THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
[*Coram: Egonda-Ntende, Barishaki Cheborion and Tuhaise, JJA*]

Civil Appeal No. 114 of 2011
(Arising from High Court Civil Suit No. 170 of 2010)

BETWEEN

Frostmark EHF[*Through its Attorney John Kabandize*]==========Appellant

AND

Uganda Fish Packers Ltd==========Respondent

(On appeal from the judgment of the High Court (Madrama, J.,) delivered on 15th April 2011.)

Judgment of Fredrick Egonda-Ntende, JA

[1] I have had the opportunity to read in draft the judgment of my sister, Tuhaise, JA. I agree with it including the orders proposed. I have nothing useful to add.

[2] As Barishaki Cheborion, JA, agrees, this appeal is allowed with costs. The judgment of the lower court is set aside and a re-trial before another judge is ordered.

Dated, signed and delivered at Kampala this 25th day of July 2019

Fredrick Egonda-Ntende
Justice of Appeal

THE REPUBLIC OF UGANDA

IN THE APPEAL COURT OF UGANDA AT KAMPALA

(Coram: Fredrick M. S Egonda – Ntende, Cheborion Barishaki & Percy Night Tuhaise, JJA)

Civil Appeal No. 114 of 2011

Frostmark EHF [*Through Its Attorney John Kabandize*] ==Applicant

Versus

Uganda Fish Packers Limited==========Respondent

[Appeal arising from the ruling/orders of the High Court commercial Division before the Hon. Mr. Justice Christopher Madrama (as he then was) in Civil Suit No. 170 of 2010 delivered on 15hth April 2011]

JUDGMENT OF CHEBORION BARISHAKI, JA.

I have had the benefit of reading in draft the Judgment of my sister, Percy Night Tuhaise JA, and I agree that this appeal should succeed with costs to the appellant.

Dated at Kampala this.....25th..... day of.....July.....2019.

Cheborion Barishaki

Justice of Appeal

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

[Coram: Fredrick M. S. Egonda-Ntende; Cheborion Barishaki; Percy Night Tuhaise, JJA]

CIVIL APPEAL NO. 114 OF 2011

Frostmark EHF *[Through its Attorney John Kabandize]*..... Appellant

Versus

Uganda Fish Packers Limited ..... Respondent

[Appeal arising from the ruling/orders of the High Court Commercial Division before the Hon. Mr. Justice Christopher Madrama (as he then was) in Civil Suit No. 170 of 2010 delivered on 15th April 2011]

Judgment of Percy Night Tuhaise JA

Background

The respondent was at all material times, since 11th July 2005, indebted to the appellant in the sum of Euro 723,000 (seven hundred and twenty three thousand), subject to interest. Through various correspondence between the parties and meetings between their lawyers from October 2007, the respondent undertook to pay to the appellant the sum of Euro 688,117.06 (six hundred eighty eight thousand one hundred and seventeen, six cents). When the respondent reneged on its undertakings and failed or refused to pay the debt owed to the appellant, the appellant commenced winding up proceedings against the respondent *vide* ***Company Cause No. 1 of 2008.***

On 8th January 2009, before the hearing of ***Company Cause No. 1 of 2008***, the parties entered into a settlement in which the respondent undertook to pay the debt which had gone up to Euro 738,450.6 (seven hundred thirty eight thousand four hundred and fifty, six cents), plus legal expenses of Euro

10,000 (ten thousand). On 14th January 2009, the parties executed an addendum to provide for specific terms regarding the payments.

Subsequently, the parties executed a settlement agreement specifically for filing under ***Companies Cause No. 1 of 2008***. Its terms were similar to those contained in the addendum executed on the 14th January 2009. The terms of the settlement under ***Companies Cause No. 1 of 2008*** were:-

1. *The petition for winding up the respondent shall be stayed and payment of the debt due to the petitioner from the respondent shall be in accordance with terms set herein.*
2. *The respondent shall pay to the petitioner a total sum of Euro 738,472.6 (seven hundred and thirty eight thousand four hundred seventy two and six cents only) as follows:*
   - *(i) The respondent shall on signing of this agreement, without interest, pay to the petitioner a sum of Euro 75,000 (seventy five thousand only).*
   - *(ii) The respondent shall, without interest, pay a total sum of Euro 88,463 specifically as follows:*
     - *(a) payment of Euro 44,231.5 on signing of this Agreement.*
     - *(b) payment of Euro 44,231.5 in six (6) monthly equal instalments from the date of signing this agreement.*
3. *The respondent shall pay the balance of Euro 574,987.6 in fifty two (52) monthly equal instalments subject to a compound interest of 8.5% per annum, from the date of 1st January 2009.*
4. *For avoidance of any doubt, the respondent shall have paid the entire debt inclusive of accrued interest by 1st May 2013.*
5. *If the respondent fails to pay any instalments as agreed herein, the petitioner shall be entitled to proceed with the petition.*
6. *Upon the due and satisfactory payment of the debt plus accrued interest, the Winding up Petition/Companies Cause No. 01 of 2008 shall be unconditionally or wholly withdrawn.*

The settlement agreement was endorsed by the Deputy Registrar of the Commercial Court.

The respondent defaulted on the payment, upon which the appellant revived the winding up petition under clause 5 of the settlement agreement. The parties' lawyers made appearance on two occasions for the purpose of prosecuting the winding up petition. Subsequently, on 20th January 2010, the appellant withdrew the winding up petition.

On 11th May 2010, the appellant filed ***Civil Suit No. 170 of 2010 Frostmark EHF (suing through its Attorney John Kabandize) V Uganda Fish Packers Limited,*** in which it claimed recovery of special damages € 577,823.5 (five hundred seventy seven thousand eight hundred and twenty three, five cents) with interest of € 122,126.6 (one hundred twenty two thousand one hundred and twenty six, six cents) general damages, interest and costs of the suit.

On 15th April 201, Christopher Madrama, J (as he then was), delivered his Ruling on a preliminary point of law. The Ruling was to the effect that ***Civil Suit No. 170 of 2010*** was barred by section 7 of the Civil Procedure Act (Cap 71) for being *res judicata.* The appellant was aggrieved by the ruling, hence the instant appeal.

The appeal raises only one ground of appeal, that is:-

> "That the learned trial judge erred in law and fact when he ruled that Civil Suit No. 170 of 2010 was *res judicata."*

Representation

At the hearing of this appeal, the appellant was represented by Mr. Patrick Alinda. The respondent was represented by Mr. Bwogi Kalibala.

The issue for determination was whether or not ***HCCS No. 170 of 2010*** was *res judicata.*

Appellant's submissions

The appellant contends that clause 5 of the settlement agreement allowed her to revive the winding up petition against the respondent which she did. The appellant's counsel maintained that the purpose of the winding up

petition was to prosecute and wind up the respondent. The appellant, with the consent of the respondent's lawyer, later withdrew the winding up cause under Order 25 rule 1 of the Civil Procedure Rules, S1 71-1. The court made no order as to costs.

The appellant's counsel argued that the settlement agreement permitted the appellant to first stay the winding up petition and revive the same on default by the respondent. He contended that the withdrawal of the winding up petition cannot, therefore, be taken to mean that the dispute between the parties had been finally determined to constitute *res judicata* as argued by the respondent. To support his submissions, the appellant's counsel cited the case of **John Semakula V Pope John Paul IV Social Club Ltd CACA No. 67 of 2004** and a plethora of other authorities which highlighted the test for *res judicata.*

The appellant's counsel contended that in the instant case there is no finality in a matter that has been withdrawn from court or upon which no judicial pronouncement exists in finality. According to the appellant's counsel, the effect of a withdrawal of a suit is that the suit ceases to exist from the record, and it will appear as though no matter had in the first place been commenced.

The appellant's counsel also contended that owing to the word "withdraw" meaning "to take back," the settlement agreement executed between the parties was not final. He submitted that the settlement agreement provided for stay of ***Companies Cause No. 1 of 2008*** (the petition); that the same agreement provided for reviving of the same petition in the event of breach of payment terms; that following the breach of the agreement, the petition was duly revived; and that upon being revived, but before it could be heard and finally determined, it was withdrawn in accordance with the law governing withdrawal of suits in Uganda. The appellant accordingly contended that the settlement agreement and ***Companies Cause No. 1 of 2008***, were extinguished by the withdrawal.

Respondent's submissions

The respondent's counsel submitted that it was not in dispute that the appellant and the respondent signed a Consent Oder dated the 15th January 2009 where they agreed to be governed by the terms of that Order.

According to the respondent's counsel, the Consent Order specifically provided for what was outstanding to the appellant, how and when it would be paid, and what would happen in the event of default. It further provided for the withdrawal of ***Companies Cause No. 1 of 2008*** in compliance with the terms of in the settlement.

The respondent's counsel argued that the Consent Order has to date not been set aside or varied. He contended that the rights and obligations of both parties were determined with finality by the Consent Order; and that therefore, the subsequent filing of ***HCCS No. 170 of 2010*** in light of the subsisting Consent Order is accordingly *res judicata.*

The respondent's counsel further submitted that as correctly noted by the High Court, the question of liability of the respondent for the sum claimed in the plaint was directly and substantially in issue in the Consent Order in ***Companies Cause No. 1 of 2008***. He argued that the question was determined by the Consent Order and the subsequent suit was therefore *res judicata.*

Resolution of the appeal by Court

It is the duty of the first appellate court to re-evaluate all the evidence on record and make its own findings of fact on the issues while giving allowance for the fact that it had not seen the witnesses as they testified, before it can decide on whether the decision of the trial court can be supported - **Pandya V R [1957] E.A 336; Kifamunte Henry V Uganda Supreme Court Criminal Appeal No. 10 of 1997.**

The duty of the first appellate court was also reiterated by the Supreme Court in **Fr. Narsensio Begumisa & 3 others V Eric Tibebaga; Supreme Court Civil Appeal No. 17 of 2002**. The Court held as follows;

"It is a well settled principle that on a first appeal, the parties are entitled to obtain from the court of appeal its own decision on issues of fact as well as of law. Although in a case of conflicting evidence, the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions."

The doctrine of *Res Judicata* is provided for under section 7 of the Civil Procedure Act, Cap. 71 which states as follows:-

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

In **Semakula V Magala & Others [1977] HCB 91**, the test to be followed when determining whether or not a suit is barred by *res judicata,* was laid out where court was held *inter alia*, that:-

"In determining whether or not a suit is barred by Res Judicata, the test is whether the plaintiff in the second suit is trying to bring before the court in another way in the form of a new cause of action a transaction which has already been presented before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon. If this is answered affirmatively, the plea of Res Judicata will then not apply to all issues but also to every issue which properly belonged to the subject of litigation and which might have been raised at the time, through the exercise of due diligence by the parties."

This test for *res judicata* has been re-echoed in **Boutique Shazim Ltd V Noratam Bhatia & Another CACA No. 36 of 2007**, and confirmed by the Supreme Court in **Civil Appeal No. 16 of 2009**.

In **John Semakula V Pope John Paul IV Social Club Ltd CACA No. 67 of 2004**, Justice C.K. Byamugisha JA, regarding section 7 of the Civil Procedure Act, opined at page 6 that:-

> *"The operative words in the section are* ***'heard and finally determined by that court'****. The provisions of the section are therefore, the embodiment of the rule of conclusiveness of judgments with regard to the points that the Court decided"* (emphasis added).

In **Mulla: The Code of Civil Procedure Vol-1**, it is stated that *res judicata* means a matter adjudicated upon, or a matter on which judgment has been pronounced. The rule of *res judicata* has been put on two grounds. The first is the hardship to the individual that he should not be vexed twice for the same cause. The second concerns public policy, that it is in the interests of the state that there should be an end to litigation.

The question to address in this appeal is whether the withdrawal of the petition amounted to finality in the matter, in other words, that by virtue of it being withdrawn, ***Companies Cause No. 1 of 2008*** was heard and finally determined by that court.

Black's Law Dictionary, 8th edition defines withdraw to mean to take back something presented, granted, enjoyed, possessed, or allowed. It also defines final to mean, regarding a judgment at law, not requiring any further judicial action by the court that rendered judgment to determine the matter litigated or concluded; or not requiring any further judicial action beyond supervising how the decree is carried out. The same dictionary defines "final judgment" to mean a court's last action that settles the rights of the parties and disposes of all issues in controversy, except for award of costs (and sometimes, attorney's fees) and enforcement of the judgment.

A withdrawal of a suit by its very nature infers that the suit ceases to exist from the record and it will appear as though no matter had in the first place been commenced. A cursory examination of Order 25 of the Civil Procedure Rules which deals with withdrawal of suits shows that a withdrawn suit is

a discontinued suit which attracts costs, but it does not bar, or is not a defence to, any subsequent action. The language of Order 25 of the Civil Procedure Rules suggests that a subsequent or fresh suit is distinct from a withdrawn suit, or a former suit. Such subsequent or fresh suit is bound by the law of limitation in the same manner as if the former suit, or the withdrawn suit, had not been instituted.

Applying the foregoing definitions to the instant situation, it cannot be correct that there is finality in a matter that has been withdrawn from court. In the instant case, the record shows that the settlement agreement provided for stay of ***Companies Cause No. 1 of 2008,*** the winding up petition. The same agreement provided for reviving of the winding up petition in the event of breach of payment terms under the settlement agreement. Following the breach of the settlement agreement, the winding up petition was duly revived, but before it could be heard and finally determined, it was withdrawn in accordance with the law governing withdraw of suits in Uganda. This, in my opinion, extinguished the settlement agreement and ***Companies Cause No. 1 of 2008,*** the winding up petition.

Thus, it cannot be stated that ***Companies Cause No. 1 of 2008*** had been adjudicated upon, or that the court handling it settled the rights of the parties and disposed of all issues in controversy. It is also not correct to say that the questions sought to be determined in ***HCCS No. 170 of 2010*** were finally determined by the settlement agreement or consent order executed under ***Companies cause No. 1 of 2008***.

The record shows that the settlement agreement resulted in settling only part of that respondent's indebtedness to the appellant. The parties in ***Companies cause No. 1 of 2008*** were litigating over recovery of Euro 738,472.6 (seven hundred thirty eight thousand four hundred and seventy two, six cents) which had been reduced by the time ***HCCS No. 170 of 2010*** was filed. The fact however is that part of the claim was still subsisting, hence the dispute was not finally determined by the settlement agreement.

In that regard, ***HCCS No. 170 of 2010*** is not *res judicata* because the matter was never finally determined on account that ***Companies Cause No. 1 of 2008*** had been withdrawn from Court, and was therefore no longer in existence. It follows that the settlement agreement executed under ***Companies Cause No. 1 of 2008***, just like the Companies Cause under which it was executed, was also extinguished by the withdrawal of the Companies Cause. I therefore do not agree with the respondent's counsel that the appellant's remedy lay in pursuing its claim under the settlement agreement and not filing a new suit when the consent order still subsists, simply because the consent order was no longer in existence.

In that regard, based on the evidence on record and the applicable laws, it is my finding that ***HCCS No. 170 of 2010*** is not *res judicata* in as far as the appellant's unsettled claim against the respondent is concerned.

This appeal is accordingly allowed. The orders of the learned trial Judge dismissing ***High Court Commercial Court Civil Suit No. 170 of 2010*** are set aside and substituted with an order for a re-trial of the matter.

The costs of this appeal and those of the lower Court are awarded to the appellant.

Dated at Kampala this.....25th.....day of.....July.....2019

Hon. Lady Justice Percy Night Tuhaise

Justice of Appeal.