THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT KAMPALA

(CORAM: ODOKI, C.J., KATUREEBE; OKELLO; TUMWESIGYE; KISAAKYE; JJ.SC).

CIVIL APPEAL NO. 13 OF 2009

BETWEEN

SAROJ GANDESHA :: APPELLANT

AND

TRANSROAD LTD. :: RESPONDENT.

[Appeal from the judgment and orders of the Court of Appeal at Kampala, (S.G. Engwau, C.N.B. Kitumba, A.S. Nshimye, and JJA) on the 8th day of April, 2009].

JUDGMENT OF KATUREEBE, JSC.

This appeal originates from an application by way of Notice of Motion, (Miscellaneous Application No. 753 of 2000) by the respondent, Transroad Ltd to the High Court whereby the respondent sought certain orders against the appellant in her capacity as administrator of the estate of a deceased Advocate named Gandesha, also her late husband. The appellant was not satisfied with the decision of the High Court and appealed to the Court of Appeal which substantially upheld the decision of the High Court, hence this appeal to this court. The facts of this case, and as agreed by both counsel, were set out in the lead judgment of Kitumba, JA as follows:-

i) "Sometime in 2001, the respondent filed High Court Civil Suit No. 516 of 2001 against the Attorney General for breach of contract. The respondent was represented by M/S Sebalu & Lule Advocates.

ii) The trial judge entered judgment by which $9.375, 473 was awarded to the respondent. The Attorney General filed a Notice of Appeal.

iii) The parties thereafter appeared before the court for review and represented that, if the respondent then the judgment creditor were to accept a reduction of $ 1 million, US.D, the Attorney General would pay the balance promptly and withdraw its Appeal.

iv) During these post-judgment negotiations, the Respondent/judgment creditor was represented by Messrs, Gandesha & Co. Advocates, a law firm whose sole partner was Mr. Himatial Gandesha.

v) A consent variation order was subsequently filed in court on 1st August 2003, by which it was ordered that the respondent be paid US.D$ 8,299,692 plus costs.

vi) The respondent filed a party to party Bill of costs which bill was taxed and allowed at Shs.217,037,314.

vii) The aforesaid decretal sum was then in accordance with the consent duly paid by government as follows:-

a) US$ 2,449,691 by cheque drawn in the names of the plaintiff.

b) US$ 350,000 by cheque drawn in the names of Messrs Gandesha & Co. Advocates, Counsel for the plaintiff.

c) US$ 350,000 by cheque drawn in the names of Tropical African Bank.

d) A sum of Shs. 871,468,173 being total costs awarded in favour of the Bank of Uganda and against the plaintiff HCCS No. 254 of 1996, Court of Appeal Civil Appeal No. 3 of 1997 its equivalent in US

Dollars shall be deducted from the sum of US.$ 5,500,000 payable to the plaintiff and retained by the said Bank of Uganda.

viii) After receipt thereof, Mr. Gandesha was taken ill and in October 2003 went to the UK for medical treatment and was reported to have died thereafter on 1st January 2004.

ix) The said Mr. Gandesha is survived by his widow the Appellant, who obtained probate from the High Court of Uganda, under Administration Case No. 219/2004 on 6/5/2004.

x) The respondent then wrote to the Appellant as Administrator to account for the moneys received by the deceased Advocate on behalf of the client, and the Appellant replied that she could not both in fact and in law be liable to account as she was not the Advocate, and that the respondent should sue the Attorney General instead.

xi) The respondent then filed Application No. 753 of 2004 arising out of H.C.C.S. No. 516 of 2001 in the High Court against the Attorney General (as first respondent) and the Appellant herein (as second respondent) seeking orders that the Attorney General certifies if he has paid full amount and if so the present Appellant as Administrator of the later Gandesha's estate accounts for the sums paid through him.

xii) On 11/11/2004, the Attorney General was discharged from proceedings in Miscellaneous Application No. 753 of 2004 with consent of the Appellant.

xiii) The trial Judge on 1st December 2004, ordered the Appellant, then represented by the same M/s Gandesha & Lule Company Advocates, to file an Advocate to client Bill of costs, within 7 days, and fully account for the said monies by deducting the sum awarded as costs and refunding the balance to the client.

xiv) The Appellant declined to do so as ordered and on 10th of December 2004, the respondent in the presence of the Appellant's counsel, then moved court to order payment of the claimed sum since the appellant had failed to account.

xv) The trial judge then ordered that the appellant do pay the monies received i.e. USD $2,799,691 and UG Shs.217,037,314.

Dissatisfied with the decision, the appellant appealed to the Court of Appeal on grounds inter alia, that as she was not a member of the Law Firm of Gandesha & Co. Advocates, she had no legal liability to account for money received by that Firm and therefore the trial judge had erred in law and fact in ordering her to pay the sums of US$ 2,799,691 and Ug. Shs.217,037,314 allegedly received by the firm of Gandesha & Co. Advocates; that as a lay person it was wrong to direct her to deliver to court an Advocate/client bill of costs in respect of H.C.C.S. No. 615 of 2001; that it was wrong to order her to make payments of the aforesaid sums of money on the basis of an application under the Advocates Act for delivery of Advocate/client's Bill of costs.

The Court of Appeal, in the lead judgment of Kitumba, JA (as she then was) ruled that the appellant, as administrator of the estate of her husband, an advocate, had the duty to account for client's money, only that she was given more time, 60 days, within which to file her bill of costs which were to be taxed by the Taxing Master. The court set aside the monetary award against the appellant. Still dissatisfied with the decision of the Court of Appeal, the appellant has now made this appeal to this court.

The appellant filed three grounds of appeal as follows:-

1) "**The learned Justices of Appeal erred, in fact and in law, in holding that the appellant is legally liable to account to the respondent for a sum of U.S.$ 2,799,691 (United States dollars two million, seven hundred and ninety nine thousand, six hundred and ninety one only) being money allegedly received by her deceased husband while acting in his professional capacity under the name and style of Gandesha and Co. Advocates.**

2) **The learned Justices of Appeal erred, in law and in fact, in finding that a client/advocate bill of costs filed under the Advocates remuneration and taxation of costs rules was a proper and lawful method of accounting for client funds allegedly received by and in possession of the deceased advocate thus arriving at a wrong decision to order the appellant to file a bill of costs as the supposed method of accounting.**

3) **The learned Justices of Appeal erred, in law and in fact, in disregarding a scheme of distribution between the respondent and the Attorney General which had been reduced into the terms of a consent variation order of the High Court, thereby arriving at a wrong decision to hold the appellant liable to render accountability of the fate of the funds allegedly received by M/S Gandesha and Co. Advocates."**

At the hearing of the appeal, the appellant was represented by Mr. Ebert Byenkya and Mr. Alex Rezida, while Mr. Peter Walubiri together with Mr. Edmond Wakida represented the respondent.

Counsel for the appellant filed written submissions, while counsel for the respondent made oral submissions. Counsel for the appellant were allowed to make oral rejoinder.

For the appellant, counsel argued ground 3 first and then argued ground 1 and 2 together. In reply counsel for the respondent took the same course. I also intend to proceed accordingly.

For ease of reference, I reproduce ground 3 which states:-

> ***"The learned Justices of Appeal erred, in law and in fact, in disregarding a scheme of distribution between the respondent and the Attorney General which had been reduced into the terms of a consent variation order of the High Court, thereby arriving at a wrong decision to hold the appellant liable to render accountability of the fate of the funds allegedly received by M/S Gandesha & Co. Advocate."***

In written submissions on this ground, counsel for the appellant contended that this ground was the main issue in this case. He contended that by varying the terms of the original judgment, the parties to the suit i.e. the respondent and the Attorney General, had by consent caused a new judgment to be put in place. This new judgment, called the ***CONSENT VARIATION ORDER***, signed by the parties' representatives and endorsed by the Registrar of the High Court, materially changed the original judgment as it introduced third parties to the judgment to whom certain specific payments were to be made out of the decretal amount of US. $ 9,373.3 with interest at 2% p.a awarded to the respondent. This money could have been paid directly to the respondent or to his counsel as is the normal

practice. However, counsel pointed out, contrary to normal practice the parties by consent provided that the decretal amount payable to the respondent be paid in agreed sums to certain entities including the respondent. Some of these entities were not parties to the suit, but were being paid on behalf of the respondent. By so doing, the consent variation order had the effect of converting a judgment in personam to a judgment in rem whereby certain specific disposition of money was ordered for specific named entities, namely, Gandesha & Co. Advocates, Bank of Uganda and Tropical Africa Bank.

Therefore, according to counsel, the respondent could not claim that the money paid to these entities by order of court was its money to be accounted for unless the order so specifically provided.

Counsel cited various authorities to define and distinguish a judgment in personam from a judgment in rem. He submitted on the authority of a South African case NICHOLAS ***FRANCOIS MARTEENS AND OTHERS –Vs- South Africa NATIONAL PARKS, CASE NO. C117*** of 2001 in the South African Labour Court, that a judgment in rem binds all persons even when they are not parties to the proceedings, and are estopped from averring that the status of persons or things, or the right to title to property are other than what the court has by its judgment declared it to be.

Counsel argued further that the respondent had voluntarily assigned its interest in those portions of the decretal amount given to third parties when it voluntarily agreed to the variation of the terms of the original judgment from where the entitlement to the decretal amount was payable to the respondent, to one where the decretal amount was now payable to named third parties. Counsel cited

OSBORNE'S CONCISE LAW DICTIONARY, JOHN B. SAUNDERS, WORDS AND PHRASES LEGALLY DEFINED and the case of ***SOVEREIGN FIRE INSURANCE OF CANADA – Vs – PETERS cited by SUNDERS*** on the definition and effect of assignment. He submitted that the Consent Variation order satisfied all the elements of an assignment since the respondent freely transferred his right to receive payment of judgment debt owed by the government to itself to other named beneficiaries in carefully set out and ascertained proportions. This was embodied in a written document duly signed by both the judgment debtor and judgment creditor and endorsed by court.

Counsel further submitted, citing sections 91 and 92 of the Evidence Act that the terms of the Consent Variation Order stood by themselves and could not be varied by other evidence, oral or written, for the purpose of contradicting, varying, adding or subtracting from its terms. Counsel criticized the lead judgment of Kitumba, JA (as she then was) for failing to correctly construe the terms of the Order and give them the intended effect, although the learned Justice of Appeal did acknowledge that the law required her to consider only the terms of the consent variation order.

According to counsel, the Justice misdirected herself in law and in fact when she interpreted the terms of the order in terms of whether or not they dealt with the issue of filing a client/advocate bill of costs. By so doing, the learned Justice imported extraneous and nonexistent matters into the variation order.

Finally, counsel argued that the respondent having converted his judgment in personnam to one in rem was estopped from asserting that the right to receive the decretal amounts was other than what is set out in the Consent Variation Order. The disposition of the money was made pursuant to a court order and not by reason

of any other agreement. Even if one of the beneficiaries was an advocate, an order of court cannot be reduced to the status of an agreement under the Advocates Act, and the order of court has the force of law and cannot be illegal. The transaction arising from that court order could not therefore, be illegal.

In his reply to ground 3 of appeal, Mr. Walubiri, counsel for the respondent contended that the primary issue in this case was the need to enforce accountability for clients' funds by advocates or their representatives. He contended that this ground was completely new to the proceedings as it had not arisen in the lower courts in that there had never been any argument or evidence raised in those courts with regard to a scheme of distribution. This matter, he argued, was about the money that had been paid to the respondent' lawyer out of the decretal amount awarded by court. He asserted that US$ 2,449,691/= had been paid by cheque to Gandesha & Co. Advocates, and US$.350,000/= had been paid by cheque to Tropical Africa Bank. It is this money totaling US$ 2,799,691/= that the lawyers for respondent had to account for. Now that the lawyer, Mr. Gandesha was deceased, the administrator of his estate had a duty to account for that money by preparing a client/advocate bill of costs as ordered by both the High Court and Court of Appeal. Counsel argued further that the Consent Variation Order did not amount to a distribution scheme, nor did it amount to a judgment in rem. It was a judgment in personam between the Attorney General spelling out how the Attorney General was to pay the decretal amount owed to the respondent. It remained the respondent's money. To counsel, there could not be a valid assignment of the fruits of the respondent's litigation as this would amount to champerty which is illegal. Citing the case of ***TRENDTEX TRADING CORPORATION & ANOTHER –Vs- CREDIT SUISSE [1982] AC 679.*** Counsel submitted that assignment of litigation and the benefits out of litigation could only be assigned

where it was shown that the assignee had a commercial interest in the litigation. In this case it was never shown or proved that Mr. Gandesha has such a commercial interest to deserve taking $ 2,799,691 or about 40% of the decree. To counsel this could only be money paid to a lawyer for the account of the client, the respondent, and there was no assignment.

With regard to the contention by the appellant's counsel that the Consent Variation Order was a judgment in rem, counsel contended, citing the case of ***MANSUKHALAL RAMJI KARIA AND ANOTHER –Vs- ATTORNEY GENERA S.C CIVIL APPEAL NO. 20 OF 2002*** that judgment in rem settles conclusively against the whole world as to the status of property or a right or title to property and as to whatever position it makes of such property. To counsel, the Consent variation Order did not settle some property against the whole world and did not bind the whole world. It was merely a judgment between the Attorney General and the respondent and simply set out how the money would be paid. It was therefore a judgment in personam. He submitted that there was no merit in ground 3 and prayed that it be dismissed.

In rejoinder, Mr. Byenkya and Mr. Rezida, counsel for the appellant insisted that the reference to a distribution scheme had in fact first been made by counsel for the respondent during proceedings in the High Court and pointed out that part of the record where the matter had been addressed by both parties. Therefore, counsel argued, the ground was not new and was valid.

With regard to the issue of champerty, counsel argued that champerty deals with pre-litigation agreements whereby a party is persuaded by a third party to sue upon a bargain that if the matter is successful, the third party takes a share of the

proceeds of the litigation. In this matter, counsel contended, the litigation had been concluded and judgment entered in favour of the respondent for a specific sum of money. It was after that judgment that the respondent and the Attorney General the two parties to the litigation, went into negotiations and made the Consent Variation Order whereby it was agreed and ordered that certain named entities be paid specified sums of money out of the decretal amount. This therefore was a post litigation agreement made by the parties to the litigation and sanctioned by court. The issue of champerty therefore did not arise. Counsel contended that the authorities cited by the respondent's counsel did not apply to this case.

With regard to the issue of judgment in rem and disposition of property counsel reiterated their submission that when there is a disposition that affects the status of property in a judgment, such disposition affects parties who were not even parties to the suit. In this case, entities like Bank of Uganda, Tropical Africa Bank, Gandesha & Co. Advocates were made beneficiaries of the decretal amount by agreement of the parties and order of the court. The entitlement of these parties was based on that order of the court and that satisfied the attributes of a judgment in rem.

Having considered the record and the arguments of both counsels for the parties, I am in agreement with counsel for the appellant that grounds 3 is really the gist of this appeal. I am not persuaded by counsel for the respondent that it is a fresh ground. Clearly it was raised at the High Court and submitted upon by the parties. The whole issue hinges on what one makes of the ***CONSENT VATIATION ORDER.*** No matter what name it is given, it appears to me to be a scheme whereby the parties agreed to distribute the decretal sum awarded to the respondent in High Court Civil Suit No. 516 of 2001. It is a scheme of distribution between

the respondent and the Attorney General which had been reduced into the terms of a consent variation order of the High Court. This consent variation order is, to me, at the heart of these proceedings. It is this order which was the basis for Miscellaneous Application No. 753 of 2004 whereby the respondent sought for orders against the appellant for accountability for funds received by Gandesha & Co. Advocates under that consent variation order, not money paid under some other agreement.

In the Court of Appeal, the matter was fully canvassed by the parties. In the appellant's written reply to the respondent's submissions, she stated as follows:-

> ***"The Variation Consent Order was, and still is the document by which the intentions and benefits of all persons mentioned therein can be ascertained. Under the provisions of sections 91, 92 and 93 of the Evidence Act, no evidence, indeed arguments which require evidence, can be produced to vary the language or import of that document. What needs to be ascertained must come from the document itself. The Consent Variation Order is a document authorized by the respondent and he continued to rely on it in this case. He cannot resile or be allowed to resile, from it as long as it stands. The Consent Variation Order is a document making a disposition of property to wit, money. It therefore falls squarely within the ambit of sections 91 and 92 and 93 of the Evidence Act. The court is invited to find and to hold that having regard to the Consent Variation Order the money which went to M/S Gandesha & Co. Advocates was not money which the advocate was required to account for to the respondent and accordingly it is not money the appellant is required to account for."***

This argument was acknowledged by Kitumba, JA (as she then was) in her lead judgment at page 12. With regard to the Consent Variation Order, the learned Justice of Appeal did agree with counsel for the appellant that the document could not be changed by oral or other evidence. She stated at page 13:-

> ***"Counsel for the appellant has argued that a written document cannot be changed by oral or other evidence according to section 91, 92 and 93 if the Evidence Act I agree with that statement of the law."***

Clearly the matter of the Consent Variation Order and its disposition of the decretal sum was always at the centre of this case. It is not a new matter, nor do I consider the raising of it in ground 3 to be a departure from pleadings. Indeed I find it strange that having stated the above position, and after reproducing the Consent Variation Order in full the learned Justice then went to the issue of filing and taxing of Advocates/Client Bill of costs when she stated:-

> ***"I have carefully perused this Consent Variation Order and it is not indicated anywhere that there will be no filing and taxing of the Advocate /Client Bill of costs."***

In my view, this was misdirection on the part of the learned Justice. In my view, it was crucial that a determination ought to have been made as to the purpose and effect of the Consent Variation Order. This would also, in my view, help determine whether the money paid to Gandesha & Co. Advocates or to Tropical African Bank was client's money or not, and for what purpose it was paid to the Advocate or Tropical Africa Bank. Upon this determination, court would then

proceed if necessary to order for accountability of client's funds by the advocate or his administrator, or indeed by Tropical Africa Bank.

From the agreed facts, it is clear that judgment had already been entered in favour of the respondent for US. $ 9,375,493 plus interest at 2% p.a. Quite rightly, in my view, the court did not at that time attempt to apportion how this payment was to be made, or indeed whether the cheque for its payment was to be written in the names of the respondent or his lawyers. I agree with counsel for the appellant that courts do not usually involve themselves in how a party to a suit arranges for his payments for the satisfaction of a judgment debt. Whom a party pays and how much he pays to them has nothing to do with the court. Yet the parties according to paragraph of the ***"agreed facts"*** the parties appeared before court for review, and,

> ***"agreed that in consideration of the defendant abandoning the intended appeal and making payments as stipulated herein, the plaintiff shall accept the said payments in full and final settlement of the Judgment /decree."***

The paragraph 5 of the Consent Variation Order is conclusive:-

> ***"The plaintiff hereby agrees that in consideration of the abandonment of the intended appeal, and <u>in consideration of payments being made by the Bank of Uganda as stipulated herein</u>, it accepts the said payments in full and final satisfaction of the Judgment and decree."***

There is no mention anywhere in the order that the recipients of the money were to hold the money on behalf of the respondent. In effect, the respondent and the Attorney General agreed that part of the respondent's money be paid to the named

entities. They reinforced this agreement by seeking and obtaining the blessing of the court, hence their agreement became an order of court.

Paragraph 3 of the Consent Variation Order gives the breakdown of the payments, i.e.

a) ***$5,500,000/= by cheque drawn in the names of the respondent.***
b) ***$2,449,691/= by cheque drawn in the names of M/S Gandesha & Co. Advocates, counsel for the respondent.***
c) ***$350,000/= by cheque drawn in the names of Tropical Africa Bank.***
d) ***"A sum of Shs.871,468,173/= being total costs awarded in favour of the Bank of Uganda and against the plaintiff in High Court Civil Suit No. 254 of 1996 and Supreme Court Civil Appeal No. 3 of 1997, or its equivalent in U.S. Dollars shall be deducted from the sum of U.S.$ 5,500,000/= payable to the Plaintiff and retained by the said Bank of Uganda."*** (emphasis added).

Pursuant to this order, cheques were duly made out for the corresponding amounts as stipulated to the various entities named therein. The appellant accordingly got a cheque for $ 5,050,369 after Bank of Uganda deducted its costs as stipulated in the Consent Variation Order. Tropical Africa Bank got a cheque for U.S.S 350,000 as ordered. Gandesha & Co. Advocates got a cheque for $2,449,691 as ordered.

The Consent Variation Order does not say why Gandesha & Co. Advocates was being paid the money it was apportioned for. Nor does it say what Tropical Africa Bank was paid for. As argued by Counsel for the appellant, the Consent Variation Order was meant to have effect as a judgment and order of the Court. That is why it was endorsed by the Registrar. It was varying the terms of an earlier judgment.

As earlier observed, the parties went to the court for review of the terms of the original judgment of the court. They had negotiations leading to the Consent Variation Order. No evidence was led as to what were the considerations in those post judgment negotiations that led to the apportionment of the decretal amount in the way it was done.

One would assume that the parties took care of why and how much was to be paid to who so that what is ordered to be paid to any person must be taken to be what was agreed should be paid to that person for whatever reason. If there were to be any conditions to be attached to that payment, then such conditions should have been spelt out in the order. The order must be given effect to what it states on the face of it. I note that in the said Miscellaneous Application No. 753 of 2000, the respondent sought for accountability from the appellant for $2,799,691 being money paid to Gandesha & Co. Advocates and Topical Africa Bank be paid $350,000 and a cheque of that amount was duly paid to them pursuant to that order. To me it is inexplicable that the respondent can then demand accountability for that payment from the appellant?

In his submissions in this court, Mr. Walubiri claimed that money was paid according to the correspondence from Gandesha & Co. Advocates and he cites a letter from Gandesha & Co. Advocates proposing that ***"the balance of $2,799,691 should be paid by cheque or bank transfer to Gandesha & Co. Advocates clients dollar Account"***. On that basis, he argued, the money must have been placed on the client's dollar account.

I find this argument strange. First having argued the claim on the basis of the Consent Variation Order, one then cannot attempt to incorporate correspondence that was not part of that order. Secondly, the Consent Variation Order did not give to anyone $2,799,691. Thirdly, the consent Variation Order was based on **"post judgment negotiations."** A careful look at the above quoted letter shows that it is dated 25th July, 2003. This was before the consent variation order which is dated 1st August, 2003. Whereas the letter refers to "the balance U.S.$2,799,691 to be paid to Gandesha & Co. Advocates", the Consent Variation Order, which was the basis of the application to the High Court, stipulates in paragraph 3(b) a payment by cheque of U.S.$ 2,449,691 in the names of Gandesha & Co. Advocates. Paragraphs 3(c) thereof stipulates for a payment by cheque of US.$ 350,000 in the names of Tropical Africa Bank.

It is important to note that the Consent Variation Order was preceded by "post judgment "negotiations between the parties. To my mind, whatever was contained in the letter of 25th July 2003 was overtaken by those negotiations. Furthermore, according to correspondence from the Permanent Secretary/Secretary to Treasury dated 7th August 2003, the Bank of Uganda did indeed prepare three cheques one being of $.2, 449,691 for Gandesha & Co. Advocates and another for Tropical Africa Bank for $350,000.

The consent variation order does not state for what purpose these payments were made. But since this was after post judgment negotiations, one must assume that the parties knew for what purpose these payments were so carefully calculated. The order speaks for itself. I find no basis to order the appellant to account or pay back money ordered by court to be paid to Tropical Africa Bank.

At the hearing of the application before the High Court, and in this court, the respondent's argument was that any money paid under a "scheme of distribution" to an advocate unless sanctioned by law was illegal. Such agreements to that effect amounted to champerty and could not be allowed. The advocate could not rely on any agreements or letters to show that they had agreed to share the benefits of litigation. To counsel, the advocate remained under a duty to account to the client for that money under the Advocates Act. In her judgment, Kitumba, JA, alluded to that argument as follows:-

> ***"There is on record, an indication that costs would be in the region of 40%. This is contained in para.22 of the appellant's affidavit in reply. Before considering the written submission, this court summoned the advocates for both parties to clarify on the matter. After listening to their submissions we realized that parties discussed the payment of lawyer's fees and estimated it at possibly 40%. However, the parties did not go far enough as required by law. They did not reduce their agreement in writing and take all necessary steps to make into an enforceable agreement as is provided by the provisions of the Advocates Act. Whatever agreement was thought of is illegal and unenforceable in law. See KITUUMA MAGALA & Co. ADVOCATES –Vs- CELTEL UGANDA LTD CIVIL APPEAL NO. 39 OF 2003".***

The learned Justice refers to agreements not properly concluded as required by law and agreements not enforceable or illegal. In my view this was a misdirection in fact. Having set out in full and considered the Consent Variation Order, the Justice should have seen that the payment made to Gandesha & Co. Advocates was not made pursuant to some mere agreement between the parties prior to the litigation,

but was made pursuant to a court order, i.e. the Consent Variation Order. According to the agreed facts this order was arrived at after post judgment negotiations between the parties. In my considered view, this order superseded all prior discussions, correspondence or agreements. It may well be that that is the reason why the parties decided to reduce their agreement or understanding into a Consent Variation Order which in effect was a judgment of court. That order cannot be illegal until declared so by a competent court. ***BLACK'S LAW DICTIONARY*** (6TH Edition) defines ***"Consent judgment"*** as follows:-

> ***"Consent judgment. A judgment, the provisions and terms of which are settled and agreed to by the parties to the action."***

It defines "Agreed judgment" as follows:-

> ***"A judgment entered on agreement of the parties, which receives the sanction of the court, and it constitutes a contract between the parties to the agreement, operates as an adjudication between them and when court gives the agreement its sanction, becomes a judgment of the court."***

The above definitions would cover the matter now before us. Indeed both counsel agree that this was a judgment of the court. The difference is as to its effect. Mr. Walubiri calls it a judgment in personam between the respondent and the Attorney General, while Mr. Byenkya calls it a judgment in rem. The question, to my mind is, why would the Attorney General have to be a party to the agreement as to what the respondent would pay to its lawyers or its other creditors and why would that agreement have to be translated into a court order when those lawyers or creditors were not party to the suit and their claims were not part of the dispute?. The only

logical conclusion is that both parties knew why those parties had to be paid and they wanted to clothe it with the authority and sanction of the court. The respondent did not need a court order to pay money to its lawyers. Moreover, as the learned Justice had already observed, one could not look beyond the terms of the Consent Variation Order. The application by the respondent in the High Court was based on money paid under that order. If the respondent formed the view that the terms of the order were based on an illegal or fraudulent agreement or practice, then it should have applied to the High Court to have the Consent Variation Order set aside. The **Kituuma Magala** case was not dealing with a court order. It might have applied if the parties had stopped at their agreements and not gone to court to register the Consent Variation Order.

This leads me to consider the respondent's counsel's arguments on champerty. Champerty by its very nature involves an agreement to traffick in litigation, or an agreement to assign a bare right to litigate.

In the ***TRENDTEX*** case (supra) ***LORD WILBERFORE*** considered the law relating to champerty at great length. It is important to bear in mind that the House of Lords, as well as other courts whose judgments are reviewed, was considering agreements made by the parties, not court judgments as in this case. The Learned Lord states at P.694:-

> ***"If no party had been involved in the agreement of January 4, 1978, but Trendtex and Credit Suisse, I think that it would have been difficult to contend that the agreement, even if it involved (as I think it did) an***

assignment of Trendtex's residual interest in C.B.N. case, offended against the law of maintenance or champerty."

The Lord went on to consider further the facts of the case and then stated:-

"The vice, if any, of the agreement lies in the introduction of the third party. It appears from the face of the agreement not as an obligation, but as a contemplated possibility, that the cause of action against CBN might be sold by credit Suisse to a third party, for a sum of US.$800,000. This manifestly "savours of champerty" since it involves trafficking in litigation – a type of transaction which under English law, is contrary to Public Policy. I take the definition of "champerty" (etymologically derived from "campi partition") from Halsbury's Law England 4th Ed. Vol. 9 (1970) para 400: "Champerty is a particular kind of maintenance of an action in consideration of a promise to give the maintenance a share in the proceeds or subject matter of the action."

After considering the cases of ***TREPCA MINES LTD*** and ***LAURENT – Vs – SALE & Co.,*** the learned Lord concluded thus at page 695:

"In my opinion accordingly any such assignment of the English cause of action as was purported to be made by the agreement of January 4, 1978, for the purpose stated, was, under English Law, void."

In my view the above cases must be distinguished from the appeal before us. No agreement for an assignment of a cause of action had been placed before us, nor any agreement that any party was to take over and maintain the suit for a consideration. What we are faced with, as rightly argued by counsel for the appellant, is a situation where the respondent had maintained its suit in court and obtained judgment. After judgment, the respondent found he had obligations to

settle with various persons. Post judgment discussions were held between the parties and a consent variation order was duly filed in, and endorsed by, court. Whatever payments that were made were in accordance with that court order. What was paid to Gandesha & Co. advocates was not stated to be for the benefit of the respondent. But since this payment was arrived at after negotiations, I have no doubt that the respondent knew the purpose for which it was given. As counsel for the appellant argued, it could well have been money to pay other persons known to both the respondent and its counsel but who were not to be disclosed and for reasons known to both of them. I noted that by its letter, undated, Annexture 56.2 the respondent had written to its Bankers, Allied Bank International Ltd that 40% of the money received in the judgment against the Government was to be ***"held at the disposal of Mr. H. Gandesha."*** Surely the respondent would have known to whom this money was to be disposed to. In- deed even the very allegation of champerty by the respondent would tend to show that the money was paid pursuant to some agreement and was not expected to be accounted for to the respondent. In that case the course of action open to the respondent in my view, would have been to apply to court to set aside the Consent Variation Order. It did not. That order stands as a judgment of court which settled specific sums of money on persons absolutely, and the respondent must abide by the terms of that order. Of course it did not help matters that it chose to bring its application and claim after the death of Mr. Gandesha, who could therefore not be able to offer his side of the story. According to the affidavit of the appellant, a period of 6 months elapsed between the making of the consent variation order and the death of Mr. Gandesha, and the appellant never raised a claim for that money during that time. It waited until after his death. Indeed, as Mr. Walubiri himself submitted before us, Mr. Gandesha cannot be heard. In effect the respondent would now be saying that it had indeed agreed to pay and had paid a sum of money to the Advocate as his share of the

proceeds s of the judgment but that it had now realized that that payment amounted to champerty and was illegal. This would be a different argument from the one being presented to us that the Advocate received this money on behalf of the client, and that therefore the advocate can account for it by way of a client/advocate bill of costs.

I am persuaded by the argument of counsel for the appellant that by consenting to the consent variation order the respondent had for whatever reason assigned part of the decretal sum owed to him under the judgment to specific named entities in agreed amounts. The respondent accepted those dispositions as final and irrevocable now being contained in an order of court. I am also persuaded by the argument of counsel for appellant on the basis of the persuasive authority of ***NICHOLAS FRANCOIS MARTEEMNS AND OTHERS –Vs- South Africa NATIONAL PARKS*** (supra) that the Consent Variation amounted to a judgment in rem in as far as the third parties were concerned. It was conclusive against the whole world that the entities ordered to be paid by order of court were so entitled, regardless of whether they were parties to the legal proceedings or not. The Bank of Uganda, for example, was entitled to deduct its costs as per that court order. That consent variation order could and had to be enforced as an order of court. That must have been the intention of the parties in seeking the endorsement of the court. Otherwise, the parties could simply have settled the judgment debt without involving the court.

In my considered opinion, the trial Judge was wrong to order that the appellant pay or account to the respondent $2,799,691 which was never paid to the advocates as per variation consent order. It is also my opinion that the Court of Appeal, in

considering the consent variation order, failed to properly address itself to the clear terms of that order and instead went on to deal with matters of client/advocate bill of costs which was not part of the Consent Variation Order. The order of the Court of Appeal that the appellant accounts for $2,799,691 itself cannot also stand.

In the result ground 3 of the appeal should succeed.

Grounds 1 and 2 were argued together by counsel for the appellant in their written submissions.

Counsel noted that the appellant was ordered to present a bill of costs in respect of respondent's case under section 56 of the Advocates Act. Counsel argued, however, that section 56 is only one of only four sections in the Act that are applicable to legal representatives of advocates. To counsel, by expressly specifying these sections, the legislature had impliedly excluded the application of all other provisions of the Advocates Act to legal representatives of advocates, such as the appellant. According to counsel, accounting for client's funds by advocates was not regulated by any of sections 56, 57, 58 or 59 of the Advocates Act, and it was therefore an error on the part of the Court of Appeal to order the appellant to deliver to court an advocate/client bill of costs to account for U.S $ 2,799,691 plus Shs. 217,037,314 being the taxed party to party costs in HCCS No. 516 of 2001.

Counsel submitted that accounting for client's funds is regulated by section 40 of the Advocates Act and the *Advocates Account Rules* and *The Advocates Trust Account Rules*. It does not come under section 56. It is section 40 and the said Rules which impose legal obligations and accountability on the advocate. This does not extend to legal representatives of deceased advocates. Therefore,

according to counsel, section 52 was not applicable to the applicant in respect of the matters under contention as the section does not include *"accounting for client funds"* as one of the things that a court can require an advocate to do under section 56. Since court cannot require that of the advocate under that section, it cannot so require a legal representative of the advocate to do so.

Furthermore, counsel argued that to require the legal representative of a deceased advocate to account for funds and prepare a client/advocate bill of costs under Section 56 is to import into that section words and meaning that were not intended by the legislature. In that regard, counsel cited the case of ***REGISTERED TRUSTEES OF KAMPALA INSTITUTE –Vs- DEPARTED ASIANS PROPERTY CUSTODIAN BOARD S.C. Civil Appeal No. 21 of 1993*** to support his argument that a court cannot read words into a statute.

Counsel further criticized the Court of Appeal for failing to appreciate the nature of a bill of costs and thereby misdirecting itself and confusing the principle of assessing fees owed to an advocate on the one had and accounting for funds held on behalf of the client on the client's account on the other. Counsel contended that the filing of a bill of costs cannot of itself constitute a complete and satisfactory accounting process to determine the fate of client funds.

To counsel, by producing all the documents that she could find in the office of the advocate relating to the court case, the appellant had fully accounted. The advocate, if alive would have been subjected to a full investigation and possible disciplinary action under Section 43 of the Advocates Act. At each of these processes he would have been entitled to defend himself and give all explanations.

Now that he was dead, it was unfair to subject the legal representative to an accounting process for matters she could not possibly be able to explain beyond the documents already produced in court.

Counsel prayed that we allow the appeal and set aside the orders of Court of Appeal.

For his part, Mr. Walubiri argued that this case is about the need to enforce the duty of advocates to account for clients' funds. He conceded that section 40 of the Advocates Act imposes a duty on the Advocate to keep accounts in accordance with the Advocates Trust Account Rules and the Advocates Accounts Rules. He further conceded that failure to keep these accounts amounts to professional misconduct under section 43 which may lead to disciplinary proceedings against the advocate. He argues however that the institution of disciplinary proceedings does not rule out the institution of civil or criminal proceedings against the advocate. In this case, he further argued, the advocate was dead and there could be no possibility of disciplinary action against him. But civil proceedings could be maintained against his legal representative under section 56 since under that section the executor or administrator can be ordered by court to prepare a client/Advocate Bill of costs.

According to him, if the court orders for the preparation of such bill, all that the administrator or executor has to do is to get the books of account that the advocate was maintaining under section 40 of the Advocates Act, get all the materials pertaining to the case and show how the money was spent. In this case, there was already a party to party bill of costs which had been taxed and allowed at Shs. 217,037,314) million which showed what costs had been spent in the litigation.

This money was paid to the advocate. Therefore there was need for the appellant to show how that money had been spent. To counsel, all that the appellant had to do was to convert the party to party bill into a client / advocate bill and show what money went to instruction fees, disbursements and all expenses incurred. The appellant could hire experts to help with this work and make sure that all the money received by the advocate was properly accounted for. He therefore supported the decision and orders of the Court of Appeal and prayed for the dismissal of grounds 1 and 2 of appeal and dismissal of the entire appeal with costs.

In dealing with grounds 1 and 2, I am of the view that one must bear in mind that the advocate who supposedly received the money is dead. And, as both counsel stated, he cannot be reached to throw light on these events. He cannot be subject of disciplinary proceedings. The issue to resolve is whether the appellant can be made to account for money received by the advocate in his legal practice before he died, using section 56 of the Advocates Act. What would have happened if the advocate did indeed receive the money in the course of his work as an advocate, made payments without records, or indeed used the money for himself. Would his administrators be made to account for that money if there was no record of such receipt or expenditure on the books of the advocate's law firm? If the law required such an advocate to suffer disciplinary proceedings, would his legal representative also suffer such proceedings if they failed to account?

The appellant, when asked to account, presented bulky correspondence and documents she was able to get from the office of the deceased advocate's law firm. At the Court of Appeal, the Court invited counsel for both parties to address Court

on these correspondences. I have already in this judgment cited the relevant part of the judgment of that court.

As I indicated in my consideration of ground 3 above, it is my firm view that the parties, after post judgment negotiations as indicated in the agreed facts, in fact reduced their agreement into writing and went a step further to make it an enforceable order of the court i.e. the Consent Variation Order. The money paid to Gandesha & Co. Advocates was for a purpose that the participants in the negotiations knew. If Mr. Gandesha had disposed of that money as per their understanding, before his death, then that money would not be part of the estate that was being administered by the appellant. The appellant has testified that she did not find that money on the account. The only record she had in her possession were the correspondences she produced which indicated an agreement by the parties as to how that money was to be used.

In my view, there is no basis for the Court of Appeal, in the lead judgment of Kitumba, JA (as she then was) to state:-

> ***"In the appeal before Court, there is no dispute that the late Gandesha Advocate received the respondent's money and banked it. The advocate is bound by law to disclose to the client money he receives on the client's behalf." (P.20).***

In fact there was a dispute whether money had been received, and if so whether if was client's money. That is why the appellant produced Bank Statements to show that the money was not reflected on the Law Firm's accounts. There was a dispute whether money paid under the consent variation order was, after payment, still the

property of the respondent. It would appear to me that the Court of Appeal, even by continuing to refer to $2,799,691 was paying no regard to the consent variation order at all.

There is no doubt that court has power to order an advocate to deliver his or her bills under section 56 (1) of the Advocates Act. But surely that must be in respect of cases where the situation warrants such an order. The section also provides for the ***"delivery up of, or otherwise in relation to any deeds, documents or papers in his or her possession."***

In this case, the advocate is dead. He cannot be ordered to draw up his bill. Would it be reasonable to expect an administrator who takes over the estate long after the advocate has disposed of a matter to draw a bill of costs? In my view, it would be only reasonable to order the administrator to deliver up documents or papers in his or her possession. That is exactly what the appellant did in this case. If the documents showed that the parties had made an illegal agreement, it would mean that the respondent itself was party to that agreement and knew exactly what the money was meant for. It would also indicate that the respondent's claim was an afterthought after the death of the other party to the agreement, and then seeking to take advantage of the appellant.

Be that as it may, it is my view that section 56 must be put in its proper context. Section 56(1) does not say that Court shall order an advocate to deliver bills etc. All it does is to provide for the jurisdiction of the court to make such order, impliedly, where that is called for Section 56(2) states:-

"In this and sections 57, 58, and 59, the expression "advocate" includes the executor, administrators and assignees of the advocate in question."

It appears obvious to me that the application of the term "advocate" to include administrators is restricted to matters provided for in those sections. It cannot possibly be construed to apply to all the sections of the Act where the expression "advocate" is used. Therefore whereas the court may, in an appropriate case order an administrator to prepare a bill of costs, the court cannot use this section to order an administrator to account for funds received by an advocate which the advocate is liable to account for under other provisions of the Act. As counsel for the appellant argued, a bill of costs is not the only way to account for money received by an advocate. If an advocate were to receive money from a client to pay off certain individuals, whom he actually proceeds to pay on behalf of the client, any statement made to the client with evidence of such payment would suffice as accountability. It would not involve a bill of costs. In their normal course of duties advocates do make payments on behalf of clients, and do account to those clients without preparing bills of costs. Payment of money on behalf of a client does not on all occasions mean that there are costs involved.

In this case there were two payments referred to one was for $2,799,691 which I have already discussed in this judgment, and the other was for Shs. 217,000,000 to Gandesha & Co. Advocates as legal fees. In its letter of 31st July, 2003 to the Ag. Deputy Governor of Bank of Uganda, the respondent confirmed the "settlement terms" communicated to the Bank earlier by the respondent's lawyers, and then added:

"Legal Costs.

Further, we wish to observe that as the legal costs are payable to the successful party, the same should be remitted to our present lawyers, Gandesha & Co. Advocates. Our arrangement with our previous lawyers, Sebalu & Lule, should be left to us to settle with them and is not a matter for the Government. There is a contract between us and Sebalu & Lule Co. Advocates, which does not concern the government. We are copying this letter to the Attorney General for information in that regard."

The letter is signed by Shamas N. Charania. In paragraph 5 of his affidavit in support of the application, Shamas Charania mentions that this money was paid to Gandesha & Co. Advocates, but does not disclose that it was so paid at his own request. The fact that he alludes to fees payable to another firm of lawyers is, to me, indicative that he thought he was thereby clearing the fees of Gandesha & Co. Advocates. This will become apparent later on in this judgment. Furthermore, in paragraph 4 of his affidavit he states that ***"a further sum of US.$ 350,000 was paid by cheque to Tropical Africa Bank to settle an outstanding loan of Silver Springs Hotel [1969] Ltd at the request of Himtal Gandesha its majority shareholder."*** This part of his affidavit introduces a new matter that is not anywhere else on record. We know that the consent variation order, upon which the application was based, was arrived at after post judgment negotiations. There is no record of what those negotiations took into account. The consent variation order says nothing of Silver Springs Hotel let alone of who its shareholders are. In my view, it would be unfair to expect the appellant to even respond to the above statement, let alone to account for money which by consent judgment was paid to a different party altogether.

In his affidavit in rejoinder Sharmas Charania states in paragraph 3 thereof that he was advised by the late Himatlal Gandesha that ***"his costs and expenses for representing the applicant in H.C.C.S No.516 of 2001 would be in the region of 40% of the decretal sum and that he would give a full account of these costs and expenses and it was on the basis of this advise that annextures S.G.2, S.G.3 and S.G.4, S.G.8, S.G. 10, S.G.11, S.G.12, and S.G.14 were written but Himtal Gandesha died before giving the applicant a detailed account of the costs and expenses."*** A close study of this paragraph and the annextures referred to shows the difficulty of the court ordering the appellant to prepare a client / advocate bill of costs to account for the money ordered to be paid under the consent order. First Annexture S.G.4 is a letter from Sebalu & Lule Co. Advocates forwarding files in respect of H.C.C.S 516 of 2001 to ***"Mr. Himatlal Gandesha, Transroad Ltd Kampala."*** Clearly these files are not being sent to Gandesha and & Co. Advocates, but to Mr. Gandesha whose address is given as Transroad Ltd. Kampala. The capacity with which he receives them is in the same letter where it is written: ***"I HIMTAL GANDESHA the duly appointed and authorized agent of TRANSROAD LTD do hereby acknowledge receipt of the files relating to HCCS 516 of 2001 upon withdrawal of instructions from Sebalu & Lule Co. Advocates."*** This is now Mr. Gandesha acting not as an advocate but as a ***duly appointed and authorized agent*** of the appellant. S.G 8 is a letter dated 23rd July 2003 now by Gandesha & Co. Advocates to Mr. Shamas, referring to a position reached in discussions which involved Mr. Shamas, one Lule and one Vivek. Paragraph 1(i) stipulates for ***"$ 5,500,000 to your side."***

Paragraph 1(ii) stipulates for *"The balance to Mr. Gandesha side to meet all the expenses, legal costs, etc."* Paragraph V stipulates that ***"the costs in the court order in regard to the successful suit amounting to about $100,000 to be retained***

by us in the normal way……..” On the 31st July 2003, Mr. Shamas Charania wrote to the Ag. Deputy Governor Bank of Uganda, Annexture S.G12, already referred to in this judgment, directing that the legal costs “*be remitted to our present lawyers, Gandesha & Co. Advocates.”*

It is clear to me that Mr. Shamas was party to these negotiations. He knew that Mr. Gandesha at one time acted as an agent of the appellant and had “a side” that needed to be paid. Surely Mr. Shamas must know what that side was that was to be paid such an amount. It is also clear to me that Mr. Shamas knew of the Transroad “side.” He also knew of Gandesha & Co. Advocates acting as lawyers for the appellant for which he consented to their retaining the costs of about $100,000.

In the circumstances I am of the considered view that had the High Court and the Court of Appeal considered the evidence on record, they would not possibly order the Appellant to prepare an Advocate/client bill of costs to account for the money received by Gandesha & Co. Advocates. In my view, Mr. Shamas Charania’s affidavit does not give the whole truth. I believe this entire application was an attempt to take undue advantage of the appellant using judicial process. In my view this smacks of abuse of due process.

In the circumstances, grounds 1 and 2 should succeed. I would allow the appeal with costs in this court and in the courts below. The appellant was put into considerable difficulty and had to engage the services of two counsel to handle this difficult matter. I would allow a certificate for two counsel.

Dated at Kampala this **28th** day of **October**, 2010.

…….

Bart M. Katureebe

JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA

AT KAMPALA

(CORAM: ODOKI CJ, KATUREEBE, OKELLO, TUMWESIGYE AND KISAAKYE, JJ.SC)

CIVIL APPEAL NO. 13 OF 2009

BETWEEN

SAROJ GANDESHA :: :: APPELLANTS

AND

TRANSROAD LTD :: RESPONDENT.

[Appeal from the judgment and orders of the Court of Appeal at Kampala, (Engwau, Kitumba, and Nshimye, JJA) dated 8th April 2009 in Civil Appeal No. 19 of 2006]

JUDGMENT OF ODOKI, CJ

I have had the benefit of reading in draft the judgment prepared by my learned brother Katureebe, JSC and I agree with it and the orders he proposed.

As the other members of the Court also agree, this appeal is allowed with orders as proposed by the learned Justice of the Supreme Court.

Dated at Kampala this **28th** day of **October,** 2010.

B J Odoki
CHIEF JUSTICE

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA

AT KAMPALA

(CORAM: ODOKI, CJ; KATUREEBE; OKELLO; TUMWESIGYE; AND KISAAKYE, JJSC.)

CIVIL APPEAL NO. 13 OF 2009

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SAROJ GANDESHA :::::: :::::: ::::: APPELLANTS

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TRANSROAD LTD :::::: :::::: ::::: RESPONDENT.

(An Appeal from the judgment and orders of the Court of Appeal at Kampala, (S.G. Engwau, C.N.B. Kitumba, A.S Nshimye, JJA) on the 8th day of April, 2009).

I have had the benefit of reading in draft the judgment of my learned brother Justice Katureebe, JSC, and I agree that this appeal should succeed. I also agree with the orders he has proposed.

Dated at Kololo this 28th day of October 2010.

G.M. OKELLO
JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA

AT KAMPALA

(CORAM: ODOKI CJ, KATUREEBE, OKELLO, TUMWESIGYE AND KISAAKYE, JJ.SC)

CIVIL APPEAL NO: 13 OF 2009

BETWEEN

SAROJ GANDESHA :: :::: APPELLANT

AND

TRANSROAD LTD :: RESPONDENT.

(An appeal against the decision of Engwau, Kitumba, and Nshimye, JJA) dated 8th April 2009 in Civil Appeal No. 19 of 2006)

JUDGMENT OF TUMWESIGYE, JSC

I have had the benefit of reading in draft the judgment of my brother Katureebe, JSC.

I agree that this appeal should succeed and I also agree in the orders he has proposed.

Dated at Kampala this 28th day of October 2010.

JOTHAM TUMWESIGYE
JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA AT KAMPALA

(CORAM: ODOKI C.J., KATUREEBE, OKELLO, TUMWESIGYE AND KISAAKYE, JJ.S.C.)

CIVIL APPEAL NO. 13 OF 2009

BETWEEN

SAROJ GANDESHA :: APPELLANTS

AND

TRANSROAD LTD :: RESPONDENT.

[Appeal from the judgment and orders of the Court of Appeal at Kampala, (S.G. Engwau, C.N.B. Kitumba, A.S. Nshimye, and JJ.A) dated 8th April 2009 in Civil Appeal No. 19 of 2006]

JUDGMENT OF DR. E.M. KISAAKYE, JSC

I have had the privilege to read in draft the judgment of my learned brother, Katureebe, JSC.

I concur with the orders he has proposed and I have nothing useful to add.

Dated at Kampala this 28th day of October, 2010.

.....
DR. ESTHER M. KISAAKYE
JUSTICE OF THE SUPREME COURT