THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 45 OF 2016

CRANE MANAGEMENT SERVICES LTD ..... APPELLANT

VERSUS

1. **FASTLINE CARRIAGE SERVICES**
2. **ISAAC NSERA .....RESPONDENTS**

(An Appeal from the judgment and Orders of the High Court of Uganda [Jinja Circuit) before Hon. Justice Godfrey Namundi dated 13th November 2015 in Civil Suit No.0051 of 2001)

CORAM: **Hon. Mr. Justice Kenneth Kakuru, JA**
Hon. Mr. Justice Geoffrey Kiryabwire, 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 Geoffrey Kiryabwire, JA, I agree with him that this appeal ought to fail for the reasons he has set out herein.

I only wish to add that, whenever necessary, in order to attain the ends of justice, this Court may invoke Section 11 of the Judicature Act (CAP 13) which stipulates as follows:-

> *11. Court of Appeal to have powers of the court of original jurisdiction.*

For the purpose of hearing and determining an appeal, the Court of Appeal shall have all the powers, authority and jurisdiction vested under any written law in the court from the exercise of the original jurisdiction of which the appeal originally emanated.

In this case we have found it necessary to exercise the powers of the trial Court. We have determined the quantum of damages due to the respondent instead of referring the file back to the High Court for it to retry one issue, in a matter that was first filed at the High Court on 30th April 2001 almost 20 (twenty) years ago.

As Hon. Madrama, JA also agrees this appeal fails and is dismissed, with further orders as set in the Judgment of Hon. Kiryabwire, JA

Dated at **Kampala** this .....30th.....day of .....July..... 2020.

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Kenneth Kakuru

JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

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(An Appeal from the Judgment and Orders of the High Court of Uganda (Jinja Circuit) before Hon. Justice Godfrey Namundi dated 13th November 2015 in Civil Suit No.0051 of 2001)

CRANE MANAGEMENT SERVICES LTD:: APPELLANT

VS

1. FASTLINE CARRIAGE SERVICES
2. ISAAC NSERA } **:: RESPONDENTS**

CORAM

HON. MR. JUSTICE KENNETH KAKURU, JA

HON. MR. JUSTICE GEOFFREY KIRYABWIRE, JA

HON. MR. JUSTICE CHRISTOPHER MADRAMA, JA

JUDGMENT OF JUSTICE GEOFFREY KIRYABWIRE.

INTRODUCTION

This is a first Appeal. It is brought against the Judgment and Orders of the High Court of Uganda (Jinja circuit) in H.C.C.S No. 51 of 2001 delivered by Hon. Justice Godfrey Namundi. The trial Judge in that case found in favour of the Respondents. He found that

the Appellants were not justified in impounding the Respondents' goods. He ordered that a Government Valuer assess the current replacement value of the goods and make a Report to court within 30 days from the date of Judgment. He also awarded general damages of Ug shs 50,000,000/= (Fifty Million Ugandan shillings) to the Respondents.

BACKGROUND

The Appellant Company, M/s Crane Management Services is a Company that manages property belonging to another company M/s DMB Company limited, located at Plot 1 Scalen Place, Jinja. The Respondents are owners of vehicles and other items which they took for repairs at a garage owned and operated by Mr. Abdu Balikoowa. Mr. Abdu Balikoowa was operating this garage at Plot No.1 Scalen Place, Jinja. He however claimed that the said premises were owned by M/s Second Spare Transport Company Limited. According to the pleadings, the Respondent's cars and other items (hereinafter referred to as the "suit properties") were impounded by the Appellant and advertised for sale because Abdu Balikoowa who operated the garage had defaulted in paying rent. The Respondents filed a suit at the High Court (Civil Suit No. 0051 of 2001) to have their vehicles released and for cancellation of their impending sale. The trial Court found that the Appellants were not justified in impounding the Respondents' property. The trial Court also found that the Appellants should have released the suit property when it was proved that the said property belonged to the Respondents and not the owner of the garage Abdu Balikoowa. The trial Court further ordered that a Government Valuer assess the value of the suit property and that the Appellants compensate the Respondent for detaining their property. The Defendant (now Appellant) being dissatisfied with the said Judgment of the trial Judge filed this Appeal and set out 6 grounds of Appeal namely;

1. **That the trial Judge erred in principle by not weighing the evidence adduced in relation to the fact of the third party being a tenant on Plot 1 Scalen Place resulting in unjust conclusions.**
2. **That the trial Judge erred in holding that the submissions made on behalf of the defendant were evidence from the bar, when in fact they were an analysis of the plaintiff's evidence thereby reaching wrong conclusions and awarding excessive damages.**
3. **That the trial Judge erred in law in shifting the burden of proof of ownership of the plaintiff's property to the Defendant.**
4. **That the Appellate Judge erred when he ordered that valuation done after Judgment forms part of the Judgment without according the Appellant a right to be heard during the valuation process thereby occasioning an injustice to the Appellant.**
5. **That the trial Judge erred in law when he did not consider the Appellant's equitable right to a lien.**
6. **That the trial Judge erred in law in granting the Respondent manifestly excessive general damages and the award of costs was not justifiable.**

REPRESENTATIONS

The Appellant was represented by Mr. Alex Rezida and Mr. Haguma Daniel while the Respondents were represented by Mr. Robert Okalang and Mr. Kenneth Amujong.

DUTY OF THE COURT

This is a first Appeal and therefore this court is charged with the legal duty of reappraising the evidence and drawing inferences of fact as provided for under Rule 30(1) (a) of the Judicature (Court of Appeal Rules) Directions SI 13-10 (hereinafter referred to as the Rules of this Court). This court also has the duty to caution itself that it

has not seen the witnesses who gave testimony first hand. On the basis of its evaluation this court must decide whether to support the decision of the High Court or not as illustrated in **Pandya v R [1957] EA 336 and Kifamunte Henry v Uganda Supreme Court Criminal Appeal No.10 of 1997.**

I shall approach the grounds and resolve them in the order in which they were argued.

Ground Four: That the trial Judge erred in law when he ordered that valuation be done after Judgment forms part of the Judgment without according the Appellant a right to be heard during the valuation process thereby occasioning an injustice to the Appellant.

Appellant's Submissions

Counsel for the Appellant submitted that the government valuer did not involve any of the parties to the suit in making the valuation. Counsel for the Appellant argued that the Government Valuer was appointed without the knowledge of the Appellants. He further argued that the Government Valuer did not see the property or consult the any party to the suit about the property that was to be valued.

Secondly, counsel for the Appellant argued that the vehicles were in poor mechanical condition by the time they were detained. However, the Government Valuer's findings on the other hand showed that the vehicles were fairly maintained up to the time of detention which was a wrong assessment because of the following reasons:

(1) The Valuer did not show any evidence of service history,

(2) That the Government Valuer though an engineer by profession, did not show any basis for the report like examination of the vehicles, service history of the vehicles and any technical tests.

(3) That some of the vehicle engines had been brought to the garage to be replaced therefore the Government Valuer could not find that they were well maintained.

(4) That since the vehicles had been taken to the garage for repairs the Government Valuer did not know the repairs needed on the cars and therefore could not assess the restorative value of the cars.

(5) The Government Valuer accessed the value of the Tata lorry wrongly at Ug Shs 12,000,000/= while Leyland bus was valued to be Ug Shs 8,000,000/= meaning that the Tata lorry was more expensive than the bus which was not possible.

Thirdly, counsel for the Appellant submitted that at the time of detention most of the vehicles were not Road worthy. He argued that some of the suit properties were missing engines, missing gear boxes and other parts and this was the reason why the said vehicles were grounded at Plot 1 Scalen Place.

Fourthly, counsel for the Appellant submitted that the entire valuation was suspect. This was because the government valuer stated that he liaised with local brand dealers for the correlation of the values of the vehicles but this was a misrepresentation because Leyland bus manufacturers did not have a local dealer in Uganda.

Fifthly, counsel for the Appellant submitted that the Government Valuer's evidence was hearsay. He argued that this was because the Government Valuer was never called as a witness in court. On the argument of hearsay counsel relied on finding of court in **Apudhan L'omodi v Attorney General and Anor H.C.C.S No.77 of 1990**. He submitted that the trial Judge misdirected and misconstrued the law on evidence thereby arriving at an erroneous decision.

Sixthly, Counsel for the Appellant also submitted that the valuation of the suit properties after the delivery of the Judgment also offended the functus officio Rule and the principle of fair hearing.

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Counsel for the Appellant submitted that after the pronouncement of the Judgment the Judge became functus officio. In this regard counsel relied on Order 21 Rule 3(3) of the Civil Procedure Rules and the case of **M/s Semo Construction Company v Rukungiri District Local Government** M.A No. 30 of 2010. In that case, court interpreted this Rule to mean that the court has no jurisdiction to reopen or amend a final decision.

He argued that the trial Judge ought to have ordered for the process of valuation and waited to receive it before delivering the Judgment. He argued that by not doing this, the Trial Judge denied himself of the window to correct the anomalies. Counsel for the Appellant submitted that the valuation also violated the Appellant's right to be heard. He submitted the defendant/Appellant was never given an opportunity to test the evidence that was given by the Government Valuer.

Counsel for the Appellant concluded his submissions by stating that not only was the Government Valuer inappropriately appointed but his findings also were questionable because they were devoid of any engineering reasoning.

Respondent's submissions

Counsel for the Respondent opposed the Appeal. He submitted that thorough research was done by the Government Valuer on how to compensate the goods and depreciation percentages were considered before reaching the compensatory sums.

It was submitted by counsel for the Respondent that the Government valuer in a letter dated 29th January 2016 addressed to the Assistant Registrar High Court; he informed court that he would base his valuation on the gross current replacement costs and the depreciated replacement costs of the assets. He presumed that the goods had been fairly maintained up to the time of their detention.

Counsel for the Respondent also submitted that in the letter the Government valuer indicated that he had also obtained confirmation from the Uganda Revenue Authority

(URA) as to when the vehicles were originally registered and also obtained information of their respective local brand dealers for correlation with the vehicle's dates against their registration details and their replacement costs.

He concluded his submissions by stating that thorough research was done by the valuer on the compensatory items and the depreciation percentages were considered before reaching the total compensatory sums.

Counsel for the Respondent submitted that under Section 33 of the **Judicature Act**, the High Court is vested with powers to give any remedy in order to render justice. He submitted that the trial Judge cannot be faulted for ordering that the valuation by the Government valuer to be part of the Judgment in the circumstances of this case.

Counsel for the Respondent further submitted that Section 39(2) of the **Judicature Act** gives the High court discretion to adopt a procedure justifiable by the circumstances of the case.

Counsel for the Respondent argued that the confiscated vehicles and other properties were pleaded by the plaintiffs; then proved by both oral and documentary evidence. He submitted that this was fifteen years before the Judgment was delivered. He argued that this evidence was never rebutted by the Appellant.

Counsel for the Respondent submitted that the Respondent was supposed to be compensated at the current market value for the tort of detinue as at the time of Judgment as was held in the case of **Christine Bitarabeho v Edward Kakonge SCCA NO.4 of 2000.**

Court's Findings

I have read the record of Appeal, the submissions of both parties to this Appeal. I have also read the authorities cited and relied upon by counsel for which I are grateful.

The dispute is in this case is about the suit property which was detained at Plot 1 Scalen Place, Jinja (hereinafter referred to as the "Suit premises") as a result of the tenant, Abdu Balikoowa, of the suit property failing to pay rent. It appears that the suit property belonged to M/s DMB Industrial Finance Ltd even though Abdu Balikoowa who operated garage there say he rent the suit premises from M/s Second Spare Transport Company Limited. This triad of ownership notwithstanding, the suit property which belonged to someone else, namely the Respondent, was then advertised for sale by the Appellant. The suit property included the following items; a Tata Lorry, a welding machine that was locally made, a Fuso engine, a Tata cabin and an Isuzu forward. The Respondents claim that they had brought the said vehicles and other items to the premises for repair between the months of December 2000 and March 2001. The suit property was to be repaired by the tenant of the suit premises, one Abdu Balikoowa who was operating a garage on the premises. It is the Respondent's case that they informed the Appellants that the suit property that was confiscated did not belong to Mr. Abdu Balikoowa and thus was not liable to be detained. The Appellant none the less went ahead to advertise the said items for sale. The Appellants on their part claimed that Abdu Balikoowa was a tenant at the premises and had rent arrears amounting to Ug Shs 16,000,000/= (Sixteen million Uganda Shillings). It is also the Appellants case that Mr. Abdu Balikoowa deserted the suit premises leaving behind property which was never claimed. This was what prompted the Appellants to confiscate the property and advertise them for sale in order to recover their rent arrears.

In his testimony, Abdu Balikoowa (Pw3) testified that he knew the owners of the vehicles as his customers at the garage. He gave them job cards for the repairs he was supposed to do for them. In cross examination he testified that he knew his landlord to be M/s Second Spare Transport Company and that he had never dealt with the Appellant M/s Crane Management Company.

The trial Judge found that the Appellants were not justified in impounding the property since the Respondents had proved ownership to the suit property. The trial Judge also found that the there was no tenancy landlord relationship between the Appellant and Abdu Balikoowa. The Judge then accordingly found (page 197 of the Record of Appeal) based on the authority of **Christine Bitarabeho v Edward Kakonge Civil Appeal No. 4 of 2000 that** the Respondent would be entitled to being compensated the value of the goods at the time of Judgment. The trial Judge however considered the fact that the values in the plaint were merely indicative because the plaint was filed 14 years ago and therefore it would be a mockery to uphold those same sums as the replacement value for the detained items. He found therefore that the Respondents were entitled to the current replacement value of the detained property. I find it difficult to fault the trial Judge on this finding of fact as it is supported by the evidence on record.

It was against that background that the trial Judge ordered the Registrar of the Court to appoint a Government Valuer to compute the current replacement value of the above property and submit his report to the court within 30 days from the time of the Judgment. He ordered that the findings of the valuer would form part of the Judgment as regards the replacement value of the items which the Appellant would be directed to pay.

Counsel for the Appellant disputes the findings of the Government Valuer and the procedure used to appoint him. I will now address the procedure used to appoint the Government Valuer. The trial Judge gave a direction in his Judgment that the Registrar of the court should appoint a Government Valuer to value the property.

Counsel for the Appellant referred us to the case of **Arua District Land Board v Bran Checken Misc. Application No. 0007 of 2016** for the proposition that direction that of court to appoint the Chief Government Valuer to determine the market price of a piece of land was not in his thinking, a licence for an ex-parte process of valuation. In this

above application, the applicant sought to set aside a valuation report because it was not done in a transparent manner without the involvement of all parties.

The court made the following findings;

"As I understand the nature of this application, the report of the chief Government Valuer is being challenged not so much on grounds of its contents but rather the procedure through which it was generated. It is clear from the outset that the applicants were guilty of dilatory conduct ... the right to a fair hearing guaranteed by article 28(1) of the Constitution of the Republic of Uganda, 1995 subsists until final execution of the decree. It guarantees the right of participation by both parties and to be heard at all stages of the proceedings, except where the parties prevent themselves from exercising that right. Implicit in that guarantee is the fact that nothing should get onto the court record in violation of any of the party's right to be heard. Decisions taken on basis of material placed before court without giving an opportunity to the parties to be heard, or in violation of the principles of natural justice, once brought to the attention of court, will be set aside..."

In the instant case, the direction of court appointing the Chief Government Valuer to determine the market price of a comparable piece of land was not a licence for an ex-parte process of valuation. The parties may not have had any useful input into the process but they were entitled to be notified of the date the process was to be undertaken, to be afforded an opportunity to make representations to the valuer or bring to the attention of the valuer such matters or facts as they may have deemed necessary to guide the valuer in determination of the value, and to be present at the time of physical site inspection. By the order contained in the judgment, the Chief Government Valuer was constituted into a quasi-judicial body with power to determine questions affecting the rights of both parties as to quantum and was thus obliged to act judicially. The court will invoke its inherent jurisdiction and intervene where its agent

appointed by its order as in the instant case, though competent but with no particular procedure prescribed for the discharge of the duty imposed, has acted in flagrant disregard or in violation of the principles of natural justice. That counsel for the applicant was present at time the report was presented to court did not cure the procedural defect consequently the report of the chief Government Valuer dated 23rd February 2015 is hereby expunged from the court record..."

I agree with this analysis of the law, however in this case the reference by the trial Court to a current replacement value for the Government valuer to apply his mind to is problematic. This is because the **Christine Bitarabeho case** (Supra) refers to the current value of the item held and not its replacement value; the two value being different. One value addresses the value of item itself as is while the other value addresses prices in the open market. So the Order of Court to the Government Valuer I find was a misdirection.

I find therefore, that the trial Judge erred but for different reasons.

Ground one: That the trial Judge erred in principle by not weighing the evidence adduced in relation to the fact of the Third party being a tenant on Plot 1 Scalen Place, Jinja resulting in unjust conclusions.

Appellant's submissions

Counsel for the Appellant raised two lines of argument under this ground.

First, counsel for the Appellant submitted that Abdu Balikoowa had testified that he operated a garage on Plot 1 Scalen Place where the Respondents used to repair their cars. His argument was that Plot 1 Scalen Place has a known owner who had appointed Crane Management Services as its management agent.

Counsel submitted that the ownership of the garage was not in issue. He also submitted that the Respondent did not adduce any evidence at the trial to show that the owner had appointed another agent to collect rent on its behalf. Counsel for the Appellant therefore submitted that any alleged rent paid to another person was done at his peril. He submitted that the trial Judge misdirected himself in that regard.

He further argued that the payment of rent was a natural consequence of occupying and using a property that belonged to another person. He argued that the absence of a tenancy agreement did not in any way operate as a right to freely use the premises.

Secondly, counsel for the Appellant submitted that the trial Judge misdirected himself when he found that the Appellant were not the landlords. He again emphasized that if Abdu Balikoowa paid rent to any other entity not being the Appellant, then he did so at his own peril.

Respondent's submissions

Counsel for the Respondent submitted that Appellant did not adduce any evidence to show that they were landlords of the premises.

Counsel for the Respondent submitted that the Appellants submission that Plot 1 Scalen Place had a known owner for who had appointed M/s Crane Management Services as its management agent was evidence from the bar. He argued that the Respondents and the third parties testified that their landlord was M/s Second Spare Transport Company Limited which evidence was never discredited in any way.

He submitted that the trial Judge was correct to find that there was no evidence to show that that M/s DMB Industrial Finance Ltd were the owners of plot 1, Scalen Place or that there was in existence an agency relationship between DMB Industrial Finance Ltd and Crane Management Services.

He submitted that the Respondents had discharged their duty of proving that the properties which were impounded by the Appellant belonged to the Respondent and not the owner of the property.

Court's Findings

I have read the Record of Appeal, the submissions notes of both parties to this Appeal. We have also read the authorities cited and relied upon by counsel for which I are grateful.

The issue in this ground is basically about whether or not the Appellant were the landlord of the Abdu Balikoowa. I have already partially addressed this issue while resolving the last one. Indeed for the sake of emphasis, the trial Judge made the following finding on page 196 of the Record of Appeal;

"...it is the finding of this court that whatever the case, the defendants were not justified to impound the property or failure to release it once the plaintiffs produced evidence of ownership. Further apart from submissions by defence counsel, there is no evidence of the tenancy /landlord relationship between the defendants and Abdu Balikowa."

I agree with the trial Judge that this vital evidence was lacking. The evidence on record however is clear that the suit property belonged to the Respondents who were clients to Mr. Abdu Balikoowa. However, the suit properties were advertised for sale by the Appellant (see advert on page 96 Record of Appeal Exb. P 9) as belonging to Abdu Barikowa Transporters whereaswe the said properties belonged to his clients. To my mind the trial Judge was justified in his conclusions and occasioned no injustice in this regard.

This ground of appeal fails.

Ground 2: That the trial Judge erred in holding that the submissions made on behalf of the defendant were evidence from the bar, when in fact they were an analysis of the plaintiff's evidence thereby reaching wrong conclusions and awarding excessive damages.

Appellant's Submissions.

Counsel for the Appellant submitted that defendant's (now Appellant) submissions at the trial court on bailment were based on the plaintiff's evidence and were therefore tenable. He submitted that the Appellant's submissions were deduced from the testimony of the plaintiff and their cross-examination.

He submitted that at the hearing, a witness for the Appellant was unable to testify because its representative had got an emergency and had to travel to India. He argued that this was what prompted the counsel for the Appellant to analyse the evidence of the plaintiff's witnesses.

He submitted that the Appellant's legal status of Bailee arose from the testimony of the other witnesses. He argued that it was not the duty of the Appellant at the High Court to lead evidence of on existence of a bailment.

Counsel for the Appellant submitted that the Respondents did not prove ownership of the suit property.

Counsel for the Appellant submitted that Section 106 of the **Evidence Act** provides that in all civil cases it is always on the one who alleges to prove that fact. He submitted that Isaac Nsera did not prove ownership of motor vehicle No. UAA 979, the Isuzu Forward. Nsera instead presented a transfer form for the motor vehicle to show that he was the owner.

Respondent's Submissions

Counsel for the Respondent submitted that the Appellant departed from his pleading when he argued that there a relationship of a bailer and bailee. He argued that in the pleadings there was no defence of bailment and the Appellant had denied liability by averring that the property belonged to M/s D.M.B Industries Finance Ltd.

He submitted that Order 6 Rule 7 of the Civil Procedure Rules prohibits a party from departing from its pleadings. He further relied on the case of **Inter Freight Forwarding (U) Ltd. v East African Development Bank Civil Appeal No.33/93** *"for the proposition that a party is bound to prove the case as alleged by the pleadings and as covered in the issues framed. He will not be allowed succeed on a case set up by him and be allowed at the trial to change his case and set up a case inconsistent with what he alleged in his pleadings except by way of amendment of the pleadings..."*

He submitted that during the hearing the Respondents also applied for third party notices against M/s D.M.B Industries Finance Ltd which were granted by court but were not served and therefore they were not joined as third parties.

He relied on the case of **Nsubuga v AG (1993)1 KALR 33** for the proposition that a defence not pleaded in the written statement of defence is inadmissible. He submitted that in the present case the relationship of bailment was not backed by any evidence since the appellant did not present any witnesses who could have been cross-examined by the Respondent on this point.

Secondly, counsel for the Respondent submitted that there was no evidence of any written instructions from any landlord to the Appellants to manage the said premises. The alleged landlord was never called to testify in court in order to prove ownership of the premises.

Furthermore counsel for the Respondent submitted that it was alleged by the Appellant that Abdu Balikoowa had abandoned the premises, and yet there was no evidence that Abdu Balikoowa had interest in the suit property as a bailee, over which the exercise a lien could be done and therefore this was all evidence from the bar.

Counsel for the Respondent also submitted that the appellant's submission that there was no nexus between the plaintiff and the first defendant was wrong because there was the evidence of advertisement of the suit properties on instruction of the first defendant; which evidence was never discredited.

Court's finding

The issue in this ground is whether reliance had on the principle of bailment by the Appellant. The Appellant submitted that the fact of bailment could be deduced from the testimony of the plaintiff while Respondent argues that the Appellant never pleaded the defence of bailment.

According to Section 88 of the **Contracts Act,** bailment means the delivery of goods by one person to another for some purpose, upon a contract that the goods shall when the purpose is accomplished be returned or disposed of according to the direction of the person who delivered them.

Section 103 of the **Evidence Act** provides that the burden of proof to any particular fact lies on that person who wishes the court to believe in its existence, unless it is proved by any law that the proof of that fact shall lie on any particular person.

In the case before us if the Appellants wanted to prove that there was relationship of bailment that existed between themselves and Mr. Abdu Balikoowa and so they had to prove this with evidence. However the Appellants did not do so, only stating that the owner's representative who testify to this fact, had an emergency in India and this is what made the counsel for Appellant to make these inferences from the plaintiff's

evidence. Clearly this was not good enough given that owner was stated to be a corporate body and not a natural person. Corporate bodies are not run by one person. There was no bailment contract express or implied that was put in evidence. The Appellants also sought to expand their defence to bailment without amending their pleadings which was also erroneous.

I am therefore unable to fault the trial Judge who found that whatever the case, the Appellants were not justified to impound the property once the Respondents produced evidence of ownership.

This ground also fails.

Ground 3: That the trial Judge erred in law in shifting the burden of proof of ownership of the plaintiff's property to the defendant

Appellant's Submissions

Counsel for the Appellant submitted that evidence of proof of ownership of the vehicles and other properties abandoned at Plot 1 Scalen Place, Jinja was inadequate.

He submitted that some of the vehicles were registered in other peoples' names and this discrepancy was not addressed by the trial Judge. He also gave an example Motor vehicles No. UAA 979 on Isuzu forward which allegedly belonged to Isaac Nsera based on a transfer form.

He submitted that the burden of proof in all civil cases is always on who alleges in accordance with section 106 of the **Evidence Act**. He cited the case of **JK Patel vs Spear Motors Ltd** Civil Appeal No. 4 of 1999 and J. **Barugahare v The Attorney General** SCCA No. 28 of 1993 for the proposition that in civil proceedings when any fact is specially within the knowledge of any person, the burden of proving that fact is upon that person.

Respondent's submissions

Counsel for the Respondent submitted that the trial Judge did not shift the burden of proof of ownership of properties impounded by the Appellant.

He submitted that the trial Judge evaluated the evidence of ownership adduced by the Respondents basing on exhibits admitted in court. These were exhibit PEX1-8, PEX10, PEX11 and PEX12. He argued that this evidence was not rebutted by the Appellants.

Court Findings

This ground points to findings I have previously made that the Respondents were able to show and prove that they owned the vehicles and other suit properties that were attached and sold by the Appellants. Clearly the Appellants sold the suit properties as though they belonged to the tenants of the suit premises whereas not.

This ground therefore fails.

Ground 5: That the trial Judge erred in law when he did not consider the Appellant's equitable right to a lien over the tenant's property in case of default of rent.

Appellants Submissions

Counsel for the Appellant submitted that there was a landlord tenant relationship between the third party (Abdul Balikoowa) and M/s DMB Industrial Finance Ltd. Since Crane Management Services was acting as the agent of the landlord it had an equitable right to exercise a lien over the property.

He relied on **Halsbury Laws of England,** (Vol. 23; 3rd Edition Butterworth and Co) for the proposition that the landlord has a right to distress for rent upon all goods found on the landlord's premises. He submitted that the trial Judge misdirected himself on the landlord/tenant relationship and the equitable rights that arises thereof.

Secondly, counsel for the Appellant submitted that in this matter it was the third party who was a bailee to keep the said vehicles and therefore it was the only person who could hand over the said goods to the rightful owner. He however noted that such a hand over was not possible, since Balikoowa had fled the premises and abandoned all the cars parts and cars at the premises.

Respondent's submissions

Counsel for the Respondent submitted that the Respondents did not acknowledge Crane Management Services as the agent of the landlord DMB Industrial Finances Ltd. He cited the case of **Uganda Revenue Authority v Rabbo Enterprises (u) Ltd and Anor** S.C.CA No. 12 of 2004 (2017) where it was held that *"A lien did not exist in vacuum but to secure or re-enforce an underlying claim."*

He submitted that Abdu Balikoowa (PW3) testified that several people had brought their vehicles to the suit premises for repair and when they had come to pick them they found the garage closed. He submitted that Abdu Balikoowa had testified that his landlord was M/s Second Spare Transport Company. It was submitted by counsel for the Respondent that Kintu Peter Zirentusa (PW1) a transporter and owner of the first respondent company and Nsera Isaac (PW2) the businessman and owner one of the vehicles that were locked up in the suit properties, adduced evidence to show that the properties belonged to them. Counsel for the Respondent submitted that evidence of ownership was never rebutted in any way by the Appellants.

Secondly, counsel for the Respondent submitted that the Appellant did not adduce any evidence of a tenancy agreement between itself and Balikoowa so there was no question of a lien being exercised by the Appellant.

He submitted that it was a common law principle that distress for rent was only applicable where a relationship of a landlord and a tenant subsisted between the

parties. He relied on the authorities of **Souza Figueredo & co Ltd (Supra)** and **Joy Tumushabe & Anor vs MS Anglo Africa Ltd & anor S.C.C.A No. 7 of 1999**. He submitted that even if there was a tenancy relationship it would not have entitled him to a lien over the Respondent's property. The landlord's remedy would have been to evict the tenant and proceed to sue for rent arrears.

Court's findings

The issue for determination here is whether M/s Crane Management Limited as the agents of the landlord could exercise a lien over the goods that they found on the suit premises. I must therefore determine when an equitable lien arises.

According to **Black's law Dictionary Sixth Edition** at page 539, it is written that:

"...An equitable lien is a right, not existing at law to have specific property applied in whole or in part to payment of a particular debt or debts. An equitable lien arises either from a written contract which shows the intentions to charge some particular property with a debt or obligation or is implied and declared by a court of equity out of general consideration of right and justice as applied to relations of the parties and circumstances of their dealings.."

This definition supports the Respondent's submission that *"A lien did not exist in vacuum but to secure or re-enforce an underlying claim."*

I have already established before that the suit property which was detained did not belong to Abdu Balikoowa who ran the garage at the suit premises, but rather to his clients.

Accordingly, this ground fails.

Ground 6: The trial Judge erred in law in granting the Respondent manifestly excessive damages and the award of costs was not justifiable.

Appellants Submissions

Counsel for Appellant raised two lines of argument under this ground.

First, counsel for the Appellant submitted that the award of damages of Ug Shs 50,000,000/= (Shillings fifty million) was too high.

He submitted that the award of damages awarded by the trial Judge was twice the value of the goods which were impounded. He submitted that the Respondents' pleadings to court the total value of the property at Plot 1 Scalen Place was Ug Shs 36,000,000/= (Shillings thirty six million) and yet the trial Judge at page 198 of the Record of Appeal awarded a sum of Ug Shs 50,000,000/= (Shillings fifty million) as general damages for the inconvenience of the Respondent's action.

Secondly, counsel for the Appellant submitted that the most of the property was not of commercial viable. This is because the motor vehicles had been brought for repair and had spent two years without going on the road. He argued that the award of general damages of Ug Shs 50,000,000/= (Shillings fifty million) was thus not justified.

It was submitted by counsel for the Appellant that wrong principles had been used by the trial Judge in awarding damages which led to a wrong decision. He cited the case of **Crown Beverages Ltd v Sendu Edward,** Civil Appeal No. 1 of 2005 (SC) where court held that an Appellate court will only interfere with the exercise of discretion where there has been a failure to take into account a material consideration or where an error in principle was made. He argued that the condition of property did not justify the award of an amount twice the value of the goods.

Respondent's Submission

Counsel for the Respondent submitted that general damages are the direct consequence of the acts complained of. He cited the case of **Hajj Asuman Mutekanga v**

Equator Growers (u) Ltd CA No. 7 of 1995 (SC) where Oder JSC (as then was RIP) held that;

"...with regard to proof of general damages are what a court may award when the court cannot point out any measure by which they are to be assessed except in the opinion and judgment of a reasonable man."

Counsel also cited the case of **Uganda Petroleum Co. Ltd v Kampala City Council** HCCS No. 250 of 2005 where an award of Ug Shs 100,000,000/= was considered sufficient in the circumstance for inconvenience as opposed to Ug Shs 2,000,000,000/=. He argued that taking into consideration the economic value of the suit properties involved and the time taken for the plaintiff to successfully pursue its rights to conclusion, the general damages awarded were reasonable. He argued that the suit had been filed on 30th April 2001 however the delay in hearing the case had been caused by the Appellant. He also argued that the first plaintiff had lost business. He submitted that this award of Ug Shs 50,000,000/= (Shillings fifty million) was appropriate.

As to costs counsel for the Respondent submitted that costs follow the event. He submitted that according to Section 27(2) of the **Civil Procedure Act cap 71** the costs follow the event and a successful party should not be deprived of costs except for good reason. He argued that in this case the Respondent succeeds in the entire case and there was no reason to deny them costs of the suit.

Court's finding

The issue for determination in this ground is whether the award of damages of Ug Shs 50,000,000/= (Shillings fifty million) awarded by the trial Judge was justifiable.

The trial Judge in making his award in damages referred to the case of **Christine Bitarabeho** (Supra) which was an action in detinue. He held that the **Christine**

Bitarabeho Case (Supra) was authority for the proposition that the plaintiffs would be entitled to being compensated the value at the time of Judgment (see page 6 of the Judgment). Justice Berko JA (as he then was) in that case more precisely held:

"...in an action founded on detinue, the value of the goods detained is assessed at the date of the judgment in favour of the plaintiff and not at the date of the defendant's refusal to return the goods. This is so because the plaintiff in detinue does not abandon his property in the goods..."

The learned Justice then added:

"...in my view, that in the instant case, the respondent is entitled to general damages for depreciation of the suit vehicle during the period it was detained by the appellant..."

In the book **McGregor on Damages** (Sweet & Maxwell 1982 page 1295) the authors discuss the common law position damages for detinue and state:

*"In **General & Finance Facilities V Cooks Cars (Romford)** [1963] 1 WLR 644 CA Diplock L.J. pointed out that "an action in detinue today may result in a judgment in one of three different forms: (1) for the value of the chattel as assessed and damages for its detention; or (2) for the return of the Chattel or recovery of its value as assessed and damages for its detention; or (3) for the return of the chattel and damages for its detention..."*

To my mind, this is the format that should have been applied by the trial court. In other words, where the chattel cannot be returned (as in scenario one of the **Cooks Cars case** supra) then the chattel should be valued as at the time of the

judgment and then in addition to that value, damages assessed for the detention of the said goods.

As I have already found, the trial Judge directed as follows:

"...the Registrar of this court is instructed to appoint a Government Valuer ***to compute the current replacement value*** *of the above items and submit his report to this Court within 30 days of this judgment. The findings will then form part of this judgement as regards* ***the replacement value*** *of the items which the Defendants will be directed to pay. Further for all the inconvenience caused to the Plaintiffs as a result of the defendant's actions, I award General Damages of Shs 50,000,000/= ..."*

The trial Judge after referring to the correct precedents then clearly misdirected himself in their application. This being a case in detinue, a valuer should have been directed to determine the current and not the replacement value of the suit properties. Thereafter the court would assess the damages for withholding the goods which damages would then be added to the value so determined. Probably the challenge the trial Judge had was how to deal with the fact that the Judgment was rendered 14 years after the suit was filed and the suit properties were no longer available for valuation.

It would appear to me that it will not be possible be possible by reason of the passage of time to assess the actual value of the goods as outlined in the precedents. At the time of the filing of the Plaint the Respondents in Paragraph 6 gave the suit properties the value of Ug Shs 36,000,000/=. In his Judgment, the trial Judge remarked:

"...The figures indicated in the plaint -14 years ago are just indicative and it would be a mockery to uphold those as the replacement value of the detained items..."

Of course even as regards their actual value they would have undergone some depreciation being mechanical assets. Be that as it may, given the circumstances of the case while keeping in mind that they would have been some depreciation of the properties and then adding damages for the suit properties detention I would award a total sum of Ug Shs 46,000,000/=.

The trial Judge also awarded general damages for inconvenience of Ug Shs 50,000,000/= which the Appellant feels are manifestly excessive. In paragraph 10 (b) of the Plaint, the Respondents pleaded that they suffered *"mental torture and inconvenience"*. Mr. Peter Kintu (PW1) testified (page 66 of the Record of Appeal) that he was a transporter of 20 years trading under the name First Line Carriage Transporters and that he never recovered his properties and his business suffered.

In the assessment of damages, the court should mainly 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).**

Furthermore, that plaintiff who suffers damages due to the wrongful act of the defendant must be put in the position he or she would have been if she or he had not suffered the wrong (See **Hadley v Baxendale** (1894) Exch 341**, Kibimba Rice Ltd v Umar Salim** S.C.C.A No. 17 of 1992**).**

It is also settled law that general damages are the direct natural or probable consequence of the wrongful act complained of and include damages for pain, suffering, and inconvenience and anticipated future loss. (**See Storms v Hutchinson** [1905] AC 515)

I find that the general damages of Ug Shs 50,000,000/= (Shillings fifty million) awarded by the trial Judge were not manifestly excessive in any way. These suit properties were part of commercial vehicles and were expected to return a profit.

Lastly, the Appellant avers that the cost award against them was not justified. As a general rule costs will follow the event and since the Appellant lost the case in the trial Court and I have found that the decision of the trial Court was by and large sound, I cannot fault the award of costs against the Appellant as unjustified.

FINAL RESULT

This Appeal fails and is hereby dismissed. I invoke the power of this Court under Section 11 of the Judicature Act to make the following orders:

1. The Appellant also pays Ug Shs 46,000,000/= being the value of the suit properties and damages for their detention.
2. The Appellant pays Ug Shs 50,000,000/= being damages for mental torture and inconvenience.
3. That interest of 16% p.a. be applied on the damages in paragraph 1 above from the dated of the Judgment at the trial Court until payment in full.
4. That interest of 8 % p.a. be applied on the damages on paragraph 2above from the date of the High Court Judgment until payment in full.
5. That costs of this appeal and the trial court are awarded to the Respondent.

I SO ORDER

Dated at Kampala this 30th day of July 2020

5 .....

HON. MR. JUSTICE GEOFFREY KIRYABWIRE, JA

THE REPUBLIC OF UGANDA,

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO 45 OF 2016

[ARISING FROM HIGH COURT CIVIL SUIT NO 51 OF 2001]

1. CRANE MANAGEMENT SERVICES LTD} .....APPELLANT

VERSUS

1. FASTLINE CARRIAGE SERVICES}
2. ISAAC NSERA} .....RESPONDENTS

JUDGMENT OF CHRISTOPHER MADRAMA IZAMA

I have read in draft the lead judgment of Hon. Justice Geoffrey Kiryabwire and I agree with facts, analysis and concur with the decisions therein on grounds 1, 2, 3, 5 and 6 of the appeal. I would however like to add a few words of my own on ground 4.

Ground 4 of the appeal is that:

> The appellate Judge erred when he ordered that the valuation done after judgment forms part of the judgment without according the appellant a right to be heard during the valuation process thereby occasioning an injustice to the appellant.

According to the facts summarised in the lead judgment the matter was forwarded to the government valuer for assessment of the quantum of loss. The learned trial Judge had held that the plaintiff was entitled to compensation with value to be assessed at the time of judgment. The date of judgment was 13th November 2015 while the suit had been filed on 30th April, 2001. The learned trial Judge ordered the Registrar of the court to appoint a government valuer to compute the replacement value of the

property at the time of judgment and submit a report to the court within 30 days from the date of judgment. The question to be determined on ground 4 of the appeal is whether the valuation report in question was arrived at in violation of the right of the appellant to be heard before a decision is made.

The procedure for references for investigation and report or trial of particular issued specified by court by referees is governed by sections 26 and 27 of the Judicature Act Cap 13 laws of Uganda. Section 26 and 27 of the Judicature Act permits trial of particular matters in a suit by a referee or arbitrator or referees or arbitrators. Where reference is made to a referee or an arbitrator/s by consent of the parties to the suit, the applicable section is section 27 of the Judicature Act which provides that:

> 27. Trial by referee or arbitrator.
>
> Where in any cause or matter, other than a criminal proceeding –
>
> (a) all the parties interested who are not under disability consent;
> (b) the cause or matter requires any prolonged examination of documents or any scientific or legal investigation which cannot, in the opinion of the High Court, conveniently be conducted by the High Court through its ordinary officer; or
> (c) the question in dispute consists wholly or partly of accounts,
>
> The High Court may, at any time, order the whole cause or matter or any question of fact arising in it to be tried before a special referee or arbitrator agreed to by the parties or before an official referee or an officer of the High Court.

Apparently, the procedure of trial by referee or arbitrator was not used in the matter before court. Such a procedure has to be by preceded by agreement of the parties to make the reference. Secondly, the procedure relates to reference of a matter by court for trial by a referee or referees and therefore the parties are entitled to be heard in the trial proceedings.

The alternative procedure is section 26 of the Judicature Act which provides that:

> 26. References to referees.
>
> (1) The High Court may, in accordance with the rules of court, refer to an official or special referee for inquiry and report any question arising in any cause or matter, other than in a criminal proceeding.
>
> (2) The report of an official or special referee may be adopted wholly or partly by the High Court and if so adopted may be enforced as a judgment or order of the High Court.

Where the official or special referee inquires and makes a report on any question arising in any cause or matter, he or she is required to submit a report to the High Court and the High Court has discretionary powers whether to either adopt the report and have it enforced as a judgment or order of the High Court or not.

The Judicature Act in section 28 specifically provides for the powers of referees and arbitrators as follows:

> 28. Powers of referees and arbitrators.
>
> In all cases of reference to a referee or arbitrator under this Act, the referee or arbitrator shall be deemed to be an officer of the High Court and, subject to the rules of court, shall have such powers and conduct the reference in such manner as the High Court may direct.

As officers of the High Court, the Government Valuation Surveyor was bound by the rules of court and was meant to be under the general direction of the High Court.

The report of the government valuation surveyor could not automatically become or be deemed to be part of the decree of the High Court and was

subject to the discretionary powers of the trial Judge to decide whether to admit it as part of his judgment or not.

The question of whether the report should be admitted or be adopted by the court should be the issue on which the parties to the suit should be given a hearing.

I have considered the law relating to references. References are ordinarily made to experts who are expected to do better than the court in the examination and very often conduct a trial in specialised areas such as in the matter of accounts or forensic examinations. It is also common where there is a dispute in valuation of property. The parties can present evidence of valuation by their own experts or agree to a reference to an independent valuation surveyor.

Section 26 of the Judicature Act has to be contrasted with section 27 of the Judicature Act. Section 27 of the Judicature Act is enforced by Order 47 of the Civil Procedure Rules which provides the procedure for references to arbitrators by consent of the parties. References may be made where there is no arbitration clause and it is desirable that the matter be refereed to arbitrators.

Order 47 rule 3 (2) of the Civil Procedure Rules provides that the court:

> shall not, except in the manner and to the extent provided in this Order, deal with the matter in the suit.

Order 47 rules 15 give the grounds for setting aside an award of a referee or arbitrator. The grounds for application to court include the grounds *inter alia* of misconduct or corruption, fraudulent concealment of any matter by one of the parties and the award being made after proceeding with the suit by the court.

The finding of an arbitrator or a referee appointed under section 27 of the Judicature Act is an award after parties; subject too rules; appeared before the referee or arbitrator and the award may be set aside on application on limited grounds as stipulated above. Because it is a proceeding by consent of the parties, the grounds for setting aside are narrow in scope. What is material is that the findings of the arbitrator or referee would be an award binding on the parties to the reference.

Trials by referees or arbitrators is contrasted with the matters dealt with under section 26 of the Judicature Act where the trial Judge is of the opinion that there is a question arising in any cause or matter of which he would like an inquiry and report. As in the appellant's matter before this court, the learned trial Judge wanted compensation quantum of the current value of the property at the time of judgment to be reported on by the Government Valuation Surveyor. It was upon the learned trial Judge to adopt the finding or report as his judgment. The survey report was not automatically part of the decree of the High Court.

The other question is whether the parties were entitled to appear before the government surveyor to present their opinions on the valuation of the suit property. I do not find any such requirement under section 26 of the Judicature Act but it could be good practice that the parties should be given a chance to give their views on the matter since the valuation surveyor is deemed to be an officer of the court. What if the learned trial Judge sought the opinion of a handwriting expert before making his decision? It is therefore necessary that the report should be availed to the parties with an opportunity given to the parties to address the learned trial Judge before he reaches a final conclusion on the valuation. The report ought not to be adopted before the parties are given a hearing.

In the premises, I concur with my learned brother Hon. Justice Kiryabwire, JA that ground 4 of the appeal is also allowed with the additional reasons I have advanced.

In the final result, I concur that the appeal fails. I also agree with the orders proposed in the judgment of Kiryabwire JA.

Dated at Kampala the 30th day of July 2020

Christopher Madrama Izama

Justice of Appeal