

5 **THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**[COMMERCIAL DIVISION]**

**CIVIL APPEAL No. 17 OF 2016**

*(Arising From Taxation of Costs Ruling In H.C.Cs No. 330 of 2013)*

10 **MTN (U) LIMITED ::: APPELLANT**

**VERSUS**

**EZEEMONEY (U) LIMITED ::: DEFENDANT/RESPONDENT**

**BEFORE: HON. MR. JUSTICE B. KAINAMURA**

**JUDGEMENT**

15 The appellant filed this appeal under the provisions of Section 62 (1) of the Advocates Act, Cap  
62 and Regulations 3 of the Advocates (Taxation Of Costs) (Appeals and References)  
Regulations S.1 2267-5 seeking orders that; this appeal be allowed, that the ruling of the  
Registrar/ Taxing Master given on the 7<sup>th</sup> April 2016 in respect of USD 13,900 for professional  
Fees for the QC’s opinion to Fountain Chambers UK be set aside and finally, costs of the appeal  
20 be provided for.

The brief background of the appeal is that;

The respondent filed a suit against the appellant in 2013 for breach of statutory duties owed  
under the Communications Act 2013, causing loss by unlawful means and inducing a breach of  
contract. The suit was heard and judgment passed in favour of the respondent and the costs of the  
25 suit awarded to the respondent.

The respondent filed its bill of costs and the Taxing Master made several awards as claimed with  
the exception of the instruction fees where he awarded UGX 10,000,000/=while the respondent  
had claimed for UGX 230,000,000/= reasoning that there was no certificate of complexity filed  
and that the subject matter value could not be ascertained. The respondent appealed successfully

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against the award. Court set aside the award of instruction fees of UGX 10,000,000/= in item 1 of the bill of costs by the taxing officer is and substituted it with an award of instruction fees of UGX 24,187,500/=. Court further stated that the rest of the award by Taxing Officer shall remain as allowed by the taxing officer. The appellant was awarded the cost of the appeal.

- 5 The appellant later brought an appeal against the same ruling of the taxing master seeking that the award of the taxing master in respect of the sum of USD 13,900 awarded as professional fees for the QC's opinion to Fountain Chambers, England, be set aside.

The grounds of the appeal raised by the appellant are;

- 10 1. That the learned taxing master erred in awarding the said sum without hearing the appellant's objections to the item;
2. The learned taxing master erred in awarding the said sum, by failing to find that the instruction fees claimed by the respondent ought to cover all work necessary for preparing the case for trial, which ought to have necessarily included the alleged QC'S opinion, if necessary;
- 15 3. The learned taxing master erred in awarding the said sum under disbursements by failing to require proof of the utilization of the QC's opinion;
4. In the alternative, he erred in awarding the said sum as it was manifestly excessive in the circumstances.
5. In further alternative, the award of the fees for the Qc's opinion is not disbursement;
- 20 6. The award of fees of the QC is equivalent to an award of a certificate for two Counsel- which can only be made by the trail judge.
7. There was no necessity for a QC's opinion on a matter relating to Ugandan law. Or facts relating to what happened in Uganda or on any matter at all;
8. There was no reliance at the hearing or by court, or the parties at all, during the court  
25 proceedings, on the alleged QC'S opinion.

The respondent filed an affidavit in reply wherein they deponed that the appeal is *res judicature*, that the grounds of the appeal ought to have been raised as grounds of cross appeal in taxation appeal No. 10 of 2016; ***EzeeMoney (U) Ltd Vs MTN (U) Ltd*** which was heard and determined.

*Res judicature.*

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The respondent raised an objection to the appeal stating that the appeal is res judicature. Counsel for the respondent stated that after the taxing master delivered his ruling on the bill of costs, the respondent filed taxation appeal No. 10 of 2016; *Ezee money Vs MTN Limited* challenging some parts of that ruling. The appeal was duly opposed by the applicant herein and it was heard  
5 and concluded.

Counsel for the respondent relied on **Section 7** of the **Civil Procedure Act** and **Explanation Note 4** of **Section 7**. Counsel further relied on the case of *Mavid Pharmaceuticals and another Vs Royal Group of Pakistan HCCS No. 383 of 2010*, where a suit was barred by *res judicature* because the claims in the suit ought to have been raised as a counter claim in a previous suit  
10 between the parties.

Counsel further averred that the applicant cannot now bring another appeal arising out of the same ruling. Whatever grounds he has, he ought to have brought them as grounds of cross appeal or otherwise in taxation appeal No. 10 of 2016. Litigation has to come to an end. It cannot be that whenever a party discovers another ground of appeal, they can file a separate appeal.

15 Counsel for the appellant in reply opposed the objection and stated that a suit is barred by *res judicature* when it is shown that the plaintiff is trying to bring before the court, a matter that has already been put before the court and has been determined. Counsel thus averred that the matter before court is wholly unrelated to the matter in taxation appeal No. 10 of 2016.

Counsel further averred that the appellant did not cross appeal because the procedure for cross-  
20 appeal in the High court is not provided for by statute.

Counsel for the appellant relied on the **Code of Civil Procedure Volume 1** by **Manohar and Chitale**, at **page 226** where explanation 4 is elucidated upon; that where the relief prayed for is not dependent on the adjudication of a particular matter it cannot be said that matter must be deemed to have been decided by the judgment although the judgment does not deal with it.  
25 Counsel averred that the taxation appeal No. 10 of 2016 was challenging the award by the taxing master of UGX 10,000,000 as instruction fees, was not dependant on the adjudication of the matter of disbursements of USD 13,900 as fees for a QC's opinion. That it cannot be argued therefore that the matter of disbursement must be deemed to have been decided by the judgment in that appeal.

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## **Ruling on res judicature**

**Section 7 of the Civil Procedure Act** provides that;

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

Counsel specifically relied on **Explanation Note 4 of Section 7 of CPA** which provides that;

10        *“Any matter which might and ought to have been made a ground of defence or attack in the former suit shall be deemed to have been a matter directly and substantially in issue in that suit”.*

According to explanation Note 4, a matter which ought to have been made a ground of attack or defence is in issue, though it was not substantially in issue in such a suit, in other words, though it had not been actually in issue directly/ substantially. This section thus makes no distinction  
15        between the claim/defence that was actually made in suit and the claim or defence that might and ought to have been made.

In the case of the ***State of Uttar Paddesh Vs Nawab Hussein AIR 0977 SC1 680***, the Supreme Court of India observed;

20        *“The same set of facts may give rise to 2 or more cause of action. If in such a case a person is allowed to choose and sue upon one cause of action at one time and to reserve the other for subsequent litigation that would aggravate the burden of litigation”.*

*Courts have thus treated such a course of action as an abuse of the process. It would be more accurate to say that the rule of res judicature is not confined to the issues the court is actually asked to decide but it covers issues/ facts which are so  
25        clearly part of the subject matter of the litigation and so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an*

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*abuse of the process of court to allow a new proceeding to be started in respect thereof”.*

In the case of **Mavid Pharmaceuticals and 3 Others, Vs Royal Group of Parkistan HCCS NO.383 OF 2010** court held that;

5           *“The bar of res judicata was considered by the Court of Appeal of Uganda in **Semakula Vs Magala & Others [1979] HCB 90**. It was held 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*  
10 *and which has been adjudicated upon. If this is answered in the affirmative then 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. This interprets explanation 4 of section 7 of the Civil Procedure*  
15 *Act that:*

*“Any matter which might and ought to have been made a ground of defence or attack in the former suit shall be deemed to have been a matter directly and substantially in issue in that suit.”*

The provision was also interpreted by the East African Court of Appeal per Law Ag. VP  
20 *in **Kamunye and Others Vs The Pioneer General Assurance Society Ltd, [1971] E.A. 263** with the concurrence of Spry Ag. P. and Mustafa J.A. at page 265 paragraph F – G. The test is:*

*“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*  
25 *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*

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*litigation and which the parties, exercising reasonable diligence, might have brought forward at the time... The subject matter in the subsequent suit must be covered by the previous suit, for res judicata to apply...*”

5 The respondent averred that a suit is only barred by *res judicata* when it is shown that the plaintiff is trying to bring before court a matter that has already been put before the court and has been heard and determined. Explanation 4 however raises the bar of *res judicature*. It covers aspects which ought to have been brought but were not otherwise brought. The essence of the rule is to bring an end to endless litigation.

10 The respondent appealed the tax master’s ruling in as far as the instruction fees were concerned. The respondent had the opportunity to also raise the issue of the professional fees for the QC’S opinion to Fountain Chambers, UK such that all matters are dealt with at once but it did not. The professional fees that are sought to be dealt with are part of the subject matter that should have been raised by the appellant when the respondent brought the first tax appeal.

15 The transaction the appellants are bringing before this court has already been put before a court of competent jurisdiction in earlier proceedings and it has been adjudicated upon. The learned judge meticulously dealt with the appeal and in fact held that ‘*the rest of the award of the taxing officer shall remain as allowed by the taxing officer.*’ I am of the view that this appeal brings 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 respondent.

20 Further, considering the issue brought in Counsel for the respondent’s submissions that the argument raised by the appellant offends public policy, the essence of *res judicata* relates to the rule of conclusiveness of the judgment based upon the maxim that there must be an end to law suits and no man should be vexed twice over the same cause.

25 In conclusion therefore, I am of the opinion that the appeal is bared by *res judicature* and I accordingly dismiss it with costs.

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**B. Kainamura**

**Judge**

**14.08.2018**

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