

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

(CORAM: KATUREEBE, KITUMBA, TUMWESIGYE, KISAAYE, JJSC, AND
ODOKI, AG. JSC)

MISCELLANEOUS APPLICATION NO 07 OF 2013

BETWEEN

BRITISH AMERICAN TOBACCO UGANDA LTD ::::::: APPLICANT

AND

1. **SEDRACH MWIJABUKI}**
2. **MUKITALE ASHIMWE }**
3. **JOSEPH BYANGIRE } ::::::::::::::::::::::: RESPONDENTS**
4. **FENEKASI BABYESIZA}**
5. **SOLOMON KIIZA _____ }**

[Application arising out of the decision of the Supreme Court at Kampala (Odoki CJ, Katureebe, Kitumba, Tumwesigye and Kisaakye JJ.SC) in Civil Appeal No 01 of 2012 dated 20 June 2013]

RULING OF THE COURT

This application was brought by notice of motion under Rules 2(2), 42 and 43 of the Judicature (Supreme Court Rules) Directions S I, 13 - 11 (hereinafter referred to as the Rules of this Court) seeking orders that:

“(a) The Court orders the Respondents to receive the payment of UGX 4,300,000,000 (Uganda shillings four billion, three hundred million only) from their former lawyers, Muwema and Mugerwa Advocates, as monies paid on account as at 13 August 2010 when Muvsema and Mugerv/a Advocates held instructions to represent the Respondents in Court of Appeal, Civil Appeal No 50 of 2008 and High Court, Civil Suit No 268 of 2005.

- (b)** *The sum of UGX 4,300,000,000 paid to Muwema and Mugerwa Advocates for the benefit of the respondents be declared part payment of the decretal sum as at 13 August 2010 and therefore be included in the computation of the decretal sum from the judgment arising in Supreme Court Civil Appeal No 1 of 2012.*
- (c)** *Interest awarded by the judgment in the Supreme Court Civil Appeal No 1 of 2012 be computed and applied to the decretal sum less the UGX 4,300,0,000 paid to Muwema and Mugerwa Advocates as at 13 August 2010 for the benefit of the Respondents.*
- (d)** *The Court make direction and orders that the sum of UGX 921,195,924 already paid to some of the farmers beneficiaries to the judgment in Supreme Court Civil Appeal No 1 of 2012, as per account rendered in compliance with the order of the Court of Appeal in Civil Application No 187 of 2010 arising out of Civil Appeal No 50 of 2008 is factored in the computation of the decretal sum in Civil Appeal No 1 of 2012 as monies paid on account*
- (e)** *The applicant's payment of UGX 7,128,203,691 is recognised by the courts as full and final settlement of the judgment and decree in Civil Appeal No 1 of 2012.*
- (f)** *Costs of this application be provided for."*

The grounds in support of the application are contained in the notice of motion and in the affidavit of Mr Jonathan D' Souza, Managing Director of the Applicant. The Respondents have filed an affidavit in reply sworn by Joshua Byangire. The applicant has also filed an affidavit in rejoinder sworn by Ms Agnes Nantongo.

Mr. James Sebugenyi with Mr Michael Mafabi appeared for the applicant while Mr. Peter Walubiri and Mr. Brian Musika represented the Respondents.

The Grounds of the Application:

The grounds of the application as contained in the affidavit of Mr. Jonathan D' Souza, Managing Director of the applicant can be summarised as follows. The applicant was involved in a contractual dispute with a group of tobacco farmers based in Hoima which culminated in the High Court Civil Suit No 268 of 2005, where the High Court delivered judgment in favour of the respondents. The applicant being dissatisfied with the decision of the High Court lodged Civil Appeal No 50 of 2008 in the Court of Appeal.

During the hearing and post hearing of the appeal, the applicant conducted good faith settlement negotiations with the respondents through their lawyers M/s Muwema and Mugerwa Advocates, who had been duly instructed to represent the respondents in the High Court and in the Court of Appeal.

The applicant paid UGX 4,300,000,000 to Muwema and Mugerwa Advocates as at 13 August 2010, for the benefit of the farmers in respect of the Court award in High Court Civil Suit No 268 of 2005 and Civil Appeal No 50 of 2008. The applicant also paid the sum of UGX 300,000,000 as legal costs to the respondent's former lawyers Muwema and Mugerwa Advocates for the High Court and Court of Appeal proceedings.

The Applicant at all times acted within the law by dealing with the respondents' then lawyers who were recognised in law as their legal representatives in the matters before Court. It is well within the remit of the Advocates Act Cap.267, the Advocates (Professional Conduct) Regulations S I 267-2 for advocates to receive payments on behalf of their clients. In accordance with Section 40 of the Advocates Act and the Advocates Accounts Rules contained in the first schedule to Cap.267, the sum of UGX 4,300,000,000 is classified as client's money and is held by Muwema and Mugerwa Advocates in trust for the respondents.

During the pendency of the Supreme Court Civil Appeal No 1 of 2012, the respondents pursued and demanded payment of UGX 4,300,000,000 paid by the applicant, from Muwema and Mugerwa Advocates through different fora. The Court of Appeal while staying execution pending Appeal No 1 of 2012 recognised the payment of UGX 4,300,000,000 by the applicant for the benefit of the respondent farmers to Muwema and Mugerwa Advocates and directed the said advocates to render an account of the monies paid by the applicant and payments so far made to the respondents. The Court of Appeal also halted further payments of monies to the respondents pending the determination of Supreme Court Civil No Appeal No 1 of 2012.

Muwema and Mugerwa Advocates, in compliance with order of the Court of Appeal, rendered an account to the Court of Appeal wherein they confirmed that payment of UGX 921,195,924 had been made to the farmers prior to the order of stay of execution and rendering of an account.

Muwema and Mugerwa Advocates continue to hold the balance of UGX 3,378,804,076 on account of and in trust for the respondent farmers to date in accordance with Section 40 of the Advocates Act Cap.267, and the Advocates Accounts Rules.

The respondents are demanding the sum of UGX 14,364,358,042 as principal and interest from 20 December 2004 at the rate of 17% and have declined to consider the aspect of the UGX 4,300,000,000 paid to Muwema and Mugerwa Advocates in their computation for the purposes of satisfying the judgment and decree in Civil Appeal No 1 of 2012.

The applicant has made its own computation factoring in the aspect of UGX 4,300,000,000 paid to Muwema and Mugerwa Advocates as at 13 August 2010 and has arrived at the sum of UGX 7,128,203,691 as the amount due to and owing after the judgment of the Court in Civil Appeal No 1 of 2012. The applicant has acted in good faith and already paid the uncontested sum of UGX 7,128,203,691 to the respondents and has also, in order to avert increased execution proceedings, deposited UGX 7,236,154,35 into an escrow account with Standard

Chartered Bank Uganda that is jointly managed by the applicant and respondents.

Upon payment of the uncontested sum of UGX7,203,691 a faction of 1,000 farmers represented by Kigozi, Sempala, Mukasa, Obonyo (KSMO) Advocates, by a letter dated 8 July 2013, demanded that their clients' entitlement under the decree of the Court should be paid to a separate account and not the designated account operated by the respondents and their legal representatives.

On 8 July Muwema and Mugerwa Advocates, the respondents' former lawyers, advised that they were willing to remit the sum of UGX 1,000,000,000/- to the designated account operated by the farmers and their legal representatives in Standard Chartered Bank Uganda. The advocates clarified further that they had paid out UGX 921,195,924 to some of the farmers. Both payments made by the advocate form part of the UGX 4,300,000,000 held in trust for the respondents by the same advocates.

However, on 8 July 2013, Kwesigabo Bamwine and Walubiri Advocates, the respondents' current lawyers, instructed Standard Chartered Bank to decline the transfer of UGX 1,000,000,000 from Muwema and Mugerwa Advocates to the respondents' designated account and rejected any payments being made by Muwema and Mugerwa Advocates towards the satisfaction of the decree in Civil Appeal No 1 of 2012.

The refusal on the part of the respondents to factor in the payment of UGX 4,300,000,000 and to receive the payment from Muwema and Mugerwa Advocates has brought a damaging stalemate to the post judgment settlement process in Civil Appeal No 1 of 2012. Therefore, it is only just and fair that the respondents be ordered to acknowledge and receive the UGX 4,300,000,000 from Muwema and Mugerwa Advocates as part settlement of the judgment and decree in Supreme Court Civil Appeal No 1 of 2012.

According to the applicant's affidavit in rejoinder, sworn by Ms Agnes Nantongo of Sebalu and Lule Advocates, Joshua Byangire is one of the respondents who have been pursuing the

payment of Shs 4,300,000,000/= from Muwema and Mugerwa Advocates and yet he is now contesting the inclusion of the said amount in the computation of the decretal sum and interest due.

She also states that Abdu Kugonza previously deponed in an affidavit in the Court of Appeal Civil Application No 175 of 2011 stating that he had been paid and taken benefit from the amount of Shs. 4,300,000,000/= paid to Muwema and Mugerwa Advocates. She avers that she has found out from the records of farmers that Suleiman Kato is not on the list of farmers and is not, therefore, a beneficiary of the judgment of this Court.

It is the case for the applicant that this is a proper case for the Court to intervene under its inherent powers vested in it to provide directions in respect of the sum of UGX 4,300,000,000 paid for the benefit of the respondents and UGX 921,195,924 so far paid to the farmers so that the applicant does not suffer injustice and the respondents do not derive a double benefit in the satisfaction of the judgment and decree in Civil Appeal No 1 of 2012.

The applicant prays for guidance, direction and clarification in the implementation of the judgment and decree in the said appeal.

The Affidavit in Reply:

Joshua Byangire, the third respondent, swore an affidavit in reply to the affidavit of Mr. Jonathan D' Souza, the Managing Director of the applicant. He states that all the grounds raised in the application and affidavit were argued and concluded in Civil Appeal no 1 of 2012.

He avers that the circumstances which led to the signing of the compromise, the consent order and payment of Shs 4,300,000,000/= to M/s Muwema and Mugerwa Advocates were earlier narrated by him and Sedrach Mwijabuki, in their affidavits dated 29th December 2011 in the supplementary record of appeal and the affidavits were considered and a conclusion was made that the compromise was invalid.

He further states that the applicant was informed not to pay but adamantly rejected the respondents' pleas not to pay Muwema and Mugerwa Advocates even before payment was made. Despite the fact the applicant knew that the respondents had won the case, the applicant went ahead and paid Muwema and Mugerwa Advocates Shs.4,000,000,000/= on 13th August 2010. He denies that Shs. 921,195,924/= was paid to the farmers and the issue was canvassed during the hearing of Civil Appeal No 1 of 2012. He asserts that any monies paid by the applicant to M/s Muwema and Mugerwa Advocates can be recovered by the applicants from the advocates in accordance with the indemnity clause in the said invalid settlement cum compromise.

Joshua Byangire states that M/s Muwema and Mugerwa Advocates were never party to Civil Appeal No 1 of 2012, and the applicants never argued at the hearing of the appeal that the money paid to M/s Muwema and Mugerwa Advocates was only part-payment of the decretal sum but the applicant's argument was that the money paid under the compromise cum settlement was in full and final satisfaction of the respondents' claim against the applicant. Moreover, M/s Muwema and Mugerwa Advocates are not parties to the present application.

The deponent further avers that M/s Muwema and Mugerwa Advocates have accepted the judgments of the Court of Appeal and Supreme court and accordingly filed party to party bill of costs in the Court of Appeal

basing it on the subject matter of Shs. 14,364,358,042/= calculated on the basis of the Supreme Court judgment.

Mr. Byangire denies that Shs. 7,128,203,691 was paid in good faith since it was only paid after several correspondences, meetings and an application for execution was made to this Court. He further states that the escrow account was also opened after further threats of execution and on the orders of the Registrar of this Court.

The deponent contends that if Shs. 4,300,000,000/= paid to Muwema and Mugerwa

Advocates is deducted from the decretal sum, the respondents and the farmers they represent will lose about half of the decretal sum and interest thereon. He further contends if the Court ordered that Shs. 4,300,000,000/= paid to Muwema and Mugerwa Advocates is taken into account when computing the decretal sum this Court would have reversed its decision on ground one of appeal and accepted the settlement cum compromise as valid and binding on the respondents.

He states that he is aware that the persons mentioned in the affidavit of D'Souza withdrew instructions from Kigozi Sempala Mukasa and Obonyo (Advocates) (KSMO) and that these persons have been working with him to ensure smooth distribution of the money so far paid by the applicant and to recover the balance of the decretal sum from the applicant.

He denies that there are factions among the farmers who are beneficiaries to Civil Appeal no 1 of 2012 but only a few individuals who in the past, tried to challenge the respondents' authority to represent all

the tobacco farmers. Therefore the respondents represent all the beneficiaries to Civil Appeal No 1 Of 2012.

He concludes that the application is brought in bad faith with the intention of making the respondents and thousands of the farmers to lose half of the decretal sum and interest thereon. He believes that the applicant will not be prejudiced if it paid the balance of the decretal sum to the respondents who were duly appointed by the High Court to represent other tobacco farmers.

Arguments of the Parties:

Mr. Sebugenyi for the applicant submitted that a dispute had arisen between the parties over the computation of the money to be paid to the respondents. According to the interpretation of the respondents, the sum of Shs.4,300,000,000/- paid on 13 August 2010 after the

judgment of the Court of Appeal should be excluded when calculating the decretal amount. The effect of this interpretation is to create a total of outstanding decretal amount as Shs.14,364,358,042/- plus interest from the date of judgment of this Court.

The applicants' interpretation, according to Mr. Sebugenyi, the sum of Shs.4,300,000,000/- should be included in calculating the decretal amount so that the outstanding sum is 7,128,203,691/-, inclusive of interest. It was his submission that the undisputed decretal sum should be Shs.11,428,203,691/-.

Learned counsel for the applicant submitted that Muwema & Mugerwa Advocates who were holding the balance of Shs. 4,300,000,000/- paid out Shs. 1,000,000,000/- to the respondents who rejected it on account

that it would prejudice their case. Therefore, the balance of Shs. 3,378,804,079/- remains in the hands of Muwema and Mugerwa Advocates. Mr. Sebugenyi also pointed out that the respondents do not want to hear of any mention of Shs.921,135,429/- paid to some of them through Muwema and Mugerwa Advocates or deduction of this amount from the decretal amount.

Counsel prayed that the Court orders the respondents to receive from Muwema & Mugerwa Advocates Shs.4,300,000,000/- which should be regarded as part-payment and also recognise the Shs.921,195,925/- paid to some of the respondents. It was his contention that Shs.7,128,203,691/- deposited in the bank be recognised as final settlement of the decree in Civil Appeal No. 1 of 2012. Learned counsel relied on several authorities which will be considered later in this ruling.

Mr. Walubiri, for the respondents, opposed the application. He pointed out that the applicant does not rely on the slip rule as there is no error in the judgment of this Court to be corrected, but relies on the inherent powers of this Court to do justice. He submitted that there will be no injustice caused to the applicant if it pays all the Shs.14,364,358,042/- to the respondent. It was his contention that what caused the problem was the money paid to Muwema & Mugerwa Advocates on the basis of a compromise which this Court declared invalid.

Learned counsel for the respondents submitted further that the negotiations between the applicant and the respondents were carried out directly with the then respondents' advocates after the applicant's advocates had advised it against it, and therefore the applicant took a gamble which was a risk. Counsel contended that the fairness of the situation requires that the applicant settles the matter with Muwema & Mugerwa Advocates.

Mr Walubiri submitted that there was never any argument during the appeal proceedings that the money paid to Muwema & Mugerwa Advocates was part-payment to be factored in the

final payment, and therefore the applicant was now introducing a new ground to the effect that this Court holds that although the compromise was invalid, nevertheless, the money paid under it to Muwema & Mugerwa Advocates was part-payment of the decretal amount. Counsel submitted that to request the Court to endorse the compromise would offend the principle of **res judicata**.

It was learned counsel's contention that the money paid to Muwema & Mugerwa Advocates should be recovered from the Advocates and paid to the applicant and the farmers who received money from the said Advocates should refund the money. It was also counsel's submission that the money can also be recovered under the Indemnity Clause in the compromise which was declared invalid but which the Advocates cannot run away from.

Consideration of the Law and Arguments:

It is common ground that this application does not seek the correction of errors or arithmetical mistakes, but seeks clarification, guidance and direction on how to implement the judgment and decree of this Court in Civil Appeal No. 1 of 2012. The applicant invokes the inherent powers of this Court under Rules 2(2), 42 and 43 of the Rules of this Court. Rule 2(2) provides;

“Nothing in these Rules shall be taken to limit or otherwise affect the inherent power of the Court, and the Court of Appeal, to make such orders as may be necessary for achieving the ends of justice or to prevent abuse of the process of any such Court, and that power shall extend to setting aside judgments which have proved null and void after they have been passed, and shall be exercised to prevent an abuse of the process of any Court caused by delay.”

This provision has been considered in a number of cases decided by this Court which include **Livingstone M. Sewanyana Vs. Martin Alier**, Misc. App. No. 40/91, **Orient Bank Ltd. Vs Fredrick Zaabwe and Another**, Civil Application No. 17 of 2007 and **Nsereko Joseph Kisukye Sarah & Others Vs. Bank of Uganda**, Civil Appeal No. 1 of 2002.

In **Livingstone Sewanyana Vs. Martin Alier** (supra) this Court after quoting Rule 35 of the

then Rules of this Court relating to the powers of the Court to correct a clerical or arithmetical mistake in any judgment or error arising from an accidental slip or omission (known as the “slip rule”) observed;

“It seems that what was taken as inherent jurisdiction in 1966 has been reflected in the Court of Appeal Rules 1972. But Rule 35 will not exhaust the inherent jurisdiction of the Supreme Court, otherwise, Rule 1(3) would not have been necessary. The latter rule is there to provide for the many types of cases when the inherent jurisdiction will be necessary to prevent abuse of the Court process as may be necessary for the ends of justice. One aspect of the inherent jurisdiction as spelt out in Rule 35, however, is that in a proper case, judgment may be recalled, even after it has been perfected. Although a great deal of emphasis was placed upon the fact that judgment has been given, if the (sic) falls within the scope of the inherent jurisdiction, the fact that judgment has been given will not debar the Court from recalling its judgment..”

In that case, the Court dismissed an application for admission of newly discovered evidence of fraud and reviewing its decision on the ground that a witness M. G. K. Mayiga gave evidence against Mr. Sewanyana which was false. The Court refused to exercise any of its inherent powers and left the applicant and his counsel Mr. Zaabwe, to exercise their rights to bring a fresh suit, challenging the judgment of the High Court confirmed by this Court, on the basis of fraud.

In Orient Bank Ltd. Vs Fredrick Zaabwe and Another (supra), this Court stated that;

“It is trite law that the decision of this Court on any issue of fact or law is final, so that the unsuccessful party cannot apply for its reversal. The only circumstances under which this Court may be asked to re-visit its decision are set out in Rules 2(2) and 35(1) of the Rules of this Court. On one hand, Rule 2(2) preserves the inherent power of the Court to make necessary orders for achieving the ends of justice, including orders inter alia -

‘Setting aside judgments which have been proved null and void after they have been passed (emphasis added)’

The Court dismissed the application holding that the application proposed to ask the Court to reverse its findings not because they resulted from accidental slip or omissions but because in view of the applicant, the findings were erroneous. The Court held that it was satisfied that the judgment fully reflected the intention of the Court.

the Registrar of the Court sought directions regarding how to proceed with the execution of the order and decree of the Court. The Court had ordered that **“The appellants who were 50 years or older as at the 30th November 1994 are entitled to their pension notwithstanding the dismissal of the appeal.”**

The Court summoned both Counsel to make submissions on the issue, particularly as the Court did not mention the number of people who were 50 years and above and who were entitled to pension. The Court allowed the application and made several clarifications which included the following:

1. Since the suit was a representative action on behalf of the Bank of Uganda Veterans Association, all appellants who qualified for pension as at 30th November 1994 should be paid their pension.
2. Bank of Uganda staff records shall form the basis for identification of applicants who qualified for pension.
3. The pension scheme operating at the time of retirement which was 30th November 1994 shall govern the calculation of the amount of pension payable to each appellant.

It is also necessary to emphasise the importance of the principle that it is in the interest of justice that there should be an end to litigation. This principle was emphasised in the case of **Lakhamishi Brothers Ltd. Vs. R. Raja & Sons** (1966) EA 313 where the Court stated at page 314:

“There is a principle which is of the greatest importance in the administration of justice and that principle is this: It is in the interest of all persons that there should be an end to litigation. This Court is now the final

Court of appeal and when this Court delivers its judgment, that judgment is, in so far as the particular proceedings are concerned, the end of the litigation. It determines in respect of the parties to the particular proceedings their final legal position, subject as I have said to the limited application of the slip rule. ”

In Supreme Court Civil Appeal No. 01 of 2012 which gave rise to the judgment and orders the applicant seeks directions as to its execution, the main ground of appeal was stated as follows:

“The learned Justices of Appeal erred in law in going ahead to deliver judgment in Civil Appeal No. 50 of 2008 in total disregard of the mutual compromise and deed of settlement filed that had been withdrawn by the applicant in view of the compromise.”

There were four alternative grounds of appeal, three of which challenged the Court of Appeal holding that the respondents and all they represented were contracted farmers and the final ground challenged the rate of interest awarded on the decretal amount.

This Court rejected all the grounds of appeal and dismissed the appeal with costs. In effect therefore, the Court confirmed the decision of the Court of Appeal which had largely upheld the decision of the High Court, except on the issue of the rate of interest awarded. It should be recalled that this Court held that the compromise or deed of settlement which was lodged in the Court of Appeal was invalid as it was not endorsed by that Court which went ahead and delivered its judgment without regard to the compromise or any money paid under it.

In none of the grounds of appeal did the applicant challenge the decision of the Court of Appeal for failure to consider part-payment, nor did the applicant include a ground of appeal in the alternative grounds of appeal, contending and praying that any money paid out to the former advocates of the respondents or the respondents themselves in consequence of the compromise should be refunded to it or taken as part-payment. Without such a ground of appeal or prayer, this Court could not have made such orders the applicant now seeks.

It should be recalled that the applicant made payments to the former advocates of the respondents M/S Muwema and Mugerwa Advocates, after the applicant’s former advocates

had advised it not to do so. As it is, the applicant took a risk to make part-payment of the decretal amount to Muwema and Mugerwa Advocates which money the Advocates still hold, except for any part payment they may have made to the respondents.

In our view, the applicant is at liberty to seek to recover whatever money is due to it from former advocates of the respondents or the respondents themselves.

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

We find that the orders this Court made in Civil Appeal No. 1 of 2012 are clear and need no guidance or direction from this Court to implement

them. We are unable to grant the orders prayed for by the applicant. The applicant should pay the respondents the decretal amount of Shs.14,364,358,042/- and then take steps to recover any money due to it from M/S Muwema and Mugerwa Advocates in the sum of Shs.4,300,000,000/- or any of the respondents claimed to amount to Shs.921,195,924/-.

In the result, by a majority of four to one of the members of the Court, this application is dismissed. We order that in view of the special circumstances of this case, each party bears its own costs.

Dated at Kampala this 10th day of July 2014

Bart Katureebe
JUSTICE OF THE SUPREME COURT

C N B Kitumba
JUSTICE OF THE SUPREME COURT

J Tumwesigye
JUSTICE OF THE SUPREME COURT

B.J Odoki
AG. JUSTICE OF THE SUPREME COURT