THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

5 **AT KAMPALA**

Coram: **Hon. Deputy Chief Justice A.E. Mpagi Bahigeine DCJ.**
Hon. Justice S.B. Kavuma, JA.
Hon. Justice A. S Nshimye, JA.

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CIVIL APPEAL N0. 56 OF 2007

M/S DFCU LTD.
15 **M/S DFCU LEASING CO. LTD.::::::::::::::::::::::::APPELLANTS**

VS

SAM R. MUTONGOLE:::::::::::::::::::::::::::::::::::RESPONDENT

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JUDGMENT OF A.S NSHIMYE.

This is an appeal from the ruling and Orders of the High Court (M.S.
25 Arach Amoko J. as she then was), in which the appellant's Written Statement of Defence was struck out with an order to set the suit down for formal proof.

The background to this appeal:

30 In the year 2001, the respondent secured a loan of Ug. Shs. 5, 000,000/= from the 2nd appellant and bought a car registration No. **UAB 264 M.** As security, the 2nd appellant retained the log book for the vehicle and demanded for an additional security. The respondent deposited his log

book for his other vehicle No. **UAD 931G** an OPEL Cadet, the subject matter of the suit in the High Court.

The respondent paid up the loan in full and ownership of the newly
5 acquired vehicle No. **UAB 264 M** was transferred into his names and the log book handed to him. However, the log book for his second car No. UAD 931 D was not returned to him. Following numerous demands for the second log book, the respondent was informed that the log book had been misplaced.

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In the mean time, the Road Licence and 3rd party Insurance for the said car expired and could not be renewed without the said log book. As the respondent could not drive the vehicle, he parked it from 2001 to 2005, during which period it began deteriorating due to non use. The
15 respondent demanded compensation from the appellants who ignored and or rejected the claim.

The respondent sued the appellants in negligence, for damages and refund of incurred transport expenses and costs of the suit.

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The appellants filed a Written Statement of Defence. The respondent, by a Notice of Motion, filed an application for striking out of the said Written Statement of Defence on the grounds that it did not disclose a reasonable defence.

25 The application was allowed and it was ordered that the suit be set down for formal proof hence, the appeal to this court.

The appeal is based on the following grounds;

1. **The learned trial Judge erred both in law and fact in finding that the appellants Written Statement of Defence disclosed no reasonable answer to the plaint.**

2. **The learned Judge erred in law when she went outside the Written Statement of Defence in construing that it did not disclose a reasonable answer to the plaint.**

3. **The learned Judge erred in law when she failed to consider the appellants plea of causation and mitigation.**

During the hearing, Mr. Edward Wakidda represented the appellants while Mr. Mutawe Joseph represented the respondent.

Submissions for the appellants;

Counsel Wakida Edward submitted that the Written Statement of Defence shows that the suit was against the 2 appellants. It was the contention of the 1st appellant that it was not disclosed in the proceedings and that there was no reasonable cause of action against it. The two appellants are different legal entities all together.

The respondent in the plaint complained that the vehicle got damaged because it was parked for a long time. Counsel made reference to the appellant's Written Statement of Defence paragraph 7, page 22, and contended that they pleaded causation. Since there was no connection

between the log book and the damage caused to the vehicle, the respondent had no cause of action in the High Court.

Counsel further submitted that causation and mitigation are valid defences. The respondent must have shown that the appellants owed him a duty of care, that the duty was breached and that as a result of the breach, he has suffered loss. According to the learned counsel, the learned trial Judge does not seem to have considered the above elements. Counsel explained that in the Written Statement of Defence a typing error was made of typing vehicle no. **UAB 264 M** instead of vehicle no. **UAD 931G,** and the appellants did not have an opportunity to correct the error.

On the point of cause of action, he contended that when one is looking for the cause of action, one has to look at the plaint and similarly for the defence, one has to look at the pleadings in the Written Statement of Defence as a whole. Counsel asserted that the learned trial Judge was wrong when she based her ruling on the Affidavit of Joshua Ogwal, the Legal Officer for the Appellants, which was not part of the pleadings. He relied on the case of **Tororo Cement V. Frokina International Ltd. SCCA No. 2 of 2001.**

Finally, he prayed that the appeal be allowed with costs.

Submissions for the respondent;

In reply, Mr. Mutawe, learned counsel for the respondent submitted that the appellant's Written Statement of Defence was struck out in a formal

application MISC. Appl. No. 640/ 2005 which was brought under the inherent powers of court.

Agreeing with the trial judge, counsel contended that the court could go
5 out of the pleadings and look at the supporting affidavits of the application to strike out the defence. He cited the case of **Remmington & Ors. V. Scoles [1895-9] ALL ER 1095** and **Bullen & Leak on pg. 4 & 5** in support of his argument.

10 In respect of ground 2, he submitted that the trial Judge was justified in striking out the Written Statement of Defence because after looking at it and the affidavit of Joshua Ogwal, it was apparent that the fact of failure to return the log book was not anywhere addressed by the appellants. There was no explanation as to why the log book was not returned.

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With regard to **grounds 1 and 3,** counsel referred us to **Para 4** specifically **sub para (h), Para 5 & 10 of the plaint** which is marked as **Annexure PL on pg 15.** This Annexure is a letter written to Mr. Mukasa as the head of credit of the 1st appellant. In the Written Statement of
20 Defence, the 1st appellant did not deny being a party to the proceedings. It therefore put up no defence and has no reasonable ground of appeal. In counsel's considered view, the objection by the 1st appellant of being a non party was an afterthought which ought to be rejected.

On cause of action, counsel submitted that the respondent's case was
25 under paragraph 3, 4, 5, 7, & 10 of the plaint.

Counsel emphasised that the Written Statement of Defence merely raised a general defence which did not specifically answer the respondent's claim, which was, why his log book had not been returned. He relied on **O.6 rules 6, 8 &10** of the Civil Procedure Rules and submitted that the defences raised are in contravention of the rules and that no Judge could have reasonably seen a defence disclosed.

The appellant under paragraphs 8 & 11 stated that the log book was returned which was a bare lie.

On the defences of causation and mitigation raised by the learned counsel for the appellant, counsel Mutawe referred us to paragraph 6 of the defence and contended that even if an amendment was allowed to change the registration number, still it could not have helped.

In his view, the Memorandum of appeal, violated rule 86 (1) of this court's rules which provides:-

> ***(1) "A memorandum of appeal shall set forth concisely and under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against, specifying the points which are alleged to have been wrongfully decided and the nature of the order which is proposed to ask the court to make".***

There is no order that is sought from this court. Counsel cited the Supreme Court decision of **Administrator General V. Okello Joyce &**

Anor. S.C.C.A 15 of **1993** in which the court (Tsekooko JSC) held that such a memorandum was defective.

He prayed that the appeal be dismissed with costs.

5 **Submissions in rejoinder;**

Learned counsel for the appellants in rejoinder, distinguished the case of **Remmington** (supra) by referring us to page 11 of the case where the defence was a bare denial and the appellant was given opportunity to file another defence which was not the case in the present case.

10 If the question was: what happened to the log book I gave you? The cause of action would be detinue and conversion. He referred us to paragraph 3 of the defence where the 1st appellant pleaded that there was no cause of action against it.

15 In order to mitigate his damages, the respondent should have gone ahead to collect his log book when called upon to pick it.

With regard to the memorandum having no prayers, the respondent should have raised it in the scheduling conference so that the appellants

20 could respond in the body of the memorandum.

The observation of Justice Tsekooko was obiter and not binding.

Counsel reiterated his earlier prayer.

Findings of the Court;

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Ground 1

The learned trial Judge erred both in law and fact in finding that the appellants Written Statement of Defence disclosed no reasonable answer to the plaint.

Counsel for the appellant's submitted to us that the respondent had no cause of action and also in their Written Statement of Defence under paragraph 4; they contended that the respondent's claim was devoid of any known cause of action at law and ought to be struck out with costs.

In order to decide the above issue, one has to look at the pleadings in the plaint and have in mind those allegations of fact which constituted the cause of action for the respondent in the High Court.

Without reproducing the pleadings verbatim, in brief they were:-

1. That the respondent deposited his log book for M/V No. UAD 931G with the appellants as security for a loan.

2. That the appellants owed him a duty of care to keep the said log book safely and return it to him after payment of the loan.

3. That he paid the loan, but on demand, the appellant refused or neglected to return, or at worst lost the log book.

4. That as a result, he could not renew the road license and third party insurance for his said motor vehicle No. UAD 931G.

5. That the car was grounded from 2001- 2005 and due to non use, many of its parts got spoilt due to extensive depreciation.

6. That for those years, he had to hire alternative transport at Ug. shs. 15, 000/= a day.

7. That he is claiming damages to put his car back on the road, or its then value and special damages by way of refund of the money he spent on hire plus costs.

Basing on the above facts, I find that there is a cause of action.

Before answering the first ground of appeal, it is necessary to consider the Written Statement of Defence which in summary was:-

1. That the plaint discloses no cause of action.
2. That the log book was returned though motor vehicle No. UAB 264M was mentioned.
3. That the damage to the car was too remote and could not have arisen for non return of the log book.
4. That the respondent was guilty of failure to mitigate the loss by applying for a duplicate log book since he was the registered owner of car.

The Civil Procedure Rules lay down the form and contents a written statement of defence should take.

O.6 rule 8 provides that;

> ***"it shall not be sufficient for a defendant in his or her written statement of defence to deny generally the grounds alleged by the statement of claim, or for the plaintiff in his or her written statement of defence in reply to deny generally the grounds alleged in a defence by way of counterclaim, but each party must deal specifically with each allegation of fact of which he or she does not admit the truth, except damages''.***

The same explanation appears in **Halsburys Laws of England by Lord Hailsham of St. Marylebone, 4th Edn. Vol. 36, Butterworth's, London, 1981, para 30** and the **Code of Civil Procedure by Prof. (Dr.) S. Venkataraman Vol. 2 Madras Law Journal Office, Madras, on pg. 654.**

In Cases & Materials on Civil Procedure by David Crump, 2007, 4th Edn. Lexis Nexis, pg. 23, in responding to a pleading, a party must;

(a) ***state in short and plain terms its defences to each claim asserted against it,***

(b) admit or deny the allegations asserted against it by an opposing party.

Relating the above criterion to the defence presented by the appellants, it
5 is clear they did not specifically deny having failed or neglected to return the respondent's log book, however, they raised other defences like causation and failure to mitigate the loss which are valid and vital defences in determining how much quantum the respondent would be entitled to.

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It follows therefore, that striking out the entire defence would be a fundamental error which would deny the appellant's access to substantive justice.

15 The mistake by the appellant's counsel to have pleaded M/V No. UAB 264M instead of UAD 931G is a professional error which should not be visited on the appellants.

Under Article 126 (2) (e) of the Constitution of the Republic of Uganda
20 provides that,

> ***" ...in adjudicating cases of both civil and criminal nature, the courts shall, subject to the law apply the following principles- substantive justice shall be administered without undue***
25 ***regard to technicalities"***

In my view, the appellants through their counsel made a typing error, but on the whole they put up a reasonable and probable defence to the respondent's claim, which needed to be substantiated by evidence during trial.

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Ground one would for the reasons given above succeed.

10 **Ground 2.**

The learned Judge erred in law when she went outside the Written Statement of Defence in construing that it did not disclose a reasonable answer to the plaint.

15 The respondent applied to have the appellant's defence struck out by way of Notice of Motion because he thought it was evasive. He did so by invoking inherent powers of court under Section 98 of the Civil Procedure Act which provides:-

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> ***"Nothing in this Act shall be deemed to limit or otherwise affect the inherent power of court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court".***

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Paragraph 75 of Halsbury's laws of England also provides that:-

"...the court also has an inherent jurisdiction to stay or dismiss proceedings which are an abuse of its process. The jurisdiction may properly be exercised where facts are proved by affidavit which shows an abuse of the process of court, but the jurisdiction should be sparingly exercised, and only in very exceptional cases".

I have already discussed and found that the appellant's defence was not frivolous, vexatious or an abuse of process since it responded to the plaintiff's claim and that although there was a typing error in it's' defence, it was curable through amendment. With due respect, the learned trial judge erred when she exercised her inherent powers unsparingly and struck off the entire appellants' defence.

I, therefore, find in favour of the appellants on this issue.

<u>Ground 3.</u>

The learned Judge erred in law when she failed to consider the appellants plea of causation and mitigation.

I more or less dealt with the defences of causation and mitigation while disposing of ground 1.

Paragraph 7 of the appellant's Written Statement of Defence stated that the defendants are at a loss to construe the connection between absence of a card with, inter alia, panel beating, spraying, tyres, oil filter, water pumps, front wind screen, lights, bearings, etc as reflected in Annexure A3 & A4 to the plaint.

Paragraph 8 stated that:-

> ***"the defendants shall contend that a log book if lost is not irreplaceable as the Traffic & Road Safety Act permits any person who has purchased a vehicle in full to proceed and apply for his registration or replacement of any lost log book which the plaintiff was advised to do but never did".***

According to Blacks' Law Dictionary by Henry Campbell Black, 6th Edn. West publishing Co. 1990, pg. 221,

> ***"causation was defined to mean the fact of being the cause of something produced or of happening. The fact by which an effect is produced. An important doctrine in the fields of negligence and criminal law''.***

Halsburys Laws of England by Lord Hailsham of St. Marylebone, 4th Edn. Vol. 36, Butterworth's, London, 1981, para 5-18 states that

" the whole approach to the concept of causation is unfettered and permits infinite variation with freedom to choose one or more causes out of a selection of factors, which combined towards the actual happening of the event.''

The defence of causation cannot be severed from contributory negligence since it is negligence that causes injury.

The plea of causation was developed from the famous case **of Donoghue V. Stevenson [1932] A.C 562 at 622.**

When I looked at paragraphs 7 and 8 of the written statement of defence, I noticed the appellants pleaded causation and mitigation.

These, in law, are valid defences and if the trial Judge had set down the suit for hearing, they would have been subjected to scrutiny.

The plea of mitigation is stated under paragraph 8 where the appellants pleaded that where the log book is lost, is replaceable- they referred to the Traffic & Road Safety Act Cap. 361 Which provides that:-

"any person who has purchased a vehicle in full to proceed and apply for his registration or replacement of any lost log book'',

The respondent was advised to obtain a replacement, but never did, thus the appellants' plea of non mitigation.

According to Blacks'Law Dictionary by Henry Campbell Black, 6th Edn.
5 1990, pg. 1002**,** mitigation is defined to mean,

> ***"to make less severe, alleviation, reduction, abatement or diminishing of a penalty or punishment imposed by law".***

10 Mitigation of damages is an affirmative defence and applies when the respondent fails to make reasonable actions that would tend to mitigate his injuries or loss.

I am therefore unable to find justification in the learned trial Judge's
15 striking out of the entire Written Statement of Defence of the appellants.

I would decide this appeal in favour of the appellants and set aside the order of the High Court striking out the appellants' defence and direct that the suit be fixed for hearing on merit.

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I would order that each party will bear its own costs.

Dated this ...**21st**...day of .....**May**..... **2012**

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A. S. NSHIMYE

JUSTICE OF APPEAL

JUDGMENT OF A.E.N.MPAGI BAHIGEINE, DCJ

5 I have read the judgment of my brother A.Nshimye, JA.

I came to the same conclusion that the appeal should succeed.

Since my brother S.B.K.Kavuma, JA is also of the same opinion, the
10 appeal does succeed with orders as stated in the lead judgment.

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A.E.N.MPAGI-BAHIGEINE,
DEPUTY CHIEF JUSTICE

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Dated at Kampala this ...**21st**...day of ....**May**.....**2012**

JUDGMENT OF S.B.K.KAVUMA, JA

20 I have read, in draft, the judgment prepared by A.S.Nshimye, JA.
I agree with the judgment and the orders proposed therein.

Dated at Kampala this ...**21st**...day of ...**May**....**2012**

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S.B.K.KAVUMA
Justice of Appeal

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