THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 242 OF 2020

(ARISING FROM MISCELLANEOUS APPLICATION NO. 654 OF 2020)
(ARISING FROM HIGH COURT CIVIL SUIT NO. 43 OF 2020)

1. DIAMOND TRUST BANK (U) LTD
2. DIAMOND TRUST BANK (K) LTD .....APPELLANTS

VERSUS

1. HAM ENTERPRISES LTD
2. KIGGS INTERNATIONAL (U) LTD .....RESPONDENTS
3. HAMIS KIGGUNDU

(Appeal from the decision of High Court of Uganda (Commercial Division) by Hon. Mr. Justice Peter Henry Adonyo delivered at Kampala on the 7th day of October, 2020 in Misc. Application No. 654 of 2020 and HCCS No. 43 of 2020)

CORAM: Hon. Mr. Justice Richard Buteera, DCJ
Hon. Mr. Justice Kenneth Kakuru, JA
Hon. Mr. Justice Christopher Madrama, JA

JUDGMENT OF RICHARD BUTEERA, DCJ

I have had the benefit of reading in draft the Judgments of my learned brothers Madrama, and Kakuru, JJA. I agree with both my learned brothers that this appeal ought to succeed for the reasons stated in their Judgments.

The learned trial Judge struck out the respondent's joint written statement of defence and entered Judgment for the plaintiffs under **Order 9 Rules 6, 8, 10 and 30** and **Order 52 Rules 1, 2 and 3 of the Civil Procedure Rules.**

I have studied the rules upon which the joint written statement of defence was struck out and I will express my views on the trial Judge's Judgment in respect of the Court Rules.

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Order 9 Rule 6 of the Civil Procedure Rules (CPR) deals with entering Judgments upon a liquidated demand.

The Rule is concerned with a situation when a Plaint is on a claim for a liquidated demand and the defendants or one of them fails to file a defence. The Judge may under the Rule pass Judgment and award the liquidated sum. The claim has to be for a clear, definite sum.

In the instant case, this was not a claim for a liquidated sum and this fact is brought out by the trial Judge in his ruling of 30th September 2020 where the trial Judge directed *"the Institute of Certified Public Accountants of Uganda (ICPAU) to appoint an independent auditor to carry out a full account reconciliation of the financial transactions which are based on the credit facilities between the plaintiffs and defendants to determine the amounts due interparties be stayed. Pending hearing and determination of Misc. Application No. 654 of 2020".*

It is clear from the above quoted order of the trial Judge that the claims which are the subject matter of the dispute were not liquidated.

It was therefore an error on the part of the learned trial Judge to strike out the written statement of defence and enter Judgment for the plaintiffs under **Order 9 Rule 6 of the CPR** since their claims were not liquidated and the defendants had not failed to file a defence. The issue of failure to file a defence never arose in the proceedings.

Order 9 Rule 6 of the CPR was simply inapplicable.

Judgment was also entered under **Order 9 Rule 8 of the Civil Procedure Rules** which states:-

> **"Assessment of damages.**
> **Where the plaint is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages, and the defendant fails or all defendants, if more than one, fail to file a defence on or before the day fixed in the summons, the plaintiff may, subject to rule 5 of this Order, enter an interlocutory judgment against the defendant or defendants and set down the suit for assessment by the court of the value of the goods and damages or the damages only, as the case may be, in respect of the amount found to be due in the course of the assessment".**

The Rule provides for a situation where a defendant or all the defendants if they are many, fail to file a defence.

In the instant case, the current appellants who were the defendants at the trial Court had filed their defences.

The trial Judge in fact refers to the written statements of defence throughout his ruling.

The procedure provided for under **Order 9 Rule 8 of the CPR** is for the trial Judge to enter an interlocutory Judgment against the defendant or defendants and then set down the suit for assessment of damages in respect of the amount found to be due in the course of the assessment.

The trial Judge did not have reason to enter Interlocutory Judgment under **O.9 Rule 8 of the CPR** as they had filed their defence in time and the trial Judge acknowledged the fact that they had filed the defences in his ruling.

The matter was never set down for assessment of damages as envisaged under the rule.

Order 9 Rule 8 of the CPR was not applicable to the situation in the instant appeal.

The trial Judge also stated that the written statement of defence was struck out under **Order 9 Rule 10 of the Civil Procedure Rules** which provides:-

> **"General rule where no defence filed.**
> **In all suits not by the rules of this Order otherwise specifically provided for, in case the party does not file a defence on or before the day fixed therein and upon a compliance with rule 5 of this Order, the suit may proceed as if that party had filed a defence".**

This Rule is only applicable for a situation where no defence was filed. In the present case, I have already found above that a defence was filed and this was a fact known to the trial Judge. This rule too was not applicable to the matter before the trial Judge and striking out the written statement of defence under the Rule was irregular.

The trial Judge also stated that the written statements of defence were struck out under **Order 9 Rule 30 of the Civil Procedure Rules.**

Order 9 Rule 30 of the CPR does not exist. I agree with counsel for the respondents that this was a slip and the trial Judge intended to proceed under **Order 6 Rule 30 of the CPR**.

The Procedure for striking pleadings under **Order 6 Rule 30 of the CPR** has been elaborately stated in the Judgment of my learned brother Justice Madrama.

I agree with the facts and findings of Justice Madrama on this issue and I will not repeat what he stated so clearly in his Judgment.

I wish to add only for emphasis what the Court of Appeal for Eastern Africa stated in **N.A.S Airport Services Limited v The Attorney General of Kenya [1959] EA 53.** The Court was interpreting provisions of **Order 6 Rule 27** of Kenya which is in *Pari materia* with our **Order 6 Rule 29** that we are concerned with. The Court stated:-

> ***"In brief, the procedure under O.6, r. 27 is a short-cut which should be sparingly used, and only in exceptional circumstances where the facts relevant to the point of law to be set down are so clear-cut on the pleadings that there is no room for evidence upon any fact pleaded which would assist in the decision of that point of law, or which fact, if decided in one way, would result in the point no longer arising."***

Order 6 Rule 30 of the CPR was not applicable to the instant appeal as all the facts were clearly contested. The Judge needed to set the matter down for hearing.

I agree with my learned brother Justice Kakuru as he stated in his Judgment that the respondents' claim as per the original Plaint was based on breach of contract. The claim was changed when the Plaint was amended on 10th August 2020.

New claims were substituted for the original claim and new prayers seeking for new orders from Court that were not in the original Plaint. Was the amendment permissible in law?

The procedure for amendment of pleadings in the High Court is permitted under **Order VI Rule 10 of the Civil Procedure Rules** which provides:-

> **"Amendment of pleadings.**
> **The court may, at any stage of the proceedings, allow either party to alter or amend his or her pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."**

This was considered by the Supreme Court in **Civil Appeal No. 26 of 2010, Mulowooza and brothers Ltd Versus N. Shah & Co. Ltd.** The Court Held:-

> ***"This is I think the correct statement of the law on amendments to pleadings. Amendments are allowed by courts so that the real question in controversy between the parties is determined and justice is administered without undue***

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regard to technicalities in accordance with Article 126(2) (e) of the Constitution. Therefore, if a plaintiff applies for leave to amend his pleadings, courts should in the interest of promoting justice, freely allow him to do so unless this would cause as injustice to the opposite party which cannot be compensated for by an award of costs, or unless the amendment would introduce a distinct cause of action in place of the original cause.

The question in this case, therefore, is whether the respondent's proposed amendments substitutes as entirely different new cause for the original or whether the amendment would cause injustice to the appellant."

Generally a party would not be allowed to change the subject matter of a suit by amendment. The East African Court of Appeal in **Civil Appeal No. 30 of [1958] EA 461, Eastern Bakery v. Castelino** held:

"……. there is no power to enable one distinct cause of action to be substituted for another, nor to change, by means of amendment, the subject matter of the suit: Ma Shew Mya v. Maung Po Hnaung (4) (1921), 48 I.A. 214; 48 Cal.832. The court will refuse leave to amend where the amendment would change the action into one of a substantially different character: Raleigh v. Goschen (5), [1898] 1 Ch. 73, 81; or where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendment, e.g. by depriving him of a defence of limitation accrued since the issue of the writ: Weldon v. Neal (6) (1887), 19 Q.B.D. 394; Hilton v. Sutton Steam Laundry (7), [1946] K.B. 65. The main principle is that an amendment should not be allowed if it causes injustice to the other side. CHITALEY p. 1313."

I am persuaded by the authorities above quoted. I would therefore strike out the amended Plaint and as a consequence the amended written statement of defence.

That leaves on court record the original Plaint and written statement of defence.

Before taking leave of this matter, there is a point of law that I find relevant and necessary to clarify in the circumstances of this appeal.

The learned trial Judge made a finding that the written statement of defence filed on the head suit perpetuates an illegality and the defence could not be sustained by a Court of law.

I agree with Justice Madrama's holding on this that the trial Judge adopted wrong procedure in reaching the conclusion he did. I also agree that in law, it is not possible

for a Plaintiff to recover by a claim based on the medium of and by aid of an illegal transaction to which he was himself a party. See **Mistry Amarsingh v Serwano Wofunira Kulubya [1963] 1 EA 408.**

I will not proceed to elaborately discuss this matter in this Judgment since it arose from an amended Plaint that is now struck off together with the written statement of defence.

The legal point I find relevant to clarify is that I know of no law that makes it illegal for a Ugandan citizen or a foreigner resident in Uganda to borrow or pay back money borrowed from a foreigner or a foreign institution, a Bank or any other organisation unless the transaction involves the perpetuation of a criminal offence such as terrorism, money laundering, human trafficking or any other offence. The loan agreement tainted with perpetuation of an offence would not be enforced by a Ugandan Court.

A loan agreement with a foreigner or a foreign entity whether the contract is executed in Uganda or outside Uganda would be enforced by a Ugandan Court in accordance with the terms of the agreement between the parties, the laws of the respective countries in which the agreement is made and or is executed and International Laws and obligations as applicable in the respective countries. In any event this was a question of mixed law and fact that was required to be adjudicated upon.

I agree with my learned brothers Justice Kakuru and Justice Madrama that there is no need to consider grounds 1,2,3,4,5,6,7,8,10 and 12.

Since Justice Kakuru and Justice Madrama agree, this appeal succeeds. The Judgment of the trial Judge is set aside. The respondents are ordered to bear the costs of this appeal.

An order is granted remitting the suit back to the Commercial Division of the High Court to be expeditiously fixed and heard by another Judge.

The High Court proceedings shall commence on the pleadings before the High Court before the amended Plaint and Written Statement of Defence which have been struck off.

Dated at Kampala this 05th day of May 2021

Richard Buteera
DEPUTY CHIEF JUSTICE

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CORAM: Hon. Mr. Justice Richard Buteera, DCJ
Hon. Mr. Justice Kenneth Kakuru, JA
Hon. Mr. Justice Christopher Madrama, JA

JUDGMENT OF JUSTICE KENNETH KAKURU, JA

I have had the benefit of reading in draft the judgment of my learned brother Madrama, JA. I agree with him that this appeal ought to succeed.

I would, if I may, add my own opinion on this matter. The parties to this appeal, at their scheduling conference at the High Court before the learned trial Judge agreed that, the Court appoints an auditor to carry out an account audit and reconciliation in respect of the 1st respondent loan account in order to determine the main issues

raised in the plaint. To my understanding the issues related to the exact indebtedness of the 1st respondent to the appellant bank if any.

Following the scheduling conference and pursuant to the agreements of the parties, the learned trial Judge issued an order that an independent auditor be appointed by The Institute Of Certified Public Accountants of Uganda, to determine the issue relating to the first respondent 's loan accounts as raised in the plaint and to furnish the Court with an audit and reconciliation report in respect of the disputed claims in issue.

It is apparent to me that, the learned trial Judge had issued the above order on the basis that the plaintiffs now respondents had raised valid claims in the plaint that required determination on one hand and that the defendants now appellants also had raised a valid defence.

That being the case, the parties together with the Court set out the issues for determination on the basis of pleadings before the Court, including all the attachments and annextures unproven as they were.

On this basis alone, I find that the learned trial Judge had read the written statement of defence and considered it not only reasonable but sufficient to require the plaintiffs to prove their claims. On the other hand the learned trial Judge must have found the plaintiffs' claims wanting as to require an independent expert to help Court understand and determine the exactly what the plaintiffs' claim was. Had the plaintiffs' claim been sufficiently set out, there would not have arisen any reason for the appointment by the Court of an independent auditor. The trial Judge ought to have proceeded with hearing and determining the suit on the basis of the pleadings and evidence adduced by the parties thereafter. The fact that, there were triable issues and a valid defence appears to have been conceded to by the plaintiffs now respondents when they framed and agreed upon issues for determination and also

consented to the appointment of an independent auditor by the Court to help in determination of those issues.

The plaintiffs now respondents' original claim set out in the plaint was in respect of breach of contract. It was set out under paragraph 10 and 11 of the plaint as follows:-

10. The plaintiffs' claim and cause of action against the defendants jointly / severally arise out of Bank Customer and Contractual relationships and they lie for;

i. Breach of terms of Contract;

ii. Breach of Contractual, Fiduciary and Statutory duties;

iii. Misrepresentation and Negligence;

iv. Undue influence and or Economic Duress;

v. Unfair and or unconscionable contractual terms;

vi. Unjust enrichment from monies unlawfully debited/recovered from the 1st and 2nd plaintiffs;

vii. Recovery of all sums unjustly, unlawfully and or unfairly charged upon and obtained from the plaintiff;

11. The plaintiffs bring this suit against the defendants for the following reliefs;

i. A declaration that the defendants, jointly and severally acted in breach of contractual, fiduciary and statutory duties during the subsistence of Bank-Customer and contractual relationships with the plaintiffs;

ii. A further declaration that the defendants' acts of Breach, Misrepresentation and Negligence complicated the performance of contractual relationships between the 1st and 2nd plaintiffs and the defendant to the prejudice of the plaintiffs;

iii. An order directing a full Account Reconciliation of all financial transactions between the 1st and 2nd plaintiffs and the defendants;

iv. A declaration that Credit facilities between the 1st and 2nd plaintiffs and the defendants have since been settled in law;

v. A order of recovery/ return of all monies unlawfully, unjustly or unfairly debited or recovered from the 1st and 2nd plaintiffs during the subsistence of their credit relationships with the defendants;

vi. A order discharging the plaintiffs from any facilities whose monies weren't disbursed by the defendants to the 1st and 2nd plaintiffs or disbursed but debited or appropriated by the defendants unlawfully and or without the knowledge or consent of the 1st and 2nd plaintiffs;

vii. An order discharging or releasing the suit properties from any charges/lien of the defendants and a return of the same to the plaintiffs;

viii. General damages for breach of contract, breach of statutory obligations and breach of duties together with interest thereon;

ix. An order that accounts be taken of the amounts and alleged accursed interest and loan installments recoveries through an audit in accordance with the offer letters and or facility contracts between the 1st and 2nd plaintiffs and the defendants;

x. Injunctive orders restraining the defendants their representatives, nominees or assignees from attaching, selling, transferring and or interfering with the plaintiff' legal interests and physical possession of the suit properties, on account of any alleged debt or accrued interest;

xi. Special damages;

xii. Damages (General, exemplary and Punitive damages);

xiii. *Interest on amounts awarded above at the commercial rate of 25% (p.a) from the date of accrual until payment in full;*

xiv. *Interest on amount above at Court rate;*

xv. *Costs of the suit.*

Clearly the claim was on breach of contract and contractual related issues. However, the plaint was amended on 10th August, 2020. The entire claim that had been premised on breach of contract was removed. It was substituted with a new claim in the amended claim set out in the new paragraphs 5, 6, 7, 8, 9 as follows:-

5. *The 1st defendant is being sued for among others, facilitating and providing an illegal cover for the 2nd defendant to engage in financial institution business in Uganda and various unethical acts of breach of trust, breach of its fiduciary duty and breach of contract.*
6. *The 2nd defendant is being sued as a foreign banking institution for engaging in unlicensed financial institutions business in Uganda by granting several loan facilities to the 1st plaintiff which is the subject of the suit.*
7. *the 2rd plaintiff in particular joins the suit as a guarantor and provider of the security/ mortgage comprised in Plot 923, Block 9 land Makerere Hill Road to support the said credit facilities, the subject of the suit.*
8. *The plaintiffs bring this suit against the defendants jointly and severally so that the question as to which of the defendants liable for illegally carrying out financial institutions in Uganda and for breach of contract, among others, can be determined.*
9. *The subject matter of the suit and cause of action against the defendants jointly and severally is for;*

   (i) A determination as to the legality of the credit facilities executed by the defendant with the plaintiffs.

   (ii) A refund of monies unlawfully/unjustly appropriated by the defendants from the plaintiffs.

(iii) A dispute over properties comprised in Kyadondo Block 248 Plot 328 at Kawuku, FRV 1533 Folio 3 Plots 36-38 Victoria Crescent II Kyadondo and LRV 3716 Folio 10 Plot 923 Block 9 land at Makerere Hill Road.

(iv) Breach of the terms of the loan agreements.

(v) Breach of contractual, fiduciary and statutory duty.

The same amended plaint sought orders and declarations that had not be contained in the plaint that was being amended.

The claims in the plaint were therefore wholly substituted with new ones as follows;-

12. The plaintiffs bring this suit seeking declarations and orders that:-

i) A Declaration that the credit defendants breached the different loan agreements entered into with the plaintiffs in the period between 16th February 2011 -16th November 2019.

ii) A declaration that credit facilities between the 1st and 2nd plaintiffs and the defendants have since been settled at law.

iii) An order for the recovery of the Ugx 34,295,951,553/= (Uganda Shillings Thirty Four Billion Two Hundred Ninety Five Million Nine Hundred Fifty One Thousand Five Hundred and Fifty Three Only) and Usd 23,467,670.61 (United States Dollars Twenty Three Million Four Hundred Sixty Seven Thousand Six Hundred and Seventy Only) being monies that were unlawfully appropriated by the defendants from the plaintiffs loan accounts.

iv) A declaration that the defendants demand for Usd 4,014,444 (United States Dollars Four Million Fourteen Thousand Four Hundred Forty Four Only) and Usd 6,974,600 (United States Dollars Six Million Nine Hundred Seventy Four Thousand Six Hundred Only) is illegal and unenforceable.

v) A declaration that the 2nd defendant is not licensed to conduct financial institutions business in Uganda and therefore the credit facilities that were offered by it to the first plaintiff were irregular, illegal, null, void and unenforceable.

vi) A declaration that the appointment of the 1st defendant by the 2nd defendant as agent Bank and security agent in respect in respect of the 2nd defendant's loan was illegal, unethical, unlawful, in breach of trust, fiduciary duty and in breach of the trust, fiduciary duty and in breach of the Financial Institutions Act 2004 (As Amended) the Bank of Uganda Consumer Protection Guidelines 2011.

vii) An order for the unconditional release/discharge of mortgages created over the Plaintiffs properties comprised in Kyadondo Block 248 Plot 328 at Kawuku, FRV 1533 Folio 3 Plots 36-38 Victoria Crescent II Kyadondo and LRV 3716 Folio 10 Plot 923 Block 9 land at Makerere Hill Road and all corporate and personal guarantees issued by the plaintiffs.

viii) An order for the taking of an audit and account of the 1st and 2nd plaintiffs' loan accounts for the period between 16th February 2011 to-date.

ix) A permanent injunction restraining the defendants from enforcing the mortgages over the plaintiffs' properties comprised in Kyadondo Block 248 Plot 328 at Kawuku, FRV 1533 Folio 3 Plots 36-38 Victoria Crescent II Kyadondo and LRV 3716 Folio 10 Plot 923 Block 9 land at Makerere Hill Road.

x) General and punitive damages.

xi) Interest on any pecuniary award at the prevailing commercial rate.

xii) Costs of the suit.

'In my view, this amendment went beyond what is acceptable under the law. It constituted a fresh cause of action. It ought to have been disallowed on that account alone.

The general position of the law on amendment of pleadings is that, either party is ordinarily given leave to make such amendment as is reasonably necessary for due presentation of his case on payment of the costs of and occasioned by the amendment, provided that there has been no undue delay on his part, and provided also that the amendment will not injure his opponent or affect his vested rights. Where the amendment is necessary to enable justice to be done between parties, it will be allowed on specific terms even at a late stage. See: *Hunt v Rice & Son, Ltd. (1937) 53 T.L.R. 931* and *Eastern Bakery vs Castelino (1958) EA 451,*

However negligent or careless may have been the first omission and however late the proposed amendment, the amendment would only be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs, but if the amendment will put them into such a position that they must be injured, it ought not to be made." See: *Clarapede & Co. v. Commercial Union Associations (1883) 32 W.R. 262, per Brett M.R.*

Sometimes to correct the error will lead to injustice which cannot be cured, as when a witness who could give evidence cannot be got at, or the solvency of one party is doubtful. See: *Clarapede & Co. v. Commercial Union Associations (1883) 32 W.R. 263, per Bowen L.J.*

If the application be made *mala fide*, or if the proposed amendment will cause undue delay, or will in any other way unfairly prejudice the other party, or is irrelevant or useless, or would raise merely a technical point, leave to amend will be refused.

Where the action has been brought on a substantial cause of action to which a good defence has been pleaded, the plaintiff will not be allowed to amend his claim by

including in it, for the first time, a trivial and merely technical cause of action, which such defence may not cover. See: *Dillon v Balfour (1887) 20 L. R. Ir. 600.*

See: *Odgers' Principles of Pleading and Practice in Civil Actions in the High Court of Justice Twenty- First Edition By D. B. Casson and I. H. Dennis.*
See also: *Auto Garage vs Motokov [1971] EA 514.*

Secondly, the amended plaint was largely premised on the claim that the contracts between the parties to suit were illegal and unenforceable. That the credit facilities, loans and other monies claimed by the defendants now appellants against the plaintiffs now respondents were irregular, null and void and unenforceable.

It is settled law as clearly set out by Hon. Madrama, JA in his lead judgment that a claim cannot be founded on an illegality. A party cannot enforce or take benefit of an illegal contract. In *Uganda Broadcasting Corporation vs Sinba (K) Limited and Others, Civil Application No. 12 of 2014*, this Court stated that:-

> *"... most importantly the judge having found that the contract upon which the suit was founded was illegal being in contravention of the law, he could not thereafter have enforced the same contract with an order directing that the same contract a party to an illegal contract be paid the money stipulated above."*

See also: *Makula International Ltd versus Cardinal Nsubuga Supreme Court Civil Appeal No. 4 of 1981, Kisugu Quaries Ltd versus Administrator General (1999) 1EA 162 (Supreme Court), Broadway Construction Co, versus Kasule & others [1972] EA 76,Kyagulanyi Coffee Ltd versus Francis Sembuya, Civil Appeal No. 41 of 2006, Shell (U) Ltd & others versus Rock Petroleum (U) Ltd High Court Civil Suit No. 645 of 2010, Active Automobile Spares Ltd versus Crane Bank Ltd & Rajesh Pakesh, Supreme Court Civil Appeal No. 21 of 2011, Crane Bank Limited and Fang min vs Belex Tours and Travel Limited , Supreme Court Civil Appeal No.06 of 2013, Mistry Amar Singh v Serwano Wofunira Kulubya [1963] 1 EA 408 (PC)*

On that account, the amended plaint premised on seeking to enforce contracts or take advantage of them on the basis that, they are illegal is unsustainable. I would strike it out on the account.

The learned trial Judge determined that, the questions of law concerning of the legality of the loan contracts, mortgages and debentures had been admitted by the appellants then defendants in their written statement of Defence (WSD). I have not found any basis to support that finding. Financial Contracts such as the ones from which this dispute arose are complex. It is not one or two contracts but rather a series of separate but related contracts. There is the loan agreement, the debenture, the mortgage, personal guarantees, and assignments and so on. They are governed by different legislation.

In respect of Mortgages, the Mortgage Act, in respect of the land, the Registration of Titles Act (RTA), in respect of money disbursed by a bank the Financial Institutions Act (FIA). In respect of debentures, the Companies Act and so on.

Therefore contravention of one aspect of the law in one of the afore mentioned legislation would most probably not vitiate all the transactions entered into by the parties.

Be that as it may, the question as to whether a foreign bank can lend money and obtain security from a Ugandan Company is one of mixed law and fact. It is a question that had to be tried.

In my view the learned trial Judge ought to have proceeded to try all the issues raised before him. Had he done so, he would have determined whether the defendants had raised a valid defence to the suit on all issues or not. He failed to do so.

Even if the learned trial Judge, had determined that there was no valid defence to the suit, upon striking it out, he ought to have set down the suit for formal proof.

The plaintiff's claim was not for a liquidated demand and no admission had been made in respect of the claims. The Judge accepted that position of the law when at scheduling conference he appointed an auditor to help the Court determine the specific claims in the plaint

The claim set out in the plaint clearly required to be proved by the plaintiff by way of evidence. Interestingly the judgment of the learned trial Judge was premised on an admission of an illegality which he found had been made in the amended written statement of defence. This admission ceased to exist on record the moment the amended written statement of defence was struck out. Therefore it could not have been the basis for the determination of a claim that remained without any written defence in opposition. I find the decision of the learned trial Judge strange to say the least.

I would allow this appeal. I would strike out the amended plaint on account that it did not comply with the law. It amounted to a fresh claim that was in any event unsustainable. Having done so, the amended defence would fall by the way side.

I would order that the parties revert to the position as it was on 31st August, 2020 immediately after the conclusion of scheduling conference.

I would save the order of the learned trial Judge appointing auditors.

I would order that the suit be set down for hearing on the basis of the original pleadings prior to the amendment of the plaint, before another Judge of the Commercial Division of the High Court without any further delay.

I would order that costs of this appeal be borne by the respondents.

It is so ordered.

Dated at **Kampala** this ..... 5th ..... day of ..... May ..... 2021.

.....

Kenneth Kakuru
JUSTICE OF APPEAL

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(BUTEERA, DCJ, KAKURU AND MADRAMA JJA)

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JUDGMENT OF CHRISTOPHER MADRAMA, JA

This judgment arises from an appeal against the orders and decree of the High Court dated 7th October, 2020 by Hon. Mr. Justice Henry Peter Adonyo in which he allowed the application in High Court Misc. Application No. 654 of 2020. The applicants who are now the respondents to this appeal filed an application against the appellants to this appeal for the respondent's joint written statement of defence filed in HCCS No 43 of 2020 to be struck out on the ground that it is a perpetuation of illegalities committed by the respondents in an illegally conducted financial institutions business carried out without a licence and/or conducting financial institutions business in contravention of the Financial Institutions Act (2004) as amended. Secondly,

and alternatively that the defence is frivolous, vexatious and evasive and did not disclose any reasonable answer to the applicant's claim of illegal conduct of financial institution's business by the respondents. Thirdly, for judgment to be entered against the respondents upon the applicant's claim in HCCS No 43 of 2020 and for costs of the application to be provided for. The learned trial judge allowed the application and issued the following orders and declarations:

1. That the written statement of defence of the respondents filed in HCCS No 43 of 2020 is a perpetuation of illegalities and is struck out. Secondly, judgment was entered for the plaintiffs as prayed for in their joint plaint under order 9 rules 6, 8, 10 and 30 and order 52 rules 1, 2 and 3 of the Civil Procedure Rules as follows:

2. That by their illegal actions, the respondents/defendants breached the different loan agreements entered into with the applicants/plaintiffs in the period between 16th February 2011 to 16th November, 2019.

3. That the credit facilities between the first and second plaintiffs and the defendants have been settled at law.

The learned trial judge further:

4. Ordered for the recovery by the applicants/plaintiffs from the respondents/defendants jointly of **Uganda shillings 34,295,951,553/=** and **US$ 23,467,670.61** being monies that were unlawfully taken by them from the applicant's/plaintiffs loan accounts.
5. Declared that since the second defendant did not produce or attach a licence allowing it to conduct financial institutions business in Uganda from bank of Uganda in respect of the business alluded thereto then the alleged credit facilities that were stated to have been offered by it to the first plaintiff were illegal and thus are void ab initio and consequently unenforceable.

6. Declared that the appointment of the first defendant by the second defendant as an agent bank and security agent in respect of the

second defendant's loan was illegal, unethical, unlawful, in breach of trust, in breach of fiduciary duty and in breach of the Financial Institutions Act 2004 (As Amended) as well as the Bank of Uganda Customer Protection Guidelines 2011 and the Kenyan Banking Act.

7. Issued an order for the unconditional release/discharge of mortgages allegedly created over the plaintiff's properties comprised in Kyadondo Block 248 Plot 328 land at Kawuku, FRV 1533 Folio 3 Plot 36 – 38 Victoria Crescent II Kyadondo and LRV 3176 Folio 10 Plot 923 Block 9 land at Makerere Hill Road and all corporate and personal guarantees issued by the plaintiffs.

8. Vacated an order previously issued by the court for taking an audit on account of all the first and second plaintiffs loan accounts for the period between 16 February 2011 up to the date of the order on the ground that it was over taken by events.

9. Issued a permanent injunction restraining the defendants from enforcing the mortgages over the plaintiff's properties comprised in Kyadondo Block 248 Plot 328 land at Kawuku, FRV 1533 Folio 3 Plot 36 – 38 Victoria Crescent II Kyadondo and LRV 3176 Folio 10 Plot 923 Block 9 land at Makerere Hill Road.

10. Issued interest on the liquidated damages at the rate of 8% per annum from the date of filing the suit till payment in full as well as awarded costs to the applicants/plaintiffs.

11. The court further issued directives to the Bank of Uganda which is the implementing authority under the Financial Authorities Act 2 of 2004 as amended to take such necessary actions and measures to ensure that the provisions of the law is implemented in accordance with the intention of the law such as to protect the Ugandan economy from illegal hemorrhages and uncontrolled flows of financial resources

and to ensure that financial institutions business in Uganda is operated within the letter of the law to protect the nascent banking business industry in Uganda.

The appellants were aggrieved by the orders and declarations issued by the learned trial judge and filed this appeal on 12 grounds of appeal as follows:

1) The learned trial judge erred in law in finding that the Financial Institutions Act 2004 applied to the second appellant in respect of credit facilities issued in Kenya to Ugandan entities.

2) The learned trial judge erred in law and in fact in finding that the second appellant required approval from the Bank of Uganda to issue credit facilities in Kenya to Ugandan entities.

3) The learned trial judge erred in law in finding that it is illegal for a foreign bank using money held on deposit whether within Uganda and or outside it to engage in activities, such as lending and extending credit facilities to Ugandan entities without authorisation of Bank of Uganda.

4) The learned trial judge erred in law in finding that the first appellant carried out agency banking in contravention of the Financial Institutions (Agent Banking) Regulations 2017.

5) The learned trial judge erred in law and in fact in finding that the first appellant acted as an agent of the second appellant contrary to Regulation 5 of the Financial Institutions (Agent Banking) Regulations 2017 and section 126 (3) of the Financial Institutions Act, 2 of 2004 as well as similar laws of Uganda without receiving evidence.

6) The learned trial judge erred in law in holding that the second appellant committed illegalities by violating section 117 of the Financial

Institutions Act 2004 in so far as it did not open a representative office in Uganda.

7) The learned trial judge erred in law and in fact in finding that the appellants breached the different loan agreement terms entered into with the respondents in the period between 16th February, 2011 to 16th November, 2019 without evidence.

8) The learned trial judge erred in law and in fact in declaring that the credit facilities between the appellants and the respondents settled at law.

9) The learned trial judge erred in law and in fact in striking out the written statement of defence of the first defendant whereas there was no challenge to it.

10) The learned trial judge erred in law and in fact in finding that the sum of Uganda shillings 34,295,551,553/= and US$23,467,670.61 were unlawfully taken from the applicant's/respondents loan accounts without evidence.

11) The learned trial judge erred in law and in fact in finding that the affidavit sworn by Allen Kagoya, was competent to support this application.

The appellants pray that the appeal is allowed and the ruling and orders of the learned trial judge in their Miscellaneous Application No 654 of 2020 and HCCS No 43 of 2020 be reversed or set aside and HCCS No 43 of 2020 be sent back to the High Court for trial with costs.

Appearances:

At the hearing of the appeal, learned counsel Fred Muwema appearing together with learned counsel Arnold Kimara Ronald represented the Respondents and learned counsel Kiryowa Kiwanuka, learned counsel

Usama Sebuwuufu and learned counsel Richard represented the Appellants. With the leave of court, learned counsel addressed the court in written submissions.

Preliminary Grounds

Having carefully considered the grounds of appeal, it should be noted that grounds 9 and 11 deal with matters of procedure that affect the rest of the grounds and I will consider them first. Ground 9 deal with the propriety of striking out the written statement of defence of the appellants and ground 11 deals with the entering of judgment for liquidated sums and issuing declarations on points of law on the basis of illegality of the loan facilities between the parties that are the subject of grounds 1, 2, 3, 4, 5, 6, 7, 8, and 10. Ground 12 deals with the propriety of using the affidavit of Allen Kagoya in support of the application and is partially covered in considering whether a defence can be struck out on the basis of pleadings alone and without considering the evidence or not, under ground 9 of the appeal.

Submissions of Counsel

Ground 9:

The learned trial judge erred in law and in fact in striking out the written statement of defence of the first defendant whereas there was no challenge to it.

For the appellants it was submitted that Diamond Trust Bank (U) Ltd, the first appellant (the first defendant in the lower court) filed a defence which was not challenged and was not based on the transaction between the second appellant and the respondent. Secondly, for the learned trial judge to use the alleged illegality in the transaction between the second appellant and the respondent he may as well go ahead and cancel all transactions conducted by the first appellant with any other client. Counsel submitted that the two transactions were not related at all. They submitted that the trial judge erred in law and fact in finding and ordering that the first appellant breached the different loan agreement terms entered with the

respondents by virtue of its illegal actions in the period between 16th February, 2011 to 16th of November 2019. Further the appellants counsel submitted that the respondents did not challenge any of the credit facilities obtained from the first appellant as being tainted with illegality in the amended plaint or in the notice of motion giving rise to this appeal. Counsel submitted that although the learned trial judge found that the appellants committed illegalities when the second appellant rendered money facilities to the first and second respondents, the learned trial judge did not also find in fact that the facilities obtained from the first appellant by the first respondent were illegal. Further, there was no evidence of any facility to the second respondent by the second appellant which was adduced.

The first appellant in the amended written statement of defence pleaded that the first and second respondents applied for and were granted credit facilities and that the respondent's failed to service the facilities and is in default and indebted to the appellants which facts were not disputed. Further, the credit facilities obtained from the first appellant were not challenged as being illegal by the respondents. He submitted that the learned trial judge ought to have investigated the claim of the settlement as had been made by the respondents in the amended plaint. He prayed that the court finds that the learned trial judge erred in law and in fact in striking out the written statement of defence of the first defendant whereas there was no challenge to it.

In reply, the respondent's counsel submitted that the ground of appeal is misconceived because the respondents challenged the appellants joint written statement of defence as being a perpetration of illegalities committed by the respondents in illegally conducting financial institutions business without a licence or conduct of financial institutions business in contravention of the Financial Institutions Act (2004) as amended. The challenge was captured in the orders sought in the Miscellaneous Application No 654 of 2020 which sought to strike out the respondent's written statement of defence.

Further the appellant's argument that the respondents did not challenge the first appellant's credit facilities is without merit due to the fact that firstly the appellant's credit facilities in the suit were part and parcel of the appellant's joint written statement of defence and they were challenged in the suit in that respect, both in the amended plaint and in Miscellaneous Application Number 654 of 2020. Secondly, the first appellant's credit facilities did not survive and remain standing in the suit when the first and second appellant's joint written statement of defence was struck out for being a perpetration of illegalities. The respondent submitted that the first appellant did not counterclaim upon the credit facilities in the suit and the first appellant cannot mount an appeal based on its credit facilities. Lastly, counsel submitted that it is also wanting for the first appellant to argue that the trial judge should have investigated its claim for monies and rights to credit facilities when the first appellant had not sued upon them in the suit.

In rejoinder, learned counsel for the appellants reiterated earlier submissions and further submitted that it is not mandatory for the first appellant to file a suit or counterclaim for recovery of monies owed to it as it has a statutory right of foreclosure which it can initiate without recourse to the court. He prayed that the court accepts the appellant's submissions on this issue.

Ground 11

The learned trial judge erred in law in entering judgment for the plaintiffs as prayed for in their joint plaint by virtue of Order 9 rules 6, 8, 10 and 30 of the Civil Procedure Rules.

On this ground counsel for the appellants submitted that Order 9 rule 30 does not exist under the Civil Procedure Rules and court incorrectly made orders under a non-existent order. Secondly, Order 9 rule 6 of the Civil Procedure Rules provides for judgment on a claim for a liquidated demand. However, the claim of the plaintiffs in the lower court was not a liquidated demand and as such the provisions of Order 9 rule 6 of the Civil Procedure Rules could not be invoked.

Thirdly, as far as Order 9 rule 8 and Order 9 rule 6 of the CPR are concerned, they are mutually exclusive and could not be applied by the trial judge at the same time in making the orders he made in the suit. The appellant's counsel further submitted that the trial judge did not follow the procedure under Order 9 rule 10 of the Civil Procedure Rules to proceed with the trial of the issues as raised as if a defence had been filed yet he applied the same in entering judgment.

Counsel reiterated submissions that no illegalities were committed by the appellants and their written statement of defence ought not to have been struck out. In any case he submitted that having struck out the written statement of defence, the learned trial judge could not have determined the matter under Order 9 rules 6, 8, 10 and 30 of the CPR. He contended that in order to strike out the pleading, it must be manifestly clear on the face of the pleadings that there is no reasonable defence.

The appellant's counsel submitted that the appellants in their written statement of defence had raised reasonable triable issues of law and fact. This included the fact that the respondents had claimed that the credit facilities obtained from the appellants were duly serviced and the appellants had been unlawfully enriching themselves and unlawfully appropriating monies from their accounts. On the other hand, the appellants averred that the facilities entered into by the respondents were lawful facilities and the first respondent is indebted to the appellants in various amounts stated. This required investigation of facts by the court. He submitted that a clear distinction should be drawn between an application to strike out a defence under Order 6 of the CPR and one where a matter of law is set down for argument as a preliminary point. The appellant submitted that a defence not being maintainable in law is not the same thing as a pleading not disclosing a reasonable defence and *inter alia* relied on **Ismail Serugo versus Kampala City Council and Attorney General; SCCA No 2 of 1998** for that proposition. It was therefore procedurally improper to enter summary judgment on the contested amounts in circumstances where fraud was alleged. The appellant's counsel submitted that it is

elementary that fraud must be proven strictly and even if the appellant's joint written statement of defence had been struck out, the onus remained on the plaintiff to prove the alleged fraud and to prove the amounts involved and this could only be done if it is set down for formal proof. The appellants invited the court to consider the need for investigation of the allegations of irregularly deducted money by auditors that is on the court record, proving the need for trial of fact. Further the claim of the respondents cannot be said to be for pecuniary damages.

The appellant's counsel submitted that Order 9 rule 8 and Order 9 rule 6 of the CPR are mutually exclusive. Further Order 9 rule 10 of the CPR requires the court to set down the suit for hearing as if a defence had been filed. Even though the rules are quoted, the learned trial judge did not follow the provisions of the rule and therefore the findings of the court were erroneous. Counsel relied on **Haji Asuman Mutekanga versus Equator Growers (U) Ltd; Civil Appeal No 7 of 1995**.

The appellant's counsel further invited the court to consider the pleadings and the averment therein which had to be proved by adducing evidence. He submitted that an interlocutory judgment is not final until the court decides other matters in the case or until the court decides whether the interlocutory judgment is backed by evidence. Generally, the learned trial judge did not follow the provisions of Order 9 rules 6, 7, 8 and 10 of the Civil Procedure Rules and the circumstances did not warrant the use of those rules.

Further the question of illegal acts by the appellants averred in the plaint require the production of evidence by the respondent who had the burden of proof. Therefore, the trial of the suit through affidavit evidence was wholly misconceived. It demonstrates that it was inappropriate to invoke the powers of the court to strike out pleadings as the case involved minute and protracted examination of documents and facts and the resolution of prolonged and serious arguments. Counsel invited the court to consider several contentious matters on the record that required trial. Additionally, the appellant's counsel submitted that the claim of the respondent could not

be based on credit facilities that are claimed to be illegal as a cause of action cannot arise from an illegality. Last but not least, the appellant's counsel submitted that section 54 (1) of the **Contracts Act, Act No 7 of 2010** provides that where an agreement is found to be void or when a contract becomes void, a person who received any advantage under that agreement or contract is bound to restore it or to pay compensation for it to the person from whom he or she received the advantage. It was therefore erroneous to make orders punishing the appellants for alleged illegalities by rewarding the respondents for the same.

In reply, the respondent's counsel submitted that it was a slip for the trial judge to refer to Order 9 Rule 30 of the Civil Procedure Rules when it does not exist. He invited the court to use its inherent powers to correct the slip error by deleting Order 9 Rule 30 of the Civil Procedure Rules from the ruling of the High Court by relying *inter alia* on Rule 2 (2), 36 (1) & 43 (3) (a) of the Judicature Court of Appeal Rules. The intention of the rule is to give effect to the intention of the court at the time when Judgment was delivered. He submitted that from the proceedings it is clear that the honourable judge intended to proceed to strike out under Order 6 Rule 30 of the Civil Procedure Rules and not Order 9 rule 30 of the CPR which rule does not exist.

The respondent's counsel further submitted that given the chequered history of the suit it was difficult to move the High Court to correct the slip. Further, the speed at which the appeal has been heard could not afford the respondents much time to file a formal application for correction of the error.

In reply to the submission that the learned trial judge applied Order 9 rules 6 and 8 and also rule 10 of the Civil Procedure Rules at the same time, the respondent's counsel highlighted the fact that Judgment was also entered under section 98 of the Civil Procedure Act (CPA). Counsel submitted that the test was whether the exercise of the wide and inherent powers of the court under section 98 of the CPA would meet the ends of justice and prevent abuse of the process of court. He submitted that the orders made

met the ends of justice and prevented the abuse of the process of court. Further counsel submitted that Order 9 rules 6 and 8 of the CPR can be applied concurrently if they relate to liquidated demands and pecuniary damages which are pleaded separately.

The respondent's counsel submitted that it would have been an abuse of court process for the trial judge to set down the suit for hearing of the appellants when the illegal defence had been struck out. That explains why the learned trial judge did not follow Order 9 rule 8 of the CPR. Further it would not have met the ends of justice for the trial judge to deny judgment to the respondents on the liquidated demand when the suit was not defended.

The respondent's counsel also submitted that the learned trial judge was not obliged to follow the procedure under Order 9 rule 10 of the CPR because the defence had been struck out. Because the appellants had not sued for any money in the suit, they could not and did not suffer any prejudice or injustice by reason of any alleged misapplication or misjoinder of Order 9 rules 6, 8 and 10 of the CPR together. Lastly, counsel submitted that the because the appellants had been adjudged to have committed illegalities, any alleged non-compliance with the rules of procedure cannot be used to cure the established illegality in this appeal.

In rejoinder, the appellants counsel reiterated earlier submissions that the appellants were not required to sue for money in the suit as this was not mandatory because the money could be recovered by foreclosure procedure without court.

Resolution of grounds 9 and 11

I have carefully considered the appeal of the appellants and particularly the grounds of the appeal. Most of the grounds of appeal deal with points of law as to whether the transactions in issue by the appellants were illegal transactions. On the other hand, ground 9 of the appeal raises a fundamental issue of procedure as to whether the learned trial judge erred in law and in fact in striking out the written statement of defence of the first

defendant. Secondly, in ground 11 the issue is whether the learned trial judge erred in law in entering judgment for the plaintiffs as prayed for in the joint plaint by virtue of Order 9 rules 6, 8, 10 and 30 of the Civil Procedure Rules.

The question of whether it was an error of law to strike out the written statement of defence of the first defendant cannot be confined to the defence of the first defendant because the order of the court is that the joint written statement of defence of the appellants is a perpetuation of illegalities and is struck out. The court therefore has to consider both written statement of defence. What is crucial is whether there are grounds for striking out a written statement of defence and the procedure therefor. Can a written statement of defence be struck out after considering the merits of the grounds of the defence or should the matter have proceeded as a point of law and after availing opportunity to both parties to address the court on the question or questions of law?

There are two scenarios which may be considered. The first scenario is where a point of law is raised for determination under Order 6 rules 28 and determined under Order 6 rule 29 of the Civil Procedure Rules. Both the Plaintiff and Defendant are entitled to be heard before the point is resolved by court. The other scenario is that of striking out pleadings under Order 6 rule 30 of the Civil Procedure Rules and the consequences of striking out a defence. This entails considering the circumstances under which a defence may be struck out and the procedure to be followed thereafter.

Order 6 rule 28 of the Civil Procedure Rules deals with pleadings and provides that:

> Any party shall be entitled to raise by his or her pleading any point of law, and any point so raised shall be disposed of by the court at or after the hearing; except that by consent of the parties, or by order of the court on the application of either party, a point of law may be set down for hearing and disposed of at any time before the hearing.

Order 6 rule 29 of the Civil Procedure Rules, which is the subsequent rule, deals with the procedure for determining a point of law averred in any pleading or set down by consent of the parties or by order of court.

The point of law envisaged in Order 6 rule 29 of the Civil Procedure Rules is a point of law averred in the pleadings of any of the parties or any point of law set down by consent of parties or by order of the court. Rule 29 gives the court power to ascertain and determine whether any point of law raised by any of the parties would wholly or substantially dispose of the whole suit whereupon the court would try it first under Order 15 rule 2 of the Civil Procedure Rules which provides that:

> 2. Issues of law and issues of fact.
>
> Where issues both of law and of fact arise in the same suit, and the court is of opinion that the case or any part of it may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined.

The ruling of the court and the application of the parties clearly indicates that the plaintiffs in the High Court filed an application under Order 9 rules 6, 8, 10 and 30 of the Civil Procedure Rules and Order 52 rules 1, 2 and 3 of the Civil Procedure Rules. Order 9 of the Civil Procedure Rules *inter alia* provides for the procedure to be followed after the time set for filing pleadings or a pleading has elapsed. In case the defendant has not filed a defence within the time limited for filing a defence and the plaint is drawn claiming a liquidated demand, judgment may be entered for the sum not exceeding the sum claimed in the plaint together with interest at the rate specified, if any, under Order 9 rule 6 of the Civil Procedure Rules (the CPR). On the other hand, where a plaint is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages, and the defendant fails to file a defence, then the matter proceeds under Order 9 rule 8 of the Civil Procedure Rules whereupon the court may enter interlocutory judgment against the defendant or defendants and set down the suit for assessment by the court of the value of the goods and

damages or the damages only as the case may be in respect of the amount found to be due in the course of the assessment. Last but not least, Order 9 rule 10 of the CPR is the general rule where no defence is filed and provides that in case the party does not file a defence on or before the date limited to do so, the court may proceed as if the party had filed a defence.

In the circumstances of this appeal, the appellants who were the defendants in the High Court had filed their pleadings by way of written statements of defence inclusive of amended written statement of defence responding to the amended plaint of the plaintiffs. I have further had a glance at the application giving rise to the current appeal and the grounds of the application are as follows:

1. The respondent's joint written statement of defence filed in HCCS No 43 of 2020 be struck out on the ground that

   (i) it is a perpetration of illegalities committed by the respondents in illegally conducting financial institutions business without a licence and/or conducting financial institutions business in contravention of the Financial Institutions Act (2004) as amended.

   (ii) Alternatively but without prejudice it is frivolous, vexatious and evasive and failed to disclose any reasonable answer to the applicants claim of illegal conduct of financial institutions business by the respondents.

   (iii) A judgment be entered against the respondents upon the applicants claim in HCCS No 43 of 2020.

   (iv) Costs of this application be provided.

In the grounds in support of the application there is no averment that the written statement of defence was filed out of time. In the premises, the matter could not have proceeded under Order 9 rules 6, 8 and 10 of the Civil Procedure Rules. It follows that the rules were irrelevant to the proceedings giving rise to the appeal and I will not consider them. The only averment that I consider relevant is that it is averred in the application that

the respondents' joint amended written statement of defence is a perpetration of illegalities committed by the respondents in Uganda and Kenya which defence is bad in law and ought not to be maintained or condoned. Alternatively, it is averred that the amended joint written statement of defence is frivolous and vexatious as it constitutes general denials, is evasive and it fails to disclose any reasonable answer or at all, to the applicants claims of illegality. Further it is averred that the defence has no merit and failed to answer or give any meaningful and substantial answer with sufficient particularity to the points of substance raised by the applicants claim of illegality and it ought to be struck out. It is further averred that the application raises substantial questions of law which can be determined on the face of the pleadings and would dispose of the main suit without the need for any interparty hearing. Strangely it is averred in paragraph (m) as follows:

> "That this application raises serious points of law and it is of great public importance as it is essential to the proper conduct of the financial institutions business in Uganda."

The learned trial judge duly set out the orders sought in the application as well as the grounds of the application and the affidavit evidence. The learned trial judge went on to consider whether the written statement of defence is a perpetration of illegalities committed by the respondents in illegally conducting financial institution business without a licence or in contravention of the Financial Institutions Act (2004) as amended. He dealt with the matter on the merits and particularly I find it curious that he also relied on the written statement of defence at page 22 of his ruling in the following words:

> "From the pleadings in the head suit it is clear to me that the written statement of defence filed by the respondents/defendants does not allude to the fact that Diamond Trust Bank (K), the first respondent here offered credit facilities to the first and second applicants outside Uganda and within the letter of offer tied the same to the Diamond Trust Bank (Uganda) Ltd which is the second respondent to act as its agents to collect funds for the repayment of the said credit facilities.

> These actions, in my view, are by their very nature the carrying out of financial institution business which are regulated under section 4 (1) of the Financial Institutions Act 2 of 2004 as amended for such actions requires valid licences granted for that purpose by the Central Bank of Uganda"

The learned trial judge went on to find that the written statement of defence filed in the head suit perpetuates an illegality. He further noted that the respondents denied that their actions were illegal and found that a reading of the written statement of defence proves the point that an illegality was committed given the reading of paragraph 19 of the respondent's written statement of defence in response to the allegations in the plaint (amended plaint). What was alleged is that the second defendant being a financial institution licensed to carry on banking business in Kenya could not conduct financial institution business in Uganda. Therefore, the financial transactions it contracted with the plaintiffs were executed contrary to the Financial Institutions Act 2004 (as amended) and as such are illegal and unenforceable. The learned trial judge quoted paragraph 19 of the written statement of defence which provides that:

> "Paragraph 13 (k) of the Amended Plaint is denied and the plaintiff shall be put to strict proof thereof. The defendants contend that the credit facilities obtained by the plaintiff from the second defendant were lawfully obtained in Kenya and are recoverable and enforceable".

He found that the pleading is a perpetration of an illegality going to the root of the dispute between the parties and that the defence cannot be sustained by a court of law. The learned trial judge went on to consider the matter in detail.

The procedural question is whether the learned trial judge erred in law to strike out the pleadings of the defendants. From a perusal of the rules cited by the applicants in the High Court, the matter was not a default proceeding at that stage of the proceedings but an application *inter alia* to strike out the pleadings of the defendants. The outcome of that application could in the most be a striking out of the pleadings of the defendant. This could only have

proceeded under Order 6 rule 30 of the Civil Procedure Rules which provides that:

> "30. Striking out pleading.
>
> (1) The court may, upon application, order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer and, in any such case, or in case of the suit or defence being shown by the pleadings to be frivolous or vexatious, may order the suit to be stayed or dismissed or Judgment to be entered accordingly, as may be just.
>
> (2) All orders made in pursuance of this rule shall be appealable as of right."

Had the learned trial judge struck out the pleadings of the defendant, the defendant was entitled as of right under Order 6 rule 30 (2) of the Civil Procedure Rules to appeal the striking out of the defence order to this court. Because the rule allowed the court to order the suit to be stayed, if the defendants desired to appeal the decision striking out the defence, further proceedings could have been stayed pending appeal and this court would be handling the issue of whether it was lawful or proper to strike out the written statement of defence on the ground that the plaintiff alleged that it was a perpetration of illegalities. Secondly, could the matter be handled as a point of law without considering the evidence? Was it not the proper procedure to hear the parties before determining the issue as a point of law under Order 6 Rule 29 of the Civil Procedure Rules? In any case had there been the envisaged order under Order 6 Rule 30 of the CPR, that is the only matter which we would have to handle on appeal. It would be a procedural matter on the assumption that it was an order made on the basis of pleadings only. Thirdly, the subsequent orders of entering judgment, though permissible after striking out a defence, needed to proceed on the basis of a claim for a liquidated amount in default of a defence but not on the basis of a conclusion that the plaintiff was entitled to the money in a contentious matter. The plaintiffs are borrowers and therefore why would a court of law enforce an illegality? The plaintiff's claim in the plaint is that it had received certain monies and in the payment or part payment thereof, certain

deductions were unlawfully made. I would further consider the pleadings at a later stage.

The head note of Order 6 rule 30 of the CPR is: *Striking out pleadings*. It deals with the striking out of any pleading on the ground that *it discloses no reasonable cause of action or answer and, in any such case, or in case of the suit or defence being shown by the pleadings to be frivolous or vexatious*, the court *may order that the suit to be stayed or dismissed or judgment be entered accordingly as may be just*. The circumstances under which pleadings may be struck out have been discussed in many judicial precedents.

Starting with the rules for striking out under Order 6 rule 30 of the CPR which is the relevant rule that enables striking out of pleadings, the wording thereof is that *"the court may, upon application, order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer and, in any such case, or in case of the suit or defence being shown by the pleadings to be frivolous or vexatious"*. There are several elements which need to be highlighted in the above rule. The first element is that the court has discretionary power and it is not mandatory to strike out any pleading on the grounds mentioned in Order 6 rule 30 unlike Order 7 rule 11 of the Civil Procedure Rules. Secondly, it is the pleading which is struck out on the ground that it discloses no reasonable cause of action or answer. A defence is an answer to a claim in a pleading and therefore one possible ground for striking out a defence is that it discloses no reasonable answer to the claim of the plaintiff. Thirdly, it may be shown that the defence is by the pleadings frivolous or vexatious. Clearly, it has to be shown by the pleading the claim or answer to the claim is frivolous or vexatious. The point that should be highlighted is that it is only upon perusal of the pleading by way of a written statement of defence that the court can reach a conclusion that the pleading is frivolous or vexatious. Secondly, it is only the pleading by way of a written statement of defence that may be struck out for not disclosing a reasonable answer. The question before the court therefore is

whether the defendant's pleading did not disclose a reasonable answer or whether it was shown to be frivolous or vexatious.

The learned trial judge never made a finding that the written statement of defence of the appellants was frivolous or vexatious. The inference is that the learned trial judge reached the conclusion that there was no reasonable answer to the allegations against the defendants in the plaint.

A pleading may be struck out under Order 6 rule 30 upon perusal of the plaint or written statement of defence only. In **Odgers' 'Principles of Pleading and Practice in Civil Actions of the High Court of Justice 22nd Edition page 148**, states that an objection on the ground that the pleading discloses no reasonable cause of action or answer or that the action is frivolous and vexatious, requires the court to only consider the pleadings and not any affidavit evidence.

Further, **Odgers' 'Principles of Pleading and Practice in Civil Actions of the High Court of Justice** (supra) makes reference to several decisions where it was held *inter alia* that the power of the court to strike out can be exercised at any stage of the proceedings but should only be exercised in "plain and obvious cases" and in cases where no reasonable amendment could cure the defect. Secondly, if the point raised requires substantial argument and careful consideration, it may be more appropriate to set it down for trial. Thirdly, the summary procedure of striking out is only appropriate where it is plainly evident that the statement of claim as it stands is insufficient even if proved, to entitle the plaintiff to what he asks, or that the defence cannot afford any answer in law to the claim. I have considered some of the cases cited in **Odgers' 'Principles of Pleading and Practice in Civil Actions of the High Court of Justice** (supra).

Striking out on the ground of no reasonable cause of action or answer

In **Wenlock v. Moloney and Others [1965] 2 All E.R 871**, the Court of Appeal of England considered R.S.C. Ord 18 rule 19 which provides as follows:

"(1) The court may at any stage of the proceedings order to be struck out or amended any pleading on the endorsement of any writ in the action, or anything in any pleading or in the endorsement, on the ground that (a) it discloses no reasonable cause of action or defence, as the case may be; or (b)it is scandalous, frivolous or vexatious... (c) ... (d) it is otherwise an abuse of the process of court; and may order the action to be stayed or dismissed or Judgment be entered accordingly, as the case may be."

I note that the rule is in *pari materia* with the Uganda Civil Procedure Rules on the aspect of striking out a pleading on the ground that it discloses no reasonable cause of action or answer or where the pleading is shown to be frivolous or vexatious. In **Wenlock v. Moloney and Others** (supra) the court considered sub rules (a) and (b) and Sellers LJ defined what a reasonable cause of action is at page 873 that:

"the only ground on which the action can be said to disclose no reasonable cause of action is that it is not one which is likely to succeed, then I doubt whether affidavit evidence was admissible."

In **Drummond Jackson v British Medical Association [1970] 1 ALL ER 1094** Lord Pearson at page 1101 on what a reasonable cause of action is stated that:

... No exact paraphrase can be given, but I think 'reasonable cause of action' means a cause of action with some chance of success, when (as required by r 19(2)) only the allegations in the pleading are considered. If when those allegations are examined it is found that the alleged cause of action is certain to fail, the statement of claim should be struck out.

In **Wenlock v. Moloney and Others** (supra) Danckwerts, L.J at page 874 considered two procedures that may be used. One is to set out a point of law for determination and another is to apply to strike out the pleading and this is what he said:

"The practice under the former rule, (3), R.S.C. Order 25 rule 4, and under the inherent jurisdiction of the court, was well settled. Under the rule it had to appear on the face of the plaintiffs pleading that the action could not succeed or was objectionable for some other reason. No evidence could be filed. In the case of the inherent power of the court to prevent the abuse of its procedure by frivolous

or vexatious proceedings or proceedings which were shown to be an abuse of the procedure of the court, an affidavit could be filed to show why the action was objectionable....

The position under the two former rules (3) has been incorporated in the present R.S.C. Order 18 rule 19 of the new rules. There is no doubt that the inherent power of the court remains; but the summary jurisdiction of the court was never intended to be exercised by a minute and protracted examination of the documents and the facts of the case, in order to see whether the plaintiff clearly has a cause of action. To do that, is to usurp the position of the trial judge, and to produce a trial of the case in Chambers, on affidavit only, without discovery and without oral evidence tested by cross examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power. The learned master stated the relevant principles and practice correctly enough, and then, I am afraid, failed to apply them to the case."

I note that the Ugandan Order 6 rule 28 and 29 of the CPR allow a point of law to be pleaded under rule 28 and set out for argument and determination under rule 29 for purposes of a suit or defence without having to take evidence first. In **Hubbuck & Sons, Ltd v. Wilkinson, Heywood & Clark, Ltd [1899] 1 Q.B. 86** at 91, there was an appeal against the order of Kennedy J to strike out the plaintiff's statement of claim on the ground that it discloses no reasonable cause of action in an application to strike out and Lindley M.R. who delivered in the judgment of the Court of Appeal at page 91 stated that:

"Two courses are open to a defendant who wishes to raise the question whether, assuming a statement of claim to be proved, it entitles the plaintiff to relief. One method is to raise the question of law directly... The other is to apply to strike out the statement of claim... The first method is appropriate to cases requiring argument and careful consideration. The second and more summary procedure is only appropriate to cases which are plain and obvious, so that the master or judge can say at once that the statement of claim as it stands is insufficient, even if proved, to entitle the plaintiff to what he asks. The use of the expression "reasonable cause of action" in rule 4 shews that the summary procedure there introduced is only intended to be had recourse to in plain and obvious cases"

Striking out pleadings is therefore considered a summary procedure more appropriate in plain and obvious cases but not for points of law which

require careful consideration and depend for their resolution on trial of facts. In **Steeds and Another V. Steeds and Another (1889) 22 Q.B.D. 537** at page 542, the Court of Appeal declined to strike out a defence and instead ordered amendment of the defence when they said:

> "We think, therefore, that we cannot strike out this defence as we are invited to do. It seems to us that it must be good for a part of the claim at all events. But we think the statement of defence defective, and that Mr. Bullen ought to amend by a further statement of the material facts, and our order is that the statement of defence be amended accordingly, and if that been not done within 10 days, the plaintiff be at liberty to sign judgment for half the amount claimed.

In **Major General David Tinyefunza v the Attorney General of Uganda; Constitutional Appeal No. 1 of 1997** Wambuzi C. J held that the question of whether a plaint discloses a cause of action is considered upon a perusal of the plaint only as stated in numerous other authorities. These include **Attorney General v Oluoch [1972] EA 392**, where it was held that the question whether a plaint discloses a cause of action is determined upon a perusal of the plaint alone, together with anything attached so as to form part of it, and upon the assumption that any allegations or implied allegations of fact in it are true. Also in **Jeraj Shariff v Fancy Stores [1960] 1 EA 374,** the East African Court of Appeal per Windham JA held that:

> The question whether a plaint disclose a cause of action must be determined upon a perusal of the plaint alone, together with anything attached so as to form part of it, and upon the assumption that any express or implied allegations of fact in it are true.

The Supreme Court in **Ismail Serugo vs Kampala City Council & the Attorney General; Constitutional Appeal No. 2 of 1998** in the judgment of Wambuzi CJ at pages 2 and 3 considered the provisions of Order 7 rule 11 and Order 6 rule 29 of the Civil Procedure Rules and held that:

> I agree that in either case, that is whether or not there is a cause of action under Order 7 Rule 11 or a reasonable cause of action under Order 6 Rule 29 (now rule 30 of the revised rules) only the plaint can be looked at...

Mulenga JSC held that there is a distinction between Order 7 rule 11 of the Civil Procedure Rules and Order 6 rule 29 in that one deals with striking out the plaint based on perusal of a pleading while the other considers a point of law of whether a suit is maintainable and cited with approval the decision of the East African Court of Appeal in **Nurdin Ali Dewji & others v G.M.M Meghji & Co. and Others (1953) 20 EACA 132** for the distinction.

In **Nurdin Ali Dewji and others v G.M.M Meghji & Co and Others** the East African Court of Appeal held that the learned trial judge erred to reject the plaint when there was an objection to the suit on a point of law and the final result was that the learned judge rejected the plaint not on the ground of an inherent defect in the plaint but because he thought that the suit was unmaintainable. These decisions analogously apply to striking out pleadings on the grounds in Order 6 rule 30 (1) of the CPR upon perusal of the pleadings and determination of questions of law that may substantially or wholly resolve a suit.

Coming to the facts of this appeal, the amended plaint of the plaintiffs, save for the averment that the transactions were illegal, goes on to state that the cause of action is for determination of the legality of the credit facilities executed by the defendants with the plaintiff and for refund of monies unlawfully/unjustly appropriated by the defendants from the plaintiffs. There was also a dispute over property is comprised in Kyadondo Block 248 Plot 328 and other land titles which are described. Thirdly it was for breach of the terms of the loan agreements. Fourthly it was for breach of contractual, fiduciary and statutory duty. The consequential claims are detailed in the particulars of unlawful enrichment and included a claim for 34,295,951,553/= Uganda shillings for irregular transactions, irregular bank charges, unauthorised withdrawals, and explained transactions and overdraft interest over charge. Similar claims were made in respect to United States dollars US$23,467,670.69. There was no trial of the transactions between the parties in terms of what the facility was and what the outstanding was if any. What was the money had by the plaintiffs if any?

I have further considered the answer of the Defendants to the alleged illegality and this is what the defendants averred in paragraphs 7 – 19. Further, I have in mind the wording of Order 6 rule 30 of the Civil Procedure Rules. Firstly, it provides that "the court may, upon application, order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer and, in any such case, or in case of the suit or defence being shown by the pleadings to be frivolous or vexatious".

The question before the court is whether the defendants pleading did not disclose a reasonable answer or whether it was shown to be frivolous or vexatious. As noted earlier the learned trial judge did not strike out the written statement of defence on the ground that it was frivolous or vexatious but that there was no reasonable answer to the allegation that the defendants were conducting unlawful business forbidden by statute.

Paragraphs 7 - 19 give some answers of the defendants in their joint Written Statement of Defence:

"7. Save that the first and second plaintiffs applied for and were granted credit facilities by the defendants, the rest of the contents of paragraph 13 (a) of the amended plaint are denied.

(i) Save that the first and second plaintiffs obtained credit facilities from the defendants, the contents of paragraph 13 (b) and (c) of the amended plaint are denied. In response thereto, the defendants contend that the first plaintiff approached the first defendant at various dates for credit facilities to fund various projects. The first defendant as a result issued 3 credit facilities to the first plaintiff, to wit; term loan facility of US$6,663,433; demand overdraft facility of Uganda shillings 1,500,000,000/= and temporary demand overdraft facility of Uganda shillings 1,000,000,000/=. (Copies of the offer letters accepted by the first plaintiff are attached as Annexure 'A1, A 2 and A2').

(ii) in further response to paragraph 13 (b) and (c) of the amended plaint, the defendants shall further content that the first plaintiff

approached the second defendant at various dates for credit facilities to fund various projects. The first defendant as a result issued credit facilities to the second defendant, to wit; term loan facility of US$4,000,000 and term loan facility of US$500,000. (Copies of the offer letters accepted by the first plaintiff attached as Annexure 'B1 and B2').

8. Save that the plaintiffs provided security in the form of property to the defendants to secure the credit facilities, the rest of the contents of paragraph 13 (b) of the amended plaint are denied and the plaintiffs shall be put to strict proof.

9. The defendants in further response to paragraph 13 (b) and (c) of the amended plaint contended that the terms of the credit facilities were freely and voluntarily executed by the plaintiffs, who certified that it received independent legal advice on the same and were not unreasonable, unfair, unconscionable or unjust as alleged.

10. The defendants shall at the trial content and prove that the facility agreements entered into by the defendant and the plaintiffs are legally binding and enforceable under the law.

11. In further response to paragraph 13 (c) of the amended plaint thereto the defendants contend that the first plaintiff failed to service its stated credit facilities and is in default of its payment obligations and, the first plaintiff is indebted as follows;

i. US$6,298,380.02 on the term loan facility of US$6,663,453 (as at 21st of January 2020).

ii. Uganda shillings 2,855,718,349/= on the demand overdraft facility of Uganda shillings 1,500,000,000/= and the temporary demand overdraft facility of Uganda shillings 1,000,000,000/= (as at 31st of December 2019).

iii. US$3,662,241.70 on the term loan facility of US$4,000,000 (as at 21st of January 2020).

iv. US$458,604.48 on the term loan facility of US$500,000 (as at 21st of January 2020) (copies of the loan statement and account statement of the first plaintiff are attached as Annexure C1 and C2).

12. The contents of paragraph 13 (d) of the amended plaint are denied, and the plaintiff shall be put to strict proof. The defendant shall contend that all interest and deductions affected by it on the first and second plaintiffs accounts are in accordance with the contractual provisions of the credit facilities granted to the first and second plaintiffs....

15. Paragraph 13 (8) of the amended plaint is not admitted and the plaintiff shall be put to strict proof thereof. The defendants contend that any notices or demands that have been made against the first plaintiff are in accordance with the law.

...

19. Paragraph 13 (k) of the amended plaint is denied and the plaintiffs shall be put to strict proof thereof. The defendants contended that the credit facilities obtained by the plaintiffs from the second defendant were lawfully obtained in Kenya and are recoverable and enforceable."

The learned trial judge proceeded under paragraph 19 of the written statement of defence as the answer to the alleged illegalities made against the defendants by the plaintiffs. However, the issue of whether the plaintiffs were lawfully carrying out the business alleged in the plaint, is partly a question of fact and partly a question of law that ought not to be concluded by striking out the written statement of defence. For instance, it is alleged that the defendants did not have a licence to do so or breached the terms of regulations. The defendants averred that they were doing business lawfully and the issue was triable as the factual basis had to be established. For instance, it is alleged that the first plaintiff went to Kenya to obtain credit facilities. What are the facts before even dealing with the law? In the very least, the matter ought to have been tried as a point of law under order 6

rule 29 of the Civil Procedure Rules and only where facts are not in dispute or have been established without need for more. In the very best of circumstances, the point of law required to be determined after taking evidence and after address of counsel on all relevant matters of law and fact. What was being alleged involves an important point of law affecting colossal sums of money. In **N.A.S Airport Services Ltd v the Attorney General of Kenya [1959] EA 53** Order 6 Rule 29 was interpreted by the then East African Court of Appeal when Windham JA who read the judgment of court stated at page 58 that:

> Clearly the object of the rule is expedition. But to achieve that end the point of law must be one which can be decided fairly and squarely, one way or the other, on facts agreed or not in issue on the pleadings, and not one which will not arise if some fact or facts in issue should be proved; for in such a case the shortcut, as is so often the way with shortcuts, would prove longer in the end.

Further could the plaintiffs recover money on the basis of an illegal transaction? The learned trial judge went ahead to enter judgment allowing colossal sums of money against the appellants after striking out their defence on the ground of illegality and without having given them a hearing on the basis for the awards.

The general proposition of law is that what is done in contravention of the provisions of an Act of Parliament cannot be made the subject-matter of an action (See **Bostel Brothers Ltd v Hurlock [1948] 2 All ER 312** judgment of the Court of Appeal of the United Kingdom per Somervell LJ at 312 and also **Phoenix General Insurance Co of Greece SA v Administratia Asigurarilor de Stat [1987] 2 All ER 152** the Court of Appeal of England per Kerr LJ held that it is settled law that any contract prohibited by statute, either expressly or by implication is illegal and void. Lastly, in **Mistry Amar Singh v. Serwano Wofunira Kulubya [1963] E.A** page 408 at page 414, the Privy Council quoted with approval the principle in **Scott v. Brown, Doering, McNab & Co (3) [1892] 2 Q.B. 724** at 728 that:

> Ex turpi causa non oritur action. This old and well-known legal maxim is founded in good sense, and expresses a clear and well recognised legal principle, which

is not confined to indictable offences. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the court ought not to assist him."

The privy Council found that in that case it became impossible for the plaintiff to recover except through the medium and by the aid of an illegal transaction to which he was himself a party. He was therefore defeated by the principle which is expressed in the maxim "*in pari delicto potior est conditio possidentis*".

Following the decision of the learned trial judge striking out the written statement of defence of the appellants, it became impossible for the plaintiff to succeed in the action, based on an alleged illegality. Further, I would consider the effect of section 54 of the Contracts Act 2010 of Uganda as submitted by the Appellants counsel. It provides that:

"54. Obligation of person who receives advantage under a void agreement or a contract that becomes void.

(1) Where an agreement is found to be void or when a contract becomes void, a person who received any advantage under that agreement or contract is bound to restore it or to pay compensation for it, to the person from whom he or she received the advantage.

(2) Where a party to a contract incurs expenses for the purposes of performance of the contract, which becomes void after performance under section 25(2), the court may if it considers it just to do so in all the circumstances—

(a) allow the other party to retain the whole or any part of any advantage received by him or her;

(b) discharge the other party, wholly or in part, from making compensation for the expenses incurred; or

(c) make an order that the party recovers the whole or any part of any payments, discharge or other advantages not greater in value than the expenses incurred."

Though there was no counterclaim by the defendants, section 54 (1) of the Contracts Act enables the court to consider the defence that the respondents were indebted to the Appellants in the amounts expressly set out in the written statement of defence. They defendants alleged that the plaintiffs owed sums of money to them. Further, the issue of whether the various transactional contracts were void and sums could not be recovered under section 54 (1) of the Contracts Act required trial of issues where *inter alia* all the relevant credit facilities would be analysed and whether both parties were in *pari delicto* if illegality is established would also be considered. In those circumstances, and even if illegality of the transaction was to be established, there was no basis for entering default judgment let alone striking out the defence as the issue of the indebtedness of the respondents remained a triable issue under section 54 (1) of the Contracts Act 2010. There were questions of fact that needed to be established after taking the necessary evidence in considering the issues.

In conclusion, the learned trial judge erred in law to strike out the written statement of defence and I would accordingly allow grounds 9 and 11 of the Appeal and set aside the order striking out the written statement of defence. I find that because the defendants were not heard, the rest of the orders issued by the learned trial judge cannot stand and there is no need to consider grounds 1, 2, 3, 4, 5, 6, 7, 8, 10 and 12 of the appeal.

I would hold that the appellant's appeal substantially succeeds with an order setting aside the judgment and orders of the learned trial judge with costs. I would issue an order remitting the suit to the High Court to be fixed before another trial judge for determination after hearing both parties.

Dated at Kampala the 5th day of May 2021

Christopher Madrama

Justice of Appeal