**Kafuma v Kimbowa Builders and Contractors**

**Division:** High Court of Uganda at Kampala

**Date of judgment:** 19 October 1973

**Case Number:** 1366/1972 (35/74)

**Before:** Nyamuchoncho J

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*[1] Civil Practice and Procedure – Judgment – Consent – Entered by advocate not on record and*

*without authority – Judgment set aside.*

*[2] Advocate – Authority – To consent to judgment – Not on record or authorised – No authority.*

*[3] Insurance – Motor insurance – Court action – Circumstances under which insurance company may*

*take over action – Traffic and Road Safety Act* 1970, *ss.* 34, 35 (*U.*)*.*

**JUDGMENT**

**Nyamuchoncho J:** This is an application by the defendant to set aside a consent judgment entered against him in favour of the plaintiff on 30 April 1973 in the sum of Shs. 105,000/- general damages, Shs. 10,000/- costs and Shs. 600/- special damages on the ground that Mr. Mugenyi, counsel who compromised the action had never been instructed by him to act on his behalf, and that he acted without authority. The facts which led to the bringing of this application are as follows: On 8 July 1972, the plaintiff’s husband Asumani Kafuma was killed in a road accident when the motor vehicle owned by the defendant in which he was travelling overturned. The plaintiff as one of the widows of the deceased instructed Mr. Tibamanya, an advocate, to file an action against the applicant for damages on behalf of herself and the other dependants. Mr. Tibamanya filed a written statement of claim on 10 November 1972. On 12 December 1972 the defendant entered appearance by his advocate Mr. Kawere and on 18 December 1972 Mr. Kawere filed a defence. On 8 March 1973 by consent of both parties, the suit was fixed for hearing on 8 June 1973. On 30 April 1973 Mr. Lukeera an advocate with whom Mr. Tibamanya had gone into partnership wrote to the deputy chief registrar asking him to enter a consent judgment. The letter reads: “The Deputy Chief Registrar, High Court, Kampala. Sir, Re: High Court Civil Suit No. 1366 of 1972 Nagitta Kafuma v. Kimbowa Builders & Contractors We refer you to the above case and have to state that it is mutually agreed by both parties that judgment be entered in favour of the plaintiff and the defendant shall pay the plaintiff Shs. 105,000/- as general damages, Shs. 10,000/- as costs and Shs. 600/- special damages. We, therefore, request you to mark the case file as aforesaid and please note that on 8 June 1973, on which date this case is fixed for hearing, we shall only seek the approval of our assessment and also deal with the apportionment among the minors. Yours faithfully, LUKEERA for Lukeera & Company. We consent (signed) Counsel for the defendant, Mugenyi.” The deputy chief registrar promptly entered a consent judgment on 30 April 1973 in the terms set out in the letter. On 18 May 1973 Mr. Mugenyi wrote to the General Manager, National Insurance Corporation advising him to pay. His letter reads: “The General Manager, National Insurance Corporation, Kampala. Dear Sir, H.C.C.S. No. 1366/72 Nagitta Kafuma v. Kimbowa Builders & Contractors Your plaint, Defence and Police Report attached. In this case, your insured M/S Kimbowa Builders & Contractors had their motor vehicle overturned as a result of which the plaintiff’s husband was killed. He was a mere passenger. The driver was negotiating a blind bend which he failed to do properly and lost control of the motor vehicle. A defence was filed but it does not raise the issue of inevitable accident or any other matter which would exonorate the driver from the charge of carelessness. There is a large obligation on your side to pay compensation in matters like this where you have underwritten third party risks in respect of a motor vehicle like this which causes mischiefs. This is a straightforward claim for loss of dependency and using the usual formula after making every possible allowance the figure works out at Shs. 105,000/- general damages, Shs. 10,000/- costs and Shs. 600/- special damages. We would advise payment and should, therefore, be grateful if you would let us have your cheque for Shs. 125,600/- including of our costs as per attached statement. Yours faithfully, MUGENYI for: Mugenyi and Company.” The General Manager simply ignored the letter. On 29 May 1973 Mr. Tibamanya for Lukeera & Company wrote to the deputy chief registrar a letter setting out the apportionment of damages to the dependants and asked the registrar to draw the judge’s attention to the apportionment. On 8 June 1973, Musoke, J. approved the apportionment. On 13 July 1973, the decree was extracted and on that day, an application for execution of decree by attachment was granted. The attachment order was served on the defendant on the 24 July 1973. It is not clear what happened thereafter but on 27 July 1973 the defendant applied for and was granted an order for stay of execution by Musoke, J. who also granted him leave to have the application for an order to set aside the judgment heard during vocation. The application came up for hearing on 17 August 1973. At the start of the hearing Mr. Lukeera for the plaintiff raised a preliminary objection to the effect that this being a consent judgment the court had no jurisdiction to entertain the application. I overruled this objection on the ground that until I had heard the arguments of both counsel I could not decide whether or not the counsel who consented to the judgment had authority to consent to such judgment on behalf of the applicant and ordered the hearing to proceed. From the foregoing it will be observed that the plaintiff instructed Mr. Tibamanya to conduct his case, this he did with his partner Mr. Lukeera; the defendant instructed Kawere & Company who acted for the defendant till 8 March 1973 the day when the case was fixed for hearing. From that day Mr. Kawere disappeared from the scene. Mr. Mugenyi took over the conduct of the case from Mr. Kawere and settled the case on 30 April 1973 with Lukeera & Company without Kawere’s knowledge and without instructions from the defendant. There is nothing on the record to show how he came in but I believe he did so as a lawyer retained by the National Insurance Corporation to deal with cases left over by Mr. Kazzora. It is this judgment signed on 30 April 1973 by Lukeera & Company for the plaintiff and Mugenyi & Company which is called a consent judgment. Mr. Bamutulaki on behalf of the defendant contended that the advocate who purported to compromise the action on behalf of the applicant acted without authority. He had no instructions or authority express or implied to conduct the case on behalf of the defendant. His action cannot bind the defendant. To prove that Mr. Mugenyi had no instructions he referred me to paras. 4, 5, 7 and 8 of the affidavit sworn by Mr. J. Kimbowa and paras. 2, 3, 4, 5, 6, 7, and 8 of the affidavit sworn by Mr. Kawere and to the whole of the affidavit sworn by Mr. Mugenyi. Mr. Tibamanya argued that Mr. Mugenyi had apparent authority to act for National Insurance Corporation in cases of this nature. He exercised his authority in accordance with the provisions of s. 35 (1) (*b*) of the Traffic and Road Safety Act 1970. The defendant could not ignore the provisions of s. 34 (3) of the said Act. The question I have to decide is whether the judgment signed on 30 April 1973 is a consent judgment. What is a consent judgment? I see in Vol. 22, p. 765, para. 1631, Halsbury’s Laws of England, 3rd Edn., the following exposition: “if either party is willing to consent to a judgment or order against himself or if both parties are agreed as to what the judgment or order ought to be, due effect may be given by the court to such consent.” A judgment which meets this definition is a consent judgment and cannot be set aside except with the consent of the parties or by fresh action. The law on this subject has developed on two different lines of authorities. The first line of authorities is represented by *Strauss v. Francis* (1866), L.R. 1 Q.B. 379; *Mathews v. Munster* (1888), 20 Q.B.D. 141; *Welsh v. Roe* (1918), 87 L.J.K.B. 520; *Shah v. Westlands General Stores Properties*, [1965] E.A. 642 and *Najjuka Namwandu v. Musoke*, M.B. 409/71. In these cases the question to be decided was whether the act of counsel in compromising a case was within the scope of his authority. The second line of authorities is represented by *Holt v. Jesse* (1876), 3 Ch.D. 177; *Neale v. Gordon-Lennox*, [1902] A.C. 465 and *Marsden v. Marsden*, [1972] 2 All E.R. 1162. These cases were concerned with the question at what point of time can a consent order be withdrawn. In cases where the courts found that counsel had authority to compromise the action the courts refused to undo the agreement even before it was drawn up. As the law developed the authorities such as *Holt v. Jesse*, and *Neale v. Gordon-Lennox*, decided that before a consent order has been drawn up and perfected the consent given by the counsel may be withdrawn by the client if the counsel gave it under a misapprehension. See also *Marsden v. Marsden*. The cases shown above are not helpful in this case. It must be observed that in the cases quoted above consent was given by an advocate appointed by and representing his client to the suit unlike in this case where an advocate engaged by a corporation not a party to the proceedings compromises an action on behalf of the defendant without any brief from him. Mr. Tibamanya has argued that s. 35 of the Traffic and Road Safety Act 1970 confers the necessary authority on the advocate. This assertion is negatived by the depositions of Mr. Kimbowa, which clearly show that the company did not give the notice of the accident to the Corporation and the depositions of Kawere, Laboke-Oweka and Mugenyi himself. Mr. Kimbowa states: “4. That when I obtained a letter of demand from Messrs. Tibamanya and Company, Advocates, I passed the same to my lawyers Messrs. Kawere and Company, Advocates, whom the company retains as its lawyers. 5. T hat I am advised by the company advocates Messrs. Kawere and Company that they entered appearance and filed a written statement of defence in the suit. 9. T hat as far as I can recollect my company has never instructed Messrs. Mugenyi and Company to represent the Defendant Company in this suit. 10. T hat as far as I recollect and I believe the same to be true Messrs. Mugenyi and Company, Advocates, have never informed me of the proposed settlement or consulted the company about its content and extent.” Kimbowa’s depositions are corroborated by Mr. Kawere who states: “2. That I am retained by Messrs. Kimbowa Builders and Contractors Ltd. as their lawyer and as such I Have acted on their behalf on certain matters. 3. T hat I was instructed by the said company to appear and defend them in the above action. 4. T hat in pursuance of the said instructions I duly entered an appearance and filed a written statement of defence in time. 5. T hat I have since been on record as acting for the above defendant and to my knowledge and recollection no other firm of lawyers has ever been briefed by my clients the said Messrs. Kimbowa Builders and Contractors Ltd., to act for them in the same matter. 6. T hat according to my records the said suit was fixed for hearing on 8 June 1973 when it was not heard. 8. T hat I know of no settlement having been communicated either to myself or to my clients by either Lukeera and Company or Mugenyi and Company Advocates and I am not privy to any purported agreement.” The depositions of Messrs. Kimbowa and Kawere are further supported by the assistant general manager of the claims department of the National Insurance Corporation who in the following paragraphs of his affidavit states: “4. That I was on 24 July 1973 approached by one Joseph Kimbowa Managing Director of Kimbowa Builders and Contractors Ltd., who showed me a copy of this court’s Attachment Order dated 16 July 1973 and asked me to look into the matter and see whether the Insurance Company could indemnify the defendant company. 6. T hat I thereupon started to look for the relevant file but unfortunately did not trace any as the accident had not been reported to the Insurance Company by the insured, the said Messrs. Kimbowa Builders and Contractors Ltd. 7. T hat on a further search of the correspondence I was unable to see any of the correspondence whereby the Insurance either instructed its then Advocates Messrs. Kazzora and Company or Messrs. Mugenyi and Company who took over the files from Messrs. Kazzora and Company Advocates to appear and defend the suit on behalf of the defendant company.” Mr. Mugenyi himself admits that he had no authority to represent the defendant. his deposition in paragraph 2 runs as follows: “2. (*a*) That I was instructed by the National Insurance Corporation to deal with its cases left over by Messrs. Kazzora and Company advocates. ( *b*) T hat I Have on several occasions settled cases out of court subject to instructions from the National Insurance Corporation which approval I have always received. ( *c*) T hat in this particular case I was unable to trace Kazzora and Company’s file but working on the assurance that this case had been drawn to the attention of Messrs. Kazzora and Company before by Messrs. Lukeera and Company Advocates I negotiated a settlement with Messrs. Lukeera and Company. ( *d*) T hat it appears from the National Insurance Corporation’s records and mine that though this is a case in which National Insurance Corporation may be interested that no actual instructions had been received either by my predecessors Messrs. Kazzora and Company or by my firm Messrs. Mugenyi and Company and it appears I was misled in the matter and I acted without proper instructions.” The depositions set out above, make it abundantly clear that the notice of the accident was not given as required by s. 34 of the Act. Consequently the Corporation could not authorise Mr. Mugenyi to conduct a case of which it had no knowledge. I find as a fact that Mr. Mugenyi had no express or implied authority to compromise the suit on behalf of the defendant. He held no brief from the defendant. Did Mr. Mugenyi act for the Corporation? Mr. Tibamanya’s contention is that Mr. Mugenyi had authority to act for National Insurance Corporation in cases of this nature and that he acted under this authority pursuant to the provisions of s. 35 (1) (*b*) of the Traffic and Road Safety Act 1970; that it was not necessary to consult the defendant before effecting a compromise is further negatived by Mr. Mugenyi who says that he was instructed to handle cases left over by Kazzora and Company. His authority was limited to those cases. As he did not have the file in connection with the case it must be assumed that Mr. Kazzora had no instructions to represent the National Insurance Corporation. In this case could the Corporation take over proceedings under s. 35 (1) (*b*) as alleged? The relevant provisions of s. 35 of the Act relied on by Mr. Tibamanya enact– “35 (1) An Insurance Company that is a party to a contract of insurance under this Part of this Act, (*a*) . . . . . . (*b*) May take over during such period as it thinks proper the conduct and control on behalf of the owner or other person of any proceedings taken or had to enforce any such claim or for the settlement of any question arising with reference thereto;. . .” This provision, looked at in isolation, appears to give the insurance company the necessary power to take over the conduct of proceedings at any time, but, I believe, it is qualified by s. 35 (2) which enacts: “(2) The owner or any other person shall sign all such warrants and authorities as the insurance company may require for the purpose of enabling the insurance company to have the conduct and control of any such proceedings.” In my view there must be prior agreement between the insurance company and the insured before the company takes over the conduct of proceedings. The insurance company must have authority from the insured and this authority should appear on the record. Was there such agreement in this case between the National Insurance Corporation and the defendant company? The record shows that National Insurance Corporation was not aware of the proceedings; see para. 6 of Mr. Laboka-Oweka’s affidavit; this is corroborated by the deposition of Mr. Lukeera in paras. 17 and 18 of his affidavit which states: “17. That Mr. Levi Laboke-Oweka and Mr. Kiwanuka of the National Insurance Corporation came to my office during the month of June, the date I cannot recall, and told me that they had heard from their advocates M/s Mugenyi and Company that we had settled this case and that they wanted me not to expedite execution as they did not have the particulars of the accident and that they were in liaison with Messrs. Mugenyi and Company their advocates to obtain particulars and they asked to give them some particulars if I had any. 18. T hat I made a photostat copy of all relevant papers in my file and handed them over to Mr. Kiwanuka.” It should be noted that the consent judgment was entered on 30 April 1973, and the apportionment was approved on 8 June 1973. If we accept Mr. Lukeera’s depositions then it becomes apparent that the consent judgment was entered at a time when the Corporation did not know of the existence of the proceedings against the insured and therefore, it could not avail itself of the provisions of s. 35 of the Act and could not authorise its lawyer to compromise the action it was not aware of. Again, the apportionment of damages was approved on 8 June 1973 when the Corporation did not have particulars of the accident. It seems to me that before an insurance company acts under s. 35 (1) (*b*) of the Traffic and Road Safety Act 1970 it must have authority from the insured who started the ball rolling by giving a notice of such accident under s. 34 to the company. (In this case we are told no notice was given to the Corporation.) On receipt of the notice the company has three alternatives – it can choose to handle the case and negotiate with the third party on behalf of the insured, who would then drop out altogether from the proceedings; or it can wait for proceedings to be brought against the insured. In that case it can take over the proceedings from the insured only in accordance with the provisions of s. 35 (2). This subsection precludes a company from interfering with proceedings without obtaining the authority of the insured. The last alternative is for the company to wait until judgment is entered against the insured and then foot the bill. There is no provision in the Act whereby an insurance company can be sued by the third party. Accordingly the third party must bring an action for damages against the tortfeasor. I asked Mr. Mugenyi how s. 35 (2) of the Traffic and Road Safety Act is implemented in practice. He replied that the Corporation would write to him to say that he is instructed to take over the proceedings from the insured on given conditions. Then he would file a notice of change of advocates on the record (which he did not file in this case.) Mr. Tibamanya argued that there is no rule requiring such notice of change of advocates to be filed. He contended that it is a mere practice which can be departed from and in fact many advocates do not follow it. It is true there is no rule in the Civil Procedure Rules to require advocates to file a notice of change of advocate but it is desirable that it should be done. This practice has been given judicial recognition. In *Elkan v. Narshibhai Patel*, M.B. 37/60, McKisack, C.J. held that “in the absence of any requirements in the Civil Procedure Rules equivalent to O. 7 of the Rules of the Supreme Court, an advocate may be treated as having ceased to act for a party for want of instructions, if he notifies the Registrar, with reasons, and if the Registrar makes an entry on the record accordingly.” Mr. Tibamanya argued that the insurance company has every right to take over proceedings from the insured because under s. 34(3) the insured is precluded from entering upon or incurring the expenses of litigation as to any matter or thing in respect of which he is so indemnified. I have already discussed the question whether the National Insurance Corporation was aware of the claim against the insured. What I would like to add is that in my opinion that subsection referred to does not preclude the insured from defending his case as is suggested. The matter is put beyond doubt by ss. 34 (4) and 35 (1) (*b*) and (*c*); s. 34 (4) of the Act enables an insurance company to recover from the injured by civil action the amount paid by the insurance company to satisfy the judgment. S. 35 (1) (*b*) and (*c*) enables an insurance company to take over proceedings from the insured. These sections cannot be complied with unless proceedings against the insured have already begun. From the foregoing it is evident that the Corporation did not authorise or instruct Mr. Mugenyi to take over the conduct and control of the proceedings. I hold that whatever Mr. Mugenyi did he did it without authority or from the National Insurance Corporation and the Corporation itself had no authority to assume the role of the defendant. It follows, therefore, that the judgment entered on 30 April 1973 and approved on 8 June 1973 is not a consent judgment. As pointed out above a consent judgment requires that either party is willing to consent to a judgment against himself or both parties are agreed as to what the judgment ought to be. The agreement thus reached, if recorded under O. 22, rr. 2 and 6, binds the parties. In this case it has been established that the defendant has never been a party to the settlement. He was not willing to consent to a judgment against himself. He never authorised his insurer to take over the proceedings in accordance with s. 35, Traffic and Road Safety Act 1970, thus making himself bound by the action of his insurers. The action was not compromised by his appointed counsel Mr. Kawere. A judgment irregularly obtained can be set aside. In *Anlaby v. Praetorius* (1888), 20 Q.B.D., it was held– “Where a plaintiff has obtained judgment irregularly, the defendant is entitled ex debito justitiae to have such judgment set aside.” This decision was followed in *Magon v. Ottoman Bank*, [1968] E.A. 156. In this case the bank obtained an ex-parte judgment against the appellant by reason of his default in filing a defence. The appellant applied to set aside the judgment. He based his application on the fact that the bank’s advocates had extended the time within which to file the defence to ten days from the receipt of their letter and that this letter was only received by the appellant on 16 March 1967 so that the time within which to file the defence had not yet expired when the bank applied for and obtained judgment on 20 March 1967. The appellant claimed to be entitled to have the judgment set aside ex debito justitiae. In his judgment Spry, J.A. said, “In the present case however, the court had no power to pass judgment since the time for filing a defence had not expired. In my opinion, where a court passes judgment when it has no jurisdiction to do so, the person against whom the judgment is passed is entitled as of right to have it set aside and no conditions can properly be imposed. I think, therefore, that the appeal must succeed.” According to Vol. 22, p. 785, para. 1665, Halsbury’s Laws of England, 3rd Edn., where there has been some procedural irregularity in the proceedings leading up to a judgment or order which is so serious that the judgment or order in question ought to be treated as a nullity then the court will set it aside. In *Craig v. Kanssen*, [1943] 1 K.B. 256, Lord Greene, M.R. at p. 262 said– “Those cases appear to me to establish that a person who is affected by an order which can properly be described as a nullity is entitled ex-debito justitiae to have it set aside. So far as procedure is concerned, it seems to me that the court in its inherent jurisdiction can set aside its own order and that it is not necessary to appeal from it.” In *Re Pritchard*, [1963] 1 All E.R. 873, Upjohn, L.J. said: “The authorities establish three classes (and possibly there are also other classes) of proceedings which are nullities: (i) Proceedings which ought to have been served but never come to the notice of the defendant at all. ( ii) Proceedings which have never started at all owing to some fundamental defect in issuing the proceedings; and (iii) Proceedings which appear to be duly issued but fail to comply with a statutory requirement.” So far as I have been able to ascertain, the High Court or the Court of Appeal have set aside judgments which were entered prematurely as in *Magon v. Ottoman Bank and Pirhabhai Lalji v. Hassanali Devji*, [1962] E.A. 306. No case similar to this has ever been decided. However, I have no doubt that it falls in class (iii) of the nullities above in that although the proceedings up to 8 March 1973, when the case was set down for hearing, were in order, subsequent proceedings offend against the Civil Procedure Rules particularly O. 3 and O. 22 of the rules. The counsel who compromised the suit was not duly appointed by the applicant to act on his behalf in accordance with O. 3, r. 1. The counsel purported to represent the Corporation which was not a party to the proceedings without being instructed by the Corporation and yet he purported to file a consent judgment under O. 22, r. 2 on the defendant’s behalf with his authority, express or implied with full knowledge that he held no brief for him. This procedure is so irregular by itself as to render the judgment entered a nullity. In addition the provisions of s. 35 of the Traffic and Road Safety Act 1970 were not complied with. I hold that the plaintiff obtained judgment against the defendant in a most extraordinary way, and it would be grossly unjust for a court to enforce such judgment against him. I would, therefore, allow this application. I order that the judgment and the apportionment approved by the court be set aside. I further order that the case be restored to the cause list and that the sum of Shs. 20,000/- deposited in court be refunded to the applicant. *Order accordingly.*

For the plaintiff:

*A Tibamanya* (instructed by *Lukeera & Co*, Kampala)

For the defendant:

*GM Bamuturaki* (instructed by *Kirenga & Gaffa*, Kampala)