THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CORAM: HON. JUSTICE A. TWINOMUJUNI, JA
HON. JUSTICE C.K. BYAMUGISHA, JA
HON. JUSTICE S.B.K. KAVUMA, JA

CIVIL APPEAL NO. 55 OF 2008

PAUL NYAMARERE……..APPELLANT

V E R S U S

UGANDA ELECTRICITY BOARD
(IN LIQUIDATION) …….RESPONDENT

[Appeal from the order of the High Court
(Arach-Amoko, J) dated 8th May 2008
in Misc. Cause No.290/2007 arising from HCCS No.719/2005]

JUDGMENT OF TWINOMUJUNI, JA

This is an appeal from the order of the High Court in which that Court struck out the appellants Miscellaneous Application No.290/07 and declared judgment in appellant's HCCS No.719/2005, which had been earlier decreed in his favour, to be a nullity.

The background to this appeal is as follows:-

The appellant was a successful party in HCCS No.719 of 2005 wherein he and others had claimed their terminal benefits against the respondent, then known as Uganda Electricity Board [UEB]. The UEB was later put under the process of liquidation under the Public Enterprise Reform and Divestiture (PERD) Act vide General Notice No.108 of 2006, and is now known as Uganda Electricity Board in Liquidation. After the benefits relating to general damages had been calculated and partly paid the appellant filed Miscellaneous Application No.290 of 270 seeking consequential orders for payment of pension and gratuity of the same employees.

At the hearing of the application, counsel for the respondent raised a preliminary objection to the effect that their client, Uganda Electricity Board, did not in law exist at all. They cited a then recent authority of the Court of appeal in **Civil Appeal No.96 of 2004 Mavunwa Edison and Others vs Uganda Electricity Generation Company Ltd** in which, counsel claimed, the court held that UEB ceased to exist on the coming into force of the Uganda Electricity Act of 1999. Counsel did not tell the High Court when that Act came into force. The learned trial judge upheld the preliminary objection, nullified her judgment in HCCS No.719/2005 and dismissed Miscellaneous Application No.290/2007, hence this appeal.

The Memorandum of Appeal raises four grounds of appeal:-

1. **The learned trial judge erred in law when she reversed her judgment in Civil Suit No.719/2005 Paul Nyamarere vs Uganda Electricity Board.**
2. **The learned trial judge erred in law when she declined to hear Application No.290/2007 for consequential orders on merits.**
3. **The learned trial judge erred in law to have dismissed the application for consequential orders.**
4. **The learned trial judge erred in law and in fact when she upheld the respondent's preliminary objection.**

The appellant is seeking the following orders:

(a) The appeal be allowed.

(b) The order of the High Court dismissing Misc. Cause No.290/2007 nullifies the judgment in HCCS No.719/2005 be set aside.

(c) The court grants the consequential orders as requested in Misc. cause No.290/07.

(d) Costs of this appeal and the High Court application be awarded to the appellant.

The grounds of appeal contained in the memorandum of appeal are repetitive and can, without prejudice to either party be reframed as follows:-

(a) The learned trial judge erred in law to have dismissed the application for consequential orders.

(b) The learned trial judge erred to hold that judgement in Civil Suit No.719/2005 Paul Nyamarere vs UEB was a nullity.

(c) Remedies.

I propose to determine this appeal following the above reframed issues.

ISSUE NO. (a)

This is whether the trial judge was right to dismiss Misc. Cause No.290/2007. Before the learned trial judge, during the hearing of this application, counsel for the respondent submitted that the respondent against whom a consequential order was being sought was a wrong party and the correct party was the companies known as Successor Companies which took over the various activities of UEB. Counsel cited as their authority this courts decision in **Civil Appeal No.96/04 Mavunwa Edison & Ors vs Uganda Electricity Generation Co. Ltd.** They specifically cited the leading judgment of Twinomujuni, JA as supporting their contention that the applicants had sued the wrong party because UEB had ceased to exist.

In upholding this preliminary objection the learned judge stated:

> **"I have considered the submission of both counsel. I have also read the judgment in the case referred to particularly the judgment of Twinomujuni, JA.**

It is my considered view, that the question whether the respondent is a party to the suit or not is immaterial.

The question is the existence of or non existence of UEB at the time that judgment was obtained against UEB. It is a question of law. That decision, unless overturned by the Supreme Court, binds this court under the doctrine of stare decisis. That decision was not obiter."

At page 8 the court identified the issue as follows:-

"This appeal arises from the decision of the trial judge that the appellants had sued the wrong party and in effect had no cause of action against the respondent."

At page 10 the judgement reads:-

"So, is it correct to find as the learned trial judge did, that UEB still existed in law and was the one liable to pay the pension of the appellants. With respect, 1999, UEB ceased to exist, it was dissolved. All its responsibilities, assets and liabilities passed on to UEGCL, the respondent. UEGCL became the successor company. Section 26(2) of the electricity Act 1999 is very precise on this point:-

'126(2) on transfer date appointed under subsection(1) the UEB shall cease to exist and shall be taken as dissolved.'

Page 11 reads in the first paragraph:

"Thereafter UEB could only exist in a very different form under a licence issued by the Minister on terms stipulated therein. It would no longer be a parastatal body set up an Act of Parliament as was formerly the case and certainly it ceased to be the employee of the appellants"

In the 3rd paragraph on the same page the judgment reads:

"After a perusal of all the provisions of the Electricity Act and the PERD Act along with the provisions of section 18 of the Employment Act, I have no doubt in my mind whatsoever that the responsibility to pay the appellants pensions earned under UEB service were transferred to the successor company, the respondent".

From the foregoing quotes, it appears that Mr. Kanyimibwa's p.o has some merit in it, for a non existent entity cannot sue or be sued. Any suit against or on behalf of a non existent entity is a nullity and so is any judgment arising therefrom.

The effect of the CA decision is therefore that the Nyamareres instituted HCCS No.719 in 2005 against an entity that had ceased to exist after the enactment of the Electricity Act of 1999, when the UGCL accepted and took over the services of the appellants in the Mivunwa case on 2nd April 20001. Their suit and judgment would therefore appear to be a nullity as far as the law stands now, as interpreted by the Court of Appeal."

With great respect to the learned trial judge, the judgment of the Court of Appeal was grossly quoted out of context and misunderstood.

First, the first quote said to be on page 8 of the Court of Appeal decision was quoted out of context because it was removed from a whole paragraph that would have given it its proper meaning. The quotation should have included the rest of the paragraph which was as follows:-

"A careful perusal of the provisions of the PERD Act and the Electricity Act, 1999 set out above will reveal that UEB was dissolved and all its responsibilities, assets and liabilities would be the responsibility of a successor company to be floated under the Companies Act. This would take place on the date fixed and announced by the Minister referred to in the Electricity Act as the "<u>transfer date".</u> It is not very clear on the evidence on record whether the Minister announced a transfer date and which date it was. However, on 20th March, 2001 UEB wrote to the appellants informing them that their services would be transferred to

UEGCL and that they would be transferred on the same terms and conditions of services stipulated in UEB Standing Instructions in force in line with the provisions of the Electricity Act, 1999. This would be with effect from 2nd April, 2001. On 11th July, 2001 the UEGCL wrote to the appellants informing them that the company had with effect from 2nd April, 2001 accepted the appellants into their company on terms and conditions they enjoyed while serving under UEB.

This offer by UEGCL was promptly accepted by the appellants who had continued working even before this date.

As far as the appellants were concerned, whether the Minister set the transfer date in writing or not, was not material. Their acceptance of the contractual terms offered by the respondent constituted a contract of employment. However, the contract was unique in a sense that it had the backing of the Electricity Act, 1999, the PERD Act and the Employment Act."

A reading of the complete paragraph would show that:

(a) Uganda Electricity Generation Co. Ltd [UEGCL] was the respondent we were dealing with and not UEB or UEB in Liquidation.

(b) It says that the passage of assets and liabilities would be on the date fixed by the Minister referred to in the Electricity Act as the transfer date.

(c) We also made it very clear that it was not clear whether the transfer date had been announced by the Minister responsible or not.

(d) That in the case we were dealing with, it was not material whether the transfer date had been appointed or not because the liability of the respondent, UEGCL did not depend on existence the or non existence of the respondent [UEGCL] but on written employment contracts between UEGCL and its employees who were formally employed with UEB.

(e) The existence or non existence of UEB was not an issue.

Even the quotations said to have been quoted from pages 10 and 11 of the judgment of Twinomujuni, JA were misunderstood. The clear meaning of those extracts are:-

(a) That the Electricity Act 1999 dissolved UEB but the date of dissolution was in accordance with S.126 (2) **"on the transfer date appointed under subsection (1) of the Act.**

(b) The UEB was discussed **OBITER** because the trial judge in the High Court had found that UEB was liable to pay the appellants because it still existed despite the Electricity Act.

(c) All references to the respondent in our judgment meant UEGCL and not UEB.

I have stated that the extracts quoted on page 10 and 11 of the judgment of Twinomujuni, JA were made obiter. BLACKS LAW DICITITONARY defines obiter dictum as a **"remark made or expressed by a judge, in his decision upon cause 'BY THE WAY' – that is incidentally or collaterally, and not directly upon the question before the court; or any statement of law enunciated by the judge or court merely by way of illustration, argument, analogy or suggestion."**

It is something said in passing and does not constitute the ratio disdendi in the case. It is not binding on any court though it is persuasive where relevant. The existence or non-existence of UEB was not an issue at all and the appeal was decided on the basis of written agreements entered into between Uganda Electricity Generation Co. Ltd and its former employees who had long ceased to be employees of UEB.

It is noteworthy that the existence of UEB is up to this point contentious because it is not clear whether the TRANSFER DATE referred to in Section 126(2) of the Electricity Act 1999 has ever been appointed. Despite a few slip-ups in the judgment of Twinomujuni, JA, it was clear in the obiter dictum that UEB would cease to exist on the transfer date appointed by the Minister. I must repeat, for avoidance of any doubt that the Court of Appeal never decided that UEB in liquidation did not exist. The ratio decidendi of its judgment was that UGANDA ELECTRICITY GENERATION CO. LTD was the right party, and not UEB, to be sued for recovery

of terminal benefits accruing to the former employees of UEB who had opted to serve the successor company on similar terms as in UEB. This was because the successor company had entered into agreements with the former employees accepting all liabilities of UEB to the said employees. This holding was challenged in Supreme Court in Civil Appeal No.24 of 2007 and was upheld. The challenge was dismissed. Holdings or pronouncements made obiter cannot be relied upon to nullify a courts own previous judgment or a judgment of any other court. [Emphasis supplied]

ISSUE NO. (b)

This brings me to consideration of whether the learned trial judge had power to nullify her judgment in HCCS No.719/2005. Counsel for the appellants submitted that the trial judge was wrong to nullify her own judgment. They argued that having pronounced upon and finally determined the issues in HCCS No.719 of 2005, she was functus officio and could not nullify the same. They relied on **Mapalala vs. British Broadcasting Corporation [2002] 1 EA 132,** a decision of the Court of Appeal of Tanzania.

Mr. Wamala, learned counsel for the respondent submitted that the trial judge, did not nullify her own judgment. He contended that all she did was to observe, obiter dicta, that it would appear that in light of the decision of the Court of Appeal, her earlier decision was a nullity. In his view, this did not nullify her decision.

In the case of **Mapalala vs BBC [Supra]** the facts were reported at page 132 under the Editors Summary as follows:-

> ***"The appellant obtained from the High Court an ex parte judgment and decree against the respondent on 13 April 1995 for UK £800,000 being general damages for defamation. He then proceeded to execute the decree in England. It turned out that according to the laws on execution of foreign judgments, the decree could not be executed, one reason being that the respondent was neither carrying on business nor resident within Tanzania and did not appear or submit or agree to submit to the jurisdiction of the Court.***

The appellant returned to the High Court at Dodoma praying for the Court to review its judgment under Order 42, rules 1 and 3 and section 95 of the Civil Procedure Code. The appellant asked the court to quash its ex parte judgment of 13 April 1995 and allow him to amend the plaint to include the alleged correspondent of the respondent in Tanzania as a co-defendant.

On 5 February 1998 the High Court granted the application. On the basis of the amended plaint, fresh hearing commenced. Judgment and decree was given in favour of the appellant for TShs 30 million and both the appellant and the respondent appealed separately. The appeals were consolidated.

The hearing of the appeal, the Court of Appeal invited advocates for both parties to address the Court on the legality of the proceedings arising from the ruling of the High Court of 5 February 1998 and in particular, whether the learned judge had power to quash his own judgment and proceedings and start hearing the case afresh.

Counsel for the appellant maintained that it was necessary to review the judgment because the appellant's inability to execute the judgment in England was a new matter and the appellant had to seek remedy from the High Court which still had jurisdiction to deal with the matter. Counsel further submitted that it was also proper for the judge to amend the plaint long after delivery of judgment because execution was part of the proceedings.

Counsel for the respondent submitted that the conditions for review of the case were not met by the appellant and that the learned judge erred grossly in quashing his own decision."

At page 133 of the report, the holding of the court is reported in paragraph (d) that:-

"It was highly irregular and improper of the learned judge to quash his previous judgment because this had the effect of the Court sitting in appeal

in its own decision. The learned judge had become functus officio once he had pronounced his judgment: <u>Kamundi v Republic {1973} EA 540</u> applied.

The order of the Court of 5 February granting the application for re-view and all subsequent proceedings were a nullity and the judgement of 13 April 1995 remained valid."

From the above, it is trite that once a judge pronounces a decision in a matter, he/she becomes functus officio and cannot nullify it by a subsequent decision in a review or in any application.

The only remaining question is whether the trial judge in the instant case nullified or purported to nullify her previous judgment. The learned trial judge stated:

"The effect of the CA decision is therefore that the Nyamareres instituted HCCS No.719 in 2005 against an entity that ceased to exist after the enactment of the Electricity Act of 1999, when the UGCL accepted and took over the services of the appellants in the Mavunwa case on 2nd April 2001. Their suit and judgment would therefore appear to be a nullity as far as the law stands now, as interpreted by the Court of Appeal."

Clearly, the decision of the court contained in the above extract is that her earlier judgment in HCCS No.719 of 2005 was a nullity and unless the Supreme Court reversed the decision of the Court of Appeal the result would be that the appellant had sued a non-existent party. This has the effect of nullifying her entire judgment in HCCS No.719 of 2005. Under the authority in **<u>Mapalala case,</u>** this was a serious error. She had no power to do that.

This takes care of the grounds 1 and 4 of the Memorandum of Appeal. The summary of my findings is that:

(d) The learned trial judge erred when she dismissed Misc. Cause No.290 of 2007.
(e) The learned trial judge was in error when she nullified her previous judgment in HCCS No.719 of 2005.

ISSUE NO. (c).

This is whether he is entitled to any remedies. This issue is indirectly raised in grounds No.2 and No.4 in the Memorandum of Appeal and directly raised in the prayers contained therein to the effect that:-

"(c) The court grants consequential orders."

This was the sole prayer in **Misc. Cause No.290/2007 Paul Nyamarere vs UEB** and the question is whether this court should entertain the matter or return the file to the High Court with a direction that the matter be handled in that court.

Mr. Bashasha learned counsel for the appellant requested that we deal with the matter following the Supreme Court decision in **Yonasani Kanyomozi vs Motor Mart (U) Limited Civil Appeal No.15 of 1995** because this court has the power to do so and a final verdict in this protracted dispute is long overdue.

Mr. Wamala, learned counsel for the respondent did not agree. He contended that should we allow the appeal, the matter would better be handled by the High Court as the file contained sensitive issues which may require further hearings in the High Court.

Paragraph three of the plaint in HCCS No.719/2005 **Paul Nyamarere vs UEB, the plaintiffs stated:-**

> **"The plaintiffs' claim against the defendant is a declaration that they are entitled to true and actual pension and gratuity and an order that the same be computed in accordance with the formula in STANDING INSTRUCTIONS, UGANDA ELECTRICITY BOARD 1992 and be paid with interest and general damages for breach and terms of conditions."**

The plaintiffs did not mention any figure as the expected quantum of the claim calculated at the date the plaint was filed. The trial judge who heard the suit made her orders in favour of the plaintiff in the following terms:-

"In the result, I make the following orders/declarations:-

(1) A declaration that the pension and gratuity for the plaintiffs still with the successor company be ascertained computed and transferred to the Contributory Pension Fund.

(2) An order that the pension and gratuity for those of the plaintiffs who were retired, dismissed or terminated after transfer to the successor companies and who quality, be calculated and ascertained using the formula in the Standing Instructions (No.22) and paid out to them subject to No. (5) below:-

(3) The plaintiffs be paid general damages of shs 500,000 each.

(4) A declaration that the plaintiffs were never retrenched by the defendant.

(5) A declaration that the defendant is entitled to off set the payments made to the plaintiffs from the payments due to them as pension or gratuity under the 1992 Standing Instructions.

(6) An order that, if the payments due to the plaintiffs as pension and gratuity turns out to be less than the retrenchment packages paid to them then the defendant shall bear the loss due to the reasons given in this judgment.

(7) The defendant shall pay interest on (2) at 18% per annum from date of judgment till payment in full.

(8) The defendant shall pay ½ (half) the costs of the suit based on the value of the computed plaintiffs' entitlements.

Since no quantum of this claim was made in the plaint, the learned trial judge could not attempt to quantify the claim. Documents on the Record of Appeal show that the appellants made their own calculations and claimed around Ug. Shs.28,000,000,000/= [Twenty eight Billion shillings only]. The liquidator of the respondent appointed two experts, a lawyer and an Accountant, to quantify the claim in accordance with the courts award. They came up with a figure of Ug. Shs.105,229,185/= [One hundred and five million, two hundred and

twenty nine thousand, one hundred and eighty five only]. This amount was rejected by the appellants. The parties agreed to refer the matter to the Auditor General who had helped resolve disputes in similar situations involving former UEB employees. He did the computation and came up with a figure of about Ug.shs.28,000,000,000/= [Twenty eight Billion only] a figure almost similar to that claimed by the appellants. This figure was disputed by the liquidators of the respondent. By the end of 2007, the computation by the appellants because of interest, had risen to over thirty nine billion shillings. As a result this dispute attracted the attention of His Excellency the President. He referred the matter to the Minister of Finance. The Minister convened a meeting where the two competing claims were discussed. The meeting directed the Attorney General to request the Auditor General to recompute the claim. The Attorney General wrote the following letter to the Auditor General whose contents are self explanatory. It is here below reproduced:-

"22 May 2007

The Auditor General of Uganda

P. O. Box 7083

Kampala

Sir,

RE: HCCS NO.719 OF 2002 PAUL NYAMARERE VS. UEB AND MISC. APPLICATION NO.18 ARISING OUT OF HCCS NO.719 OF 2002.

1. **There was a meeting chaired by the Minister of Fiancé, Planning and Economic Development on 30.04.07. This meeting was pursuant to the directive of H.E. the President in search of a way forward in the above subject.**

2. **Your department was represented at the said meeting.**

3. **I have received a copy of the Minutes of the Meeting of 30.04.07. I forward a copy to you.**

4. **The subject of my present writing is Minute 3.5. In its entirety, the minute reads as follows:-**

"3.5 Resolution by the meeting

The meeting observed and noted and the basis of the Auditor General's report was based on the interpretation of the judgment given by the Solicitor General. It also noted that the said interpretation went beyond the parameters of the judgment and the meeting thus sought to restrict it to the judgment. The meeting therefore resolved as follows:-

1. **That the Attorney General will in tandem with resolution of the meeting instruct the Auditor General in writing to re-compute the sums due under the judgment.**

2. **On the instructions of the Attorney General, the Auditor General's Office carries out the computation with immediate effect as time is of essence.**

3. **The revised report of the Auditor General mentioned in 2 above will be reviewed by the meeting before it is submitted to court.**

4. **The official Receiver/Liquidator forwards the revised experts reports to the Auditor General.**

5. **A follow on meeting be held on Monday 7th May 2007 at 3.00 p.m.**

6. **I understand that 3.5.4 has already been complied with. I enclose the letter of the official liquidator reference UEB/LIQ/001 of 07.05.07 and attachments.**

7. **I now write to request you to assist Government by dealing substantively with 3.5.1 and 3.5.2.**

8. **Your prompt action in this matter will be greatly appreciated.**

Hon. (Dr.) E. Khiddu Makubuya, M.P.
ATTORNEY GENERAL MINISTER OF JUSTICE

AND CONSTITUTIONAL AFAIRS."

The record of appeal does not contain any material to let us know whether the requests of the Attorney General in paragraph 7 of the letter to the Auditor General were complied with. I would have been heavily inclined to follow his final computation if his report was on this record because indeed this court has the power to do so and the suit has taken long. The claimants are in danger of dying without receiving a penny of their hard earned benefits. But apparently, the matter is still pending with the Auditor General. In those circumstances this court should not grant the consequential orders as prayed. The matter can better be handled by the High Court of Uganda.

Hon. Lady Justice C.K. Byamugisha, JA and Hon. Mr. Justice Kavuma, JA, agree with this judgment.

In the result, I would order as follows:-

(a) The appeal be allowed and is hereby allowed.
(b) The order of the High Court in Misc. Cause No.290/2007 be and is hereby set aside.
(c) Misc. Cause No.290 of 2007 be returned to the High Court to be heard and finalised as a matter of urgency.
(d) Costs of this appeal be awarded to the appellants.
(e) Costs of Misc. Cause No.290/07 abide the result of hearing just ordered in (c) above.

Dated at Kampala this …31st …day of …August…..2009.

Hon. Justice A. Twinomujuni
JUSTICE OF APPEAL.

JUDGMENTOF BYAMUGISHA, JA

I agree with the final orders that have been proposed in the lead judgment that has just been delivered. I have nothing useful to add.

Dated at Kampala this … day of …August, …….2009

C.K.Byamugisha
Justice of Appeal

JUDGMENT OF S.B.K.KAVUMA, JA

I have had the benefit of reading the judgment prepared by A.Twinomujuni, JA. I agree with that judgment, the reasoning for the same and the orders made therein.

Dated this …31st … day of …August……2009

S.B.K.Kavuma
Justice of Appeal