THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 278 OF 2016

(ARISING FROM HCCS NO. 598 OF 2014)

(CORAM: KAKURU, KIRYABWIRE, MADRAMA, JJA)

STANBIC BANK UGANDA LIMITED ..... APPELLANT

VERSUS

KALULE DEO ..... RESPONDENT

JUDGMENT OF CHRISTOPHER MADRAMA, JA

This is a first appeal from the judgment and orders of Kainamura, J of the High Court dated 1st September 2016. The Respondent had filed Civil Suit No. 598 of 2014 in the High Court against the Appellant where he sought the following reliefs:

1. A declaration that the defendant's actions amounted to breach of contract.
2. Recovery of a TATA truck Registration No. UAM 504N which was unlawfully and illegally disposed of by the defendant or recovery of its monetary value;
3. Special damages for loss of business and daily income from the 4th March, 2011 caused by the defendant's wrongful and illegal attachment and sale of the motor vehicle totalling to Uganda Shillings 232, 400, 000/= for 42 months inclusive of weekends calculated at a daily income of Uganda Shillings 200, 000/= per day.
4. Costs of the suit.

The background to this appeal as set out in the judgment of the learned trial Judge is that the Respondent applied for and was granted a car lease by the Appellant on the 2nd September 2009. The leased car was a TATA SE Truck Registration No. UAM 504N, Chassis No. MAT 38814291R4993 worth $

35,000. The Respondent paid the requisite deposit sum of $ 5,250 under the terms of the lease agreement leaving an outstanding balance of $ 29,750. The truck was delivered to the Respondent from TATA Uganda Limited and was registered in the names of the Appellant as security. The Respondent failed to pay the rentals scheduled as stipulated in the agreement and was in default but later cleared the arrears of rentals.

Under the financial lease facility, the Appellant was entitled to charge a penalty upon default of the Respondent calculated on the outstanding sums. The lease was to run for a period of 60 months and rentals were to be paid for a continuous period of 60 months beginning 30th August, 2013. Owing to circumstances in the Respondent's business leading to inadequate income for the months ending 31st January 2011 and 28th February 2011, the Respondent defaulted in scheduled rental payments. Apparently, the Respondent satisfactorily explained his circumstances to the Appellant's loan officer. On the 2nd March 2011, the Respondent paid Uganda Shillings 1,600,000/= and on the 3rd March 2011, he further paid Uganda Shillings 260,000/=. On the same day of 3rd March 2011, the Appellant's agents attached the truck without notice to the Respondent and thereafter the Appellant disposed of the leased truck.

At the trial court, the Appellant's case was that the Respondent was required to make monthly payments of Uganda Shillings 1,544,000/= upon failure of which the Appellant was entitled to cancel the lease agreement, take possession of the vehicle and dispose of it in any manner. The Appellant stated that the Respondent acknowledged the material default in his payment schedules. The Respondent was served with notice, and a further 14 days' notice in a newspaper prior to the sale of the leased vehicle. The Appellant counterclaimed for the sum of Uganda Shillings 13, 183, 726/= as the outstanding Finance Lease amount and default interest thereon of 10% per annum. It further prayed for general damages, interest on the general damages and costs of the counterclaim.

At the trial, the parties addressed the court on five issues namely;

1. Whether the plaintiff defaulted on the Finance Lease Facility?
2. Whether the plaintiff was put to notice before the said motor vehicle was attached?
3. Whether the defendant lawfully sold the TATA Truck, the subject of the Finance Lease Facility?
4. Whether the plaintiff owes the defendant Uganda Shillings 13, 183, 726/= as the outstanding Finance Lease sum?
5. What remedies are available to the parties?

On whether the plaintiff defaulted on the Finance Lease Facility? The learned trial Judge found that the Respondent defaulted in making the necessary payments as scheduled and it was immaterial that the Respondent later regularized his payments or explained the reason for the default in payment. The fact remained that he defaulted not just once but twice leading to the attachment of the truck and its eventual sale. Issue one was resolved in the affirmative.

On whether the plaintiff was put to notice before the said motor vehicle was attached? The learned trial Judge found that the evidence adduced by both parties revealed that no 14 days' notice was served prior to the attachment of the truck as stipulated in the Finance Lease agreement. The learned trial Judge did not consider the Appellant's argument that it did not have the postal address of the Respondent which made it impracticable to serve the notice as sufficient to serve by Newspaper advertisement. He held that the Appellant acted outside the agreement and in breach of clause 11.2.1 of the agreement which required the Appellant to give the Respondent 14 days' notice.

On whether the defendant lawfully sold the TATA truck, the subject of the Finance Lease Facility? The learned trial Judge held that the Appellant unlawfully sold the TATA truck when it seized the truck without the contractual prior notice. Secondly, it was sold to another party through an auction conducted along Salaama road instead of the place notified for the auction in the newspaper advertisement. In the premises, he resolved the issue in the negative.

On whether the plaintiff owes the defendant Uganda Shillings 13, 183, 726/= as the outstanding Finance Lease sum? The learned trial Judge held that the Appellant failed to prove its claim that the vehicle was valued by the Auto Mobile Association by tendering in a valuation report. The court further held that the Appellant failed to discharge its burden under section 102 of the Evidence Act to prove that the Respondent owes it Uganda Shillings 13, 183, 726/=.

On what remedies are available to the parties? The learned trial Judge rejected the Respondent's claim for special damages in the sum of Uganda Shillings 232, 400, 000/= for lost daily income because the claim for special damages was not proved as required by law. The learned trial Judge entered for the Respondent in the following terms:

1. The defendant pays to the plaintiff Uganda Shillings 42,000,000/= being the value of the TATA truck.
2. The defendant pays to the plaintiff Uganda Shillings 2,000,000/= as general damages.
3. The defendant pays to the plaintiff 12% on the award of Uganda Shillings 42,000,000/= above from the date of filing the suit till payment in full.
4. The defendant pays to the plaintiff interest at court rate on the award of general damages above from the date of judgment till payment in full.
5. The defendant pays costs of the suit.

The Appellant being aggrieved and lodged this appeal on the following grounds:

1. The Learned Trial Judge erred in law and fact when he held that the Appellant's seizure and sale of the truck was outside the Lease Agreement.
2. Having found that the Respondent defaulted on his lease obligations, the Learned Trial Judge erred when he awarded the Respondent the value of the truck whose purchase had been funded by the Appellant

and without considering the Respondent's lease obligation to re pay the loan.

3. The Learned Trial Judge failed to properly evaluate all the evidence adduced and hence erred in rejecting the Appellant's counterclaim.

The Appellant prays that the appeal is allowed and the orders of the High Court set aside. The Appellant further prays that the sale of the truck and the counterclaim be upheld; and for costs of the appeal and costs in the High Court.

The appeal was scheduled for hearing on the 23rd March 2020 but due to the global pandemic of Covid-19 which rendered open court hearing not acceptable, Counsel were directed through the Registrar of the Court to address the court by way of written submissions. The Appellant, was represented by Messrs Nangwala, Rezida & Co. Advocates and adopted the Appellant's Conferencing Notes in support of the appeal and in rejoinder as the written submissions of the Appellant while the Respondent, represented by Messrs Lukwago & Co. Advocates, filed written submissions in addition to adopting the Respondent's Conferencing Notes on record. It is *inter alia* on the basis of these submissions from Counsel that the appeal was resolved.

Submissions of the Appellant's Counsel

Ground 1

The Appellant's Counsel submitted that the learned trial Judge erred in law and fact when he held that the Appellant's seizure and sale of the truck was outside the Lease Agreement. He submitted that the 14 days' prior written notice became impractical and untenable. He relied on the testimony of DW1 who testified that the Respondent could not be traced for several months, and all communication to him could only be through telephone calls. Consequently, the Respondent was informed of the seizure and sale of the leased truck through a telephone call and further through advertisement in the newspaper. Counsel submitted that this evidence remained unchallenged and yet it was never considered by the trial court in its final findings.

Counsel further referred to the Respondent's Bank Statement on record which showed that the Respondent was in arrears throughout the tenure of the suit lease and yet he claimed that he was earning Uganda Shillings 200,000/= per day or Uganda Shillings 6,000,000/= per month and this was also pleaded in the plaint. Counsel submitted that as a result of the Respondent's persistent arrears, his account was placed under a "lock up" – which refers to a situation where the Appellant bank suspended interest earnings and made provisions for a bad debt.

Counsel submitted that the deposit of Uganda Shillings 8,000,000/= which is evident on the Respondent's Bank Statement served to clear his arrears which had accumulated over a long period of time. He submitted that the Respondent admitted that he was warned against the account falling into arrears of rentals lest the vehicle be seized again. However, the Respondent defaulted again and this is evident from the Bank Statement. The Respondent was served letters requiring him to pay the arrears but failed to do so. Counsel pointed out that the Respondent agreed to the seizure of the vehicle on account of failure to pay the outstanding sums under the lease agreement.

Counsel further submitted that the leased vehicle could not be traced for a long time and this put the Appellant bank in jeopardy. Further, the Appellant reserved the right under clause 11.2.1 of the Lease Agreement to sell the truck in any manner upon default.

Counsel relied on **Mugambi vs. Housing Finance Company of Kenya Limited [2006] 1 EA 231**, a persuasive decision of the High Court of Kenya **Maithya vs. Housing Finance Company of Kenya & another [2003] 1 EA 133** another Kenyan High Court decision where it was held that it is not for a borrower to choose to stop making payments and that he or she ought to continue remitting payments whilst prosecuting his or her case. The court further held that no courts of equity will aid a man to derive advantage from his own wrong.

In conclusion on ground 1 of the appeal, Counsel submitted that the seizure

and sale of the truck was well within the Lease Agreement in light of the special circumstances of the case where service of notice before seizure was impractical.

With regard to ground 2 of the appeal, Counsel submitted that having found that the Respondent defaulted on his lease obligations, the learned trial Judge erred when he awarded the Respondent the value of the truck whose purchase had been funded by the Appellant and without considering the Respondent's lease obligation to re pay the loan.

The learned trial Judge awarded the Respondent the value of the leased truck because it was illegally sold by the Appellant. The trial Judge gave two reasons why he found that the sale of the truck was illegal, namely; that it was seized and sold without prior written notice to the Respondent, and secondly, that it was sold at Salaama Road contrary to the place of sale advertised in the newspapers.

With regard to the first reason given by the trial Judge, Counsel maintained his submission on ground 1 that the notice was inapplicable in the circumstances of the Respondent's default in his lease obligations and the fact that the only means available to reach him was by telephone call.

Counsel submitted that clause 11.1.10 and 11.2.1 of Lease Agreement envisioned the possibility of the Respondent not being accessible and therefore provided for seizure without notice.

With regard to the reason that the sale was conducted at a different place from the one indicated in the Lease Agreement, Counsel submitted that this issue was not pleaded neither was it proved to have prejudiced the Respondent. The question only came up during cross examination. Counsel argued that this should have been specifically pleaded and particularised in accordance with Order 6 rule 3 of the Civil Procedure Rules. Counsel contended that since there was no evidence on record to show that the Respondent went to the address indicated in the advertisement namely at Buganda Road on the day of the sale, there was no basis to raise the issue of the place of the sale. Furthermore, all the bidders went to the location which

was advertised in the newspaper and their bids were received from there. He submitted that this proves that the sale transaction was concluded at the advertised place. Further, the winning bid was received at Buganda Road as shown and was accepted with communication to the Buganda Road address.

The Appellant's Counsel submitted that the trial Judge having found that the Respondent defaulted on the Lease Agreement, erred to reward the Respondent with a monetary award equivalent to the value of the truck. He submitted that this contravened the equitable maxim that equity does not reward a wrong. He relied on **Mugambi v Housing Finance Company of Kenya Limited [2006] 1 EA 231** and **Maithya v Housing Finance Company of Kenya and another [2003] 1 EA 133** where the High Court of Kenya held that no court of equity will aid a man to derive advantage from his own wrong.

Counsel further contended that even if the Respondent had fully paid up the sums owing to the Appellant, the truck still belonged to the Appellant and the Respondent could not recover the truck because he did not own it in the first place as stipulated by to clause 11 of the Lease Letter of offer and clause 3.1 of the Lease Terms and Conditions.

Lastly, on ground 2 the Appellant's Counsel submitted that it was erroneous for the learned trial Judge to reward the Respondent with the value of the truck and grant him damages without considering the outstanding indebtedness of the Respondent on the lease account. He submitted that the Respondent remained indebted even after the sale of the truck and as pleaded in the counterclaim brought under clause 11.2.1.2 of the Lease Agreement.

On ground 3 of the appeal, Counsel submitted that the learned trial Judge failed to properly evaluate all the evidence adduced and hence erred in rejecting the Appellant's counterclaim. He pointed out the trial Judge held that the Appellant failed to prove that the Respondent owed it the sum of Uganda Shillings 13,183,726/= as claimed in the Appellant's counterclaim. The trial Judge's finding was based on the fact that the Appellant did not

produce a valuation report of the truck done by Auto Mobile Association of Uganda.

Counsel submitted that the trial Judge ought to have established the Respondent's loan obligation from his Bank Statement and not from the valuation report of the truck. The Bank Statement reflected the book value of the truck and that is what mattered in so far as the Respondent's lease obligations were concerned. The Appellant's Counsel submitted that the truck could have diminished in value owing to its use by the Respondent but this could not have any bearing on the Respondent's outstanding loan balance. Counsel invited the court to consider the Bank Statement and invited court to re-evaluate the evidence on record in respect of the sum claimed by the Appellant in its counterclaim.

Submissions in reply of the Respondent's Counsel

In reply to the submissions of the Appellant's Counsel on ground 1 of the appeal, learned Counsel for the Respondent supported the trial Judge's finding that the Appellant's seizure and sale of the truck was outside the lease agreement. He submitted that the sole purpose of court in interpreting an agreement is to give effect to the intention of the parties and not to purport to introduce new terms for the parties. He relied on **Future Stars Investments (U) Ltd v Nasuru Yusuf HCCS No. 12 of 2017** for this proposition.

The Respondent's Counsel submitted that whereas the Respondent did not pay the sums due under the Lease Agreement contrary to clause 11.1.1 of the terms of the Finance Lease Facility Agreement, the same agreement provided the procedure to be followed in the event of breach. The procedure allowed the Appellant to cancel the agreement and take possession of the truck subject to issuing 14 days' written notice. Counsel submitted that the Appellant breached this procedure when it failed to give the said notice before taking possession of the truck.

The Respondent's Counsel further submitted that whereas clause 11.2.1 of the terms of the Finance Lease Agreement gave the Appellant the right to

dispose of the truck in any manner in the event of breach, the Appellant chose to auction the truck. DW1 testified that the sale did not take place at the date and place indicated in the advertisement but took place at Salaama Road instead of Block 660 Buganda Road Flats to the prejudice of the Respondent. The Respondent's Counsel submitted that selling the truck at the place of sale in the advertisement would have attracted the highest bidder, and thereby protected the interests of the Respondent.

Counsel submitted that there was no valuation of the vehicle though DW1 testified that the valuation report was made by the Automobile Association of Uganda. According to Counsel, it was not certain whether the purported sale went to the highest bidder and possibly with a balance payable to the Respondent. Counsel submitted that without the valuation report tendered in court, a fraudulent motive of the Appellant could not be ruled out.

Counsel submitted that DW1 confirmed that the Respondent cleared his arrears on the 9th January 2011. Therefore, the Appellant having received all the instalments albeit out of time was entitled to recover only the balance on the Lease Agreement. Counsel further submitted the Respondent did not owe the Appellant any outstanding sum under the Finance Lease Agreement and the Appellant failed to prove that the Respondent owed it Uganda Shillings 13,183, 726/=

In conclusion on ground 1 of the appeal, Counsel submitted that the Appellant acted illegally when it failed to give written notice of seizure and sale of the truck to the Respondent; when it auctioned the truck at Salaama Road contrary to the place of sale advertised in the newspaper; and when it failed to file a valuation report. He relied on **Makula International v His Eminence Cardinal Nsubuga, Civil Appeal No. 4 of 1981** where it was held that court cannot sanction what is illegal and illegality once brought to the attention of court overrides all questions of pleadings including admissions made therein. He further relied on **National Social Security Fund & another v Alcon International Ltd SCCA No. 15 of 2009** for the proposition of law that a party relying on illegality in their pleadings can raise it at any point in time during the proceedings.

In reply to the Appellant's submissions on ground 2 Counsel for the Respondent submitted that the ground is too wide and offends rule 86(1) of the Judicature (Court of Appeal Rules) Directions which requires grounds of appeal to be concise, without argument or narrative. Counsel prayed that the court strikes out ground 2 for offending rule 86 of the Rules of this court. In the alternative, he supported the trial Judge's finding that since the truck was sold illegally, the Respondent was entitled to recover the value of the truck at the time of sale.

In reply to ground 3 of the appeal, special damages must be specifically pleaded and proved but the Appellant did not attempt to prove special damages and hence the learned trial Judge held that the Appellant had failed to prove that the Respondent owed it Uganda Shillings 13, 183, 726/=

In conclusion, Counsel submitted that this appeal had no merit and that it should be dismissed with costs.

Resolution of the appeal

I have duly considered the written submissions of Counsel for and against the appeal, the record of appeal and the law. The general duty of this court as a first appellate court in an appeal against a decision of the High Court in the exercise of its original jurisdiction is to reappraise the evidence on record, which duty is stipulated in Rule 30 (1) (a) of the Rules of this court which states that:

> 30. Power to reappraise evidence and to take additional evidence
> (1) On any appeal from a decision of the High Court acting in the exercise of its original jurisdiction, the court may—
>
> (a) reappraise the evidence and draw inferences of fact; and ···

By use of the word "may" in Rule 30 (1) and (a), the duty of the court to reappraise the evidence is a discretionary one and depends on the controversy or controversies for determination in the appeal. The duty of this court to reach its own conclusions after reappraisal of evidence was also set out in **Peters v Sunday Post Ltd [1958] 1 EA 424** by the East African Court

of Appeal at page 429. The Court held that the duty of a first appellate is 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.

Further in **Fr. Narsensio Begumisa & 3 others v Eric Kibega SCCA No. 17 of 2002** Mulenga, JSC with regard to the duties of a first appellate court stated that the rule to reappraise evidence by a first appellate court is a common law duty rather than a statutory one when he held that:

> The legal obligation on a first appellate court to reappraise the evidence is founded in the common law, rather than in the rules of procedure. It is a well – settled principle that on a first appeal, the parties are entitled to obtain from the appeal court its own decision on issues of fact as well as of law. Although in a case of conflicting evidence the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions.

In the course of resolving the dispute, the parties were recalled to address the court on the following additional issues around 2nd November 2020 namely:

1. The Legality of a leasing agreement in view of Section 18 of Cap 54 (The Financial Institutions Act)
2. Whether the contract was (i) a leasing facility, (ii) a Hire purchase agreement, (iii) loan agreement; or (iv) any other agreement.
3. Who is the legal owner of the Motor Vehicle, the subject matter of the contract?

In the additional written submissions both counsel of the parties are in agreement that the applicable law to the facts in issue is the Financial Institutions Act, 2004 which repealed the Financial Institutions Act, Cap 54 and therefore section 18 of the repealed Act does not apply. However, sections 37 and 38 of the Financial Institutions Act, 2004 (the FIA, 2004) replaced section 18 of the Financial Institutions Act, Cap 34 in that section 37 prohibits financial institutions from engaging directly or indirectly in trade,

commerce, industry, insurance or agriculture except under the stated exceptions. Section 37 of the FIA 2004 provides:

> 37. Engaging in trade, commerce, industry
>
> A financial institution shall not—
>
> (a) engage directly or indirectly for its own account, alone or with others in trade, commerce, industry, insurance or agriculture, except in the course of the satisfaction of debts due to it in which case all such activities and interests shall be disposed of at the earliest reasonable opportunity;
>
> (b) acquire or hold, directly or indirectly, in the aggregate, any part of share capital of, or make any capital investment or otherwise have any interest in enterprises engaged in trade, commerce, industry or agriculture in excess of twenty five percent of its core capital, except in the course of the satisfaction of debts due to it; but in such a case all shares and interests shall be disposed of at the earliest reasonable opportunity.

I agree that section 37 when read in context of the FIA, 2004 does not forbid the business of financial leases for the purchase of capital assets by borrowers as stated below. Further section 38 similarly, does not apply to acquisition of assets through financial leases and the use of the asset as security by a financial institution. I shall in due course consider the nature of financial leases. Suffice it to quote section 38 of the FIA, 2004 which provides that:

> 38. Investments in immovable property
>
> (1) A financial institution shall not purchase or acquire any immovable property or any right in it except as may be reasonably necessary for the purpose of conducting its business or of housing or providing amenities for its staff, in which case the cost of the property, in aggregate, shall not exceed one hundred percent of the financial institution's core capital.
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> (2) A financial institution which on the date of commencement of this Act, holds directly or indirectly, in the aggregate immovable property, the cost of which exceeds one hundred percent of its core capital, shall within five years from that date—

(a) dispose of the property in order to comply with this Act; or

(b) add new capital as shall be directed by the Central Bank in order to comply with this Act.

(3) The provisions of this section shall not be construed so as to prevent a financial institution from securing a debt on any immovable property and in case of default of payment of the debt, from holding the immovable property for realization at the earliest reasonable opportunity to the financial institution.

(4) A financial institution which contravenes subsection (1) of this section shall pay to the Central Bank a civil penalty of five currency points for each day on which the contravention continues···

Section 38 generally forbids a financial institution from investing in immovable property though section 38 (3) allows a financial institution to secure a debt on immovable property and this applies to immovable property in the nature of a capital asset acquired through financial leases. Last but not least on the issue of legality of a financial lease, financial institution business has been defined under section 3 (k) of the FIA, 2004 to include

(k) financial leasing if conducted by a financial institution;

Further the Second Schedule to the FIA 2004 in paragraph (B) on Non – Bank Financial Institutions allows them under item (iv) on Finance Houses to make provision of finance and operating leases/factoring facilities. The fact that this Second Schedule applies to non-bank financial institutions is not prima facie an exclusion of banks from conducting the business of financing the acquisition of capital assets and using the asset as security for a loan. Finally a Financial Institution has been defined under section 3 of the FIA, 2004 to mean:

a company licensed to carryon or conduct financial institutions business in Uganda and includes a commercial bank, merchant bank, mortgage bank, post office savings bank, credit institution, a building society, an acceptance house, a discount house, a finance house or any institution which by regulations is classified as a

financial institution by the Central Bank;

I would find that leasing agreements do not breach any section of the FIA, 2004 and are lawful agreements.

With regard to additional issue 2 on the nature of a financial lease, I reserve the issue in the resolution of the appeal.

Further on the issue of who the legal owner of the lease, is, my finding in the body of the judgment is that it is expressly stipulated by the parties in the written contract and I will resolve the issue in the course of resolution of the grounds of appeal.

In the circumstances, I shall deal with the grounds of appeal in the order submitted by Counsel and establish whether on any fact or facts there is need to re-evaluate the evidence.

In ground 1 of the appeal, the memorandum of appeal states that:

1. **The learned trial Judge erred in law and fact when he held that the Appellant's seizure and sale of the truck was outside the lease agreement.**

Ground 1 of the appeal seemingly does not involve any controversy or controversies of fact but rather revolves on the interpretation of the lease agreement and facts which are not in dispute. The ground of appeal challenges the finding of the learned trial Judge that the seizure of the leased truck was outside the lease agreement. In arriving at his decision the learned trial Judge dealt with the issue number 2 that had been framed at the trial and which was:

> Whether the plaintiff was put to notice before the said motor vehicle was attached

The learned trial Judge held that it was the evidence of both witnesses of the plaintiff and the defence that no notice was served prior to the attachment of the truck despite the requirement in the lease contract to give 14 days' notice. I note that there is no controversy of fact about the fact that no prior

notice of attachment was served on the Respondent. Secondly, it is material that the question stated by the Appellant on which the submission of Counsel rested is whether it was practical to serve the notice thereby excusing the Appellant from serving it and instead advertising in the Newspapers. The case of the Appellant is that they failed to trace the plaintiff on his address of service. On this issue the learned trial Judge held that there was no notice to the plaintiff before the vehicle was attached. In the premises he noted that the address of service of notice provided was Nyendo Masaka and therefore the bank acted outside the agreement and the breach of the agreement fell under clause 11.1.1 of the agreement and called for notice under 11.2.1.1 of the agreement. In this appeal the Appellant's submission remains the same. He submitted that the circumstances were laid out to show that the applicable provision was actually clause 11.1 .10 and 11.2.1 in that service on the Respondent on the Respondent's address of service had become impracticable. This was because the Respondent could not be traced for several months according to the testimony of DW1.

In clause 11.1 .10 it is provided that the lessee shall be in breach of the agreement if he generally does anything which may harm the lessor's rights or cause the lessor to suffer any loss or if the lessor's rights under security given are lessened, lost or harmed in any way. Secondly, under clause 11.2.1, in the event of such a breach immediately the lessor shall be entitled to cancel the agreement and take possession of the goods. Thereafter the lessor shall be entitled to dispose of the goods in any manner. It is the Appellant's submission that because the lessee could not be traced for a long time, this put the Appellant's property in jeopardy. Secondly, all communication to the Respondent could only be handed over to him in person upon a telephone call.

The agreement of the parties which is embodied in the finance lease agreement is the primary document that governs the relationship of the parties and it speaks for itself. Clause 11 of the agreement deals with breaches and sets out the factors that constitute breach of the contract. The fact that the Respondent was in default of payment of rental arrears and

therefore in breach under clause 11 of the agreement is not in dispute in that the learned trial Judge found in handling issue number 1 on whether the plaintiff defaulted on the finance lease facility, that it does not matter as argued for Counsel by the plaintiff that he later regularised payments or explained the reason for delay. The fact remains that he defaulted to make payments not only once but twice and this led to the attachment of the truck which was eventually sold off. The learned trial Judge resolved issue number 1 in the affirmative. What remains to be dealt with was whether, upon breach of the lease agreement by the plaintiff, the Appellant served him with any written notice prior to attachment and sale of the truck.

The requirements for notice are found under clause 15 of the lease agreement. I shall set out clause 15 of the agreement which was not dealt with by the parties as follows:

> 15. Notices
>
> 15.1 The parties choose the addresses set out in the Schedule as the street addresses at which the lessee or lessor, as the case may be, will accept delivery of legal and other notices. Should either party wish to change its address, the other party must be notified in writing. The notice must be hand delivered or sent by registered post.
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> 15.2 If a notice has been sent to lessee by hand, the lessor will be deemed to have received it on the date of delivery.
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> 15.3 Where there is no delivery of post to the lessee's chosen address, then the lessor is allowed to send the notice to the lessee's postal box. If it is sent by registered post, the lessee is deemed to have received it seven days after posting.

The agreement is clear and unequivocal that the parties chose their addresses which are set out in the schedule to the lease agreement. The fact that the lessee's address of service is Nyendo Masaka is not in dispute. It is clearly set out in the lease agreement itself. It is also clear that the address of service is the address where notices are to be served. It is not specifically required that the notice should be delivered to the Respondent personally. It is sufficient to have the notice envisaged under clause 15 of the agreement delivered at the address of service. This is very clear with the deemed receipt

of notice through the postal address. As a matter of fact, no postal address of the Respondent was included in schedule. Notice of change of address of service has to be notified in writing. In any case how the Respondent was to be served is not the problem of the Respondent. It was upon the Appellant to ensure that there was a proper address of service of the customer for purposes of carrying out its business. The question of it having become impracticable to serve the Respondent does not arise where notice is left at the physical address indicated in the schedule to the finance lease agreement. The testimony that the Respondent could not be traced for several months would be immaterial since the address of service is indicated and service is deemed to be effective if served at the address for service. As to whether the address is clearly specified is an issue of management of the Appellant's business by the Appellant's officials.

The clear evidence on record is that there was no service of notice and the Respondent testified in paragraph 18 of his witness statement that:

> That on the 3rd March, 2011 the defendant's agents without any notice again attached the TATA truck yet I had dully paid the monthly instalment.

Secondly, DW1, Denis Kiiza, the Manager of Specialized Recoveries in the Appellant bank put the question of whether the Respondent was served with notice to rest when he admitted in his cross examination testimony that no written notice was given to the Respondent before the vehicle was attached. He testified that this was because there was no known postal address for the Respondent. As noted above, there was a physical address of the Respondent provided in the schedule to the agreement and no postal address and therefore the Appellant could not purport to serve on a postal address.

This is what DW1 stated at pages 66 and 67 of the record:

> Counsel Nanjibu: Tell us how notice is supposed to be?
>
> DW1: A notice is supposed to be delivered to the address that a customer has (given) the bank.
>
> Counsel Nanjibu: How is it delivered there?

DW1: Through post

Counsel Nanjibu: In January 2011, before the motor vehicle was attached, did the bank send Kalule Deo any written notice?

DW1: No because there was no known post address for Kalule Deo.

Counsel Nanjibu: About the second attachment, when did it happen?

DW1: March 2011

Counsel Nanjibu: Was Kalule Deo given any written notice before the attachment?

DW1: No

The lease Agreement shows that the Respondent's address was Nyendo Masaka Municipality. In the cross examination of the Respondent, he testified that he gave the Appellant his physical address as Nyendo and that the truck was always parked at Nyendo. The learned trial Judge took note of these facts and stated at page 11 of his judgment as follows:

> It is my considered opinion that there was no notice to the plaintiff before the vehicle was attached. As required by the agreement the street address for service of notice provided was Nyendo, Masaka. With due respect I am of the view that the bank acted outside the agreement and the breach of agreement fell under clause 11.1.1 of the agreement and as such called for notice under clause 11.2.1.1 of the agreement. In the premises issue 2 is answered in the negative.

The lease agreement provides that the lessee will be in breach of the agreement if he does not pay when due, any money that is payable to the lessor. The evidence was that the Respondent was in breach of the agreement by non-payment of money when it was due. Secondly, the learned trial Judge considered 11.2.1 which provides that:

> In the event of breaches 11.1.1 and 11.1.2, cancel this agreement and take possession of the goods upon giving 14 days' written notice to the lessee and in the event of breaches 11.1.3 to 11.1 .10 immediately cancel this agreement and take possession of the goods. The lessor shall thereafter be entitled to dispose of the goods in any manner.

Because the breach was non-payment of rentals, clause 11.1.1 was applicable

and therefore the lessee was entitled to 14 days' notice. In the premises, I do not find any error of law or fact in the judgment of the learned trial Judge in the holding that the attachment was outside the agreement. To put it in other words, the attachment of the leased truck was not done in accordance with the lease agreement. Having found that the attachment was without the requisite notice, it follows that it was unlawful and any proceedings taken thereafter such as of the sale were unlawful. In the premises, ground 1 of the appeal has no merit and I would disallow it.

I will handle grounds 2 and 3 of the appeal together since they both deal with the award of the learned trial Judge and the remedies following after finding for the plaintiff in the suit.

Grounds 2 and 3 of the appeal are that:

2. **Having found that the Respondent defaulted on his lease obligations, the learned trial Judge erred when he awarded the Respondent the value of the truck whose purchase had been funded by the Appellant and without considering the Respondent's lease obligation to repay the loan.**
3. **The learned trial Judge failed to properly evaluate all the evidence adduced and hence to erred in rejecting the Appellants counterclaim.**

From the very outset as a matter of general principle, it is important to state that the Respondent was servicing a financial lease at the end of which, if he successfully completed payment of the rentals, he would exercise the option to purchase the truck at a nominal fee which is provided for. It follows that when the financial lease agreement is breached, the breach can be rectified by the payment of outstanding rentals and penalties. If the vehicle is sold off, the principle of offsetting what is due and outstanding has to be considered. All depends on the wording of the financial lease agreement or contract.

The learned trial Judge dealt with the issue of whether the defendant lawfully sold the truck, the subject matter of the financial lease facility. Secondly, whether the plaintiff owes the defendant Uganda shillings 13,183,726/= as

the outstanding finance lease sum. This is what the learned trial Judge held:

> Moving to the third issue whether the defendant lawfully sold the Tata truck, the subject matter of the finance lease facility, it is not in dispute that the banks only security under a lease finance facility was the truck subject of the lease. The truck was registered in the names of the bank, the defendant in this case. Upon default, the defendant seized the truck without prior notice and had it sold to another party through an auction that took place along Salaama road contrary to the advertised place. Accordingly issue three is answered in the negative.

It is evident from the holding that the learned trial Judge held that the truck was seized without prior notice. That was sufficient for his finding on whether the property was lawfully sold. To go further into the process of sale would deal with the question of whether a fair value was obtained for the sale rather than whether it was a lawful in the circumstances. In the circumstances the submission about the place of the auction goes to the aggravation of the breach by failure to give notice and will be considered on the issue of the award.

The question is whether it was erroneous for the learned trial Judge to award to the Respondent the value of the truck. The Appellant's Counsel submitted that the learned trial Judge had not considered the outstanding amounts on the Respondent's loan statement. In other word's this had to be offset. There needed to be reconciliation of accounts between the two parties after the sale of the truck to establish who loses what and who gains what.

The evidence shows that by letter dated 26th of June 2011 the Respondent was advised that the truck was auctioned for Uganda shillings 42,000,000/= which partly settled the lease account. Thereafter what remained outstanding was Uganda shillings 14,222,024.56. In the counterclaim, the Appellant states that the outstanding financial lease amount was Uganda shillings 13,183,726/=. No specific facts are pleaded in the written statement of defence or the counterclaim relating to what the outstanding amount was and how much was due after reconciliation of the amount of the trucks sold, plus the payments made by the Respondent. In the witness statement of the Respondent, he stated that the Appellant had ordered him to pay Uganda

shillings 72,274,757/= plus interest within 5 days. On 7th of March 2011 he received a letter requiring him to pay Uganda shillings 70,441,755.77 without explanation. Then on 28th of June 2011, he received a demand notice requiring him to pay Uganda shillings 14,222,024/=.

On the other hand, the Appellant's witness Mr Denis Kizza DW1 testified that by 30th of November 2009, the Respondent had arrears of rentals on the account amounting to Uganda shillings 10,938,946/= by October 2010. Scheduled payments were for Uganda shillings 1,544,000/= every 30th day of the month. The Respondent had taken a financial lease equivalent to US$29,750 and had paid an insurance premium facility of Uganda shillings 5,390,000/=. The disbursement was made on 23rd September, 2009 whereupon the vehicle was delivered to the Respondent. There is no testimony about the entire outstanding amount of rentals. What is clear is that the next instalment of 30th of January 2011 was the last instalment that was not cleared by the Respondent.

I have further considered the testimony of witnesses. The plaintiff testified as PW1 and the defendant's official testified as DW1. Each party called one witness.

The evidence of the plaintiff of deposits is exhibit P8. On 18th January, 2011 the plaintiff paid Uganda shillings 8,000,000/= and the truck which had been impounded at the time was returned to him. In cross examination of the plaintiff who is the Respondent to this appeal, the plaintiff testified that the cost of the truck was Uganda shillings 91,000,000/=. He had paid Uganda shillings 33,000,000/= and when is added the Uganda shillings 42,000,000/= from the sales of the truck, one would get Uganda shillings 77,000,000/=. The plaintiff agreed that he had paid Uganda shillings 33,000,000/= by 3rd of March 2011. Secondly, he had also paid Uganda shillings 15,000,000/= deposit which came roughly to Uganda shillings 48,000,000/=.

On the other hand, DW1 testified for the defendant/Appellant to this appeal in cross examination but did not give the specific amount of money that the Respondent had paid the bank.

I must say the parties and Counsel expected the learned trial Judge to work out the figures from the statements without assistance from auditors or accountants or indeed from witnesses.

The learned trial Judge considered the 4th issue of whether the plaintiff owes the defendant Uganda shillings 13,183,726/= as the outstanding finance lease sum. He found that there was no evidence to support the counterclaim. On the question of remedies, the learned trial Judge awarded the recovery value of the truck at the sum of Uganda shillings 42,000,000/= being the amount of money at which the truck was sold. He awarded general damages of Uganda shillings 2,000,000/=. The learned trial Judge disallowed the special damages of Uganda shillings 232,400,000/= for loss of business and daily income from 4th of February 2011 when the vehicle was illegally attached and subsequently sold.

With due respect to the learned trial Judge, the consequences of the breach by default or failure to give notice should be considered on the basis of the nature of the contract and the terms of the contract. Was there a repudiatory breach of the contract? Who was entitled to damages? Who was the legal owner of the asset?

The common law is that future rentals may or may not be payable depending on the facts of each case. This was considered by Lord Denning in **Financings Ltd v Baldock [1963] 1 All ER 440** when he held that:

> It seems to me that, when an agreement of hiring is terminated by virtue of a power contained in it and the owner retakes the vehicle, he can recover damages for any breach up to the date of termination, but not for any breach thereafter, I see no difference in this respect between the letting of the vehicle on hire and the letting of land on a lease. If a lessor, under a proviso for entry, re-enters on the ground of non-payment of rent or of disrepair, he gets the arrears of rent up to the date of re-entry and damages for want of repair at the date, but he does not get damages for loss of rent thereafter or for breaches of repair thereafter. In this and many hire purchase agreements, the owners have sought to avoid the general principle by inserting a "minimum payment" clause such as we see in clause (11) (a) here, ··· The owners by such a clause are really seeking, on an early termination of the hiring, to recover damages for loss of future rentals, when they have not lost any.

> They have no right to future rentals after they have terminated the agreement and got the vehicle back. ···

The general principle is that termination of an agreement brings to an end the obligations of the parties up to the date of the termination subject to recovery of damages for breaches or injuries that have occurred up to that point. In **Lombard North Central plc v Butterworth [1987] 1 All ER 267** Lord Mustill agreed with the proposition that where a breach goes to the root of the contract, the injured party may elect to put an end to the contract. Thereupon both sides are relieved from those obligations which remain unperformed and the injured party may elect to sue for compensation for any breaches which occurred before the contract was terminated. Most importantly it was held that a term of the contract prescribing what damages are to be recoverable when the contract is terminated for breach of a condition is open to being struck down as a penalty, if it is not a genuine covenanted pre-estimate of the damage.

The question of whether future rentals should be paid therefore should be based on the assessment of the facts. After all the Appellant sold the truck and recovered some money in addition to the Respondent having paid the rentals. Secondly, upon a breach of the condition to give notice, the Respondent was robbed of an opportunity (or possibility) of rectifying the breach and therefore continuing with the contract and finally he was also robbed of the possibility of exercising the option to purchase the truck at a nominal price.

The Common Law was further explained in **Lombard North Central plc v Butterworth [1987] 1 All ER 267** there was lease of a computer and the court considered payment of future rentals on the basis of whether it was a fair pre-estimate of the compensation due to breach. In clause 6 of the lease agreement it was stipulated that in the event of termination of the lease for non-payment of rent, the lessee shall forthwith pay to the lessor all arrears of rentals. Secondly, the further rentals which would, but for determination of the lessor's consent to the lessee's possession of the goods, have fallen due to the end of the fixed term of the lease less a discount for accelerated

payment of 5% per annum. It was specifically provided that the determination of the lessor's consent to the lessee's possession of the goods shall not affect or prejudice the rights of the lessor and remedies provided for. The Creditor filed an action for recovery of damages plus the outstanding arrears. The trial Judge gave judgment for damages recoverable in respect of the future instalments subject to credit allowed in the statement of claim. The question was whether clause 6 of the agreement was a penalty and, if so, whether the conduct of the hirer (the defendant) amounted to a repudiation of the agreement that was accepted by the owner (the plaintiffs).

Nicholls LJ stated in **Lombard North Central plc v Butterworth** (supra) that in the absence of a repudiatory breach, clause 6 was a penalty in so far as it purported to oblige the defendant, regardless of the seriousness or triviality of the breach which led to the plaintiff terminating the agreement by taking possession of the computer, to make a payment, in respect of rental instalments which had not accrued prior to repossession.

I wish to emphasise the holding of Nicholls LJ on the characteristics of a financial lease in discussing the additional issue of the nature of a financial lease in terms of definition and who the legal owner of the capital asset leased is. Nicholls LJ stated that it was the business of the plaintiff in **Lombard North Central plc v Butterworth** (supra), to finance customers to acquire goods whether by hire purchase or lease. The financier purchases the goods chosen by the customer from the supplier and lets them to the customer on lease or hire. The lease agreement provides for payment of rentals for the duration of hire/lease sufficient to make a commercial profit on the money paid for the acquisition of the property. The defendant has the option to buy the goods at the end of the hire for a nominal sum. The interest of the financier upon repossession of the goods was confined to reselling them at prevailing market rates and possibly at a time when the goods had undergone some depreciation. It was crucial for the agreed instalments to be paid promptly. Interest is calculated on the basis of instalment dates in order to have them paid regularly and promptly. Failure to pay promptly would make the arrangements unattractive and unprofitable and was likely to cause

substantial loss to the financier. The defendant's objective was to use the goods while making instalment payments and at the end of the hire period to acquire ownership to the property. Nicholls LJ on analysis of the agreement found that failure to pay promptly amounted to a repudiatory breach of the agreement. He found that failure to pay triggers the right of the plaintiff/the financier to terminate the agreement and take possession of the goods. In the context of financial leases, a breach in the payment of instalments goes to the root of the contract. Consequently, the legal consequence of the contract was that the plaintiff would be entitled to claim damages for loss of the whole transaction. The parties agreed that breach of such a condition would go to the root of the contract and would entitle the innocent party to accept the breach as repudiation and to be paid damages according to the contract.

The decision rested on the construction of the lease agreement to the effect that failure to pay promptly was repudiation of the lease.

On the nature of a financial lease, the arrangement as reflected in the agreement of the parties is that the customer, such as the respondent to this appeal, identifies a capital asset for funding by the bank. He is required to pay a deposit of about 15% of the total price of the capital asset. The bank upon evaluation of the prospective deal, would have decided to finance the purchase of the capital asset but retains the legal ownership as security for the loan advanced to the borrower. The terms of the lease agreement may reflect the fact that the borrower is entitled to ownership of the property by a transfer of title (legal ownership) upon the payment of a nominal fee agreed stated in the contract pursuant to completing the rentals which take care of the monies say about the 85% advanced to the borrower for the purchase of the capital asset in the facts of this appeal as well as a profit woven into the rentals calculated at a rate to endure for the duration of the lease. Obviously, there is a need for statutory regulation of the business of finance leases. The advantage it has is that the borrower only needs to raise the 15% of the total cost of the capital asset. The financial institution may

require the borrower to provide additional security as it may be risky upon handing over of the capital asset to the borrower to have it as the only security to secure the money borrowed together with the interest or profit it earns. The advantage to the borrower is that, the borrower continues to make money on the capital asset while faithfully servicing the rentals. Where there are breaches, the parties stipulate the consequences in the contract. The financial institution is secured by the capital asset remaining in its names as the legal owner thereof but in practical terms, the beneficial owner uses the property. These are legal devises by which the parties can exercise their rights and obligations in the acquisition of a capital asset. Legal ownership, does not give the bank the right to enjoy the property by generating money from the capital assets. For the contract to work, the capital asset should be able to generate money for the borrower as well as service the rentals unless the borrower has another source of income to do so. It is the borrower who is the beneficial owner of the capital asset with obligations to service the loan in what is termed as "rentals". Where the borrower defaults in the payment of the "rentals", the bank uses its legal title of ownership to attach the capital asset and where there is failure to rectify the breach by the borrower, to sell the capital asset. Upon the sale, there is provision for reconciliation of accounts to establish who owes the other and how much.

Nicholls LJ in **Lombard North Central plc v Butterworth** (supra), summarised the principles. The question is whether the hirer repudiated his liability for future rentals and whether the legal owner is entitled thereby to treat the repudiation as going to root of the contract. In case the repudiation did not go to the root of the contract, the remedy of the owner was to claim damages up to the time of the breach with interest. It could not claim for future instalments since they had not arisen. The question of whether failure to pay amounted to repudiatory breach should be determined on a case-by-case basis and based on construction of the contract with the underlying principle to restore the injured party on the basis *restitutio in integrum*.

The resolution of issue turns on the construction of the contract and the brief facts are that the Respondent was offered a lease facility equivalent to US$29,750 and IPF of Uganda shillings 5,390,000/=. The nature of the agreement was a finance lease agreement. The asset to be supplied was to be approved by the lessor and the lease facility was sanctioned to finance a brand-new Tata truck. Payments were to be made by debit order on the account of the Respondent with the Appellant bank. The Appellant was required to pay an initial sum of 15% equivalent to US$5250 of the financed asset to be paid to the supplier prior to the disbursement of the facility. The rentals were to be paid in 60 equal monthly rentals inclusive of interest. The IPF was to be paid in 10 equal monthly instalments. After receiving 15% payment as stipulated above, the Appellant disbursed money upon which the supplier of the vehicle was paid and the account of the Respondent debited. The agreement stipulated that at the expiry of the lease, upon successfully completing the monthly rentals, the Respondent was entitled to purchase the financed asset at 0.5% of the original amount financed by the bank.

The payment of rentals was never completed and the Respondent was unable in the circumstances to exercise the option of paying for the truck and owning it. The truck remained under the legal ownership and title of the Appellant bank. This was supposed to be the case until after the Respondent exercised the option to purchase upon completing the 60 instalments in the rentals. Upon repudiation of the contract, the Appellant would lose the right to purchase the vehicle at 0.5% of the initial purchase price. On the other hand, the bank had received some rentals and the question was whether it was entitled to charge for the future rentals by selling the asset to recover the future rentals.

The terms of the contract included the consequences of breach and I particularly set out the relevant provisions where the parties *inter alia* agreed that:

> 11.2. Should any one of the above events happen or should the goods be lost or destroyed or damaged, the lessor may, if it chooses and without harming any of

the other rights it may have, exercise any of the following options: –

11.2.1 In the event of breaches 11.1.1 and 11.1.2, cancel this agreement and take possession of the goods upon giving 14 days' written notice to the lessee and in the event of breaches 11.1.3 to 11.1 .10 immediately cancel this agreement and take possession of the goods. The lessor shall thereafter be entitled to dispose of the goods in any manner.

11.2.1.1 If the proceeds of the goods, referred to in clause 11.2.1, are less than the amounts outstanding, which includes amounts presently outstanding and amounts which would have become due in the future plus expenses incurred by the lessor in the repossession, sale, transportation, valuation or storage of the goods, or any other charges (including, without limitation, any tax which may be payable), the lessee shall pay to the lessor the amount of the shortfall thus arising, within 14 days of demand by the lessor; or

11.2.1.2 If the proceeds of the goods, referred to in clause 11.2.1, are more than the amounts outstanding, which includes amounts presently outstanding and amounts which would have become due in the future plus expenses incurred by the lessor in the repossession, sale, transportation, valuation of all storage of the goods, or any other charges (including, without limitation, any tax which may be payable), the lessor shall pay the excess to the lessee within 21 days of the lessor receiving such proceeds.···

As held by the learned trial Judge, the lessor purported to exercise the option provided by clause 11.2.1 on the ground of breach by non-payment under clause 11.1.1. This option gave the lessor, upon giving 14 days' written notice to the lessee, the right to immediately cancel the agreement and take possession of the goods. Upon taking possession of the goods, the lessor would be entitled to dispose of the goods in any manner. However, the learned trial Judge held that the lessor had not given the requisite 14 days' written notice. That is where the matter ended. In other words, the lessor was not entitled to take possession of the goods or entitled to dispose of the goods in any manner following repossession. It should further be highlighted that failure to pay rentals promptly as scheduled violates clause 2 and 11.1.1 of the agreement. This however gives the lessor discretionary right whether to take possession of the leased truck or waive the right and seek payment of arrears as it did before in this matter. In any case the notice to lessee would

enable the lessee to rectify the breach.

It follows that clauses 11.2.1.1 and 11.2.1.2 which deal with reconciliation of accounts upon sale of the goods by the Appellant would be inapplicable because the condition precedent would be the giving to the lessee prior 14 days' written notice followed by repossession of the truck upon failure to rectify the breach and thereafter the right of disposal of the goods by the lessor.

However, it was envisaged that, had the 14 days' notice been given, the Appellant would have been entitled to recover outstanding amounts which would have become due in the future plus expenses incurred by the lessor in the repossession, sale, transportation, valuation or storage of the goods or any other charges inclusive of taxes and if there is any outstanding amount after that, make a demand within 14 days for payment by the lessee of the outstanding balances. The second case scenario is if the proceeds of the goods lawfully repossessed are more than the amounts outstanding, inclusive, amounts presently outstanding and which would have become due in the future plus expenses incurred by the lessor in the repossession, sale, transportation, valuation or storage of the goods or any other charges inclusive of taxes payable, the lessor would pay the excess to the lessee within 21 days of the lessor receiving such proceeds.

Because no prior notice of 14 days was given, the repossession was unlawful and therefore the sale was unlawful and the contract is deemed repudiated with the injured party being the Respondent. The applicable measure of damages to the Respondent would be *restitutio in integrum* to the injured party. The natural consequences of the breach have to be considered where the court should determine what damage the Respondent suffered in the circumstances.

Generally, damages as defined in **Halsbury's Laws of England, 4th Ed Vol. 12 (1) Paragraph 802** is that it is:

> The pecuniary recompense given by process of law to a person for the actionable wrong that another person has done to him or her.

Lord Greene M.R in **Hall Brothers Steamship Company Ltd v Young (1938) 43 Com Cas 284**, defined damages as:

> to an English lawyer imports this idea, that the sums payable by way of damages are sums which fall to be paid by reason of some breach of duty or obligation, whether the duty obligations is imposed by contract, by the General laws, or legislation.

Lastly, according to according to Lord Macnaghten in **Stroms v Hutchinson [1905] AC 515** general damages are those damages as the law would presume to be the direct natural or probable consequence of the act complained of.

In the facts and circumstances considered in this appeal, the consequences of the failure to give notice are clearly that the Respondent did not have a chance to rectify his own breach by failure to pay rentals promptly and therefore lost out on performance of the contract to the extent where possible of acquiring the truck. Reconciliation of accounts between the parties should have been preceded by a contractual repudiation of the contract. The admitted statement exhibit P8 shows that the Respondent paid 29 instalments of various amounts amounting to Uganda shillings 33,640,000/= in addition to the US$5250 deposit which had been paid. For the moment I would not consider the insurance premium paid by the Respondent which insurance is against insurance risks for the benefit of the insured under the contract of insurance. What was proved in evidence was the payment of Uganda shillings 48,000,000/= reflecting slightly over half of the purchase price of the truck. While the truck remained in the formal legal ownership of the Appellant bank, the Respondent lost the whole deal of acquiring the truck. In any case, further probable loss is loss of income to be earned while in possession of the truck. The other anticipated loss is loss of income to service the loan amount. In the premises, the injured party is entitled to general damages up to the date of the breach by the failure of the Appellant to give the requisite notice.

The learned trial Judge considered the fact that the Respondent could not prove and did not prove loss of income to the tune of over Uganda shillings

220,000,000/= for the non-use of the truck. He disallowed this claim and there was no counter appeal against that judgment. As a matter of principle, it was erroneous for the learned trial Judge to award to the plaintiff/Respondent the value of the truck which remained the property of the Appellant. That said; the Respondent was entitled to damages for the loss arising from failure to give notice.

Furthermore, with regard to the 3rd ground of appeal, the Appellant was not entitled to future rentals on account of its own breach by failure to give the requisite written notice at the agreed address of service. The Appellant simply repossessed its track and lost the right to future rentals because of the repudiatory breach of the contract by failure to give prior notice and selling of the truck without giving the Respondent a chance to rectify the breach of failure to pay promptly the rentals.

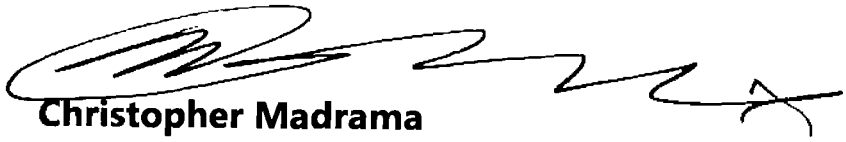
In the premises I would disallow ground 3 of the appeal and find that the Appellant was not entitled to counterclaim for future rentals.

I would partially allow ground 2 of the appeal but would in lieu of the value of the truck, award to the Respondent general damages. I would in the circumstances set aside the award of Uganda shillings 42,000,000/= which award is equivalent to the price at which the truck was sold by the Appellant. I note that the Respondent had already been awarded general damages. In the circumstances, I would substitute the judgment of the High Court with the judgment of this court and therefore substitute the award of general damages of Uganda shillings 2,000,000/= with an award of general damages of Uganda shillings 15,000,000/=.

I would further order that the award of Uganda Shillings 15,000,000/= as general damages shall carry interest at the rate of 6% per annum from the date of judgment of the High Court till payment in full.

Furthermore, the appeal of the Appellant having substantially failed, I would award the Respondent half the costs of this appeal and confirm the decision of the High Court with regard to costs in the High Court.

Dated at Kampala the 25th day of Feb 2021



Christopher Madrama

Justice of Appeal

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 278 OF 2016

STANBIC BANK UGANDA LIMITED .....APPELLANT

VERSUS

KALULE DEO.....RESPONDENT

(Appeal from the decision of the High Court of Uganda, dated 1st September 2016 by Hon. Mr. Justice B. Kainamura)

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 opportunity of reading in draft the judgment of my learned brother Hon. Madrama JA. He has already set out the background to this appeal, the grounds upon which it is premised, the representations and submissions of counsel for both parties. I will therefore not belabor to reproduce them here.

I have found myself compelled to look at the issues raised at the trial and grounds of the appeal herein from a completely different angle from that of my learned brothers on this Coram.

The question I seek to determine is whether the contract between the parties, referred to in the pleadings at the High Court as "the lease agreement" from which this appeal arises was legal and valid in the first place.

Since this question was not canvassed at the trial and was not raised in the grounds of appeal, pursuant to Rule 102, of the Rules of this Court, the parties were recalled

to submit on the same. They were also requested to file written submissions on the specific questions on the legality of the contract which they both did. The questions they were required to submit on were;

1. The legality of the leasing agreement in view of the provisions of the Financial Institutions Act (FIA).
2. Whether the contract was;
   (i) A leasing a facility.
   (ii) A hire purchase agreement.
   (iii) A loan agreement
   (iv) Any other type of agreement.
3. Who the legal owner of Motor vehicle the subject of the contract was at the time it was sold.

Submissions for the appellant

In respect of the above issues, the appellant in their written submission stated as follows:

Issue 1

The legality of the leasing agreement, in view of Financial Institutions Act.

The Financial Institutions Act, Cap 54 was repealed by the Financial Institutions Act, 2004. The latter statute commenced on 26th March 2004.The Lease agreement which is the subject of the current dispute is of 2nd September 2009.

Section 18 of Cap 54 of the Financial Institutions Act, was repealed and reproduced in the Financial Institutions Act, 2004 under two sections, that is, Sections 37 and 38. Section 37 generally prohibits financial institutions from engaging directly or indirectly in trade, commerce, industry, insurance or agriculture except under the stated exceptions. The exceptions relate to satisfaction of debts due to it. Section 38 on the other hand prohibits financial

institutions from purchasing or acquiring any immovable property or any right in it except under the exceptions stated thereunder.

Section 3 of the Act under the definition of financial institutions business as well as the second schedule to the Act, nonetheless, respectively list (k) financial leasing if conducted by a financial institution' and "provision of finance and operating leases/factoring facilities' conducted by Finance Houses as financial institutions business.

The other mention of Finance Leasing under the Act is under Section 3 of the Act where a "Finance House" is defined to mean "a company licensed to conduct financial institution business in Uganda which is specified in the Second Schedule to this Act as its principal business and which consists ... operational and finance leasing ... "

> From the foregoing, it is clear that the Financial Institutions Act, 2004 under which the Lease Agreement the subject of the dispute before the Court was executed, provides for Lease Financing as part of Financial Institutions business conducted by a Finance House. The legal foundation of a Lease Agreement is therefore the Financial Institutions Act, 2004.

Issue 2

Whether the contract was, (i) a leasing facility; (ii) hire purchase agreement (iii) loan agreement (iv) any other type of agreement.

It was submitted for the appellant that, the contract was a Leasing Facility. In the second schedule of the Financial Institutions Act, 2004, what constitutes Financial Institutions business for a Finance House is indicated to separately include: provision of hire purchase facilities; provision of finance and operating leases/factoring facilities; and lastly; provision of short and medium-term loans. Leasing is clearly distinct from Hire-purchase. Indeed, while Hire-purchase is

provided for under the Hire Purchase Act, 2009, Leasing is currently only a subject of a long pending Bill in Parliament, developed by the Uganda Law Reform Commission. Section 3 of the Hire Purchase Act defines a 'hire purchase agreement' to mean an agreement for the bailment of goods under which the bailee may buy the goods or under which the property in the goods will or may pass to the hirer.

There is no Ugandan decision from an Appellate Court that addresses Finance/Financial Lease/Leasing. The High Court has, however, adjudicated matters touching on financial leasing and defined it. *High Court (Civil Division) Civil Suit No.230 of 2012 Kelly Jarret Silveria and Others vs. Stanbic Bank Uganda Ltd* summarised the position in earlier cases in the following terms:

> The courts have overtime entertained a number of cases on asset/lease financing and have laid down a number principles/precedents basing on the various laws of the land. Whereas there is no particular statutory framework for lease financing, the Financial Institutions Act (F.I.A), 2004 under section 3 recognizes it as one of the business of a financial institution. This therefore places the operation of asset financing in the financial institutions like commercial banks, saving banks, credit institutions among others which have to be licensed in Uganda. Hon. Justice Lameck Mukasa gave a definition of finance leasing in Nassolo Farida v DFCU Leasing Company Ltd HCCS No, 536/2006 while quoting Chitfy on Contracts, 27th Edition Vol 7 as follows; "Finance Leasing- a form of long term finance has developed known as finance leasing. In a finance lease, the lessee selects the equipment to be supplied by a manufacturer or dealer but the lessor (a finance company) provides funds, acquires title to the equipment and allows the lessee to use it for all (or most) of its expected useful life. During the lease period, the usual risks and rewards of ownership are transferred to the lessee, who bears the risk of loss, destructions and depreciation of the leased equipment (fair wear

and tear only expected) and of its obsolescence or malfunctions. The lessee also bears the costs of maintenance, repairs and insurance. The regular rental payments during the rental period are calculated to enable the lessor amortize its capital outlay and to make a profit from its finance charges. At the end of the primary leasing period, there will frequently be a secondary leasing period during which the lessee may opt to continue to lease at a nominal rental or the equipment may be sold and a proportion of the sale proceeds returned to the lessee as a rebate of rentals. The lessee thus acquires any residual value in the equipment after the lessor has recouped its investment and charges. If the lease is terminated prematurely, the lessor is entitled to recoup its capital investment (less the realizable value of the equipment at the time) and its expected finance charges (less an allowance to reflect the accelerated return of capital). The bailment which underlines finance leasing is therefore only a device to provide the finance company with a security interest (reversionary right)'.

In view of the above decision, the ownership of the leased vehicle remains with the lessor by acquisition of its title, the usual risks and rewards of ownership are transferred to the lessee who bears the risk of loss, destructions and depreciation of the leased equipment. The ownership of the leased vehicle by the lessor is meant to secure the lessor's interest to ensure that the lessor recovers its capital investment and profit thereto.

The **Unidroit Convention on International Financial Leasing** on the other hand describes Finance Leasing under article 2 as a transaction that entails:

(a) The lessee specifies the equipment and selects the supplier without relying primarily on the skill and judgment of the lessor;

(b) The equipment is acquired by the lessor in connection with a leasing agreement which, to the knowledge of the supplier, either has been made or is to be made between the lessor and the lessee; and

(c) The rentals payable under the leasing agreement are calculated so as to take into account in particular the amortisation of the whole or a substantial part of the cost of the equipment.

The contract in this case was specifically indicated under clause 1 of the Lease Letter of Offer as a "Finance Lease Facility". The Terms and Conditions of the contract in issue all bear the characteristics of a Finance Lease.

Issue 3

Who the legal owner of the motor vehicle the subject matter of the contract was at the time it was sold.

It is submitted that in light of lease Financing agreement and the specific agreement in issue in this case, the motor vehicle/Truck, the subject matter of the contract was at the time of sale legally owned by the appellant, Stanbic Bank Uganda Ltd and then operated by the Respondent.

Clause 11 of the Lease Letter of Offer addressed the issue of the residual value of the Truck. It provided that "subject to full payment of the Lease, you may exercise and option to purchase the financed asset for 0.5% (zero point five) percent of the original amount financed by the bank. You will be required to exercise this option within 3 months, failure of which the Bank shall be entitled to effect the transfer at your own cost.

Clause 3.1 of the Terms and Conditions at page 15 of the Record of Appeal, line 1 specifically provided that" The Lessor will at all times remain the owner of the goods."

> It is thus clear from the terms of the Lease Agreement that the motor vehicle/Truck was owned by the Appellant at the time it was sold. Had the Respondent not defaulted, he would have nonetheless had the opportunity to purchase the Truck from the Appellant at the end of the Lease term.

The foregoing position is unique to Lease Financing. Thus, while the Appellant as Lessor remains the registered owner of the leased vehicle, the Lessee operates it, earns from it and bears all risk and liability. See: *Kelly Jarret Silveria and Others vs. Stanbic Bank Uganda ltd and Others, High Court (Civil Division) Civil Suit No.230 of 2012.*

As such, it is also trite law that the fact of registration on the Logbook is not conclusive proof of ownership as to automatically infer liability. It is a rebuttable presumption under the law. Thus, section **30 of the Traffic and Road Safety Act, Cap 361** on the presumption of ownership of a vehicle provides that:

> The person in whose name a motor vehicle, trailer or engineering plant not subject to a hiring agreement, or a hire-purchase agreement or a finance lease agreement is registered shall, unless the contrary is proved, be presumed to be the owner of the motor vehicle, trailer or engineering plant.

There is a clear exception created with respect to Finance Lease arrangements which we have submitted, the motor vehicle/Truck was subject to. Specific to Finance Leasing arrangements such as that in which the parties herein were involved, the High Court of Uganda in **High Court (Commercial Division) Civil Suit No. 416 of 2009, Samuel Black T/A SB Coaches** vs. **DFCU ltd** held as follows:

> *... there is no statutory law in Uganda governing finance leasing. ... finance leasing is governed by the principles of common law which are invoked under*

section 14 (2)(b)(i) of the) Judicature Act. ... in determining leasing disputes, reference is made to the agreed terms of the contract between the parties. . .. This clause in essence envisioned all kinds of risks of loss by theft, damage or destructions. By the above terms, the plaintiff agreed to bear all risks of loss, theft, damage or destruction to the vehicles. ... I therefore do not agree with counsel's argument that because the lease agreement provides that ownership of the vehicles shall at all times during the lease remain in the lessor. this means that the lessor bears risk for the vehicle. ... That argument would be contrary to the established position of the law .. · much as the ownership of the leased vehicle remains with the lessor by acquisition of its title, the usual risks and rewards of ownership are transferred to the lessee, who bears the risk of loss, destructions and depreciation of the leased equipment. It is also clear that the ownership of the leased vehicle by the lessor is meant to secure the lessor's interest to ensure that the lessor recovers its capital investment and profit thereto. Furthermore, it was the lessee responsible for taking out insurance against loss arising directly or indirectly from the vehicles thereof. This is so despite the fact that the defendant also had insurable interest in the buses. ... To my mind the interpretation adopted by the defendant which this court agrees with, makes a lot of commercial sense because it is indeed the plaintiff who was running the buses and getting all the benefits. It therefore follows that any risks associated with running the buses should be borne by the plaintiff. The argument that because the ownership remained with the defendant it should bear the risk is devoid of any commercial sense.

It was further submitted for the appellant that, in light of the facts and the above authorities, the motor vehicle/Truck subject of the Lease arrangement was under the ownership of the Appellant at the time it was sold although it operated as collateral for the credit facility extended for its acquisition to the Respondent.

The Respondent's reply

Issue 1

The legality of a leasing agreement in view of the Financial Institutions Act (FIA).

The Financial Institutions Act 2004 repealed the Financial Institutions Act CAP 54 hence making it a bad law. Section 133 of the Financial Institutions Act 2004 states that: *"For the purposes of any matter concerning financial institutions, this Act shall take precedence over any enactment and in the case of conflict, the Financial Institutions Act 2004 Act shall prevail."*

Section 18 of the repealed Financial Institutions Act CAP 54 is more less similar to Section37 (a) of the Financial Institutions Act 2004; a financial institution shall not engage directly or indirectly for its own account, alone or with others in trade, commerce, industry, insurance or agriculture, except in the course of the satisfaction of debts due to it in which case all such activities and interests shall be disposed of at the earliest reasonable opportunity.

Section 37 does not in any way outlaw a lease agreement (lease facility), in fact the Interpretation of "financial institution business" among others under Section 3 (k) of the Financial Institutions Act 2004, means the business of financial leasing if conducted by a financial institution.

Section 59 of the Income Tax Act provides for the tax treatment of finance lease and for a lease to qualify as a finance lease under this section, consideration is given to its effective life, the option to purchase the property and the estimated residual life of the property.

There is no any other specific legislation that regulates the business and practice of leasing. Therefore, finance leasing is generally governed by certain provisions of

finance Acts, the Income Tax Act, principles of the law of contract and the legal precedents.

It is submitted that Section 37 of the Financial Institutions Act 2004 cannot outlaw a lease agreement (lease facility) yet financial leasing forms part and partial of the of the financial institution business as per Section 3(k) of the same Act.

Issue 2

Whether the contract was: A leasing facility, Hire purchase agreement, Loan agreement or any other type of agreement.

The Lease letter of Offer under item 1 is clear on the type of facility as a Finance lease Facility.

Black's Law Dictionary defines a financial lease as a fixed term lease used by a business to finance the Capital Equipment.

In *Otaok Charles Vs Equity Bank Uganda Ltd (HCC Suit Number 335 Of 2010)* where Court cited the case of Demand Information (In Administrative Receivership) and another versus Michael Gerson (Finance) PLC and another [2000] 4 ALL ER 734, a finance lease was defined as a lease that actually involved payment by lessee to a lessor of the full costs of the asset together with a return on the finance provided by the lessor. The Lessee has substantially all the risks and rewards associated with the ownership of the assets, other than the transferred. Section 59 of the Income Tax Act, finance Lease transfers substantially all the risks and rewards incidental to ownership. Title may or may not eventually be transferred. In a typical finance lease, the lessor, usually a bank, leasing company, or other financial Institution, (often a special-purpose entity formed by the parties for the sole purpose of holding title to the asset), purchases the asset from a vendor and leases it to the user, or lessee. The lease agreement requires the lessee to pay the lessor periodic lease payment during

the lease term. At the end of the term, the lessee may purchase the asset at a predetermined fixed purchase price. Alternatively, the lessor may sell the asset to a third party, with the lessee providing a first-loss guarantee in the form of a termination payment.

In *Deluxe Enterprises Limited vs Uganda Leasing Co. Limited* the Court relied on Chitty On Contracts (27th Edition, Vol. II, 1994 at relied on the proposition of law that:-

> *"in a finance lease, the lessee selects the equipment to be supplied by the manufacturer or dealer, but the lessor (a finance company) provides funds, acquires title to the equipment and allows the lessee to use it for all (or most) of its expected useful life. During the period of the lease, the usual risks and rewards of ownership are transferred to the lessee, who bears the risk of loss, destruction and depreciation of the eased equipment (fair ware and tear only excepted) and of its obsolescence or malfunctioning... The regular rental payments during the rental period are calculated to enable the lessor amortise its capital outlay and to make a profit from its finance charges. At the end of the primary lease period, there will frequently be a secondary leasing period during which he lessee may opt to continue the lease at a nominal rental, or the equipment may be sold and a proportion of the sale proceeds returned to the lessee as a rebate of rentals ... "*

A distinction ought to be drawn between a finance leasing transaction and a hire purchase agreement. It will be shown that the two agreements are more dissimilar than similar.

Hire purchase is a purchase of an asset in which customer makes down payment and finance rest of the amount through financial institutions or bank. On rest of the unpaid amount he pays interest at a certain pre-described rate of interest. After

making complete payment the assets becomes the legal right of customer. Lease on the other hand is an agreement of using asset for certain period and paying rent on it at a pre-described rate of interest. It is a temporary acquiring of an asset just to use it.

Whereas in a hire- purchase agreement the hirer pays owner of the equipment rentals that are a composite of the price, in a finance lease the lessee is paying rentals to enable the lessor recoup its capital outlay and realize profits from finance charges. Thus, while having met the instalment obligation of the contract ownership passes under hire- purchases, under finance lease merely meeting rental payments as and when they fall due does not give rise to transfer of ownership, a further contract is required.

The latter agreement non-cancellable with the former may be cancelled. The remedy of an owner under the hire purchase agreement is to recover the rental arrears with interest for default. While in finance lease the lessor is not only entitled to recover rental arrears but to compensations that would place him in the position he would have been had the lessee performed the agreement.

A finance lease agreement is likened more to a loan agreement than a hire purchase agreement. This similarity is more emphatic in Section 59 of the Income Tax Act Cap 340, Laws of Uganda. The impugned provisions states that; (1) Where a lessor leases property to a lessee under a finance lease, for the purposes of this Act- (a) The lessee is treated as the owner of the property and (b) . The lessor is treated as having made a loan to the lessee, in respect of which payments of interest and principal are made to the lessor equal in amount to the rental payable by the lessee.It is apparent from the above section that the closest transaction akin to finance lease is a loan agreement.

In a typical finance lease transaction, the following tenets steps ought to be present;

1. An application for the facility from the intended lessee.
2. An offer letter from the financing institution *i.e* the leasing company or the bank.
3. A master lease agreement. This ordinarily lays down the general terms of the agreement.
4. A lease schedule agreement. This agreement is an integral part of the master lease agreement by incorporation, it lays down the specific terms of the lease, the nature of the equipment financed, capital cost, rentals payable and any other condition precedent to performing the agreement like providing security for payment of rentals, directors or personal guarantees, spousal consent in case of mortgaging family property.
5. Proforma invoices and other documents in proof of purchase.
6. Supply agreement from the supplier.
7. A sale and lease back agreement
8. The Lease Ledger maintained by Lessor with the guiding lease accounting principles.

In the case of *Deluxe Enterprises vs Uganda Leasing Co. Limited* (supra), Court recognized the fact that there was no legislation to govern the issues at hand. There was skepticism from court whether the defendant was licensed to carry on the business of finance lease. However, the issue would be whether there was such a requirement since there was no statute regulating such business. Counsel for the defendant had intimated in his submission that since there was no legislation governing leasing, court should lay down a precedent upon which future cases on finance leasing would be decided. However, the court was hesitated to transcend into the untrodden path which was a missed opportunity to guide future cases. Justice C.K Byamugisha, as she was then stated that; "What I have done is not to lay

down any ground rules or parameters to govern the business of finance leasing in Uganda. I just put into effect what the parties agreed on.

In *Stanbic Bank (U) Ltd vs Nakanyonyi Development Association (Noda) Ltd, High Court Civil Suit No. 137 OF 2012* in which the *Magezi and Another vs Ruparelia [2005] 2 EA 156* was followed the Supreme Court held that the intention of the parties to an agreement is to be determined from the words used in the agreement.

The wording of the terms of the agreement between the parties and conditions under item 11.1, 11.1.1, 11.2.1 are clear and unambiguous and makes it mandatory to give 14 days written notice to the lessee before cancellation of lease agreement and taking possession of the truck.

Issue 3

Who the legal owner of the motor/vehicle the subject matter of the contract was at the time it was sold.

Clause 12 of the Lease letter of offer clearly states that the only Security required was original logbook of the financed vehicle registered in the names of Stanbic Bank(u) ltd and clause 3.1 of the terms and conditions state that the Lessor will at all times remain the owner of the goods.

The Appellant being the owner of the motor/vehicle did not entitle it to violate all other terms and conditions of the agreement. The Lessee being in contractual arrangement with the lessor had equitable rights which is why there were conditions before the lessor could fully exercises his rights of cancellation and take possession of the motor/vehicle.

Both parties knew that there could be breach of the terms and conditions, which is why they chose to lay down provisions to manage that breach. It is rather surprising that the Appellant chose to apply such conditions selectively in total disregard of others. Those terms and conditions were meant to limit any of the parties from acting in a way they wished or wanted in total disregard of the other party.

The failure to give notice amounted to a fundamental breach of the lease agreement and deprived the respondent of the right to salvage the motor vehicle before the sale by auction and as a result of fraudulent valuation of the equipment at a very unreasonably low price.

The Supreme Court held in *Imelda Nassanga vs Stanbic Bank and another, Supreme Court Civil Appeal No. 10 of 2005* that where there has been an irregularity in any sale, the wronged party may sue for compensation. In *Gladys Nyangire and Another vs DFCU leasing company Ltd HCCS 106, 150 and 78 of 2007* the sale of the mortgaged property was set aside for failure by the Defendant give the Plaintiff demand default notice under the mortgage. In Steel vs. Sirs (1980) All ER 529 Lord Diplock held that *"where the meaning of the words is plain and unambiguous, it is not for the judges to invent fancied ambiguities as an effect to its plain meaning because they considered the consequences for doing so would be inexpedient or even unjust or immoral."*

Counsel asked the Court to dismiss this appeal.

Resolution

The duty of this Court as a first appellate court is well settled. We have a duty to re-appraise the evidence and make our inferences in all questions of law and facts. Parties therefore expect to obtain from this Court while sitting as a first appellate Court is its own decision, on all questions of law and facts. See: *Fr. Narsensio Begumisa and 3 others vs Eric Tibebaga, Supreme Court Civil No. 17 of 2002.*

I must say that I am indebted to both Counsel of their submissions reproduced almost verbatim above. However both did sidestep the main questions of law that this appeal raises.

> *"Whether the appellant, Financial Institution licensed under the Financial Institutions Act 2004 may engage in business of leasing assets to its customers?"*

Section 37(1) of the Financial Institutions Act 2004 provides as follows;-

> Financial Institution shall not:-
>
> *(a) engage directly or indirectly for its own account, alone or with others in trade, commerce, industry, insurance or agriculture, except in the course of the satisfaction of debts due to it in which case all such activities and interests shall be disposed of at the earliest reasonable opportunity.*

The key words under Section 37 (A) are *"A Financial Institution shall not engage directly or indirectly from its own account, alone or with others in trade, commence..."*

There is no exception provided in the Act to Section 37(A). We have been asked by Counsel for the appellant to construe Section 3 of the Financial Institutions Act a regulation contending that, a business of financial leasing is an exception to Section 37 of the Act. I cannot accept this to be a correct interpretation of the law. A definition Section cannot override a provision of a statute that is unambiguous. In any event Sections 37 above reproduced does not in any way mention or refer to financial leases as an exception. Had the legislations intended financial leasing to be one of the businesses that could be legally undertaken by a Financial Institution, it would have clearly stated so. It did not. The Financial Institutions Act does not mention leasing contracts or businesses anywhere in its body. The schedule to the Financial Institutions Act sets out the types of Financial Institutions and the businesses they are legally permitted to engage in under the Act. Under type "A", the

business commercial banks such as the appellant are permitted to engage in do not include financial leasing.

Category "B" under the same schedule provides for None-Bank Financial Institutions which include Financial Houses. It is under that category that "Provision of Finance and operating leases /facilitating facilities is provided.

We have no evidence that the respondent is a Finance House, and as such is not a Commercial Bank. On the contrary, all the evidence points to the fact that the appellant is a Commercial Bank and its licensed as such, under the Financial Institutions Act. The submissions of counsel for the appellant, appear to been deliberately misleading.

In fact the 2nd schedule of the Financial Institutions Act clearly excludes the leasing from the list of businesses or undertaking available to a Commercial Bank such as the appellant. This is clearly in conformity with Section 37 of the FIA (supra).

It has been submitted for the appellant that, a financial lease is characterized by the lease in this case the respondent, selecting the equipment to the supplier by a dealer or manufacturer. The finance company in this case the appellant that avails the funds required or part thereof to the dealer, acquires titles to the equipment, and allows the lessee to use it for the duration of its useful life. During that period referred to as the lease period, the lessee bears the risk of loss and depreciation. The lessee makes regular rental payments to the lessor to enable the lessor amortize its capital outlay and to make a profit from its financial charges.

The above description is adopted from the judgment of Lameck Mukasa J in *Nassolo vs DFCU Leasing Company* (supra). The Judge relied on Chitty On Contracts (supra) and on the definition set out in Black's Law Dictionary as expounded upon in on *Demand Information (in Administrative receivership and another vs Michael Gerson*

(Finance) PLC and another (2002) 4 All ER 734 referred (Supra). My own understanding of this transaction is as follows:-

Mr. "A" is desirous of engaging in business but is without financial capital. He approached "B" a finance company, for money to purchase a specified chattel. He intends to put in use will produce regular income. "B" in this case a Bank, pays "C" the dealer or manufacturer of the special to chattel. The purchase price or a substantial part thereof is paid by 'B' the bank. The chattel is thereafter registered in the names of "B" who retains the documents of title. It is however, released to "A". He takes possession of it and put it to use. He bears the loss, the risk, and the depreciation. When all the money is paid back to "B" as per agreement in regular installments, 'A' returns the chattel to B or is allowed to buy it on a normal amount. Thereupon, it is transferred to A's name and title passes on to him. In the event of default, the terms of agreement apply, including seizure and sale of the chattel by 'B'.

The above description relates to a single transaction, in respect of a single chattel from a single dealer or manufacturer. In reality the lessor or the financial institution is engaged in a series of such transactions in respect of a number of lessses, customers or clients over a long period of time. The lessor or the financial Institution is in reality the purchaser of the chattel and therefore the customer to the dealer or manufacturers. The two are engaged in business. They are doing so directly or indirectly. This what Section 37 of the Financial Institutions Act, prohibits. The nature of the transaction above described is nothing else but business of buying, hiring out and eventually selling a chattel by the lessor, Bank, Financial Institution or whatever other description is preferred. The Bank is engaging in business of selling goods in the market place. The lease agreement is intended to circumvent the law.

I find that, the contract entered into between the appellant and respondent is a business transaction and as such it contravenes Section 37 of the Financial

Institutions Act the appellant being a Commercial Bank and licensed as such under the Act.

I now proceed to examine the nature of the agreement the subject of the dispute between the parties.

In order to do so, I am constrained to reproduce the entire lease letter of offer that formed the basis of the contract.

"2nd September, 2009

Lease letter of offer

Stanbic Bank Uganda Limited (the lessor) are please to confirm that we have approved the following facilities to Deo Kalule (the lessee) subject to the terms and conditions contained herein or any other terms and conditions set out in an agreement entered into between you and the bank.

1. *Type of facility*	*1.1 Finance lease facility*	
	1.2 Insurance Premium Facility	
2. *Amount for transaction*	*2.1 Lease UDX Equivalent to USD 29,750(United States Dollars Twenty nine thousand seven hundred fifty only) The exchange rate used is for conversion purpose only and the final rate will be the rate prevailing at the time of final disbursement. The proved facility will eventually be amended*	
3. *Agreement Facility:*	*Finance lease Agreement Insurance Premium Agreement*	
4. *Supplier:*	*The asset and the supplier should be approved by the lessor prior to any commencement in terms of this approval*	
5. *Purpose :-*	*the loan facility is sanctioned to*	

	finance the purchase of One brand New Tata Truck Model SE 161/42 10 Tom 5833CC Direct injection. *The IPF is sanctioned to provided insurance premium for the financial truck.*
6. *Period*	*60 (Sixty)months*
7. *Payment Required:*	*Repayments to be made by debit order on a monthly basis from the customer's account no.0140081282001 .*
8. *Initial payment:*	*15 %(fifteen percent) equivalent to USD 5.250 {United States Dollars Five' Thousand Two Hundred Fifty, (only) of the financed asset to be paid to the supplier prior' to disbursement of the facility.*
9. *Rentals*	*The lease facility is to be repaid by 60("sixty six) equal" monthly rentals each inclusive of interest. The installments will be determined by the facility amount In UGX at the time of disbursement commencing one month after delivery of the asset torn the lessee.* *The IPF is to be repaid in 10 (ten) equal monthly installments each inclusive of Interest, commencing on the date of payment of the first premium 'to the insurance company. The installments will be determined by the facility amount in UGX at the time of disbursement.*
10. *OPERATION:*	*Up-on receipt of confirmation of the Lessee's 15% (Fifteen percent) contribution. And proforma invoices in favour of the bank form the recognized supplier for the vehicles , the Lessor will order for the vehicle and debit the Lessee's account with the cost , thereafter the lease will commence.*

	Upon receipt of an irrevocable letter of undertaking from one of the Lessors approved insurance companies and a signed insurance premium agreement by the Lessee, the Lessor will pay the insurance premium payments will commence
11. RESIDUAL VALUE:	*Subject to full payment of all the rentals and VAT at" the expiry of the Lease. You may exercise an option to purchase the financed asset for 0.5 %.(zero point. five) percent the original amount financed by the bank. You will be required to exercise this option within 3 months, failure of which the Bank shall be entitled to effect the transfer at your own costs. Costs of transfer shall amount to one hundred and fifty thousand shillings only (UGX 200,000) and may be amended from time to time.*
12. Security required	*12.1 Original logbook of the financed vehicle registered in the names of Stanbic Bank (U) Ltd* *12.2. Irrevocable Letter of Undertaking from the approved insurer to refund any unused portion of the premium paid on a pro-rate' basis in case of cancellation of the insurance policy.* *12.3 Top Up Insurance cover over the leased asset for the duration of the lease which will be 1 % (One percent) of the total value of the asset per annum.* *12.4 Automatic settlement benefit cover over Kalule Deo.*
13. Insurance:	*The assets are to be fully insured for the duration of the Lease facility with an insurer approved by the bank, with the bank noted as first loss payee.*
14. Invoice:	*Invoices from the supplier to be addressed to Stanbic Bank Uganda Limited.*

15. Costs: *Costs, which may arise such as, stamp duty, bonds costs, valuations, lawyers' fees or any other costs, fees or disbursements that may be incurred, will be for your account.*

16. Interest Rate: *16.1. Interest rate on the facility will be charged at 5% (five percent) per annum plus the bank's Uganda shillings prime (currency 18.5%) prevailing from time to time.*

16.2 Interest on the IPF will be charged at a flat rate of 8.25% (Eight point Two Five percent) per annum.

17. Pre-delivery Interest : *All payments made by the bank before delivery of the asset will attract interest at the rate quoted above. The lessee will either pay this interest to the bank at the commencement of the lease or it will be added to the cost of the asset.*

18. Penalty Interest Rate: *5% (Five percent) above the agreed interest rate.*

19. Documentation Fees: *Upon acceptance of this facility letter, a facility fee of 1% (one percent) based on the lease amount of UGX Equivalent of USD 29,750(United States Dollars Twenty Nine Thousand Seven Hundred fifty Only) will be debited to the lessee's account with the bank. This amount will attract VAT at the standard rate (currently 18%).*

...

Date *2/04/2009*

In addition to the conditions set out above, other standard terms and conditions are set out in a separate document. The lease letter offer set out above mirror ordinary loan offer letters save for the description of the bank as lessor, instead of lender and its customer as lessee, instead of borrower.

Under this agreement, clearly the respondent approached the bank, where he either held a bank account or one was opened immediately prior to the offer. His account number is 0140081282001. This is clearly indicated on the bank statements issued

by the appellant bank, relied upon by the appellant at the trial. The fact that, the respondent approached the bank for a loan is set out in the evidence of Denis Kiiza, a manager with the appellant bank when he stated thus;-

> *"Mr. Kalule approached the bank in August 2009 for a financial Lease facility to purchase a brand new Tata truck. The bank agreed to his request....."*

The respondent did not approach the bank in order to lease from it a lorry, but rather approached the bank in order to obtain money to purchase one. Indeed on 4th March 2013, after the said lorry had been impounded by the bank, the respondent wrote to the bank a letter in Luganda, translated as follows;

> *"Dear head of the above Bank. I acquired a loan from your bank on account N0. 1040081282001 in the names of Kalule Deo whereby I acquired motor vehicle Tata N0. UAM 504N....."*

In his own witness statement, the respondent stated that, he was a customer of the appellant bank in 2009, he was convinced by it's bank manager at Masaka branch, to apply for a motor vehicle loan finance for a Tata lorry to facilitate his business.

In his witness statement, Denis Kizza for the appellant, stated that the respondent was availed two facilities (a) a Finance lease facility of USD 29.750 and (b) insurance premium facility of shs. 5,390,000/- . Further that,

> *" 7. Both facilities were disbursed to him on the 23rd September 2009 and using the money he acquired the Tata truck on the same day....."*

Upon the signing of the Lease offer letter, the bank opened a loan account N0. 900013222 DEALOOOKA in the names of the respondent and debited it with shs. 67,725,000/-. This loan account was maintained by the appellant bank right up to the time the motor vehicle in question was ceased from the respondent and sold.

On the 7th March 2011, the appellant's head of rehabilitation/recoveries wrote to the respondent as follows;

" Mr. Deo Kalule,

Dear Sir,

Re: Settlement of your outstanding VAF Loan of 78,441,755.7 as at 07-03-2011.

. . ."

The same manager had earlier written to the respondent a letter on the same subject referring to the outstanding vehicle Asset/Tata truck and UAM 504N loan of Ugx 72.

My understanding of the letter from the appellant to the respondent is that, both parties understood the transaction to be a loan and treated it as such. Indeed even after the lorry had been seized by the bank and auctioned, the bank went ahead to write to the respondent demanding "an outstanding amount balance of Ug. 14,222,024.5/=. This was clearly an outstanding balance in respect of the loan that had been disbursed as set out earlier.

There is nothing on record in respect of the contract that relates to/or points to a lease agreement *per-se* but on the contrary, the record reveals that transaction could not have been a lease.

The appellant bank could not have legally 'leased' the motor vehicle if the same belonged to its owner in the legal sense. The term lease is a misnomer as chattels can only be 'hired' and not leased. Leases under Common law and statutory law until recently only related to land. In essence, a chattel 'leasing' agreement in an agreement for the bailment of goods. It could also be construed as a chattel mortgage which is defined as a bailment of goods for more than three years under Section 3 of the **Chattels Securities Act (Act 7 of 2014).**

In so far as I understand the law, the Lessor in a leasing agreement must own the property leased. Indeed in the Under clause 3.1 of the terms and conditions of the lease agreement between the parties provides that;

3.1 " the lessor will at all times remain the owner of the goods."

The above assertion in relation to ownership of the motor vehicle is repeated several times elsewhere in the agreements. Indeed the Under Clause 12.1 of the leasing offer, the original logbook of the vehicle had to be registered in the names of the appellant who would retain it as the owner. The appellant would remain the owner and only transfer the motor vehicle to the respondent. Upon full payment of the outstanding amount and in addition 0.5% of the original cost as purchase price.

This is where everything relating to leasing agreements becomes murky.

The appellant bank did not purchase the motor vehicle the subject of the agreement. Therefore it had no right to claim ownership. The respondent paid 15% of the purchase price as a pre-condition to the bank availing him the balance.

On that account alone, the bank's claim of 100% ownership of the vehicle has no basis. At the very least, the bank was a joint owner of the vehicle in the proportion of 85% and 15%.

However this was not even the case. Under Banking law, the banker customer relationship is that of debtor/creditor. In this particular case, the respondent had a running bank account with the appellant prior to or immediately before the agreement in issue. The 85% of the value of the vehicle together with insurance, taxes and other charges were debited on the respondent's account.

This means that, the money paid to the dealer, Cooper Motors Uganda, belonged not to the appellant bank but rather to the respondent himself. This amount paid to the dealer from the respondent's bank account constituted 85% of the purchase price.

He had already paid 15% of the prices as a pre-condition to the sale therefore, the respondent paid 100% of the purchase price and therefore owned the motor vehicle in question.

For simplicity's sake, whenever a customer with bank "B" obtains an overdraft on his or her loan account would be debited with the sum advanced. His or her current account would be credited with the same amount. When he withdraws money form this current account and purchases a car, or even just groceries, those items do not belong to the bank. The money disbursed and debited on a customer's account ceases to belong to the bank as a matter of law, practice and common sense. It belongs to the account holder.

In making the above inferences, I am fortified by the fact that, the motor vehicle in question was never and had never been listed in the appellant's Bank's list of assets. In otherwise, whenever a bank such as the appellant finances purchase of any asset, it does not include it, in its assets register, in its books of accounts. The reason being obvious, that, the asset never belonged to the bank at any one time. The bank's books of account reflect the disbursed amount or the outstanding amount on the client's loan account as a 'loan'. It may be described as performing or non-performing as the case maybe.

The mere fact that the motor vehicle logbook is registered in the names of the appellant bank did not confer and/or its ownership. Counsel for the appellant has referred us to Section 30 of the traffic and Road Safety Act Cap 361 which states that;-

> ***"30 Presumption of owner of vehicle***
>
> *The person in whose name a motor vehicle, trailer or engineering plant not subject to a hiring agreement, or a hire-purchase agreement or a finance lease agreement is registered shall, unless the contrary is proved,*

be presumed to be the owner of the motor vehicle, trailer or engineering plant."

From the afore going, it is clear that, whenever a motor vehicle is subject of a leasing agreement, its registration in the names of the lender does not confer title and/or ownership upon the lender. The registration in the name of the lender is only for the purpose of securing the loan and does not go beyond that. This a departure from the provisions of the Traffic and Road Safety Act 1970 *Section 49* of which is provided as follows;-

" the person in whose name a motor vehicle, trailer, engineering plant is registered, unless the contrary be period be presumed to be the owner of the motor vehicle, trailer or engineering plant."

While discussing this particular provision of the law, since repealed, the Supreme Court in *Fred Kamanda vs Uganda Commercial Bank, Supreme Court Civil Appeal No.* 17 of 1995 held that:-

"The plain meaning of this Section is that unless the contrary is shown the name in the registration book is proof of ownership of the vehicle to which it relates. The persons named in the registration book would be entailed to dispose of the motor vehicle to which it relates. Per Odoko JSC.

The above is no longer good the law. Parliament deliberately provided exception to the above when in enacted Section 30 of CAP 361 (supra). That exception permits a lessor or lender under hire purchaser, chattel lease, or hiring agreement to be registered on the log book as 'owner' only for the purpose of security.

Therefore, in this case before us, the appellant bank's registration as 'owner' on the motor vehicle log book did not confer upon it ownership but rather, was only for purpose of security for payment of money advanced to the owner of the vehicle who is for all intents and purpose the respondent . The appellant Bank therefore could

not have leased to the respondent a motor vehicle it did not own. The respondent could not have leased from the appellant a motor vehicle he owned.

In arriving at the above conclusion I am fortified by the fact that the income Tax Act treats the lessee and not the lessor as the owner of the property and imposes upon him/her tax obligations as such.

This is so because ownership is the context of a leasing agreement the subject matter of this appeal is nothing but legal fiction. The lessee is for all intentions and purposes the owner of the goods. The agreement however, deems the lessor to be the owner against for all intents and purposes. The lease agreement is a loan, payable over an agreed period of time in specified instalments that attract interest. It is alone deemed to be a lease under the lease agreement.

In this regard Section 59 of the Income Tax Act provides as follows:-

> ***59. Finance leases.***
>
> *(1) Where a lessor leases property to a lessee under a finance lease, for the purposes of this Act—*
>
> *(a) the lessee is treated as the owner of the property; and*
>
> *(b) the lessor is treated as having made a loan to the lessee, in respect of which payments of interest and principal are made to the lessor equal in amount to the rental payable by the lessee.*
>
> *(2) The interest component of each payment under the loan is treated as interest expense incurred by the lessee and interest income derived by the lessor.*
>
> *(3) A lease of property is a finance lease if—*

(a) the lease term exceeds 75 percent of the effective life of the leased property;

(b) the lessee has an option to purchase the property for a fixed or determinable price at the expiration of the lease; or

(c) the estimated residual value of the property to the lessor at the expiration of the lease term is less than 20 percent of its fair market value at the commencement of the lease.

(4) For the purposes of subsection (3), the lease term includes any additional period of the lease under an option to renew.

As I have already stated above, the appellant bank or any lessor for that matter in respect of a lease agreement of this nature, does not include the leased property on the list of the assets it owns. The income derived from the business of leasing is treated as loans given to its customers and the income accruing therefore is treated as interest not profit.

For the purposes of income Tax and other Taxes such as VAT, the tax laws have rejected the legal fiction and focused on the reality. The tax law therefore considers the lessee as the actual owner of the assets and imposes tax on him/her as such. It also rejects the provisions of the lease agreement and considers the 'lease' as a bank loan.

It has been argued for in this case and many others before it that, parties are free to contract and what is required of a Court of law is simply to give effect to the intention of the parties.

That the Court, will not improve a contract, which the parties have made themselves however desirable the improvement maybe, See: A Tampalin Steamship Co. Ltd vs Anglo-Mexican Petroleum Products CO. Ltd [1916]2 AC 397.

See also: *Trollope & Colls Ltd v North West* Metropolitan *Regional Hospital* Board *[1993] 2 All ER 260,* for the proposition that, the Courts function is to interpret and apply the contract which the parties have made for themselves. The above is the age -old common law doctrine of freedom of contract. In reality freedom of contract is a myth. Every contract under the sun is regulated by the law without exception.

Therefore parties must contract within the law. Every aspect of business is regulated by specific law including chattel leasing, banking, hire purchase, sale of goods and a host of all those. The reason why contracts are regulated is simply because, left unregulated mayhem would follow.

Whereas Court's of law acknowledge and uphold the doctrine of freedom of contract, they are nonetheless aware that, it is only applicable with the limits set out by the law. Further that, it is subject to the requirements of good faith, fair dealing and a host of mandatory rules established over time to regulate usage, custom and trade.

Accordingly, the law intervenes to guide and regulate the conduct of parties in respect of the terms and which they can contract.

The law therefore is employed to effectively balance the inequality of the parties barging powers and ensures optimum protection for the poor, the consumer and the general public who often have limited expertise in the subject matter of the contract. This is more so is respect of "new types of contracts" such as the subject matter of this appeal.

Reverting to the subject of freedom of contract, the United Kingdom Court of Appeal in *Good life Foods Ltd versus Hall Fire Protection Ltd [2018] EWCA CIV 1371* noted that, the approach to be taken in commercial contracts where parties are of equal bargaining power is that freedom of contract remains and the terms of the contract are enforceable. The reverse therefore is true where one of the parties do not have

equal bargaining power as in this case. In the *Good life case* (supra) the Courts were interpreting a standard exclusion clause of a specialist fire suppression contract under the unfair contract terms Act 1971.

This is just to illustrate that the legislature and the Courts have taken steps to protect the vulnerable public from powerful commercial interests through regulation. Indeed a number of countries have unfair contracts legislation including UK, Canada, India, Malaysia, Singapore, Sri Lanka and a host of others.

Similarly a number of Countries in the world have enacted laws to regulate Asset leasing or finance leasing for the same reasons, to ensure consumer protection and fair trade. In Uganda a study was conducted by Uganda law Reform Commission and a report was issued together with recommendations on financial leasing in Uganda. The Financial leasing bill 2012 has been pending either in Cabinet or Parliament for the last eight years.

The result of which is that, financial institutions and the public are operating in an atmosphere of uncertainty and confusion in relation to "asset leasing".

In the absence of a law establishing and regulating financial leasing agreement I am unable to find that the agreement the subject of this appeal is a financial leasing agreement.

In the case before us, I also find that, the following terms appears to me, to have been clearly unfair and unjust as to render the contract voidable, on the principle that it was against public policy.

1. The respondent paid 15 percent of the value of the asset but was not considered as owner or co-owner of the asset.
2. He has no equitable right of redemption as he is not regarded as the owner of the goods.
3. He has no option to purchase before the expiration of the contract.

4. He was paying interest at 33 percent per annum on the contract far higher than, what is payable on ordinary commercial loans which is between 28%-20% per annum.

In the final analysis I would find as follows:-

1. That the respondent was entitled to notice as found by the learned trial Judge.
2. That the respondent was entitled to damages and losses as found by the learned trial Judge.
3. That the appellant being a commercial bank contravened Section 37 of the Financial Institutions Act when it engaged in the purchase and leasing and sale of motor vehicle disguised as finance lease agreements.
4. The agreement between the appellant and the respondent, the subject matter of this appeal is a loan agreement and not a lease and ought to have been treated as such.
5. The agreement being unfair could not have been enforced against the respondent by the appellant, except for return of the goods or money had and received.

I therefore agree with Madrama, JA albeit for different reasons, that this appeal has no merit and therefore fails. As Kiryabwire, JA also agree, this appeal stands dismissed, with orders as set out in the Judgment of Madrama, JA.

We so order.

Dated at **Kampala** this .....25th.....day of .....Feb..... 2021.

.....

Kenneth Kakuru

JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(ARISING FROM HCCA NO.598 OF 2014)

CIVIL APPEAL NO. 278 OF 2016

(CORAM: KAKURU, KIRYABWIRE, MADRAMA,JJA)

STANBIC BANK (U) LTD========== APPELLANT

VERSUS

KALULE DEO==========RESPONDENT

JUDGMENT OF MR. JUSTICE GEOFFREY KIRYABWIRE, JA

JUDGMENT

I have had the opportunity of reading the draft Judgment of the Hon. Mr. Justice Christopher Madrama, JA.

I agree with his Judgment and I have nothing more useful to add.

Dated at Kampala this.....25th..... day of .....Feb.....2021.

.....

HON. MR. JUSTICE GEOFFREY KIRYABWIRE

JUSTICE OF APPEAL