THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

MISCELLANEOUS APPLICATION NO.13 OF 2001

(Arising out of HCCS 1289 of 1998)

ATTORNEY GENERAL…….APPLICANT

Versus

CHARLES ABOLA & OTHERS…… RESPONDENTS

BEFORE: THE HON. MR. JUSTICE E.S. LUGAYIZI

RULING

This ruling is in respect of an application to review a consent judgment dated 10th January 2000. The application was brought by way of Notice of Motion under sections 83 and 101 of the CPA and Order 42 rules 1 and 8 of the CPR and sections 16 and 35 of the Judicature Statute. It is accompanied by an affidavit that was sworn by Mr. Byamugisha Kamugisha. The background to it is briefly as follows.

The respondents are former civil servants. They filed HCCS No.1289 of 98 against the Government on their behalf and on behalf of their colleagues whose number was over six thousand in all, on account of breach of terms and conditions of employment. They claimed that theGovernment had initially promised to pay them pension on the understanding that they would accept being retrenched. However, when they accepted to be retrenched the Government reneged on its promise to pay. They therefore filed the above suit against the Government and sought a declaration that they were entitled to pension on retrenchment and general damages for breach of terms and conditions of employment. In his WSD the applicant denied the above claim. However, on the strength of certain admissions Court entered judgment against him and held him liable to the respondents. Following the event on 10th January, 2000 the applicant and the

respondents entered into a consent judgment in which the applicant undertook to pay the respondents a sum of Shs.7,356,283,107/= as pension. On 31st March, 2000 a consent order was recorded between the respondents' advocates and the respondents in which the latter undertook to pay the former 15% of their pension money as remuneration. Subsequently, (on the respondents' application) Court made an Order directing the applicant to pay the advocates' costs (i.e. 15% of Shs.7,356,283,107) directly to them. Time passed, but the applicant did not pay the respondents' pension or the advocates' costs. Instead, he chose to seek a review of the consent judgment dated 10th January 2000. Hence this application.

As the time of hearing the application, Mr. Matsiko (a Senior State Attorney) represented the applicant; and Mr. Nsibambi Kimanje represented the respondents. In essence, Mr. Matsiko submitted that the applicant seeks a review of the consent judgment because he was not aware at the time of entering it that the sum of Shs. 7,356,283,107/= initially projected by the Minister of Service as pension payable to the respondents was merely a tentative figure. However, he only came to know the truth later when the Permanent Secretary to the said Ministry advised him of the details of the persons who were entitled to be paid pension and how much they were entitled to. From those details it became clear that 1507 respondents (out of 6339) were not entitled to pension. Consequently, the true amount that the respondents were entitled to as pension was Shs. 4,869,096,384/= and not Shs.7,356,283,107/=. Mr. Matsiko concluded that if a review affecting the above figures is not granted, the Government will lose twice. Firstly, instead of paying the sum of Shs.4,869,096,384/= as pension to the respondents, the applicant will pay a hefty sum of Shs.7,356,283,107/=. Equally so, the advocates' costs (i.e. 15% of the pension payable to the respondents' advocates) will be based on the hefty figure above and not the small one. For those reasons Mr. Matsiko urged Court to review the consent judgment in order to save the Government from losing money.

Mr. Nsibambi Kimanje opposed the application for two reasons. Firstly, he submitted that it did not fall within the purview of section 83 of the CPA. This is so because (in his view) the applicant failed to prove that at the time the consent judgment was recorded there was fraud or collusion or that the arrangement was against the policy of Court. He relied on the case of **Brooke Bond Liebig(T) Ltd v Mallya [1975] EA 266 at page** 269 for that. position. Secondly, Mr. Nsibambi submitted that Mr. Byamugisha Kamugisha's affidavit which the applicant relied

upon as evidence to support the application was defective in that it offended Order 17 Rule 3 of the CPR. It was based on the information he obtained from the officials of the Ministry of Public Service, but no ground4. for believing that information was disclosed. For those reasons Mr. Nsibambi Kimanje called upon Court to dismiss the application with costs.

In Court's view this application raises two main issues, that is to say,
1. Whether it is fundamentally defective and should be dismissed?

2. Whether it falls within the purview of section 83 of the CPA and Order 42 rules 1 and 8 of the CPR and should be granted?

Court will deal with those two issues in that order.

With regard to the first issue, it is important to examine Order 17 rule 3(1) of the CPR which reads as follows,

"Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications, on which statements of his belief may be admitted, provided that the grounds thereof are stated".

That provision lays a general rule that the contents of an affidavit must consist of things that a deponent personally knows and can prove from his own knowledge. However, the provision points out an exception to that rule which is "interlocutory applications", in which the deponent may include things he believes, but are outside the realm of his personal knowledge. Indeed, information that a deponent may have received from another person and believed, would fall within that exception if the grounds for believing it are stated. In the instant case, it was not disputed that the application which is the subject of this ruling is an interlocutory application. It was also not disputed that the affidavit accompanying the application is based on information outside the personal knowledge of Mr. Byamugisha Kamugisha. It was further not disputed that the above affidavit does not show the grounds upon which Mr. Byamugisha Kamugisha believed the said information. However, the crucial question is whether failure on Mr. Byamugisha Kamugisha's part to disclose the grounds upon which he believed that information renders the affidavit incurably bad thus making the application fundamentally defective? Court's answer to

that question is negative, for the requirement of the law in Order 17 rule 3 of the CPR is a procedural formality whose absence, in this case, did not affect the root of the affidavit. That side, the contents of the affidavit, as they are, did not prejudice the respondents in their defence. For those reasons it remains a valid affidavit despite the defect. **(See Brooke Bond Liebig (T) Ltd v Mallya (Supra) at the bottom of page** 268.) All in all, the application which is the subject of this ruling is not fundamentally defective. The first issue is therefore answered in the negative.

With regard to the second issue, section 83 of the CPA provides as follows;

"Any person considering himself aggrieved –

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act,

May apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."

The phrase "and the court may make such order thereon as it thinks fit," at the end of the above provision seems to give courts a very wide discretion to review judgments passed by them. However, that discretion is limited by Order 42 Rule 1 case law. **(See Brooke Bond liebig (T) Ltd .v. Mallya- supra)**. Therefore, in reality courts can only exercise the discretion referred to in section 83 of the CPA where an applicant has been able to prove any of the following grounds,

(a) that he has discovered new and important matter of evidence that was not within his knowledge or could not be produced by him at the time of the consent judgment;

(b) That there is some mistake or error apparent on the face of the record;

(c) That there was fraud or collusion in reaching the agreement;

(d) That the agreement was contrary to the policy of court or public policy; or

(e) Some other valid reason as would afford good ground for varying or rescinding a contract between the parties.

Did the applicant succeed in proving any of the above grounds? The applicant's case was founded on grounds (a) and (b) above, that is to say, that he had discovered new and important matter of evidence that was not within his knowledge at the time of the consent judgment. Alternatively, that there is a mistake or error apparent on the face of the record. He endeavoured to justify the existence of the two alternative grounds above by pointing out that at the time the consent judgment was recorded, he did not know that 1507 respondents out of 6339 had no valid pension claim. He discovered the truth later after the Permanent Secretary to the Ministry of Public Service communicated to him that fact in her letter dated 28th December 2000. the applicant concluded that the above means that the respondents with a valid pension claim were only entitled to a sum of Shs.4,869,096,384/= and not Shs.7,356,283,107/= as pension. Hence, the need to correct the above figures in the consent judgment so that the true state of things may be reflected.

From the foregoing, it is quite clear that the heart of the applicant's case is that 1507 respondents out of 6339 were paid pension before the consent judgment was recorded and therefore those respondents had no valid claim under the consent judgment. The law is that the person who alleges certain facts must prove their existence if he is to succeed **(see sections 100 and 101 of the Evidence Act Cap. 43).** The question therefore is whether the applicant proved what he alleged above? In court's opinion he did not. The letter from the Permanent Secretary to the Ministry of Public service dated 28th December 2000 which the applicant relied upon as proof of payment was in reality not proof of payment, but merely the source of the allegation that payment was made to the said respondents. This is particularly so, since under Charles Abola's unchallenged affidavit the respondents denied that they received pension at any time. In the circumstances, Court has no choice but to hold that the applicant failed to prove that the application which is the subject of this ruling falls within the purview of section 83 of the CPA and Order 42 rules 1 and 8 of the CPR. In the result, the application must fail and it is hereby dismissed with costs.

E.S LUGAYIZI

JUDGE

21/5/2001