THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 147 OF 2012

STANBIC BANK UGANDA LIMITED ..... APPELLANT

VERSUS

1. **SSENYONJO MOSES**
2. **NAKIBUKA NUSULA ..... RESPONDENTS**

(An appeal from the Judgment of the High Court at Kampala (Commercial Division) before His Lordship Hon. Peter Adonyo dated the 22nd day of June, 2015 in High Court Civil Suit No. 445 of 2011)

CORAM: Hon. Mr. Justice Kenneth Kakuru, JA
Hon. Mr. Justice Stephen Musota, JA
Hon. Mr. Justice Christopher Madrama, JA

JUDGMENT OF JUSTICE KENNETH KAKURU, JA

I have had the benefit of reading in draft the judgment of my learned brother Hon Mr. Justice Christopher Madrama.

I agree with him that this appeal succeeds only in part. I agree with his reasoning and with the orders he has proposed.

As Justice Stephen Musota also agrees it is so ordered.

Dated at **Kampala** this .....29th.....day of .....March.....2019.

.....

Kenneth Kakuru

JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

CIVIL APPEAL NO. 147 OF 2015

STANBIC BANK UGANDA LTD.....APPELLANT

VERSUS

SSENYONJO MOSES & NAKIBUUKA NUSULA.....RESPONDENT

(Arising from the Judgment of the High Court (Commercial Court Division) before his Lordship Hon. Peter Adonyo dated 22nd day of June, 2015 in High Court Civil suit No.445 of 2011)

CORAM:

HON. MR. JUSTICE KENNETH KAKURU, JA

HON. JUSTICE STEPHEN MUSOTA, JA

HON. MR. JUSTICE CHRISTOPHER MADRAMA, JA

JUDGMENT OF JUSTICE STEPHEN MUSOTA, JA

I have had the benefit of reading in draft the judgment of my learned brother Hon. Mr. Justice Christopher Madrama.

I agree that for the reasons he has given and the orders he has proposed, this appeal should succeed only in part.

Dated at Kampala this 29th day of March 2019

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Stephen Musota

JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA,

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO 147 OF 2015

(Coram: Kakuru, Musota, Madrama, JJA)

STANBIC BANK UGANDA LTD}.....APPELLANT

VERSUS

1. **SSENYONJO MOSES}**
2. **NAKIBUUKA NUSULA}..... RESPONDENTS**

JUDGMENT OF CHRISTOPHER MADRAMA

The appellant lodged this appeal against the decision of Honourable Justice Henry Peter Adonyo, of the High Court Commercial Division, dated 22nd June, 2015 in which he held that the contract, the subject matter of this suit was illegal on account of breach of the Illiterates Protection Act. Pursuant to the finding he held that the lease letter and the leasing agreement executed between the parties was illegal and unenforceable. Secondly the appellant was ordered to refund to the respondent US$54,000 being their contribution for the purchase of buses which the appellant repossessed. Thirdly, the learned trial judge ordered the appellant to refund to the respondent all the monies deposited by the respondents for the purpose of exaggerating the transaction into the account held by the appellant. Fourthly, the learned trial judge held that the appellant refunds the plaintiffs an amount of Uganda shillings 83,000,000/= being Value Added Tax (VAT) deductions that had been made in respect of the transaction. Fifthly, the learned trial judge ordered the appellant to pay to the respondents general damages of Uganda shillings 30,000,000/= for the mental torture the respondents went through owing to the appellants said illegal actions. The appellant was ordered to pay interest at 21% per annum on the special damages and interest at 6% on the general damages. The respondent's suit against the appellant succeeded with costs.

The appellant appealed against the decision on seven grounds of appeal namely:

1. The learned trial judge erred in law and fact when he declared that the leasing agreement is illegal;

2. The learned trial judge erred in law and fact when he awarded unpleaded and unproved special damages.
3. The learned trial judge erred in fact when he held that the impounding of the buses and the sale was unlawful.
4. The learned trial judge erred in law and fact when he ordered the refund of value added tax of Uganda shillings 83,000,000/= to the respondents.
5. The learned trial judge erred in law and fact in awarding general damages to the respondents.

In the alternative to grounds one and two the appellant averred that court;

6. the learned trial judge erred in law in ordering the refund of US$54,000 and all money paid under the loan;
7. the learned trial judge erred in law and fact in awarding excessive interest on the US$54,000

The appellant prays that the appeal is allowed and the judgement of the High Court set aside. Secondly, the appellant prays for an order for the judgement of the High Court to be substituted with an order dismissing the suit and for the respondents to pay costs of the appeal in this court and the costs in the High Court.

At the hearing of the appeal learned Counsel Mr. Robert Okalang assisted by learned Counsel Ms Kevin Amujong represented the respondents while learned Counsel Mr. Joseph Luswata represented the appellant. With the leave of court, both council adopted their written submissions filed on court record and gave highlights of the submissions orally court.

The gist of this appeal is that the learned trial judge erred in law when he held that the lease agreement was illegal because the Illiteracy Protection Act is not an Act of strict application. It is contended that a mortgage agreement had been executed and remained valid. Secondly, VAT was paid to Uganda Revenue Authority and could not be refunded to the respondents by the appellant. Thirdly, special damages were not pleaded and could not have been proved. The respondents counsel on the other hand supported the judgement of the High Court.

The submissions of the appellants counsel are that the respondent approached the appellant bank for a vehicle loan facility as a result of which Scania buses were purchased with the respondents contributing 20% (US$54,000) towards the purchase price and the appellant paid 80% amounting to US$216,000 equivalent to Uganda

shillings 465,000,000/= then. The buses were registered in the names of the bank and they acted as security for the 80% financing from the bank. The respondents operated the buses but defaulted in repayment of the facility. The buses were impounded and sold and part of the facility recovered. Thereafter the respondents filed this suit alleging illegality of the lease on the ground that they did not understand the English language and were therefore illiterate in that respect. They sought refund of money paid under the loan and lost income. The learned trial judge allowed this claim and declared the leasing agreement illegal for being executed in contravention of the Illiterates Protection Act.

There was an objection to the grounds of appeal on the ground that they were not drawn in accordance with rule 86 of the Rules of this court because they did not set forth concisely the grounds of objection to the decision which are alleged to have been wrongly decided. We overruled the objection and the matter proceeded on the merits.

As far as the grounds of appeal are concerned, appellant's counsel addressed the issue of illegality and contended as a matter of fact that the respondents never tendered in evidence to prove the fact that the Illiteracy was known to the appellant. There was no evidence that the appellants knew that the respondents were Illiterate in the English Language. The appellants counsel contends that the Illiterates Protection Act does not impose an obligation to a party to a contract to investigate whether the person he or she is dealing with is an illiterate in the language of the contract as specifically provided in the Mortgage Act which imposes a duty to investigate whether property in question is the subject of the interest of the spouse or member of the family as stipulated in The Land Act Cap 227. He contended that the Illiterates Protection Act does not impose an obligation on a party to a contract to investigate whether the person he or she is dealing with is an Illiterate in the language of the contract. The appellants counsel relied on the case of **Hart vs. Oconnor (1985) AC 1000** where the Privy Council Court was of the view that a contract with the lunatic made by a person who did not know that the other party was a lunatic can be a valid contract. Secondly, the Illiterates Protection Act creates criminal sanctions for breach of its provisions. As a matter of criminal law, offences are only committed if there is *mens rea* and *mens rea* is not an element of the offence under section of the Act creating the offence. Learned counsel for the appellant further dwelt on the issue that as a matter of evidence there was no evidence to support the finding that the respondents were illiterate in the English language.

Furthermore counsel contended that special damages awarded over all money paid under the loan; US$54,000 and VAT refund of Uganda shillings 83,000,000/= were not pleaded or proved contrary to the judicial precedents.

As far as illegality is concerned, it is based on the *ratio decidendi* in **Makula International Ltd v Cardinal Emmanuel Nsubuga and another [1982) HCB page 11**. The appellants counsel contended that the learned trial judge gave the holding in that decision a wider interpretation of the phrase "an illegality once raised overrides all questions of pleadings including admissions thereon". He submitted that the illegality will be considered by the court notwithstanding that it was not pleaded. Secondly any admissions made of facts which later disclose illegalities will be ignored. Thirdly admissions in pleadings do not stand in the way of addressing the illegal issue. However, the learned trial judge expanded the principle by saying that an illegality "overrides all other factors". The appellants counsel submitted that this principle does not override the requirement in the civil procedure rules to give particulars where necessary. Any loss incurred due to illegal transaction must be quantified as pleaded. The principle does not in any way suggest that special damages need not be proved because of an illegality.

Learned counsel further argued that the learned trial judge erred in law when he ordered a refund of VAT of Uganda shillings 83,000,000/= to the respondent. This arose from the holding that the leasing agreements were illegal and anything under it was refundable. Secondly he contended that there was no proof that VAT was ever paid over to Uganda revenue authority. Evidence that VAT was remitted to URA on a monthly basis by filing is in exhibit D9. Learned counsel further submitted that if the court finds that the leasing agreement was illegal, then the VAT paid under the legal act cannot be refunded to the plaintiff because there is no illegality in tax. In any case the appropriate order was to direct URA to refund the VAT.

In the alternative grounds learned counsel submitted that the learned trial judge erred in law in ordering a refund of Uganda shillings US$54,000 and all monies paid under the loan. He submitted that the US$54,000 was paid to a third party and only money paid to a defendant in an illegal contract is refundable.

With regard to other monies paid under the loan, learned counsel for the appellant submitted that the respondent testified that he only paid the loan according to money received from the buses which had been financed by the bank. In essence they were

paying back the money they got from the bank. At any rate, only 20% would be refunded. Learned counsel further submitted that the learned trial judge erred in law in awarding interest of 21% per annum on the US$54,000 which award was excessive.

Furthermore, he submitted that the plaintiff who claimed interest was under a duty to prove that the interest rate in foreign currency was 21% per annum. The court then had discretion whether to award 21% or less.

Counsel prayed that the appeal is allowed and the prayers in the grounds of appeal granted.

In reply, the respondents counsel opposed the appeal. As noted above, this court overruled the objection to the grounds of appeal under rule 86 (1) of the Rules of this Court. With regard to the issue as to whether the learned trial judge erred in law and fact when he declared that the leasing agreement was illegal, he supported the learned trial judge's reasoning and added additional authorities that we have considered.

On the question of whether there was any evidence to prove the facts of Illiteracy of the respondents, the evidence is contained in the testimony of the respondents at page 160 of the record and paragraph 3 of the witness statements that he was given an application form which the officials themselves filled in and was told to sign which he did. He further testified that they did not allow him to get someone to interpret for him and only asked him to sign. Furthermore the document was not read to him word by word. On the part of the second respondent the same thing happened. The document was written in English and was not translated into her language which she understood.

Furthermore counsel submitted that the evidence of Illiteracy was never challenged by the appellant. With regard to exhibit D7 and exhibit D11 at page 121 of the record of appeal, the documents were written in Luganda and translated by the typist into English which evidence came out.

With reference to the Illiterate's Protection Act cap 78, an illiterate means in relation to any document as the person who is unable to read and understand the script or language in which the document is written or printed. Furthermore, under section 3 of the Act, is provided that where a document is written by another person and signed by the illiterate, it must have the registration indicating who translated.

With regard to the submission that the respondents did not tell the appellants that they were illiterate in the English language, this is not what is envisaged by the Illiterates'

Protection Act. It does not say that by signing a document, one is literate. It goes on to highlight that even where there is a signature, a person can still be illiterate. The respondent's counsel submitted that the respondents proved that they were illiterate.

With regard to ground 2 which attacked the award of special damages and which the appellant submitted was not proved, the reference to special damages is a new ground that never featured in the lower court and cannot be argued in this court. The respondent's counsel submitted that it was averred in the plaint that whatever was paid as a consequence of the illegal transaction had to be refunded. The learned trial judge ordered refund of the respondents US$54,000 being the contribution to the purchase of buses, a refundable deposits made as a consequence of the illegal contract and a refund of Uganda shillings 83,000,000/= being VAT deductions which had never been remitted to Uganda Revenue Authority. The respondents counsel submitted that the learned trial judge did not refer to "special damages" and the plaintiff in the course of hearing proved what was paid in the oppressive agreement. The respondents having suffered financial loss due to misrepresentations of the appellant, it was only just and fair that all monies paid with regard to the illegal contract to be refunded. In any case counsel submitted that the facts were admitted and in terms of section 57 of the Evidence Act Cap 6, "facts admitted in the proceedings need not be proved". It was admitted by the appellant's witnesses namely DW2 and DW3 that the respondents paid the initial agreed deposit to the bank and those facts did not have to be proved. Furthermore the respondents proved payment of all monies under the laws and VAT of Uganda shillings 83,000,000/=.

With regard to ground three, the learned trial judge did not err in law to order refund of Uganda shillings 83,000,000/= to the respondents because this amount was not reflected on the plaintiffs URA account and there is evidence to this effect. There was proof that the appellant had deducted VAT of Uganda shillings 83,814,406/= but the appellants never presented any evidence to show that it was remitted to Uganda Revenue Authority. The respondents counsel submitted that the appellants were aware that they had executed an illegal lease and sought to take advantage of the respondent by deducting what they termed VAT but in fact retained it for their own gain and which sum ought to be paid back the respondents and the lease agreement having been found to be illegal, the VAT cannot be paid to URA.

On the alternative grounds, the respondents counsel submitted that the learned trial Judge did not err in ordering the refund of US$54,000 and all the money paid under the

loan. The assertion that US$54,000 was paid to the third-party for the purchase of buses which buses the appellant impounded and sold was clutching at straws. Respondents counsel submitted that the appellant impounded and sold and enjoyed all the proceeds of the buses without refunding the respondents contribution of 20% and as such the learned trial judge properly ordered for a refund of US$54,000.

With reference to the money paid under the loan, the respondents counsel submitted that the appellant could not retain the money paid by the respondents if they had retained the buses. The appellant having opted to sell the buses, it meant that all monies paid by the respondents ought to be reimbursed in light of the nullification of the lease and the learned trial Judge did not err in fact or law to reach that conclusion.

As far as the award of interest is concerned, learned counsel for the respondent submitted that it is compensatory and is awarded at the discretion of the court. He submitted that the trial Judge judicially exercised his discretion considering the fact that the appellants striped the respondents of their finances since the year 2009 when the illegal lease was executed.

As such the respondent contends that the appeal is incompetent and should be struck out with costs in this court and in the lower court and the decision of the High Court trial Judge upheld.

Resolution of the appeal

I have carefully considered the submissions of counsel for and against the appeal as set out above. This is a first appeal from the judgment of the High Court of Uganda sitting in its original jurisdiction and our duty as an appellate court is to reappraise the evidence and come to our own conclusions on matters of fact and law. Questions of law can be resolved without reference to the evidence provided they are based on uncontested evidence. Where the basis of the law depends on the matter of fact which is in dispute, it is imperative that the question of fact should first be disposed of. The question of fact for resolution of this dispute is whether the respondents were illiterate before the question of whether to apply the Illiterates Protection Act arises.

Our duty when dealing with controversies of fact is to subject the evidence on record to fresh scrutiny and to come to our own conclusions on the factual controversy or controversies with the necessary caution that we did not hear or see the witnesses testify. This duty is spelt out by Rule 30 (1) of the Rules of this court which provides inter

alia that on any appeal from a decision of the High Court acting in the exercise of its original jurisdiction, the court may reappraise the evidence and draw inferences of fact. The power is discretionary. In the case of **Peters' v Sunday Post Ltd [1958] 1 EA 424** at page 429 the Court of Appeal for East Africa held that the jurisdiction to reappraise evidence should be exercised with caution:

> "An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution: it is not enough that the appellate court might itself have come to a different conclusion."

The above held principles were emphasised by the Supreme Court of Uganda in **SCCA No. 10 of 1997 Kifamunte Henry v Uganda** when they held that the duty of a first appellate court is to:

> "...reconsider the materials before the trial Judge. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it."

The appellant appealed against the decision on the seven grounds of appeal which I have already produced above.

At the hearing of the appeal grounds 3 and 4 of the appeal were abandoned by the appellant's counsel and I shall not refer to them.

Most of the grounds of appeal revolve around the basic premises of the issue of whether the lease agreement by which the respondents got a lease of two buses was illegal and unenforceable. The basis of the contention is the illiteracy of the respondents in the English language under the Illiterates Protection Act Cap 78 Laws of Uganda 2000. It would be unnecessary to consider the question of law unless it is was proven that the respondents were illiterates and the trial judge relied on that fact before applying the provisions of the Illiterates Protection Act to declare the agreement in question illegal.

The respondents were the plaintiffs in the High Court and this suit proceeded on the major premise that the respondents were illiterate and the agreement and related documents executed between the plaintiffs and the defendant were unenforceable, null and void. The entire contention of the plaintiffs in the High Court was that they did not read or understand the contents of the lease offer letter. They contended that they understood the oral advice of the appellant's officials that the respondents would

contribute 20% of the total cost of the buses and the appellant would advance 80% of the costs of the buses. The respondents would pay off the 80% from the operations of the buses depending on the actual earnings of the buses. They however did not understand the documents which they executed.

The respondents contended in the plaint that when the buses were surprisingly impounded they became aware of the terms and conditions of the facility when they obtained copies of documents thereof. It is averred in the plaint that the plaintiffs were informed that the two buses were auctioned for Uganda shillings 190,000,000/= and Uganda shillings 120,000,000/= respectively and the defendant was demanding from the plaintiff Uganda shillings 133,108,802.58/= on both accounts of the two buses. Among other things, the plaintiffs alleged misrepresentation, oppression and undue influence and particularly failure to translate the contents of the lease agreement into Luganda.

In the written statement of defence, the defendant contended in paragraph 3 (b) that they were not aware or had no knowledge that the plaintiffs lacked understanding of the English language. The defendant counterclaimed for Uganda shillings 133,108,802.58/= together with interest at 25% from date of filing the counterclaim till payment in full, penalty interest at 5%, general damages for breach of contract and costs of the counterclaim. The contention of the appellant was that the lease facility was to be repaid within 48 months from February 2010 but the plaintiffs defaulted on the same and by July 2010 had defaulted in two instalments for each of the buses. The defendant impounded the buses and after negotiations released them to the plaintiff. Upon further default by the plaintiffs, the defendant impounded the buses and advertised them for sale and they were sold altogether for Uganda shillings 310,000,000/= leaving the balance the appellant claimed in the counterclaim.

The learned trial Judge considered the question of fact on the issue of whether there was a valid contract between the parties. After analysis of the evidence, he concluded that PW1 the first plaintiff was lured by the staff of the defendant sometime in 2009 to take advantage of credit facilities offered by the appellant to acquire assets such as buses, Lorries and tractors. Secondly, the first respondent was a primary 4 school dropout. The appellant was invited to sign documents after his application which had been filled for him had been considered and was successful. The documents he was made to execute were not translated to him by the appellant's officials. He established

that PW1 did not actually endorse the relevant produced by the defendant exhibit D7 to prove that he was literate in the English language.

We have carefully studied the written evidence and I find nothing to fault the finding of fact of the learned trial judge on the fact that the respondents were illiterate in the English language. In fact, the position of the appellant is that its officials were not aware that the appellant was illiterate in the English language. The learned trial judge first of all believed the testimony of PW1 and PW2. Secondly, the Appellant's case was that it never gave advice to the plaintiffs and was not aware that the respondents never understood English and on several occasions the respondents did communicate to the defendant in English. The learned trial judge considered the correspondence referred to above and came to the conclusion that it was established that PW1 and PW2 were primary four and primary three dropouts. He further held that the fact that the respondents alleged that they were illiterates shifted the burden of proving that they were illiterates on the defendant and the defendant did not discharge that burden. He found that the defendants were not sufficiently informed about the contents of the documents they executed. He believed the respondents and not the appellant's witnesses on the issue of literacy. The learned trial Judge further considered judicial precedents which interpreted section 3 of the Illiterates' Protection Act. Section 3 of the Illiterates Protection Act provides as follows:

> 3. Verification of documents written for illiterates.
>
> Any person who shall write any document for or at the request, on behalf or in the name of any illiterate shall also write on the document his or her own true and full name as the writer of the document and his or her true and full address, and his or her so doing shall imply a statement that he or she was instructed to write the document by the person for whom it purports to have been written and that it fully and correctly represents his or her instructions and was read over and explained to him or her.

The evidence clearly is that the document in question was filled for the respondents. However, there is no indication whatsoever as to who translated the document for the respondents and there is no statement about that fact. The document reads as if the respondents understood the contents and they having understood, endorsed the terms and conditions by accepting them at page 36 of the record. The first respondent testified in paragraph 4 of his witness statement as follows:

"4. After some time the bank official came to my shop to inform me that my application had been successful. They invited me to their offices at Jinja branch to sign other papers relevant to the project. The papers were drawn in English languages which I am illiterate in and I was not given a copy of the same. The bank official did not translate the documents into Luganda but assured me that the papers were about obtaining buses through their scheme.

5. Through the defendant's staff I was advised to pay 20% of the costs of the two buses and the defendant would pay 80%. They directed me where to pay this money which I did and obtained the receipts of the same and that I would pay back the 80% in accordance with the operations of the buses."

The first respondent was cross examined on his witness statement by the appellants counsel. In cross examination he testified that he used to write to the bank in the Luganda language and the typist would translate it into English. I have considered the evidence in cross examination and I do not see any basis on the written record to impeach the conclusion of the learned trial Judge that PW1 was illiterate in the English language.

PW2 the second respondent is the wife of the first respondent. In paragraph 5 of her witness statement she testified that on 6th August, 2009 while they were in the bank with her husband, she and her husband were given lease offers written in English, which she signed upon advice by bank officials though the same was not translated into Luganda, the language she understood. In paragraph 7 she testified as follows:

"7. I signed the documents on the understanding that they were authorising us to obtain the buses. But like the other documents signed before, I was not given a copy."

In her testimony in cross examination she testified that she schooled up to primary three. She further testified that she does not know English. She insisted that she did not understand the English language. There is no material on the printed evidence to suggest that her testimony was not truthful. In the premises, there is no basis to impeach the testimony of PW2. It is an established fact that PW1 who is the first respondent and PW2 who is the second respondent were illiterate in the English language. The expression "illiterate" does not mean unable to understand the English language but it means unable to read and write in that language. Section 1 (a) and (b) of

the Illiterates Protection Act defines the word "document" as well as the word "illiterate" in the following words:

> "(a) "document" means any print or writing capable of being used as evidence of any fact or thing as against the person by, for or at the request, or on behalf or in the name of whom the same purports to be written or signed in any way;
>
> (b) "illiterate" means, in relation to any document, a person who is unable to read and understand the script or language in which the document is written or printed."

In the proceedings in the High Court and in this court, the word document means the questioned document sought to be impeached on the ground of the illiteracy of the signatory to the document. That is the illiteracy of the first and second respondents to this appeal. Secondly, the word "illiterate" clearly does not connote or mean "unable to understand the English language as such" but means unable to understand the script or language in which the document is written or printed. It has everything to do with understanding the written language. This is also because it concerns a documentary script and necessarily means the ability to read in that language or in the language of the script. Being literate in another language other than that of the script, does not qualify a person to be literate in the language of the questioned script. In this particular case, the appellants were illiterate in the English language and were therefore unable to write or read in the English language.

Concerning the submission that the Illiterates Protection Act is not an Act of strict application, I do not accept the submissions of appellant's counsel on this issue. First of all the knowledge of the appellant as to whether the respondents were illiterate or literate in the English language is not material. What is material is whether as a matter of fact they were literate in English. Under section 2 of the Illiterates Protection Act, the duty is on the person who writes the name of the illiterate or who writes a document on behalf of the illiterate to prove that the illiterate understood the contents of the written document. Secondly, the duty under section 3 of the Illiterates Protection Act is to verify any document written for or at the request or on the behalf of any illiterate by writing the translators name and full address as evidence that he or she was instructed to write the document on behalf of the illiterate, and by the illiterate. Section 4 makes it an offence for the writer of the document or witness to the signature of the illiterate not to

write his or her full name and address as provided for under sections 2 and 3 of the Illiterates Protection Act. Section 4 provides as follows:

> "4. Offence and penalty.
>
> If the writer of or witness to the signature on any document fails to write on it his or her true and full name and address as provided in section 2 or 3, or if he or she has done so and the statement which under this Act is implied by the writing is untrue in any particular, then and in every such case the person commits an offence and is liable on conviction to a fine not exceeding three hundred shillings, or in default of payment to imprisonment for a period not exceeding three months, but without prejudice to any criminal or civil liability which he or she may have incurred in the circumstances by reason of fraud, forgery, misrepresentation or otherwise."

The above provision clearly was meant to protect the illiterate from endorsing a document which he or she did not understand and to be bound by a document he or she has not instructed the writing of. It protects the right to decide for one's self whether to endorse a contract or not. It preserves the freedom of an individual to choose what to be bound by. It was meant to overcome the misrepresentation of facts to someone who does not understand the language in which it is written. It deals with the potential to defraud or forge the signature of an illiterate. In this case there is no verification of the lease document written for the signature of the illiterates. It cannot be established whether they fully understood the contents of the document. Secondly, section 2 of the Act is couched in mandatory terms. The name of an illiterate person by way of signature to any document shall not be written without having been translated by reading over and explaining to the illiterate. The conclusion is that it is forbidden to write the name of an illiterate by way of signature to any document unless he or she shall have first appended his or her mark to it and after translation. Secondly, names are written on the instructions of the illiterate. The document has to be read over and explained to the illiterate. Breach of section 2 is an offence. Where a statutory provision commands something to be done in mandatory language and makes it an offence to disregard the statutory command, breach of the command renders any act done in disregard of it void. In the case of **Bostel Brothers Ltd v Hurlock [1948] 2 All ER 312,** it was held that a contract executed in violation of a statutory provision is void and Somerville L.J said at page 312:

"The principle of law relied on was stated concisely and in a form appropriate to the present issue by Ellenborough CJ in Langton v Hughes (1 M & S 593, 596):

> "What is done in contravention of the provisions of an Act of Parliament cannot be made the subject-matter of an action."

The respondents are entitled to avoid enforcement of the contract on the terms written in the lease document because it was never translated to them. The written contract is unenforceable or the question remains as to whether a quasi contract remains on the terms understood by the respondents and which terms are spelt out in their written and oral testimonies. In the premises ground 1 of the appeal fails and is hereby disallowed.

The second issue is **whether the learned trial judge erred in law and fact when he awarded special damages which were not pleaded or proved**.

As a matter of fact, there is no specific heading entitled "special damages" in the plaint. However, in paragraph 20 of the plaint at page 7 of the record particulars of loss and damage are given in the following words:

(a) Amount paid by the plaintiff to the defendants (subject to the production of account statement).
(b) Loss of earnings as from the respective dates of impounding the buses by the defendants. (To be adduced at the trial)."

Furthermore, the plaintiffs averred in paragraph 22 (b) of the plaint that the plaintiffs are entitled to a refund of all the monies paid arising from the unfair, oppressive and unenforceable leasing agreement. In paragraph 22 (f), the plaintiffs averred as follows:

> "(f) That the defendants both produce account statements and the defendants pay the plaintiff's loss of anticipated earnings/anticipated damage from the date of impounding of the buses till payment in full."

The appellant was on notice that the account statements in relation to the transaction of leasing buses were demanded of them. The plaintiffs' plaint discloses that they would demand all monies they paid to the appellant under the agreement. The accounts of the loan repayments were in the possession of the appellant which is a banking institution. For purposes of proof of the accounts, it was incumbent upon them to produce to the court the account statement relating to the payments made by the plaintiffs/respondents. The Evidence (Bankers' Books) Act Cap 7 laws of Uganda

provides for the mode of the proof of Bankers' Books which is defined under section 1 (b) as:

> "(b) "bankers' books" includes ledgers, day books, cash books, account books and all other books used in the ordinary business of the bank;"

The account statements or bank statements relating to a loan facility taken by the respondents could be proved by the bank through a banking official as stipulated in the law. Section 2 of the Evidence (Bankers' Books) Act provides that:

> "2. Mode of proof of entries in bankers' books.
>
> Subject to this Act, a copy of any entry in a banker's book shall in all legal proceedings be received as prima facie evidence of that entry, and of the matters, transactions and accounts recorded in it."

Last but not least it is written under section 3 of the Evidence (Bankers' Books) Act that an entry in a bankers' book cannot be received in evidence except when it is proved that it was made in the usual and ordinary course of business and by a person such as a partner or officer of the bank. It provides as follows:

> "3. Proof that a book is a banker's book.
>
> (1) A copy of an entry in a banker's book shall not be received in evidence under this Act unless it is first proved that the book was at the time of the making of the entry one of the ordinary books of the bank, and that the entry was made in the usual and ordinary course of business, and that the book is in the custody or control of the bank.
>
> (2) Such proof may be given by a partner or officer of the bank, and may be given orally or by an affidavit sworn before any commissioner or person authorised to take affidavits."

From the above provisions, the respondents anticipated the production of a bank statement which they clearly averred in the plaint that they would demand for any monies paid as a consequence of the alleged illegal contract. That information was in the possession of the bank which was the only one authorised to prove the contents of an entry in a bankers' book in a court of law. Section 106 of the Evidence Act Cap 6 laws of Uganda makes an exception on the burden of proof being on someone who stands to gain if the evidence is produced of evidence in the possession of the adverse party.

106. Burden of proving, in civil proceedings, fact especially within knowledge.

In civil proceedings, when any fact is especially within the knowledge of any person, the burden of proving that fact is upon that person

The burden was on the respondent to prove its case but where the information sought was required by law to be proved by the defendant/appellant, the burden shifted to the appellants to prove the bank statements. It follows that the averment that the plaintiff shall prove at the trial monies paid as a consequence of the alleged illegal transaction was sufficient averment in relation to any special damages claimed arising there from. Court fees therefore can be reassessed after the judgment. The purpose of pleading is to put the defendant to notice and since the fact was within the knowledge of the defendant/appellant, it was sufficient to aver that what was within the knowledge of the defendant what could be proved as damages. Even if the word "special" in relation to damages is not used, that would be a matter of form and not of substance. Furthermore, it was the duty of the appellant to adduce in evidence any entries in a bankers' book in support of the plaintiff's case. As a matter of fact the plaintiff produced exhibit PE 11 which gives the costs of the buses. Attached also is the independent review of the bank statement by Elijah and company certified public accountants dated 15th of September 2014 giving an opinion on both payments and deposits as well as the loan account of the respondents. Bank statements were also attached to this report. The defendant also produced exhibit D12 which contains the bank statement on the same loan transaction. In the joint scheduling memorandum at page 22 of the record, the plaintiffs loan account statements was admitted as exhibit D12 by agreement of counsel. Any information contained in this accounts would be deemed to be admitted by the defendant/appellant. In any case the appellant was under obligation to produce the bank statements in court if so ordered to do so. In the premises, ground two of the appeal deals with a matter of form and not substance and has no merit. The defendant was fully notified of all the claims of the plaintiff in the plaint and duly responded to it in the written statement of defence.

I shall further consider the matter in the grounds and 6 and 7 of the appeal which are grounds argued in the alternative. It is averred in ground 6 that the learned trial Judge erred in law in ordering the refund of US$54,000 and all money paid under the loan. Secondly, in ground 7 it is averred that the learned trial Judge erred in law and fact in awarding excessive interest on the dollar claim of US$54,000.

It is not in dispute that the amount of US$54,000 represents 20% of the total cost of the buses the subject matter of the leasing agreement. It is also not in dispute that the plaintiffs paid 20% being a sum of US$54,000 towards the purchase of the buses. First of all the learned trial Judge proceeded from the premises that the courts will not enforce an illegal contract but went ahead to rely on the exception where parties to the illegal contract are not in *pari delicto*, the less guilty party would be entitled to recover any money paid or property transferred under such contract especially where the contract is made illegal on account of being barred by statute. He relied on the case of the **Kiriri Cotton Company Ltd v Ranchhoddas Keshavji Dewani [1958] 1 EA 239** for the proposition that where the parties are not in *pari delicto* or where the contract is made illegal by statute whose object is the protection of a particular class of persons such as the plaintiffs who are illiterate, the respondents who were the plaintiffs in the High Court can recover damages. The learned trial court went on to assess the damages and inter alia ordered the refund of US$54,000 being the contribution for the purchase of the buses which the defendant repossessed. Secondly, to refund to the plaintiff all the monies deposited by the plaintiffs and that the leasing agreement and declared by the court to be an illegal agreement.

In **The Kiriri Cotton Company Ltd v Ranchhoddas Keshavji Dewani [1958] 1 EA 239 at 249**, the Court of Appeal for East Africa sitting at Kampala held that:

> "The ordinary rule is that the court will not assist any party who comes before it to recover money if it is necessary for the party presenting the cause of action to rely on the commission by him of an illegal act. Gray v. Southouse (12); Scott v. Brown (15), [1892] 2 Q.B. 724, 734. But there is an exception to this rule where the contract is made illegal by statute with the object of protecting a particular class of persons to whom the plaintiff belongs. 8 Halsbury's Laws (3rd Edn.) 951; Browning v. Morris (10) and Kearley v. Thomson (11)."

It is clear from the principles stated above that as a general rule; the plaintiff cannot recover damages for his own or her own illegality. The exception is that where the statute bars something from being done and the intention of the statute is to protect the class of persons which include the plaintiff, the plaintiff can recover damages. We generally agree that in the circumstances of this case the respondents had got possession of the buses for which the appellant had paid 80% of the purchase price. Secondly, the respondents had paid 20% of the purchase price amounting to Uganda shillings US$54,000. Thirdly, the respondents had the use the bus and failed to pay the

loan using the purchased bus. Fourthly, the appellant impounded the buses and sold them. Having established that the contract for the leasing of the bus was illegal, what happens to the money which had been paid and the buses?

What happens where a plaintiff receives value for money rather than having paid up money? It is not sufficient to find that the plaintiff was in a class of persons protected by the Illiterates Protection Act because they had received the valuable consideration and understood that they were supposed to pay back valuable consideration after using the buses. Illegality should not be used for unjust enrichment of a plaintiff. The only purpose of the Illiterates Protection Act in the facts and circumstances of this case was to protect the plaintiff's/respondents from misapprehension of facts through misrepresentation. It was to protect them from misunderstanding the terms and conditions of the leasing agreement. However, the evidence of PW1 was clear that they were paying some money at 20% of the purchase of two buses and the defendant bank would pay 80% of the purchase whereupon they would get the buses and would pay back the 80% with interest. Indeed the respondents received the buses after payment of the 20% of the purchase price amounting to US$54,000. Could they therefore recover the US$54,000 after having used the buses for a while?

According to the **Osborn's Concise Law Dictionary Eleventh Edition** payment can be made on the basis of a *quantum meruit* claim which term connotes a remedy in quasi contract inter alia when work was done and accepted under a void contract which was believed to be valid. Furthermore, according to the **Oxford Dictionary of Law Fifth Edition**, paragraph 693 *claims for a quantum meruit in respect of work voluntarily done under a contract terminated for breach, or under an unenforceable, void or illegal contract are properly regarded as a quasi contractual.*

Furthermore, **Halsbury's laws of England Fourth Edition in** Para 695 states that:

> "**Work done under unenforceable, void or illegal contract**. In some circumstances, the plaintiff may recover on a quantum meruit in respect of work done under a contract which is unenforceable, void or illegal.
>
> Where a contract is unenforceable, as a general rule the defendant is not precluded by the fact of performance by the plaintiff from pleading the unenforceability. If, however, the contract has been performed by the plaintiff, and anything has been done by the defendant upon the doing of which the law would imply a promise to pay, the plaintiff can recover on the implied promise

notwithstanding the unenforceability of the contract. First, where work is done at the request of the defendant and for which he has had the benefit, the plaintiff can recover on a quantum meruit.

According to Greer LJ in **Craven-Ellis v Canons Ltd [1936] 2 All ER 1066 (Court of Appeal of England)**, in cases of quantum meruit, the obligation to pay is imposed by a rule of law:

> "The decisions in Clarke v Cuckfield Union Guardians and Lawford v Billericay Rural District Council, are also authorities to the effect that the implied obligation to pay is an obligation imposed by law, and not an inference of fact, arising from the performance and acceptance of services. In the last mentioned case the work in respect of which the Plaintiff sued was done in pursuance of express instructions given by the Defendant council, but was not binding on the Defendants because no agreement had been executed under their seal. "

Because it is possible to recover on a *quantum meruit* on the basis of goods had and consumed even under a contract which is illegal, the equitable doctrine can be extended to the appellant's appeal in which the transaction has to be examined to establish who had the benefit of the contract. The respondents got two buses which they used for a considerable period of time in the transportation business. They were required to pay back 80% of what the appellant had provided with interest. They understood this and when they defaulted in the repayment of the loan, they alleged illegality of the contract. On the basis of the law per se, they cannot recover back all the money they paid because they received the benefit of more than 80% of the cost of the buses at the time of purchase. They were required to pay back the 80% with interest. They had not lost out completely since they got the value in exchange for the contract they signed. They understood some implicit terms that they only had to contribute 20% of the buses that the assumed control of. They also understood that they would pay back 80% with interest. It is an implied term that upon failure to pay back the 80% of the contribution of the bank with interest, some recovery measures would be taken by the appellant bank.

By getting a refund of US$54,000, it would appear that the plaintiff lost the 20% to the appellant whereas the plaintiffs/respondents had got two buses in which there was the 80% contribution of the appellant. Nullification or declaration that the contract of leasing was void does not debar any of the parties to receive back or payback value received. What is barred is enforcement of the contract in future. For what happened in

the past, a restitutionary order can be made to restore the parties to a position they would have been in as if the contract had not been executed. This is not possible where there was part performance. In the premises, it was erroneous to order the refund of US$54,000 without considering the fact that the appellants had given out value. Secondly, the money was paid to a third party for the acquisition of the buses. We have considered the argument that the appellant impounded the buses and sold them. That argument is correct but does not take into account the fact that the respondents used the buses for a period of time and earned some money. This was the information the plaintiffs/respondents wanted to adduce for the award of damages. They then claimed damages for loss of income. We particularly refer to the evidence of PW1 in cross examination at pages 164 and 165 of the record of appeal when he said as follows:

> "PW1: the bus business went well and I was making money which I took to the bank.
>
> PW1: I did make profits from the buses.
>
> PW1: I do not recall how much I was making on each (of the buses?) during the period."

The facts are as follows. The respondents received the buses on 17th February, 2010. In August 2010, (six months later) the appellant impounded the buses but later released them after negotiations. The buses were impounded again on 2nd February 2011 and 7th March 2011 respectively for non-payment of the monthly arrears. The buses were subsequently auctioned by the appellants. The learned trial judge had received in evidence an account statement and an analysis of what had taken place from one Elijah and Company Certified Public Accountants. It indicates that the bank loan was effected on 24 February 2010. The initial debit was Uganda shillings 232,817,756/=. The plaintiffs added 46,563,556 giving a total of Uganda shillings 279,381,282/=. This concerned the bus UAN 996A. With regard to bus UAN 998A the initial debit was 232,817,726 when an additional amount paid by the plaintiffs of Uganda shillings 46,563,556/= giving a total of Uganda shillings 279,381,282/=. The summary of the transaction is as follows:

The bank loan was Uganda Shillings 465,635,592/= and the plaintiffs paid Uganda shillings 93,127,112/=. The total cost of the two buses was Uganda shillings 558,762,704/=. It is further indicated that the bank loan indicates VAT input of Uganda shillings 83,814,406/=.

The real question for consideration is how much money was recovered through deposits by the plaintiffs/respondents? Such an enquiry would not indicate how much the respondents received which they did not deposit with the bank. Thirdly, what is the value of the buses being kept by the respondents for a period of about one year? What about depreciation? In the premises, it would be unjust to order a refund of US$54,000. What needed to be assessed was the actual loss suffered by the respondents as a consequence of the contract. According to the appellants, the buses were sold for Uganda shillings 310,000,000/= and the outstanding sum owing was Uganda shillings 133,108,802.58/= owing to the facility which the appellants claimed against the respondents in the counterclaim.

What happened on the loan account is found in the testimony of DW3, Mr Dennis Kizza, the Manager Rehabilitation and Recoveries Department of the appellant. The vehicles were handed over to the respondents on 17th of February 2010. On 26th of July 2010, the appellants instructed auctioneers to impound the buses and the same were released in August 2010. By the time of the release, the respondents agreed to pay a sum of Uganda shillings 22,000,000/= which was the outstanding instalment payment. Thereafter, the respondents still defaulted in the payment of the instalments. By the time of default, arrears stood at Uganda shillings 59,354,907/=. Thereafter the buses were impounded and sold. In cross examination however the witness could not identify the sum outstanding of Uganda shillings 22,000,000/= in the statement and admitted that the document he relied on did not have all the transactions. The amount of Uganda shillings 22,000,000/= was however the agreed amount to be paid for the release of the buses and the basis is supposed to include the costs incurred in impounding the buses.

What is clear is that it was arbitrary for the learned trial Judge to order for refund of US$54,000 without examining what kind of loss was suffered. As a matter that proceeded on an implied quasi - contract, there are certain terms that can be implied upon which a fair assessment of loss can be made. Ground six of the appeal succeeds and is hereby allowed.

Ground seven of the appeal concerns the award of excessive interest on the dollar claim or US$54,000. Because ground 6 of the appeal has been allowed, there is no need to consider the issue of excessive interest on the award of US$54,000 because the award is by implication hereby set aside as a consequence of the resolution of grounds 6 of the appeal.

This brings me to ground 4 of the appeal that the learned trial Judge erred in law and fact when he ordered the refund of the VAT of Uganda shillings 83,000,000/= to the respondents.

It was the question of fact as to whether this amount was remitted to Uganda Revenue Authority. DW3 Mr Dennis Kizza testified that the appellant was required by law to submit VAT for every lease. VAT input is 18% of the loan disbursed. He was not cross examined on his testimony on the VAT payable. He testified that it could not be established except from the records of Uganda Revenue Authority. The learned trial Judge held that the VAT payable had not been established. VAT is charged on the monthly lease rentals paid by the banks customers. Input tax is paid on the purchase of the motor vehicle. The total amount of VAT paid claimed from URA can be established from the records of URA and it was therefore erroneous to reflect it on the respondents account.

I have carefully considered the submission and it is a rule of law that VAT is payable by the consumer of the services and collected by the supplier of the services such as the appellant for remission to URA. With regard to the supplier of the vehicle, VAT is payable by the supplier of the two buses and this should be reflected in the total cost payable for the purchase of the vehicle. This is of no concern to the appellant or the respondents. The total cost of the vehicle includes VAT. If the input tax being the VAT payable on the vehicles is reflected in the accounts of the appellant, it is only meant to be used in the reconciliation of the VAT output and input tax for the total liability of the appellant to URA. Such reconciliations do not concern the respondents who cannot be charged for the amount of VAT input tax on the vehicles because they had already paid the VAT tax in the total cost of the vehicles. Input tax is the VAT paid to the supplier of the vehicle from the perspective of the appellant and is counted as a credit against which output tax can be offset to establish the final VAT liability of the appellant, if any, to URA for the relevant tax period.

Under section 1 (L) of the Value Added Tax Act Cap 349 (VAT Act), "input tax" means tax paid or payable in respect of a taxable supply to or an import of goods by a taxable person while "output tax" under section 1 (o) means the tax under Section 4 in respect of a taxable supply. "Taxable supply" under section 1 (y) has the meaning in section 18 of the VAT Act. Taxable supply under section 18 (1) of the VAT Act means "supply of goods or services, other than an exempt supply, made by a taxable person for consideration as part of his or her business activities." The supply of a loan can qualify

for charge of VAT provided it is not an exempt supply. Exempt supplies are specified in section 19 of the VAT Act which provides that they are specified in the Second Schedule. Section 1 (c) of the Second Schedule provides that financial services are exempt. "Financial services" are defined in section 2 (b) (i) of the Second Schedule of the VAT Act to mean:

> "granting, negotiating, and dealing with loans, credit, credit guarantees, and any security for money, including management of loans, credit or credit granted by the grantor.

Financial services which include the dealing with loans, credit, credit guarantees or any security for money and the management of loans is exempt from VAT. As noted above, it is the duty of the supplier of the buses to pay VAT for them and should be included in the total cost of the buses which was paid by the parties to this appeal. It further follows that the payment of VAT on the vehicle cannot be and should not be reflected in the loan account of the respondents. Secondly, VAT is not payable on the provision of financial services. It follows that the charging of Uganda shillings 83,000,000/= was not only illegal for being contrary to the express provisions of the VAT Act but was outright fraudulent. It follows that ground 4 of the appeal has no merit. The learned trial Judge did not err in law and fact when he ordered refund of the value added tax of Uganda shillings 83,000,000/= to the respondents.

At the hearing of the appeal grounds three and four of the appeal were abandoned.

The final result is that grounds six and seven of the appeal succeed. The rest of the grounds are disallowed. The final orders which issue from the judgment are:

1. Ground 1 of the appeal fails and is disallowed.

2. Ground 2 of the appeal deals with a matter of form and not substance and has no merit and is accordingly disallowed.

3. Ground 6 of the appeal succeeds and is hereby allowed.

4. Ground 6 having succeeded and the award thereof set aside, ground 7 of the appeal succeeds and is hereby allowed.

5. Ground 4 of the appeal has not merit and is disallowed. The learned trial judge was justified to order refund of Uganda shillings 83,000,000/=.

6. Ground 3 of the appeal stands abandoned.

7. The appeal substantially succeeds and the judgment of the High Court is set aside to the extent decided in grounds 6 and 7 of the appeal.

8. The appellant is awarded one fourth of the costs of this appeal.

Dated at Kampala the 29th day of March 2019

Christopher Madrama

Justice of Appeal