THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

CIVIL APPEAL NO. 98 OF 2017

(ARISING FROM NABWERU CIVIL SUIT NO. 10 OF 2016)

VISION FUND UGANDA LIMITED :: APPELLANT

VERSUS

BUWEMBO MONDAY KASULE :: RESPONDENT

BEFORE: HON. JUSTICE BONIFACE WAMALA

JUDGMENT

Introduction

[1] The Appellant being dissatisfied with the judgement and decree of **Her Worship Ajuna Doreen**, Magistrate Grade One, delivered on 2nd October 2017 at Nabweru Chief Magistrates Court, brought this appeal seeking orders that the appeal be allowed, the decision and orders of the learned trial Magistrate be set aside and costs of the appeal be borne by the Respondent.

Brief Background to the Appeal

[2] The Respondent filed Civil Suit No.10 of 2016 against Appellant in the Chief Magistrates Court of Nabweru for a declaration that the plaintiff's motor vehicle Reg No. UAJ 939T was wrongly sold by the defendant, for general damages and costs of the suit. The Appellant had advanced to the Respondent a loan facility of UGX 8,000,000/= on 10th April 2014 payable within one year in monthly installments of UGX 906,600/= totaling to UGX 11,360,000/=. The loan was secured by a motor vehicle Reg. No. UAJ 939T Toyota Hiace. It was alleged that the plaintiff failed to pay the outstanding balance on the loan and the motor vehicle was valued, advertised and sold by the Appellant (defendant). The Respondent brought the suit challenging the legality of the sale. The trial Magistrate entered judgment in favour of the plaintiff (now Respondent),

awarding him damages, interest and costs. The Appellant was dissatisfied with the judgment and decree, thus this appeal.

Representation and Hearing

[3] At the hearing, the Appellant was represented by **Mr. Mulema Mukasa** from M/s KSMO Advocates while the Respondent was represented by **Mr. Mbasa Denis** from M/s Kigenyi Opira & Co. Advocates. It was agreed that the hearing proceeds by way of written submissions which were duly filed by both counsel. I have considered the submissions in the determination of the matter before the Court.

The Grounds of Appeal

[4] The Appellant raised five grounds of appeal in their memorandum of appeal, namely that;

a) The learned trial Magistrate erred in law and fact when she held that the Respondent had not breached the loan contract he signed with the Appellant.
b) The learned trial Magistrate erred in law and fact when she held that the sale of the Respondent's motor vehicle to recover the loan was unlawful.
c) The learned trial Magistrate erred in law and fact when she awarded the Respondent mesne profits when it was not pleaded.
d) The learned trial Magistrate erred in law and fact when she awarded the Respondent general and punitive damages.
e) The learned trial Magistrate failed to properly evaluate the evidence on court record thereby arriving to wrong conclusions and orders.

Duty of the Court on Appeal

[5] The duty of a first appellate court is to scrutinize and re-evaluate the evidence on record and come to its own conclusion and to a fair decision upon the evidence that was adduced in a lower court. See: *Section 80 of the Civil*

Procedure Act Cap 71. This position has also been re-stated in a number of decided cases including *Fredrick Zaabwe v Orient Bank Ltd CACA No. 4 of 2006*; *Kifamunte Henry v Uganda SC CR. Appeal No. 10 of 1997*; and *Baguma Fred v Uganda SC Crim. App. No. 7 of 2004*. In the latter case, **Oder, JSC** stated thus:

> *"First, it is trite law that the duty of a first appellate court is to reconsider all material evidence that was before the trial court, and while making allowance for the fact that it has neither seen nor heard the witnesses, to come to its own conclusion on that evidence. Secondly, in so doing it must consider the evidence on any issue in its totality and not any piece in isolation. It is only through such re-evaluation that it can reach its own conclusion, as distinct from merely endorsing the conclusion of the trial court".*

Consideration of the Grounds of Appeal

Ground 1: That the learned trial Magistrate erred in law and fact when she held that the Respondent had not breached the loan contract he signed with the Appellant.

Submissions by Counsel for the Appellant

[6] It was submitted by Counsel for the Appellant that the learned trial Magistrate's finding that there was no breach of contract on the part of the plaintiff was flawed. Counsel argued that the assertion by the trial Magistrate that the actions of the defendant were dishonest and intended to frustrate the plaintiff's right of redemption, leading to the finding that there was no breach of contract, was erroneous. Counsel argued that there was no evidence to prove the claims laid by the plaintiff and neither was there a repayment schedule nor any sale. Rather, there was admission of indebtedness by the plaintiff, failure to pay and approval of sale of the security to realize the outstanding sum of money. Counsel submitted that there was no evidence that the Appellant

agreed to the proposal seeking to reschedule the loan. Counsel also submitted that the Respondent had to clear his loan obligations between 10th April 2014 and 10th May 2015 and that the purported letter by the Respondent (plaintiff) dated 21st May 2015 was made after the loan had been recalled by the Appellant.

Submissions by Counsel for the Respondent

[7] In response, it was submitted by Counsel for the Respondent that the learned trial Magistrate rightly analyzed the evidence to the effect that the Respondent sought a loan repayment schedule having travelled out of the country which was backed by a letter dated 21/05/ 2015 that varied the terms of the loan contract. It was further argued that the Respondent had gone further to sell off his kibanja on 20/5/2015 to clear his loan obligation and redeem his vehicle; which was a sign that he was able and willing to meet his obligation under the contract.

Determination by the Court

[8] The undisputed facts are that the parties herein entered into a loan agreement dated 10th April 2014 which was admitted on record as DEX 1. The agreement had clear terms as to payment; which was to be by specified monthly instalments. The agreement also stipulated under clause 2 thereof that in case of non-payment of any instalment that was due, the entire outstanding amount would fall due and payable. It was alleged by the Appellant (defendant) that the Respondent (plaintiff) breached his obligation to pay as agreed and was required to pay up. There is on record a letter dated 27th November 2014 in which the Respondent acknowledged that he had defaulted on payment of the loan as agreed and gave his consent and approval to the move by the Appellant to sell off the motor vehicle which the Respondent had pledged as security for payment of the loan. This document was admitted in evidence and marked DEX 2.

[9] It was argued by the Respondent that the terms of the loan agreement were varied by a loan repayment reschedule pursuant to a letter dated 21st May 2015 in which the Respondent was apologizing for the prior default and was indicating efforts he was undertaking to ensure payment before the sale of the motor vehicle. It is clear in that letter that the Appellant had, by that time, already advertised the motor vehicle for sale in line with the loan agreement. There is no evidence that the above letter was responded to or acted upon by the Appellant in a manner that could constitute a waiver of the Appellant's right to enforce against breach or a variation of the express terms of the contract. Under Section 67 of the Contracts Act 2010, *"where any right, duty, or liability would arise under agreement or contract, it may be varied by the express agreement or by the course of dealing between the parties or by usage or custom if the usage or custom would bind both parties to the contract"*.

[10] In the instant case, there is no evidence of either an express agreement, a course of dealing between the parties, a usage or custom capable of binding both parties from which evidence of variation of the contact herein in issue can be derived. It is an established fact that as at the time the Appellant advertised a notice of sale of the security under the loan agreement, the Respondent was in breach of the express terms of the contract. It was therefore an error on the part of the learned trial Magistrate to find otherwise. I am therefore in agreement that the learned trial Magistrate erred in finding that the Respondent had not breached the terms of the loan agreement. The first ground of appeal accordingly succeeds.

Grounds 2 & 5: The learned trial Magistrate erred in law and fact when she held that the sale of the Respondent's motor vehicle to recover the loan was unlawful <u>and</u> that the learned trial Magistrate failed to properly evaluate the evidence on court record thereby arriving to wrong conclusions and orders.

Submissions by Counsel for the Appellant

[11] Counsel for the Appellant faulted the trial Magistrate for finding that the Appellant sold the pledged security unlawfully. Counsel submitted that the trial Magistrate misdirected herself on matters of law and fact in that since the advert was published on 11th May 2015, the 15 days lapsed on 25th May and a sale on 26th May was after the lapse of the required period of time. Counsel stated that the Appellant was served with the interim order on 26th May 2015 after the sale had already happened. Counsel further submitted that, contrary to the magistrate's finding that the purchaser did not sign the sale agreement, the agreement attached to the plaint as Annexure E is duly signed by all the parties. Counsel also faulted the learned Magistrate for relying on the provision under Order 22 rule 64 of the CPR which provision is applicable to execution of court orders which was not the case herein.

[12] Counsel further assailed the learned trial Magistrate for entertaining the claim without jurisdiction on account that the Respondent obtained the loan facility from vision Fund Mpigi but filed a suit at Nabweru Chief Magistrates Court yet the Magistrates Court (Magisterial Area) Instrument SI No.17 of 2017 vests jurisdiction in regard to the instant matter with the chief Magistrates Court of Mpigi. Counsel stated that the application by the Appellant challenging the jurisdiction of the trial court was ignored by the trial court.

Submissions by Counsel for the Respondent

[13] Counsel for the Respondent submitted that the trial Magistrate was right in faulting the Appellant for unlawfully disposing of the Respondent's motor vehicle upon evaluation of the evidence on record. Counsel submitted that the Respondent had a right to redeem his motor vehicle upon performing his obligations which efforts to redeem were frustrated by the Appellant. Counsel argued that the trial Magistrate rightly found that the sale of the Respondent's

motor vehicle was tainted with fraud. Counsel stated that the court order to stay the sale was not overtaken by events since it was served at 8:30am on the day of the alleged sale. Regarding lack of jurisdiction, Counsel submitted that whereas it is true that the Respondent obtained a loan from the Appellant's branch in Mpigi, the head office of the Respondent is situated at plot 256 Bombo Road, Makerere Kavule within the territorial jurisdiction of the trial court. Counsel stated that the loan agreement was partly performed at the head office when the Respondent was forwarded to settle his issues from there. Counsel concluded that the learned trial Magistrate was clothed with jurisdiction to entertain the matter.

Determination by the Court

[14] It is important to note that the Respondent did not challenge the power of the Appellant (lender) to sell the security in principle. The Respondent only challenged the legality and regularity of the procedure adopted by the Appellant in conducting the sale. I need to set out, for avoidance of doubt, that in principle, and based on the agreement between the parties, the Appellant had power to sell the motor vehicle upon default in payment of the loan. Since there was evidence that the Respondent had defaulted in payment, the Appellant had legal authority to advertise the motor vehicle for sale.

[15] The first procedural issue raised by the Respondent before the trial court was that the sale took place on 26th May 2015 before the expiry of the 15 days that were reflected in the advertisement. The law in force at the time was the Chattels Transfer Act Cap 70. The Chattels Securities Act, No. 7 of 2014 was not yet in force since it commenced on 14th December 2018 by virtue of the Chattels Security Act (Commencement) Instrument No. 51 of 2018. The Chattels Transfer Act Cap 70 did not make specific provision for time within which sale of a chattel pledged as security could be done. I have also not seen

any Regulations made under the said Act. However, section 41 of Cap 70 provided for the power and manner of sale. It provided that;

> *"Where an instrument expressly or impliedly gives power to the grantee to sell all or any of the chattels comprised in it without applying to court, the sale shall be by public auction, unless the grantor and encumbrancers subsequent to the grantee, if any, consent to a sale by private treaty".*

[16] In the loan agreement dated 10th April 2014 (DEX 1), it was stated in clause 17 thereof that the lender *"shall have the discretion to dispose of the pledged collateral and recover the outstanding loan, interest and associated recovery costs incurred if the borrower fails to repay any interest"*. It follows, therefore, that upon default, the Appellant had the right and power to sell the collateral without having to apply for an order of sale from the court. The legal requirement was that the sale had to be by public auction in absence of any agreement between the parties to conduct a sale by private treaty. A sale by public auction presupposes a notice of advertisement which serves two purposes; one is to notify intending buyers to express interest in the advertised item and the other is to give time to the borrower to make a last attempt to redeem his interest in the collateral. In absence of a specific legal provision as to the period of time within which the advert is to run, the parties have to adopt reasonable time. Over time, auctioneers have adopted a period of 14 or 15 days in such cases. Under Section 11(1) of the Auctioneers Act Cap 270, an auctioneer is permitted to sell property under auction within such time as the property owner may require except that the auctioneer is not bound to sell the property sooner than seven days from the date he/she has accepted the sale of the property.

[17] In this case, the auctioneer adopted 15 days which he included in the advert. According to the evidence, the advert was published on 11th May 2015. The 15 days elapsed on 26th May 2015, the same day the sale is said to have

taken place at 8.00am. Strictly, the sale ought to have taken place on the day following the 26th May 2015. The fact that it was conducted on the last day of the advert constitutes an irregularity. The question, however, is what effect such an irregularity had on the validity of the transaction. I will return to this point later in this judgment.

[18] The second issue raised by the Respondent before the trial court was that the sale was not conducted by a court bailiff or auctioneer and, as such, it was illegal. As argued for the Appellant, there is no legal provision directing that the sale herein in issue had to be conducted by a bailiff of the court. It has to be understood that this was not a judicial sale; it was not a sale pursuant to an execution of a court order. The guiding principle, however, is that the sale had to be by public auction. Under the Auctioneers Act Cap 270, such a sale could only be conducted by a duly licensed auctioneer. In this case, it was stated that an auctioneer under the name of Kamugumye Korthoson, trading as Focus Auctioneers & Court Bailiffs, was instructed by the Appellant to advertise and sell the motor vehicle in issue. He indeed advertised the property in the Observer Newspaper of 11 – 12 May 2015. The evidence by the Respondent, however, is that the said auctioneer did not conduct the sale. The auctioneer testified before the trial court as PW3 and although he owned up the advert, he stated that he neither conducted the sale nor got to know when and how the sale was conducted. According to the evidence by the Appellant's witness, Nanyonga Rhoda Muganzi (DW1), the sale appears to have been conducted by the officers of the Appellant themselves.

[19] In view of the above, the law governing a sale by public auction was not followed. In absence of evidence by the Appellant that they engaged a different auctioneer or that they had a licence to do the business of public auction, the only reasonable inference is that the motor vehicle in issue was sold without conducting a public auction. This was in breach of the law and thus illegal. I

will also return later to the impact of this unlawful conduct on the part of the Appellant and in regard to the sale of the motor vehicle in issue.

[20] The third issue raised before the trial court by the Respondent regarding the lawfulness of the sale was that the sale took place after the Appellant had been served with an interim injunction order restraining the Appellant or its agents from proceeding with the sale of the motor vehicle vide Nabweru Chief Magistrates Court M.A No. 121 of 2015. It is claimed by the Respondent that he personally served the order on 26th May 2015 at 8.30 am. On the other hand, it is claimed by the Appellant that the sale was conducted on the same date at 8.00 am and, as such, by the time of service of the order, the sale had already taken place. The trial court found that the sale had been conducted in contempt of a clear order of the court and it was thus illegal.

[21] In my view, strict scrutiny and proof on this issue would have been relevant and necessary if the sale had been lawfully and regularly conducted in other aspects. Nevertheless, in the circumstances of this case, it is difficult to establish when the sale actually took place since it was not conducted by a duly authorized person. At the same time, there is no evidence as to which officer of the Appellant was actually served with the court order. Under Order 29 rule 2 of the CPR, service of process upon a corporation is supposed to be effected through the secretary, a director or other principal officer of the corporation. In absence of evidence indicating the person who was actually served, it would not be possible for the court to establish whether the Appellant had knowledge of the court order before they purported to sell the property in issue. In that regard, I have found no basis upon which the trial Magistrate found an illegality under this aspect. In my view, if the sale had been conducted lawfully and regularly, it would not have been impeached on this ground.

[22] The fourth and last issue raised by the Respondent before the trial court in an attempt to impeach the sale was that the sale was not complete since the sale agreement was not signed by the purchaser. While the trial court agreed with the Respondent on this issue, I have found absence of clarity on the issue. This is because the copy of the agreement attached to the plaint as Annexure E is signed by the purchaser while the copies attached to the WSD and on the witness statements bear no signature of the purchaser. Noteworthy, however, is that all copies bear the signature of the purchaser on each page except on the last page in respect to the latter category. There was no inquiry by the trial court as to what exactly happened. Since the Respondent who raised this issue is the person that attached the signed copy, the reasonable inference is that the purchaser indeed signed but possibly omitted to sign the last page of some of the copies. I have, therefore, found no substance in this aspect as raised before the trial court.

[23] I now turn to the impact of the illegality (by not conducting a public auction) and irregularity (by selling on the last day of the advert). It was found by the trial court that owing to the above conduct, among others, the motor vehicle in issue was unlawfully sold. While such would be the logical conclusion, the end result arrived at by the trial Magistrate was erroneous. Of course, the error started with the finding by the trial court that the Respondent had not breached the loan agreement. In view of my finding that the Respondent had, indeed, breached the loan agreement, the impact of the illegality and irregularity highlighted above cannot be the same. In this I derive guidance from a number of decided cases by the superior courts establishing a position that where money is borrowed, illegality or irregularity in the execution or securitization of the arrangement does not absolve the borrower of the outstanding indebtedness.

[24] Particularly, in *Formula Feeds Ltd & 3 Others v KCB Bank Ltd, SCCA No. 13 of 2020 [2023] UGSC 35 (13 October 2023)*, the matter concerned a mortgage that was found to have been illegally executed. The Supreme Court while agreeing with the finding of the Court of Appeal adopted the following statement;

> *"First we agree with the finding of the trial Judge that the mortgage deed was illegal. However, a mortgage deed which is a security should be distinguished from a loan or credit facility. If the security is defective, then it simply means that the credit facility is not capable of being reimbursed from that source. This is because the mortgage is simply collateral to and independent from the credit facility"*.

[25] The Court went on to hold that since it was common ground in that case that the borrower had received money from the lender as a loan facility and the borrower had defaulted on some instalments as required, it was without doubt that a person who borrows money is expected to pay it back in accordance with the loan agreement and declaring the mortgage illegal did not extinguish the borrower's indebtedness.

[26] The above being the legal position, it is clear to me that where a loan contract exists and the fact of default on the part of the borrower has been established, any illegality or irregularity in the execution, securitization and/or enforcement of the agreement are secondary to the primary purpose of the agreement; the primary purpose being that one person borrowed another person's money with the intention of paying it back upon agreed terms. In the present case, the evidence is that the Respondent was still indebted to the Appellant to the tune of UGX 9,500,000/= as acknowledged by the Respondent by document dated 27th November 2014 (DEX 2). At the time of enforcing payment, the motor vehicle taken as collateral was valued by M/s Ntende and Associates, valuation surveyors, who returned a market value of UGX

5,500,000/= and a forced sale value of UGX 3,800,000/=. The valuation report was admitted in evidence as DEX 4. Upon sale by the Appellant, the motor vehicle fetched a sum of UGX 4,000,000/=. It was stated by DW1 (the Appellant's Company Secretary) that after the sale, the costs incurred in the advertisement and valuation of the property were defrayed and upon applying the remaining funds to the Respondent's loan, the outstanding balance stood at UGX 5,058,826/=.

[27] From the above facts, I have not found any evidence of under valuation, fraud or deceit committed by the Appellant as would be capable of vitiating the sale. A decision vitiating the sale of a chattel that took place in May 2015 would simply be most unreasonable and unjust especially when taken in absence of very compelling circumstances or on technical grounds. Conversely, the Respondent would be entitled to damages if he proved two matters; one, that he was himself not in default; and secondly, that he suffered some actual damage or loss as a result of the highlighted irregularities. In this case, in absence of any evidence of undervaluation, fraud or deceit committed by the Appellant, I am unable to find evidence of any actual damage or loss suffered by the Respondent. Given that the 15 days of the advert were elapsing on the day the sale is said to have taken place, and the Respondent having been in default as far back as November 2014, the motor vehicle was bound to be sold whatever the circumstances. I do not see how the existence of the highlighted illegality and irregularity would change this position.

[28] In the premises, I would agree with the Appellant that the trial Magistrate erred in holding that the sale of the motor vehicle in issue in recovery of the loan was unlawful and capable of attracting compensation to the Respondent by the Appellant. As analyzed above, the Respondent was bound to pay and he suffered no material loss as a result of the impugned sale. The second ground of appeal thus succeeds. The 5th ground becomes immaterial.

Ground 3: The learned trial Magistrate erred in law and fact when she awarded the Respondent mesne profits when it was not pleaded or prayed for.

Submissions by Counsel for the Appellant

[29] Counsel for the Appellant submitted that the Respondent never prayed for mesne profits nor presented any particulars for loss of business. Counsel cited the case of *Baluku v Bwambale HCCA No. 0045 of 2015 [2018] UGHCCD 78* where the Court declined to award mesne profits on account that business loss had not been pleaded and no particulars of loss were given. Counsel prayed that the Court finds that the award of mesne profits was made by the trial Magistrate in error.

Submissions by Counsel for the Respondent

[30] In response, Counsel for the Respondent argued that since the Respondent in his plaint prayed for any other reliefs that the court may deem fit, one of those reliefs was mesne profits. Counsel submitted that there is no uniform criterion for assessment of mesne profits and that the quantum depends on the facts of each case. Counsel further argued that the trial magistrate having rightly held that there was unlawful sale of the Respondent's motor vehicle, was right to award mesne profits.

Determination by the Court

[31] The position of the law is that a court ought not award remedies not sought for by a party and over which the parties have had no opportunity to address the court. See: *Fang Min v Belex Tours and Travel Ltd, [2015] UGSC 12*. Indeed, inclusion in a pleading of the phrase "any other relief the court may deem fit" is superfluous. The court in its inherent power may, however, grant any relief which it determines to be implied or consequential to its findings and

is within its jurisdiction. The court may exercise that power without the party having to add the above highlighted phrase.

[32] With specific regard to mesne profits, the term in law refers to profits of an estate received by a tenant or occupant in wrongful possession of the estate to which the landlord is entitled to recovery. It is not a term that is applicable to chattels. Loss of money occasioned by deprivation of use of a chattel is recoverable by way of a claim for financial or economic loss or loss of profits. The application of the term mesne profits in the present case by the trial Magistrate was therefore erroneous. Secondly, and equally important, mesne profits are normally claimed and proved as special damages. Owing to the fact that the same were neither pleaded nor supported by evidence, it was an error in law and fact on the part of the learned trial Magistrate to make such an award. Ground 3 of appeal, therefore, succeeds.

Ground 4: The learned trial Magistrate erred in law and fact when she awarded the Respondent general and punitive damages.

Submissions by Counsel for the Appellant

[33] Counsel for the Appellant submitted that the award of general and punitive damages by the trial court was excessive and devoid of legal basis given that no specific amount was claimed for breach of contract, the initial loan amount was UGX 8,000,000/= and the market value of the vehicle was UGX 5,500,000/=. Counsel cited the case of *William Alfred Kisembo & Anor v Kiiza Rwakakaikara Ivan HCCA No. 7 of 2013* which relied on *Mbogo v Shah (1968) E.A 93* for the position of the law as to when a court on appeal may interfere with the exercise of discretion of a trial judge on the question of award of damages. Counsel invited the Court to find that the circumstances of the present case called for interfering with the exercise of discretion by the trial Magistrate.

Submissions by Counsel for the Respondent

[34] Counsel for the Respondent submitted that the trial Magistrate correctly analyzed the law on award of general and punitive damages and found that since the plaintiff was denied his right to redeem his vehicle even when he was willing to do so, he was physically inconvenienced and mentally distressed. Counsel argued that the trial Magistrate was right to award the damages that she did.

Determination by the Court

[35] The position of the law is that an appellate court will not interfere with an award and assessment of damages by the trial court unless the trial court has acted on some wrong principle of the law, or where the amount awarded is so high or so low, as to make the award to be an entirely erroneous estimate of damages to which the plaintiff is entitled. See: *Impressa Federici v Irene Nabwire, SCCA No. 3 of 2000* and *Administrator General v Bwanika James & Others, SCCA No. 7 of 2003*.

[36] In the present case, the learned trial Magistrate based her award of general damages on the finding that the Respondent's vehicle was sold unlawfully on account of the irregularities highlighted in her judgment. She awarded a sum of UGX 20,000,000/= as general damages. Assuming she had been right in her finding regarding the sale, the question is whether an award of UGX 20,000,000/= was a fair and reasonable sum as general damages in the circumstances. The law is that general damages are a natural and probable consequence of the wrong complained of. Although awarded at the discretion of the court, the purpose of the damages is to restore the aggrieved person to the position they would have been in had the breach or wrong not occurred. See: *Hadley v Baxendale (1894) 9 Exch 341; Kibimba Rice Ltd v Umar Salim, SC Civil Appeal No. 17 of 1992* and *Robert Cuossens v Attorney General (SCCA No. 8 of*

1999) 2000 UGSC 2 (2 March 2000). In the assessment of general damages, the court should be guided by the value of the subject matter, the economic inconvenience that the plaintiff may have been put through and the nature and extent of the injury suffered. See: *Uganda Commercial Bank v Kigozi [2002] 1 EA 305.*

[37] On the case before the Court, there was no proof of loss that had been suffered by the Respondent beyond the mere allegation that the motor vehicle had been sold on the last day of the advert, without use of a court bailiff and in presence of an interim order of injunction restraining the sale. The motor vehicle in issue had been valued and its market value was put at UGX 5,500,000/=. There was evidence before the court that the Respondent had not paid back the loan in the terms agreed although the court had found his excuses acceptable. There was no evidence of any material loss suffered by the Respondent as to warrant being granted such a sum in general damages. It is clear to me that the award was not based on the established principles for award of general damages and was manifestly high, representing an erroneous estimate of the sum that a plaintiff in such a case would have been entitled to. I would therefore find this a fit and proper case for interference with the award of general damages made by the trial court. In my considered view, if the trial Magistrate had been right on the issue of liability, the sum awardable as general damages would not have exceeded UGX 5,000,000/= in any event. I therefore set aside the sum awarded by the learned trial Magistrate as general damages.

[38] The learned trial Magistrate also made an award of UGX 10,000,000/= as punitive damages. Under the law, punitive damages are expressed by way of exemplary damages. Exemplary damages represent a sum of money of a penal nature in addition to compensatory damages given for loss or suffering occasioned to the plaintiff. The rationale behind the award of exemplary

damages is to punish the defendant and deter him/her from repeating the wrongful act and should not be used as means to enrich the plaintiff.

[39] According to decided cases, there are only three categories of cases in which exemplary damages are awarded namely; where there has been oppressive, arbitrary, or unconstitutional action by the servants of government; where the defendant's conduct has been calculated by him to make a profit which may well exceed the compensation payable by the plaintiff; or where some law for the time being in force authorizes the award of exemplary damages. There are also three matters that must be borne in mind before making an award of punitive/exemplary damages, namely; the plaintiff cannot recover exemplary damages unless he or she is a victim of punishable behaviour; the power to award exemplary damages should be used with restraint; and the means of the parties are material in assessment of exemplary damages. See: *Rookes v Barnard [1946] ALLER 367 at 410, 411* and *Fredrick J.K. Zaabwe v Orient Bank & Others [2007] UGSC 21*.

[40] On the case before me, the trial Magistrate awarded exemplary damages on the basis that the Appellant had sold off the motor vehicle even when the plaintiff had obtained a court order stopping the same which was served before the sale on 26th May 2015 at 8:30am. If proved, this would have been a good reason for award of punitive damages since it would tantamount to contempt of the court motivated by an intention on the part of the defendant to take an unfair advantage over the plaintiff. However, the sum awarded would be questionable, especially given that the trial court had already made an award of UGX 20,000,000/= in general damages. This made the award illegal since the maximum pecuniary limit of the trial Magistrate was UGX 20,000,000/= which had already been reached. The learned trial Magistrate therefore erred in making the award of punitive damages in the circumstances before her. I

would accordingly set aside the award of punitive damages. Consequently, ground 4 of the appeal also succeeds.

[41] In all, therefore, the appeal has succeeded on grounds 1, 2, 3 and 4 of the appeal. However, owing to my findings in ground 2 of the appeal, the Appellant committed some irregularities which, although could not vitiate the sale of the subject motor vehicle, would constitute justifiable cause for the Respondent (plaintiff) in raising the action before the trial court. For that reason, although the appeal has succeeded, I find reason to adopt the exception to the general rule on award of costs; which is that costs follow the event unless the court, for good cause, decides otherwise. In this case, I find it appropriate that each party bears their own costs in the proceedings before this Court and in the trial court. Accordingly, the appeal is allowed with orders that;

a) The judgment and decree of the learned trial Magistrate are set aside.

b) Each party shall bear their own costs of the appeal and of the lower court.

It is so ordered.

Dated, signed and delivered by email this 4th day of April, 2024.

Boniface Wamala
JUDGE