THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

HCT-OO-CV-MA-0172-2010

(Arising out of High Court Civil Suit No. 353/2003)

MATOVU & MATOVU ADVOCATES ::::::::::::::::::::::::::::::::::APPLICANT

VERSUS

1. **UGANDA ELECTRICITY GENERATION CO. LTD**
2. **THE ATTORNEY GENERAL ::RESPONDENTS**

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

RULING

This application by notice of Motion was brought under Section 361 (1) (sic) and Section 98 of Civil Procedure Act and O.52 rr.(1) and (3) of the Civil Procedure Rules. It is for orders that the 1st respondent pays the applicant the sum of Shs.108,620,944.75 as balance of the legal fees for HCCS No. 353 of 2003 in accordance with the consent judgment and satisfaction of the decree; and that the costs of the application be provided for.

The general grounds of the application are contained in the affidavit of Angwella Emmanuel, an Advocate of this Court and an employee in the applicant firm. Briefly, they are that:

(i) ***The applicant represented the plaintiffs (in a representative capacity in HCCS No. 353 of 2003 and obtained judgment in their favour.***

(ii) ***The applicant entered into a remuneration agreement with the plaintiffs in HCCS No. 353 of 2003 entitling him to an equivalent of 15% of the total court award from the beneficiaries of the suit.***

(iii) ***The applicant obtained a consent judgment clause 8 of which required the 1st respondent to deduct 15% of the plaintiffs/beneficiaries dues and sent them to the applicant as legal fees.***

(iv) ***The respondents have refused, neglected and/or failed to remit and or pay the applicant Shs.108,620,944.75 being legal fees of 7 claimants/beneficiaries who were paid as a result of the consent judgment.***

From the records, in 2003 former employees of Uganda Electricity Generation Co. Ltd (UEGCL) filed ***HCCS No. 353 of 2003*** claiming pension and gratuity and damages for breach of contract. They were represented by the applicant firm of lawyers. By an agreement dated 7th August, 2007 the plaintiffs agreed to remunerate the Advocates by 15% of the total proceeds of the clients pension, gratuity and terminal/retirement benefits.

It is significant to note that the plaintiffs lost the suit in High Court. They appealed to Court of Appeal vide ***Civil Appeal No. 96 of 2004*** and Court of Appeal reversed the decision of High Court. The respondents appealed to the Supreme Court vide ***Civil Appeal No. 24 of 2004*** which upheld the decision of Court of Appeal and remitted the suit to the High Court for determination on merits. In the course of time, a settlement was reached between the parties and a written agreement of compromise filed in the proceedings and made an order of the court on 01/12/2009. The document was worded as follows:

> ***THIS SUIT coming up for final disposal this 1st Day of December 2009 before his Lordship Justice Yorokamu Bamwine; in the presence of Mr. John Matovu Counsel for the Plaintiffs, Mr. Nicholas Ecimu Counsel for the 1st Defendant and Mr. Bafirawala (State Attorney) Counsel for the 2nd Defendant.***

BY CONSENT OF THE PARTIES, IT IS HEREBY AGREED as follows:

1. ***That the Plaintiffs are entitled to pension or gratuity from the 1st Defendant.***
2. ***That the 1st Defendant pays the pension/gratuity due to the Plaintiffs from the date of retirement/termination to-date as calculated by the Office of The***

Auditor General and set out in the schedule attached to this consent marked Appendices "A", "B", "C" and "D" respectively.

3. ***That the sums as calculated and set out in 1 above be made in full and final settlement of all the plaintiffs' claims against the 1st Defendant, save for the pensionable Plaintiffs whose rights to monthly pensions only is hereby recognized and reserved.***
4. ***That each of the Plaintiffs be paid Shs.1,000,000/= (shillings one million) as general damages in this suit as set out in column 8 of the Appendices in 1 above.***
5. ***The 1st Defendant pays lump sum interest at a rate of 10% on the pension/gratuity arrears certified as duel to the Plaintiffs by the Auditor General and set out in the calculations in the Appendices in 1 above.***
6. ***The 1st Defendant pays the costs of Shs.50,000,000/= (shillings fifty million) to the Plaintiffs in this suit.***
7. ***That in accordance with the Judgment of the Supreme Court in Civil Appeal No. 24 of 2007, the 1st Defendant pays Shs.20,000,000/= (Shillings twenty million) in full and final settlement of the Plaintiffs' costs in the Supreme Court.***
8. ***The payments of the pension/gratuity arrears, general damages and interest be made by the 1st Defendant directly to the Plaintiffs after deducting their Advocates fees in accordance with their remuneration agreement.***
9. ***The suit against the 2nd Defendant be and is hereby withdrawn.***

Dated at Kampala this 1st day of December 2009.

Attached to the Consent judgment was a list of plaintiffs totaling 203 with their individual pension/gratuity benefits, including damages and interest for each of the plaintiffs. The applicant signed for the said 203 plaintiffs, much as the heading reads "***Edison Mavunwa & 195 others",*** M/S Sebalu & Lule Advocates signed for the 1st respondent/1st defendant and Mr. Elisha Bafirawala for the 2nd respondent/2nd defendant.

The 1st respondent has to-date only paid Shs.618,781,970/= as fees and costs of Shs.70,000,000/= only but has not yet paid all the fees totaling to Shs.108,620,944.75. The long and short of all this is that the 1st respondent has paid the applicant firm legal fees for only 196 claimants and has neglected and/or refused to forward the payment for seven claimants totaling to Shs.108,620,944.75.

Hence this application in which the applicant is seeking an order of specific performance against the 1st respondent for payment of the said balance of Shs.108,620,944.75.

As regards the 2nd respondent, I would note that under paragraph 9 of the consent judgment, the plaintiffs discharged and/or withdrew ***HCCS No. 353 of 2003*** against the Attorney General.

In light of that withdrawal, and considering that the applicant seeks to recover the suit amount being the balance of the legal fees in ***HCCS No. 353 of 2003*** in accordance with the consent judgment and satisfaction of the decree, there was no legal justification for dragging the 2nd respondent into this application.

In the affidavit sworn by Bonabana Caroline on behalf of the 2nd respondent, court has been prayed to strike out the claim against the 2nd respondent with costs. In view of the facts I have outlined above, I am unable to fault the 2nd respondent's prayer.

The claim against the 2nd respondent is accordingly struck out with costs.

As regards the claim against the 1st respondent, herein after referred to as the respondent, the case for the respondent is that the applicant is not entitled to the sum claimed because the seven former employees/beneficiaries from whom fees at the rate of 15% was not deducted and remitted to the applicant by the respondent were not party to ***HCCS No. 353 of 2003.***

According to the respondent, the applicant claims that the said suit was a representative suit but has not furnished any evidence to support that claim. The applicant counters that the representative order was sought and obtained under ***Miscellaneous Application No. 69 of 2003***; that details of it are in the Civil Registry at the High Court; and that since these are execution proceedings under Section 34 of the Civil Procedure Act ("the Act"), in order to determine whether or not the applicants are entitled to the suit amount the Court can only look at the consent judgment and decree; that it is not open to the parties to raise matters of the substance of the suit which ought to have been raised in pleadings and/or at the hearing.

I have addressed my mind to the able arguments of both counsel.

It is in my view not necessary to reproduce them here since the submissions constitute part of the court record.

The submissions of learned counsel for the respondent aroused my curiosity to call for the records regarding the application for a representative order. From Court records, I would confirm that the order was obtained under ***HCT-00-CV-MC-0069-2003***, a Miscellaneous Cause heard and determined before the then Deputy Registrar of this Court, Her Worship Henrietta Wolayo on 11/06/2003. This confirmation disposes of the query raised by the respondent in connection with the Representative Order.

Having said so, I would add that the applicants in that Miscellaneous Cause did not specify the exact number of claimants to be covered by the Representative order. All they said was that:

> ***"There are about 194 former employees of the Uganda Electricity Generation Company Limited who have the same interest in one suit."***

They did not attach a list of the said claimants. And although ***HCCS No. 353 of 2003*** shows the plaintiffs as "***1. Mavunwa Edison 2. Amiti Tom for and on behalf of 194 others,"*** the opening paragraph in the plaint reads:

> ***"The plaintiffs are former employees of the defendant company and are suing for and on behalf of over 210 former employees……."***

Although it is not in dispute that the seven claimants/beneficiaries have been paid pension, gratuity and damages like the undisputed 196 plaintiffs, the respondents' submissions do not offer explanation as to how they joined the case, since there is no any amended plaint on record in which they may have been added as parties to the suit. The respondent's submission does not also offer explanation as to why the seven claimants allowed the applicant to sign the consent judgment as their counsel or why they allowed themselves to be called plaintiffs in the suit and even benefit under the consent judgment, yet as counsel for the respondent argues, they are not party to the suit.

Moreover, from the records the applicant was not a party in ***HCCS No. 353/2003.*** It only acted as counsel for the plaintiffs and M/S Sebalu & Lule Advocates acted as counsel for the respondent. From the records, M/S Sebalu & Lule Advocates were not counsel for the seven claimants. None of the seven claimants has indicated to court that he/she did not instruct the applicant to represent them in the suit. The burden lies on the respondent to show that the applicant acted without the instructions of those seven persons and in what capacity it is raising the objection when under the consent judgment its duty was to deduct payments from them and pass them on to the applicant. This burden has not been discharged in the instant application. In ***James Rwanyarare & Anor vs Attorney General Constitutional Petition No. 11 of 1997*** (reproduced in ***[1997] VI KALR 61***) the Supreme Court observed:

> ***"We think it is trite that the representative capacity must be disclosed and proved. ……..Under Order, Rule 8 (1) of the Civil Procedure Rules a person may bring a representative action with***

leave of the court. It would have been at that stage, of seeking leave, that the first petitioner would have disclosed the identity of those to be represented and whether he had their blessing to do so."

The court rejected an argument of counsel that any spirited person can represent any group of persons without their knowledge or consent as that would be un democratic and could have far reaching consequences. In the instant case, none of the seven claimants has given evidence that the applicants in ***HCMA No. 69 of 2003*** acted without their knowledge or consent. From the records also, the issue of the 203 claimants instead of 196 was raised by the Auditor General while computing their entitlements. The query was not addressed or copied to the applicant herein. M/S Sebalu & Lule Advocates hazarded a reply (annexture F to Mr. Ecimu's affidavit):

"…….we also believe that the said employees having been named in the Mavunwa case in 2003, it was an oversight on the part of court and the Nyamalere lawyer to allow them participate in a subsequent case in 2005 when the Nyamalere case was filed."

It is now evident that the seven claimants were not among the claimants in the Nyamalere case and that if the query had been addressed to counsel for the plaintiffs in ***HCCS No. 353/2003***, a more fitting explanation would have been offered to the Auditor General in connection with the seven claimants and if there was any irregularity, it would have been at that stage, of clearing the payment by Government, that the applicant would have disclosed the identity of those who had instructed him to represent them and whether the seven claimants had blessed the applicant to represent them as well. As it is now all that was lost at that stage under the watchful eye of the respondent.

The respondent's submissions do not contain a prayer for setting aside the consent judgment, rightly so in my view because the evidence adduced by the parties by way of affidavits and the circumstances surrounding the consent judgment would not support such a prayer. Setting aside a consent judgment is not a simple task. The rationale, stated

by my sister Arach-Amoko J (as she then was) in ***Morris Ogwal & Others vs Attorney General and Anor Miscellaneous Application No. 456 of 2007*** (unreported) is not difficult to find. It is to be found in the rule of sanctity of contracts. Courts are very reluctant to interfere with agreements or contracts freely entered into by the parties. A consent decree is passed on terms of a new contract between the parties to the consent judgment and so when the applicant argues that after recording a consent judgment the parties thereto cannot now raise issues behind it, i.e. the question of representative order and that of instructions, it cannot be faulted. If any authority were required to support this point of law, the leading one is ***Brooke Bond Liebig (I) Ltd vs Mallya [1975] E.A. 266*** where court held that a consent judgment may only be set aside for fraud, collusion or for any reason which would enable court to set aside an agreement.

In the instant case, neither the applicant nor the respondent is alleging that there was fraud or collusion in entering the consent judgment. The respondent's allegation is failure by the plaintiffs in ***HCCS No. 353/2003*** to obtain a representative order and that of applicant's lack of instructions to represent them. As regards the latter issue, the applicant has not produced a list of claimants including the seven persons herein. It has, however, produced a consent judgment with a list attached to it. That list includes the seven claimants. I would think that the question as to whether the applicant is entitled to the suit sum must be determined upon perusal of the consent judgment alone, together with anything attached so as to form part of it, and upon the assumption that any express or implied allegations of fact in it are true. The perusal of the two, i.e. the consent judgment and annextures to it, shows that the applicant acted for all the 203 plaintiffs, implying that even the seven claimants, directly or indirectly, instructed the applicant to represent them. Since they have already benefited from the consent decree, they cannot be heard to disassociate themselves from it. It seems that those seven claimants want to eat their cake and have it. They are estopped from doing so. The principle of equitable estoppel is that a person who stands by and keeps silence when he observes another person acting under a misapprehension or mistake, which by speaking out he could have prevented by showing the true state of affairs, can be estopped from later alleging the true

state of affairs. This principle applies to the respondent the same way it applies to the seven claimants now in question.

In the absence of evidence from them to the contrary, they ought to be deemed to have directly or indirectly instructed the applicant to represent them in the suit and I so hold.

Both parties herein were privy to the consent judgment. In ***Hirani vs Kassami (1952) EACA 133*** the Court of Appeal for Eastern Africa held that:

> ***"Prima facie, any order made in the presence of counsel is binding on all parties to the proceedings or action …… and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court……or if consent was given without sufficient material facts or in misapprehension or in ignorance of material fact, or in general, for a reason which would enable the court to set aside an agreement."***

I would think that failure to attach a list of the 203 claimants to the application for the representative order or to the plaint was an irregularity. However, like the court in ***Brooke Bond Liebig*** case, supra, I would repeat, and respectfully adopt, the following passage from the judgment of Newbold, p. in ***Mawji vs Arusha General Store [1970] E A 137 at p. 138:***

> ***"We have repeatedly said that the rules of procedure are designed to give effect to the rights of the parties and that once the parties are brought before the courts in such a way that no possible injustice is caused to either, then a mere irregularity in relation to the rules of procedure would not result in vitiation of the proceedings. I should like to make it quite clear that this does not mean that the rules of procedure should not be complied with – indeed they should be. But non-compliance with the rules of procedure of the court, which are***

directory and not mandatory rules, would not normally result in the proceedings being vitiated if, in fact, no justice has been done to the parties."

See also: ***Tarlol Singh Saggu vs Roadmaster Cycles (U) Ltd C.A. No. 46 of 2000 (C.A)***.

It is therefore clear to me that failure to attach a list of the claimants was a mere error which should not necessarily debar the applicant from being paid. In any case that's a matter that ought to have been raised either in the pleadings and/or at the hearing.

This leaves a possibility of an order of review under Section 82 of the Civil Procedure Act. Under this law, any person considering himself or herself aggrieved by a decree or order from which an appeal is not allowed may apply for a review of judgment to the court which passed the decree or made the order.

In ***Mohammed Allibhai vs Bukenya SCCA No. 56/96*** reproduced in ***[1996] III KALR 92*** the court observed that a person considers himself aggrieved if he has suffered a legal grievance; that a person suffers a legal grievance if the judgment is given against it or affects his interest.

In the instant case, clause 8 of the consent judgment stipulates that the payments of the pension/gratuity arrears, general damages and interest be made by the respondent to the plaintiffs. It has done so. It also provides that the above be done after deducting their advocates fees in accordance with their remuneration agreement.

The respondent is not any such person from whom the Advocates fees are to be deducted. It is not even party to the remuneration agreement, directly or indirectly. In these circumstances, I have failed to see what legal grievance it (the respondent) has suffered or how the impugned clause 8 affects its interest.

In the premises and for reasons stated above, I find no valid reason to review the consent judgment in issue.

Finally, I have considered the respondent's submission that the applicant firm received the last payment of Shs.32m on 3/03/2010 and signed for the same as being in full and final settlement of all its dues from the plaintiffs. The applicant does not deny receipt of the said amount and or the acknowledgement itself. However, it submits that there is no such rule of law which says that a lawyer cannot issue a receipt by mistake or otherwise. It is further submitted for the applicant that a party who has admitted not paying an outstanding balance of Shs.108,620,944.75 of seven plaintiffs on account of lack of instructions cannot set up a defence of receipt for a lesser sum being full and final payment.

I have already indicated that the consent judgment created a contract between the applicant and the respondent for the respondent to deduct Advocates fees from the plaintiffs and pass the payment to the applicant. It is trite that a contract may be discharged by agreement.

Generally speaking, what two people agree to do, they may later agree not to do. In lawyers' language, this process is known as ***waiver***: the parties agree to waive (give up) their rights and responsibilities under the contract. Normally, as each party is released from his contractual obligations, each gives and receives consideration, i.e. he gives the other's discharge and receives his own. The parties must be ***ad idem*** (meeting of the minds). However, it may happen, as in the instant case, that one party has already made a start on his side of the contract. In such a case, his waiver must be supported by fresh consideration, a situation known in law as ***accord and satisfaction***, the accord being the agreement to discharge the contract and the satisfaction the fresh consideration offered by the other party to the contract in exchange for that agreement.

In the instant case, no such transaction is disclosed by the pleadings. It would appear that upon the respondent making a start on the implementation of clause No. 8 of the consent

judgment and making deductions from the 196 plaintiffs, the other seven raised the objection re-echoed by the respondent herein. Instead of advising them that by virtue of the consent judgment they had become parties to the suit, the respondent suspended the deductions and peddled the arguments herein on behalf of the seven claimants when it, the respondent, has never acted for them in the suit. I do not think that it is possible for one to legally take benefits of a judgment of court as a ***plaintiff*** without being a party to the suit. It appears plain to me that the impugned acknowledgement was made in error, as learned counsel for the applicant has admitted. It was not negotiated by the parties to constitute a waiver, as no fresh consideration moved from either party. Given that the respondent has admitted in its pleadings that non-payment was on account of lack of instructions by the seven claimants to the applicant, and in light of the finding of court on this point, the respondent cannot be heard to set up a defence of a receipt of a lesser sum being full and final settlement. This ground must also fail and it fails.

I would in all these circumstances allow the application and make an order that the respondent pays the applicant the suit sum as prayed. The decreed sum shall attract interest of 25% per annum from the date of Ruling till payment in full.

As regards costs, the usual result is that the loser pays the winner's costs. This practice is subject to the court's discretion, so that the winning party may not necessarily be awarded costs. In the instant case, failure by the plaintiffs in ***HCCS No. 353/03*** to disclose the full identity of those to be represented and whether the seven claimants had blessed their application does not give credit to the applicant as their counsel. It has been the root cause of this confusion. I would for this reason not make an award for costs in favour of the applicant as against the respondent. Each party shall therefore meet its own costs herein.

Orders accordingly.

Dated at Kampala this 17th day of August, 2010.

Yorokamu Bamwine

JUDGE