionality of Regulation 26 of the Advocates Remuneration is denied.

In conclusion all the objections fail. The proceedings in this suit shall proceed against all the Defendants. Whatever costs incurred because of the Preliminary objections shall abide the final decision.

**Dated at Kampala this 3<sup>rd</sup> day of September 2018**

**HON. JUSTICE DAVID WANGUTUSI**

**JUDGE.**