THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 35 OF 2003

(FROM ORIGINAL MENGO C. S. NO. 762 of 1999)

SALONGO KIBUDDE ::APPELLANT

VERSUS

MRS. JOSEPHINE MUBIRU ::::::::::::::::::::::::::::RESPONDENT

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

JUDGMENT

The above named appellant being aggrieved by and dissatisfied with the judgment, decree and orders of Her Worship Atukwase Justine, Magistrate Grade I, delivered on 20/05/2003 at Mengo Chief Magistrate's court appealed to the High Court against the whole of that judgment and decree on the following grounds:

1. The learned trial Magistrate erred in law and fact when she found that the appellant owned (sic) Shs.1, 509,100/= to the respondent without evidence to prove existence of a contract between the appellant and the respondent.

2. The learned trial Magistrate erred in law and fact when she found as a fact that the appellant used the respondent's vehicle as a special hire when it was unlicensed and could not lawfully be driven on the road.

3. The learned trial Magistrate erred in law and fact when she rejected the defence evidence of non-use of the vehicle, which was contradicted.

4. The learned trial Magistrate failed to properly evaluate the evidence on record on both sides thus coming to a wrong decision.

The grounds of appeal were formulated by the appellant personally. On getting a lawyer, they were not reviewed. The four grounds can, in my view, be conveniently summarized as follows: -

1. Whether the learned trial Magistrate subjected the evidence before her to adequate scrutiny.
2. Whether the learned trial Magistrate erred in law when she made the impugned orders.

The above broad grounds, in my view, do encompass all the grievances the appellant has against the decision of the lower court.

From the evidence, the plaintiff/respondent is the owner of the motor vehicle Registration No. UBD 996 a Toyota Corona, having bought it from one Nyanzi Umaru. After acquiring the same, she lent it out to the defendant/appellant for operation of special hire services at the rate of Shs.20, 000/= per day. The defendant/appellant stayed with it for a period of one and half months without any payments being made to the plaintiff/respondent. Hence the suit.

The learned trial Magistrate was invited to determine:
1. Whether there was a valid contract between the plaintiff and the defendant.
2. What were the terms of the contract.
3. Whether any of the parties breached the contract.
4. Remedies.

She determined the first issue in the affirmative. As regards the second one, she found that the defendant was to use the vehicle for hire services at the rate of Shs.20, 000/= per day. Since throughout the contract period the defendant never made any remittance of funds to the plaintiff, the learned trial Magistrate determined the suit in the plaintiff's favour. Hence the appeal.

This is a first appeal. It is the duty of the first appellate court to review the record of the evidence for itself in order to determine whether the conclusion reached upon the evidence by the trial court should stand. It is trite that if the conclusion of the trial court has been arrived at on conflicting testimony after seeing and hearing the witnesses, the appellate court in arriving at a decision would bear in mind that it has not enjoyed this opportunity and the view of the trial court as to where credibility lies is entitled to great weight.

In law a fact is said to be proved when court is satisfied as to its truth. The evidence by which that result is achieved is called the proof. The general rule is that the burden of proof lies on the party who asserts the affirmative of the issue or question in dispute. When that party adduces evidence sufficient to raise a presumption that what he asserts is true, he is said to shift the burden of proof: that is, his allegation is presumed to be true, unless his opponent adduces evidence to rebut the presumption. The standard of proof balance of probabilities.

Applying the above principle to the instant case,the plantiff/respondent led evidence to show that she was the owner of the vehicle in question. She also led evidence to show that after acquiring the vehicle, she lent it out to the defendant /appellant for operation of special hire services. The transaction was not reduced to writing. It is trite that a contract is a legally binding agreement.

In general, no particular formality is required for the creation of a valid contract. I t may be oral, written, partly oral and partly written, or even implied from conduct.

In the instant case, the defendant /appellant did not deny the fact of taking the vehicle from the plantiff/respondent on hire terms.

Looking at the defendant/appellant's written submissions of 11th December,2002, the existence of the contract and the terms as testified to by the plantiff/respondent were not denied.The very first paragraph of counsel's submissions runs thus:

"The defendant admits the existence of a contract between himself and the plantiff whereby the defendant…..agreed to drive the plaintiff's motor-vehicle registration No.UBD 996 for her as a special Taxi which had recently been purchased by the plantiff on 9/07/1999.The plantiff having actually taken possession of the vehicle decided to use same as a private special taxi and invited the defendant to drive the same for the purpose of raising some extra income. It was agreed term by both parties that shs.20, 000/= would be given to the plantiff at the end each working day.The contractual relationship was to continue as long as the defendant continued using the plaintiff's vehicle as a private hire taxi commonly known in this country as SPECIAL HIRE. If that was not possible (payment) o daily basis, then to defendant was supposed

3vehicle for all the period of his disappearance from the respondent. The appellant's assertion does not make any business sense and it simply lacked logic. The learned trial Magistrate was entitled to reject
it. Accepting, as I must, learned Counsel's submission that the appellant is bound by the doctrine of estoppel, I am unable to fault the learned trial Magistrate's conclusion on this point. She subjected the evidence before her to adequate scrutiny.
I now turn to the issue of damages.

The respondent in her plaint prayed for special damages of Shs.1,509,000/= for the period the vehicle was under the use and custody of the appellant. She also prayed for general damages for loss of earnings and inconvenience, interest and costs of the suit. By simple calculation, Shs.20,000/= per day for 45 days gives a figure of Shs.900,000/=. Learned counsel for the respondent has conceded that between **gth** July, 1999 and when the vehicle was finally impounded, the respondent's entitlement was Shs.900,000/= and not Shs.1,500,000/=. In view of this concession the award made by the learned trial Magistrate cannot be allowed to stand.

I find cause to interfere with it. Given that the respondent's claim of Shs.9,000/= (Shillings nine thousand only) being the cost of radio announcements was not challenged, I would substitute the order for payment of Shs.1,509,000/= as special damages with an order for payment of Shs.909,000/= by the appellant to the respondent. I do so.

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save on the question of special damages. On the whole, this appeal lacks merit. I dismiss it subject to the above variation. In view of the appellant's partial success on the issue of special damages, the respondent shall be paid two-thirds of the costs of the appeal.

Orders accordingly.

Yorokaa mwi ne

JUDGE

03/04/2009

03/04/209:

Mr. Charles Mbogo for respondent

Respondent absent

Appellant present in person.

Counsel:

Counsel for appellant is absent. We are ready to receive the

Judgment.

Court:

Judgment delivered.

Yorokam) mwine

JUDGE /

03/04/2009

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THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL APPEAL NO. 109 OF 2009
ARISING OUT OF MISC. APPLICATION NO. 08 OF 2009
MISC. APPLICAION NO. 566 OF 2008
AND
CIVIL SUIT NO. 320 OF 2007
1. BANKOFUGANDA
2. STANDARD CHARTERED BANK APPELLANTS
UGANDA LIMITED
3. CHRISTOPHER KIBANZANGA
VERSUS
1. SAIDI KYADONDO
2. DAN KATARIBWE KWATAMPORA
3. STEPHEN KAGORO
4. TUMWINE SILAGI RESPONDENTS
5. IMAM KANKURIHEMU
6. JAMES MAGEZI
BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE
RULING:

The appleal was brought under 0.50 r.8 of the Civil Procedure Rules and S. 98 of the Civil Procedure Act. It is for orders that:

(i). The order of Her Worship Elizabeth Kabanda dated 3 February, 2009 in *Miscellaneous Annlication No. 08 of 2009* refusing

the substituted service order in relation to ***Miscellaneous Anylication No. 566 of 2008*** be set aside.

(ii). The 1st, 3rd, 4th, 5th and 6'' respondents in Miscellaneous Application No. 566 of 2008 ("the respondents') be served by advertising of the Notice of Motion in the Monitor Newspaper and by posting a copy thereof to the said respondents postal addresses, as indicated on the respective certificate of Titles registered in their names.

(iii). The costs of this appeal be in the cause.

From the records, the appellants filed ***Miscellaneous AnDlication No. 08 of 2009*** seeking to serve Miscellaneous Application No. 566 of 2008 on the respondents by substituted service,

having failed to effect service on them in the ordinary way. The application for substituted service was refused by the Registrar principally on the ground that the respondents were not parties to the underlying suit, HCCS No. 320 of 2007, from which the impugned decree arises. The Registrar also held, as a further ground of refusal, that there was no disclosure of the source of information of the process server in relation to paragraph 4 of the process server's affidavit.

It is contended for the applicants that the Registrar erred in law in refusing the application on the basis that the said respondents were not parties to the main suit, ***HCCS No. 320/2007*** as that was not relevant. That the relevant question was whether the respondents were party to ***Miscellaneous Application No. 566 of 2008*** which application it was sought that they be served.

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When the application came up for hearing on 30/03/09, Mr. Kiggundu Mugerwa appearing on Mr. Masembe Kanyerezi's brief applied for adjournment. The only reason advanced by counsel was that the lawyer was appearing before another Judge. I found it strange that counsel could apply for a hearing date and then proceed to another court come that date. Be that as it may, I was of the view that court could make a determination of the matter one way or the other on the basis of the available material.

The history of the matter can easily be discerned from the impugned ruling. Briefly, the applicants filed HCCS No. 320/2007 wherein on June 26th, 2008 a consent decree was issued by the Deputy Registrar of this court. The parties to the decree are: *Harry Kasigwa and Christopher Kibazanga* as plaintiffs and the *Attorney General, Bank of Uganda; Basajjabalaba Hides & Skins Limited,* and *Standard Chartered Bank (U) Ltd* as defendants. On 24/09/08, *Henry Kasigwa was struck off HCCS No. 320/2008* by an order of the Registrar vide ***Miscellaneous Apylication No. 349/2008.*** Subsequent to this action, the applicants herein filed ***Miscellaneous Anglication No. 566/2008*** seeking orders to set aside the consent decree issued in ***HCCS No. 320/2007.*** The respondents in ***Miscellaneous Annlication No. 566/2008,*** save the 1st respondent, are not parties to ***HCCS No. 320/2007.*** Hence the learned Deputy Registrar's decision to disallow the service to the respondents by substituted service. I have addressed my mind to the circumstances herein and the manner in which the impugned consent decree was obtained.

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It is clear to me that the respondents were joined in Miscellaneous Application No. 566 of 2008 because they are indicated as the current owners of the property sought to be recovered by the setting aside of the impugned ***consent decree*** and cancellation of the change in proprietorship. As such, they are entitled to be heard, if they so wish, in that application as persons likely to be affected by the decision therein. Should they elect not to be heard, that will be their decision.

I have looked at ***HCCS No. 320/2007.*** It relates to an entirely different question. That question is the propriety or otherwise of the Government's use of state funds to bail out a private company. The issue herein is the propriety of the purported sales to the respondents of the property, the subject matter in ***HCCS No. 566/2007.*** The two issues are different and need not be confused. In all these circumstances, it is to me fair, just and equitable to order that since the respondents cannot be served in the ordinary way, for reasons to be ascertained from the affidavit of Chris Okurut, they be served by substituted means. The presumption of course is that the respondents are within jurisdiction.

For the reasons stated above, I am of the considered view that the order of substituted service was unreasonably with-held by the learned Deputy Registrar. Accordingly, the order dated 3rd February 2009 in ***Miscellaneous Annilcation No. 8 of 2009*** refusing the substituted service order in relation to ***Miscellaneous Application No. 566 of 2008*** shall be set aside. The 1st, 3rd, 4th, 5th and 6th respondents in ***Miscellaneous Application No. 566 of 2008*** *shall be served by advertising of the Notice in* ***both*** the Monitor Newspaper and the New

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Vision and by posting a copy thereof to each of the respondent's postal address, as indicated on their respective Certificates of Title.

The appellants shall meet the costs of and incidental to this appeal.

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JUDG

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

MISC. CAUSE NO. 112 OF 2008

M/S KIBEEDI & CO. ADVOCATES ::::::::::::::::::::::::::APPLICANT

VERSUS

AYA INVESTMENTS (U) LTD ::::::::::::::::::::::::::::::RESPONDENT

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAM WINE

ORDER

When this matter came up for directions under S. 62 (2) of the Advocates Act, Cap. 267, this morning in the presence of Mr. Peter Walubiri for the applicant and Mr. G. S. Lule for the respondent, I ordered the applicant to file an ordinary suit on plaint against the respondent where witnesses shall be cross-examined for proper determination of the dispute on merits or else the application stands struck out on account of improper procedure, in the absence of any cause to the contrary, within 14 days from the date of this order.

I also ordered that costs abide the outcome of the suit yet to be filed, provided that in the event of no suit being filed within the stipulated time or at all, each party be deemed to have been ordered to bear own costs of and incidental to the application.

I promised to come up with a more detailed ruling on the matter and I now do so.

The background to the dispute, which has now become like a game of ping-pong between me and the Deputy Registrar of this court, is that MIs Kibeedi & Company Advocates, a firm of City lawyers, seeks relief herein against the respondent, their client. The relief sought is that an Advocate-client bill of costs be taxed. Prior to this, the applicant had presented the same bill for taxation. It is a sizeable bill of USD 2,448,500 being for fees for services allegedly rendered to the respondent. The taxation before the learned Deputy Registrar of the court proceeded ex parte. Upon the respondents getting wind of it, they immediately sought orders to set it aside. The gist of their case is that the applicant has no any outstanding claim against them. They claimed that the applicants were fully paid for the services they rendered to them and presented vouchers purportedly signed by a partner in the firm, Mr. Kibeedi. At the hearing of ***Miscellaneous Annlication No. 491 of 2008*** to set aside the ex parte taxation, the applicants disputed the said payment vouchers and branded them a forgery. Faced with accusation and counter accusations of forgery in a simple application for setting aside the ex parte order of taxation, I invoked the inherent powers of this court to make such orders as may be necessary for the ends of justice and set aside the impugned order. The effect of that

order was that the matter would now revert to the Deputy Registrar to handle the issue of taxing the bill of costs interpartes.
From the records, when the matter came up for hearing before the said Registrar on December l9'', 2008, both parties submitted to the jurisdiction of the court to tax the bill of costs. However, before the same could be taxed, Learned Counsel for the respondents, Mr. G. S. Lule, raised yet another preliminary objection. He argued that there
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was no bill of costs for taxation because, as he had argued earlier on in the application I personally heard and determined, the costs prayed for by the applicants have already been settled, implying nonexistence of any valid claim against his clients. The objection was again resisted by learned Counsel for the applicants who argued that the existence of the bill of costs was not open for further debate given the consent order that their bill be taxed.
In a ruling that gave rise to the instant referral to me for directions, the learned Deputy Registrar said:
"My considered view is that the respondents allegation that the applicant's bill was discharged proof being payment voucher 'MMM4' and the applicant's denial of payment of the debt, raises a contentious issue. Allegations of fraud by the applicant against the respondent raise yet another contentious issue. The complexity of the fraud is compounded by the legal requirement in 0.5 r.1 (sic) of the CPR that it must be specifically pleaded. This would require evidence to prove or disprove fraud. It cannot be done before a taxing officer, during taxation. It goes without doubt that the bill of costs has become highly contentious. Notwithstanding that there is an order by consent that the bill be taxed, it is not too late to remedy this unfortunate situation because I see that no failure of justice will be occasioned to
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the applicant should the contentious issues raised first be resolved."
I cannot agree more with the learned Deputy Registrar. Her approach is, to say the least, logical and appreciable.
As to the way forward, I am of the view that the justice of this case requires that issues as to the purported services to the respondents, value thereof; and, the alleged payments to the applicants in full and final settlement of their claim, be fully investigated and remedied. How then would this be achieved?

I cannot claim to have a monopoly of ideas on this point. I have given due consideration to the submissions of Counsel on the way forward. It is next to impossible to obtain from Counsel a negotiated position on the way forward. Be that as it is, I have considered the possibility of allowing the investigation to be done on motion as herein. P. G. Osborn in 'A Concise Law Dictionary', 5th Edition, p. 214, defines ***Motion*** as an application to court or a judge for an order directing something to be done in the applicant's favour.
By necessary implication, it is a simple procedure of enforcing one's rights. It pre-supposes existence of a right, that is, a legally protected interest. By its very nature, the procedure also pre-supposes that evidence at the trial shall be by affidavits. True, in a proceeding of this nature the parties can file as many affidavits as they wish and either side is at liberty to cause the deponents of affidavits to be cross-examined. This, however, is easier said than done. We tried it in ***Miscellaneous Application No. 491 of 2008*** and I can attest to
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its impropriety. I have addressed my mind to the facts surrounding this matter. The applicants seek an order against the respondents for payment of USD 2,448,500. The respondents do not only deny the claim but have also produced documents showing or intended to show that the impugned services were actually paid for. Each side alleges fraud against the other. In ***Hanninaton Wasswa & Anor vs Maria Anvanao Ochola SCCA No. 22/93*** (reproduced in [1994] IV KALR 98), one of the issues related to propriety of commencing a suit by Notice of Motion to prove fraud. The highest court observed, and I am bound by that decision, that in other branches of Civil Procedure, affidavit evidence has been found to be too limited in scope to give rise to a satisfactory decision. The court further observed that it was not proper to commence proceedings to challenge alleged acts of fraud by notice of motion because the standard of proof in fraud cases is higher than in ordinary suits. The court was of the view that because of that fact, the matter required an ordinary suit where witnesses could be cross-examined.
I adopted the same reasoning in ***BCR General Ltd vs City Council of Kampala, High Court Civil Application No. 21 of 2004*** (unreported) and I am inclined to adopt the same herein.
True the court can treat the proceeding herein as a suit, and thus call for further affidavits in the nature of statements of claim and defence, in order to clarify issues. True also that the trial issues can be widened beyond mere affidavit allegations and counter-allegations. However, my overall assessment of the justice in this case is that such procedure would be wholly

inadequate, cumbersome and inappropriate in view of the requirement under 0.6 r.3 of the Civil Procedure Rules

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that in cases of fraud the party relying on it must furnish particulars of it in the pleadings with dates.

It is trite that fraud must be proved strictly, the burden being heavier than on a balance of probabilities generally applied in civil matters:

***KamDala Bottlers Ltd vs Damanico (U) Ltd, SCCA No.* 22/92.**

In my view if there has ever been a case that requires an ordinary suit on a plaint where issues of fraud ought to be pleaded and proved on evidence, this is it. It is for the reasons I have stated above that I ordered the applicants to file an ordinary suit on the plaint where particulars of fraud will be set out and witnesses cross-examined as by law established. The application stands struck out on account of procedural impropriety, in the absence of any cause to the contrary, within fourteen (14) days from the date of this order.

Considering the overall justice herein, especially the fact that change of procedure has been necessitated by the peculiarity of the applicant's claim and the respondent's reply thereto, I ordered that costs do abide the outcome of the suit yet to be filed, provided that in the event of no suit being filed as ordered, each party shall be deemed to have been ordered to bear its own costs.

Orders ac ingly, application disallowed on the above terms.

Yorokam Bamwine

JUDGE

06/04/ 2009

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

CIVIL APPEAL NO. 0034 OF 2008

(Arising from Luwero Civil Misc. Application No. 035 of 2008)

And

(Original Luwero Civil Suit No. 025 of 2008)

GAHIRE DAVID ::APPELLANT VERSUS

UWAYEZU IMMACULATE ::::::::::::::::::::::::::::::RESPONDENT

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

JUDGMENT:

The appellant herein was aggrieved and dissatisfied with the Judgment and orders passed on 10/07/2008 by His Worship Katorogo, Chief Magistrate, sitting at Luwero court whereby his case was dismissed.

The grounds of appeal are contained in the memorandum of appeal.

He drafted them himself and they are rather argumentative in nature.

It is not necessary to reproduce them here.

Be that as it is, the bone of contention as I see it is whether the learned trial Chief Magistrate was entitled to dismiss the application for setting aside the ex-parte judgment as he did.

The brief facts are that on 3/3/2008 the respondent herein, Owayezu Immaculate, filed a suit against the appellant. Summons to file a defence were issued to the defendant on 6/03/08. The suit was for

recovery of Shs.2,400,000/= being value of six cows allegedly stolen by the defendant/applicant, general damages and costs of the suit.

In an affidavit of service dated 01/04/08, one John B. Serwadda states that he was instructed by Kapeka court to go and serve summons to one **Gahira (sic's David** which were originating from Luwero Chief Magistrate's Court. In paragraph 3 he states:

"3. That on the 15th day of March 2008 I reached the home of the defendant on (sic) to presence of his local council chairman of Katale Kamese village and I explained to him the purpose of the visit and read to him the summons."

In paragraph 4, he avers that instead of acknowledging receipt of the summons the defendant decided to walk away assuring him (the process server) that he will not sign. On the basis of the said Affidavit, the plaintiff wrote to court praying for an interlocutory Judgment against the defendant and to have the case set down for formal proof. This was on 08/04/2008.

Acting upon the said request, Court entered an interlocutory judgment and set the suit for formal proof on 24/04/08. Judgment in the matter was delivered on 08/05/08.

On 10/06/08, the appellant filed Miscellaneous Application No. 035 of 2008 seeking orders that the ex parte Judgment and orders be set aside and the case fixed for hearing on merit. His major ground was that he came to know of the case on 06/06/08 when his 28 heads of cattle were attached by M/s Impala General Auctioneers and Court

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Bailiffs, implying that Mr. Serwadda's affidavit of service indicating service on 15/03/08 was false. At the hearing, he told court that he did not know the case against him and that he was not served.

In his ruling dated 10/07/08, the learned trial Chief Magistrate observed that Judgment was entered against the applicant/appellant on 08/05/08 and that the same was not appealed against in the High Court of Uganda but instead he filed the application to set aside the ex parte decree. There was of course nothing wrong with the procedure adopted by the applicant/appellant, given that according to him he had come to know of the case on 06/06/08 when his cattle were attached in execution of the decree.

The learned Chief Magistrate then observed that before the application was filed, the plaintiff had filed an application for execution of the decree and orders of his court; and that the same had been heard and the necessary orders issued. He then observed:

"All in all I find that it is a waste of time to order a retrial of the suit when the Judgment and its orders have already been executed, to do so would mean abuse of court process and wasting court's time."

He then dismissed the application for lack of merit at all and ordered the applicant to pay the respondent costs of the application as well. Hence this appeal.

I have very carefully addressed my mind to the grounds of appeal herein and to the arguments of counsel.

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The appellant contends that there was no service on him on 15/03/08 since he was out of the country in Tanzania. He has produced a copy of a movement travel permit dated 14/03/08 which indicates that he crossed the Uganda/Tanzania border on that day. The appellant's argument is that it cannot be true that he refused to acknowledge service on 15/03/08 as Mr. Serwadda appears to suggest in his affidavit of service because by then he was out of the country.

I have found no conclusive proof on this point.

Firstly, while it is true that the appellant filed **Miscellaneous Application No. 035 of 2008** seeking an order to set aside the ex parte decree, he appears to have made no mention of any trip to Tanzania in March 2008. The affidavit in support of the motion is silent on that point.

Secondly, the temporary movement permit presents an incomplete picture. Whereas it shows that he left Uganda for Tanzania on 14th March 2008, it does not show when he came back. It only shows Exit from Uganda.

Given that the issue of travel to Tanzania appears not to have been raised as reason for his failure to file a defence in ***Civil Suit No. 25 of 2008,*** one cannot conclude with any decree of certainty that this is proof on a balance of probabilities or at all. It is in my view of no evidential value, and I would, therefore, attach no weight to the same. Having said so, however, the appellant did state in his application, ***Miscellaneous Application No. 035 of 2008,*** that he came to know of the case on 06/06/08 when his 28 heads of cattle were attached in

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execution, thereby indirectly putting Mr. Serwadda's affidavit of service in issue.

Order 9 rule 27 of the Civil Procedure Rules lays down the procedure for setting aside decree ex parte against the defendant. It reads:

"27. In any case in which a decree is passed ex parte against a defendant, he or she may apply to the court by which the decree was passed for an order to set aside; and if he or she satisfied the court that the summons was not duly served, or that he or she was prevented by any sufficient cause from appearing when the suit was called on for hearing, the court shall make an order setting aside the decree against him or her upon such terms as to costs....."

Clearly, a court handling an application for setting aside a decree obtained ex parte is duty bound to investigate and make a finding as to whether summons was or was not duly served. It is not enough that there is an affidavit of service on record because such an affidavit could be false.

What then was the trial court's finding on this point?

From the record of proceedings, the parties appeared before him on 03/04/08. I am a bit apprehensive about this date because it is out of depth with the sequence of events in this case. I am saying so because according to available records, the suit itself was filed in

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March 2008, service was purportedly effected on 15/03/08, and the plaintiff wrote to court on 8/04/08 praying for an interlocutory judgment. It was entered on 9/04/08 and the suit set down for formal proof on 22/04/08. The application to set aside the ex parte decree is dated 10/06/08. I have therefore failed to understand how an application filed on or about 10/06/08 could have been heard on 03/04/08, two months before it was filed. This is simply illogical and I would hesitate to attribute it to a clerical error on the part of the learned Chief

Magistrate. Be that as it may, the record reads as follows:

"3/04/08, Parties present. Applicant: I apply that

we have the ex parte judgment set aside and

orders past (sic).

- I did not know of the case against me.

- I was not served.

Respondent:

I object to this the summons were sent to him by the court of Kapeeka, when the Chairman LC was there.

Court:

Ruling on 8/07/ 08 at 1.1.30 a.m."

From this record, it is very clear to me that the issue of service or lack of it was never investigated by court.

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The learned Chief Magistrate merely dismissed the application on account of execution having been carried out. This was a misdirection on his part.

For as long as it is still within the power of the court to declare a sale invalid, as for instance where any of the requirements in the rules of court or parties for the time being in force have not been complied with, the execution process cannot be said to be **100%** safe or at all. After the decree, the court may, if satisfied that the service of the summons was not effective or for any other good cause, set aside the decree, and if necessary stay or set aside the execution: 0.36 r.11 of the Civil Procedure Rules.

In the instant matter, there is no application for stay of execution or setting aside of the same. In light of the background to the case, I consider it just, fair and equitable not to set aside the execution.

For the reasons stated above, I find merit in the appellant's contention that the ruling of the learned Chief Magistrate disallowing the application to set aside the ex-parte judgment occasioned a miscarriage of justice. I therefore allow the appeal. To avoid a multiplicity of proceedings, and in the spirit of Section 98 of the Civil Procedure Act, the impugned ex-parte judgment and decree shall and are hereby set aside. The appellant/defendant shall file the intended defence in the main suit here at the High Court of Uganda within ***two*** (2) weeks from the date of this order and thereafter the file shall be forwarded to the Chief Magistrate's Court at Luwero for the Chief Magistrate's re-allocation to another Magistrate with

competent jurisdiction or his/her determination of the claim on merits, whichever the said Chief Magistrate shall find more convenient. In view of the

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doubts expressed on the appellant's purported travel to Tanzania at the time of the impugned service of summons on 15/03/08, the appellant shall meet the costs of and incidental to his appeal and Miscellaneous Application No. 035 of 2008. He is at liberty to seek appropriate remedies regarding the fate of the cows attached and sold under the impugned decree in a counter-claim. Costs of the main suit shall abide the outcome thereof. Appellant shall meet own costs herein.

Orders accordingly.

Yoroka1hiu Bamwine

JUDGW

30/03/09

30/03/09:

Appellant's representative, Francis Lugwe present.

Jolly Kauma — Clerk, in attendance.

Court:

Judgment delivered.

Yoroka mwi

JUDGE

30/03/2009

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

MISCELLANEOUS APPLICATION NO. 380 OF 2008

ARISING FROM MISCELLANEOUS CAUSE NO. 156 OF 2008

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

SEEKING THE PREROGATIVE ORDERS OF CERTIORARI AND

PROHIBITION BY MESSRS CLEAR CHANNEL INDEPENDENT

(UGANDA) LTD

CLEAR CHANNEL INDEPENDENT (U) LTD ::::::::::::::::APPLICANT

VERSUS

PUBLIC PROCUREMENT AND
DISPOSAL OF PUBLIC ASSETS AUTHORITY ::::::::::RESPONDENT
BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE
RULING:

This application for Judicial Review was brought under Section 38 (1) (b) and (c) of the Judicature Act, Cap. 13 (as amended by Act 3 of 2002), Rules 6, 7 and 8 of the Civil Procedure (Amendment) (Judicial Review) Rules S. 1 75 of 2003; and Rules 3 and 4 of the Law Reform (Miscellaneous Provisions) (Rules of Court) (Rules 51 79 — 1). It is for an order of certiorari, to quash the findings, remarks and recommendations in the impugned Report so far as they relate to the applicant; and for an order of prohibition, directed to the respondent prohibiting the Civil Aviation Authority and/or anyone else from implementing the recommendation of the Report under review.

The evidence before the court consists of the affidavit of one Ian Parker, the General Manager of the applicant; the affidavit in reply sworn by one Cornelia K. Sabiiti, Director Legal and Compliance of the Respondent, the impugned Report and numerous other correspondences on the matter.

The background to the case can briefly be stated as follows:

The applicant is a business company, mainly dealing in Billboard advertising. Prior to the matter under review, it had been in charge of bill board advertisement at Entebbe International Airport for a period of more than five years.

From the pleadings, the applicant submitted a bid to the Civil Aviation Authority for the tender of the Management of Advertisement at Entebbe International Airport following a request for bids by the said Civil Aviation Authority. It is the applicant's case that its bid was unjustly and unreasonably rejected by the said Civil Aviation Authority and the tender was awarded to M/s Alliance Media Ltd.

It is instructive to note that the decision sought to be reviewed is not that of the Civil Aviation Authority but that of the respondent.

This is because, according to the applicant, upon the Civil Aviation Authority ('the CAA') rejecting its tender bid, it (the applicant) applied to the respondent for Administrative Review of the said decision as by law established. The respondent in its review process found that the tender process had been marred by several irregularities and omissions. Despite these findings, however, it (the respondent) allowed the tender process to continue. Hence this

action.
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At the conferencing the parties framed the following issues for the determination of the court:

1. Whether or not the respondent erred in law when it allowed the tender process to proceed despite having found irregularities in the tender process.
2. Reliefs, if any.

The parties then agreed that they address their arguments to court by way of written submissions.

Counsel:

Mr. Arthur Ssempebwa for the applicant.

Mr. George Kallemera for the respondent.

Before I delve into the determination of the two issues above, let me make a comment or two on the subject of Judicial Review in the context of this matter.

Judicial Review is the process by which the High Court exercises its supervisory jurisdiction over the proceedings and decisions of inferior courts, tribunals and other bodies or persons who carry out quasi- judicial functions, or who are engaged in the performance of public acts and duties. Those functions/duties/acts may affect the rights or liberties of the citizens. Judicial review is a matter within the ambit of Administrative Law. It is different from the ordinary judicial review of the court of its own decisions, revision or appeal in the sense that in the case of ordinary review, revision or appeal, the court's concerns
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are whether the decisions are right or wrong based on the laws and facts whereas the remedy of judicial review, as provided in the orders of mandamus, certiorari and prohibition, the court is not hearing an appeal from the decision itself but a review of the manner in which the decision was made. The court is not, therefore, entitled on an application for judicial review, to consider whether the decision was fair and reasonable. Lord Hailsham of St Marylebona L.C set the tone as regards the purpose of judicial review in the following terms:

"Since the range of authorities, and the circumstances of the use of their power, are almost in finitely various, it is of course unwise to lay down rules for the application of the remedy which appear to be of universal validity in every type of case.. But it is important to remember in every case that the purpose of remedies is to ensure that the individual is given

fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question. The function of the court is to see that lawful authority is not abused by unfair treatment and not to attempt itself the task entrusted to that authority by the law. The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is

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authorized or joined by law to decide from itself a conclusion which is correct in the eyes of the court."

See: ***Chief Constable of North Wales Police vs Evans ri 9821 3 All E.R. 141 (at D. 143h - 144a).***

I agree with the above legal principle. I will accordingly proceed to the determination of the issues.

Issue No. 1: Whether or not the respondent erred in law when it allowed the tender process to proceed despite having found irregularities in the tender process.

From the impugned Report, on receipt of the application by M/s Clear Channel Independent, the Authority (the respondent) instituted an investigation in accordance with PPDA Regulation 350 (1) (b) and directed the Accounting Officer of CAA to suspend the procurement process and submit the procurement file and inform all bidders accordingly (Paragraph 3.1).

These were then the findings of the respondent on the applicant's specific complaints:

"5.2 Entity's response to the complaint by M/s Clear Channel.

The response by CAA to MIs CCI's complaint was made by the Procurement Manager and not the

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Accounting Officer of CAA. This is in breach of Section 26 (g) and PPDA Regulation 345 (1). There are no CC minutes on investigation of this complaint and the decision taken. There is no evidence that Accounting Officer of CAA investigated the complaint. The Manager procurement of CAA went ahead and responded to the bidder, and there is no evidence that this matter was forwarded to the AO or proof of delegation of authority for the Procurement Manager to respond on behalf of Accounting Officer."

Section 26 (g) provides as follows:
"26. The Accounting Officer of a procuring and disposing entity shall have overall responsibility for the execution of the procurement and disposal process in the procuring and disposing entity, and in particular, shall be responsible for —
(a) — (f)
(g) Signing contracts for procurement or disposal activities on behalf of the procuring and disposing entity; (h) — (j)
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The section is couched in mandatory terms, by use of word "shall", CAA breached it and the respondent took notice of the said breach.
fl5•3 *Solicitation Document of CAA/SR VIOl - 8/00016 CAA did not use the standard SBD of PPDA as required in the PPDA Act Section 62 (1) and regulation 128 (2) and there is no evidence that a waiver or clearance was sought from the Authority to use a different SBD as per regulation*
129."
Section 62 (1) of the Act is also couched in mandatory terms. It provides:
"62 (1) A procuring and disposing entity shall use the standard documents provided by the Authority as models for drafting all solicitation documents for each individual procurement or disposal requirement."
Regulation 128 (1) provides for use and choice of standard solicitation documents. It provides:
"128 (1). The use of the standard solicitation documents issued by the Authority, as the basis for each individual solicitation document shall be mandatory, except where otherwise provided in these Regulations."
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Again, it was the respondent's finding of fact that CAA acted in breach of this mandatory legal requirement.
In 5.4, under Requirements of Eligibility, the respondent found as follows:
"In drawing up the tender document, CAA did not provide sufficient details on the requirements. CAA indicated lack of knowledge of regulation 186 (2) which states the requirement for documentary evidence. CAA misinterpreted regulation 186 (1) (e) to mean provision of documentary evidence and therefore failed MIs CCI on this ground. The

Authority finds that CAA erred on this ground."

And under 5.5, Financial Bid Opening, the respondent found that:

"The financial bid of Alliance Media was opened on

March 2008 according to PP form 35; Record of bid opening. Evaluation was done on 17th7 March 2008 and Display on 26th February 2008. The Display of BEB was done before evaluation process was completed. CAA displayed notice of best technically evaluated bidder before considering the financial bid."

And under 5. 6, Third Party Procurement Agent, the respondent found that:

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"CAA contracted the services of SMARTBUY (U) LTD a third party procurement party to carry out the evaluation and an evaluation report was given to CAA ***1gth*** *February 2008. This firm was approved by the CC but the Authority notes that no clearance was sought from PPDA to use the services of this firm, prior to their agreement. This is in breach of PPDA regulation 40."*

On the basis of the above irregularities and breaches of the law, the respondent came to the conclusion that the procurement process was marred with procedural irregularities and omissions in particular:

• *The Evaluation process was mismanaged due to the misinterpretation of the application of ITB 7 (f).*

• *The Evaluation Committee by passed some of the requirements in Addendum I during the evaluation process to the disadvantage of one of the bidders.*

• *The Contracts Committee erred by approving a third party procurement and Disposal agent without obtaining approval from PPDA.*

• *The Procurement Manager assumed the rules of the Accounting Officer by handling the complaint of the bidders.*

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What this means in practical terms is that the Authority (the respondent) found procedural flaws in the entire tender process:

acting in breach of Section 26 (g) and PPDA Regulation 345 (1); acting in breach of Section 62 (1) and Regulation 128 (1); acting in contravention of Regulation 186 (2), etc. In short the respondent found that the tender process had not been done in strict compliance with the law or at all.

What then was the respondent expected to do in those circumstances?
The general principles which should guide statutory domestic or administrative tribunals sitting in a quasi-judicial capacity are well known. The authorities were reviewed in De Souza vs Tanga Town Council [1961] E. A. 377.
The principle, so far as it affects the present case, is that if a statute prescribes, or statutory rules or regulations binding on a domestic tribunal prescribe, the procedure to be followed, that procedure must be observed.
It is trite that when an administrative body does something, which it has in law no capacity to do or does it without following the proper order, it is said to have acted illegally. This will be a ground for applying for orders of Certiorari, mandamus or prohibition because such an act is beyond powers and hence ***ultra vires.***
See: ***Annebrit Aslund vs A. G. Miscellaneous Cause No. 441 of 2004.***
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The question for the court is not whether the error can be corrected but whether such decision is reviewable. In the case of High Court, where such error is found, the order of mandamus may be issued compelling the body to do its duty, or in case it did not have jurisdiction, its decision may be quashed by issuing the order of certiorari, the likes of the one sought herein.
In the instant case, the answer to the problem presented to the respondent by the applicant lay in the application of section 91 (2) of the Act, that is, to annul in whole or in part the unlawful decision of CAA. Instead of doing so, after declaring that the tender process was done contrary to the law, the respondent went ahead to authorize CAA to proceed with the procurement process.
Both parties are in agreement that the PPDA Act applied to the impugned procurement. The basic public procurement and disposal principles appear in Sections 43 — 54 of the Act. In short, all public procurement and disposal must be conducted in accordance with the Act. The reason is simple: because of entrenched corruption and institutionalized incompetence in most Government Departments, it is necessary that tenders be handled in an open manner to minimize complaints of unfairness. The procurement process therefore has well laid out guidelines for procurement and disposal of assets. For instance, there must be no discrimination in public procurements. The process must promote transparency, accountability and fairness (section 45) or else every allocation of a government tender or contract will be challenged. The contract must be awarded to the bidder with the best evaluated offer ascertained on the basis of methodology and criteria detailed in the bidding

documents. The
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Statute prescribes the means. Those means must be employed in the interests of fairness. From the findings of the respondent, the relevant methodology and criteria were flouted by CAA. It is surprising that the respondent could choose to ignore them and even offer no reason for doing so. It was in my view a sad day in the field of procurements, what with CAA behaving as if the Act didn't exist, or if it existed, wasn't necessary to be followed.
The writs of certiorari are a means of controlling bodies of persons having legal authority to determine questions affecting the rights of others and having the duty to act judicially. With reference to certiorari, the learned authors of Harlisbury's Laws of England (3 Edn, Vol. 11 p. 62) have this to say:
"When the inferior tribunal has jurisdiction to decide a matter it cannot (merely because it incidentally misconstrues a Statute, or admits illegal evidence, or rejects legal evidence, or misdirects itself as to the weight of evidence, or convicts without evidence) be deemed to exceed or abuse its jurisdiction. If, however, an administrative body comes to a decision which no reasonable body could ever have come to, it will be deemed to have exceeded its jurisdiction, and the court can interfere."
I agree.
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It is trite that a challenge to a quasi-judicial body's exercise of
discretion can be sustained if:
(i). bad faith was exhibited.
(ii). absurdity was present.
(iii). legally relevant issues were ignored.
(iv). improper motives were demonstrated.
(v). the point of the statute was frustrated.
See: ***R vs Secretary of State for Environment, Ex narte Hammersmith & Anor T1991 1 1 A. C 521.***
Relating the above principles to the instant case, it is clear to me that legally relevant issues were ignored in okaying the tender process by the respondent. The decision went against the body of evidence and the point of the PPDA Act was frustrated by the very body put in place to safeguard it. The frustration was to the applicant's prejudice. It was an absurd decision.

Learned Counsel for the respondent has submitted that the respondent's decision was arrived at after a careful consideration of the law and facts before them in the presence of both parties and the decision of CAA was upheld.

With the respect, I do not agree with learned Counsel's reasoning on this point. Having come to the conclusion that "the procurement process by CAA was marred with procedural irregularities and omissions," the tender award was ineffectual and therefore invalid in law. Issues of the power of attorney, income tax clearance and evidence of social security contributions were not issues raised before

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the Authority by the applicant. These issues were therefore immaterial in as far as the application for administrative review before them was concerned. The award having been made by improper means was tainted with illegality as the respondent correctly found. Since there was a procedure to correct it under S. 91 (2) of the Act, it could not be allowed to stand. And this is regardless of whether or not the applicant could indeed have failed to win the tender in a fairly conducted process.

In ***Makula International Ltd vs His Eminence Cardinal Nsubua & Anor 119821 HCB 11*** *at p. 15 the law regarding illegality was stated thus:*

"A court of law cannot sanction what is illegal and illegality once brought to the attention of the court overrides all questions of pleading including admissions made thereon

To decide otherwise would be to condone an illegality since the award had been made contrary to established procedure.

For the reasons stated above, the respondent erred in law when it allowed the tender process to proceed despite the procedural flaws.

I so find.

Issue No. 2: Reliefs, if any.

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The concept of ***ultravires*** is one to control the actions of persons or public bodies not authorized necessarily, or, by implication, by law. Since anything done not authorized by law is ***ultravires,*** judicial review will stop the unlawful action as refusal to do so would be effectively to validate an ***ultravires*** act. A competent court of law cannot do so.

From the above analysis of the law and evidence on the matter, the applicants have proved to the satisfaction of the court on a balance of probabilities that the decision of the respondent

was a nullity and so was the purported award by CAA.

The effect of a nullity was stated in ***Macfav vs United Africa Co. Ltd 1196113 ALL E.R. 1169 thus:***

"If an act is void, then it is a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

I agree.

Applying the same principle to the facts herein, in view of the finding that there was no valid award by CAA which could be okayed by the respondent, the purported blessing of CAA's award by the respondent

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was contrary to law, illegal, void and a nullity on account of noncompliance with the provisions of PPDA Act. I would therefore allow the application for judicial review, grant the orders of certiorari and prohibition sought herein and order a repeat of the tender process.

I do so.

As regards costs, in keeping with the principle that costs follow the event, the applicant shall have the taxed costs of the application against the respondent.

Orders accordingly.

Yoro a u

JUDE

14/04/2009

14/04/2009:

Mr. Arthur Sempebwa for applicant

Mr. George Kallemera for respondent

Court:

Ruling delivered.

Ba

Yoroi

14/04/09

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

HCT-00-CV-MA-0020-2009

(Arising from CS 356 of 2007)

SEIVIBUYA TOI'1 ::APPLICANT

VERSUS

1. MUGUME BEN ::::::::::::::::::::::::RESPONDENTS

2. ATWINE JUSTINE J

BEFORE: THE HONOURABLE MR JUSTICE YOROKAMU BAMWINE

RULING:

This application was brought under Order 22 Rules 84 and 89 of the Civil Procedure Rules and Section 98 of the Civil Procedure Act. The applicant seeks orders that:

1. He be allowed to get vacant possession of the Kibanja and developments formerly belonging to the respondents and located at Namungoona H LCI Lubya Parish Rubaga Division.
2. The respondent be detained in Civil Prison.
3. Costs of the application be provided for.

The application is further supported by the grounds in the affidavit of the applicant. These are briefly that:

(a). The applicant bought the property the subject of this application on auction by court bailiffs who were acting on orders of court.

(b). The respondent has resisted efforts by the applicant to get vacant possession.

(c). The applicant is greatly aggrieved by the conduct of the respondent which has occasioned him commercial prejudice.

The application came up for hearing on 23/03/09. I realized that service had not been effected as per rules of court in that although the application was against two respondents, only one had evidently been served and none of them was in court. In the course of time, however, the second respondent, Atwine Justine,appeared.

This second respondent informed court that she had engaged a lawyer, one Judith, to represent her in the matter. I advised her to ensure that her lawyer files a reply by 20/04/09 at

2.30 p.m. when the application would be heard. Come that date, she appeared in person again and claimed that her lawyer, Judith, had discussed the way forward herein with applicant's counsel, Kwemara Kafuuzi. According to Mr. Kafuuzi, however, some person calling herself Judith Nsenge had called him and asked him about sale of land. She did not indicate to him that she was coming to court. Asked about the first respondent, Mugume Ben, second respondent said he had escaped following this matter.

I allowed learned Counsel for the applicant to state the applicant's case and at the end of his address allowed the second respondent time to put her house in order in as far as legal representation is concerned and appear for response to the applicant's version on 24/04/09. Again the second respondent appeared in person and indicated to court that

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her lawyer had refused to come to court. Her short address to court was that she had indeed guaranteed the repayment of the loan only that she did not know that she would lose the property in the process. She said her property is in two parts. One could be sold and she retains the other.

The genesis of this matter is ***HCCS No. 356 of 2007,*** a summary suit filed on 01/06/2007 by one Akankwasa Edward against the respondents herein to recover Shs.18m which he had loaned to the first respondent sometime in November 2006. From the records, the lender and the borrower executed a loan agreement which the 2nd respondent signed as a guarantor and also pledged her plot and developments therein as security for the said debt. The money was not paid, hence the suit.

The defendants in that suit took no steps to file a defence in the matter. The 2nd respondent's attempt to set aside the ex parte order failed vide ***Miscellaneous Application No. 04 of 2008*** before my sister Hon. Lady Justice Arach-Amoko. The learned Judge ordered that the suit property be sold in execution to realize the decretal sum.

From the records, and this now brings me to the instant application, on 19/12/2007 the applicant herein purchased the suit property. He bought it at an auction by Armstrong Auctioneers following an advert in the Press, took possession of the premises and placed one Mwonda Charles there as his agent. On 4/01/2008 his said agent was forcefully ejected from the premises by the 2d respondent with the help of armed soldiers of the UPDF. The second respondent purported, thereafter, to file an application to set aside the judgment but lost the

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application as well with further costs. Court has issued several warrants for her eviction but she has resisted them. Hence this application.

From the facts narrated above, the second respondent is a difficult person. She aided the first respondent to borrow money from Akankwasa Edward. The lender and the borrower executed a loan agreement which she signed as a guarantor and also pledged her plot and developments therein as security for the said debt. The first respondent defaulted on the loan repayments and Akankwasa sued both the borrower and the guarantor and obtained judgment against them. The suit property was not decreed to the lender. Rather it was attached and sold in execution of a decree. That sealed her proprietary interest in the suit property. All attempts to set aside the decree and the subsequent sale of the suit property have been unsuccessful, further sealing her fate in the matter.

In the meantime, the applicant herein as an innocent purchaser for value took possession of the premises only to be ejected therefrom by the 2nd respondent with the help of armed soldiers of the UPDF. I am not sure whether this was done in fulfillment of the recent Government directive stopping eviction of bibanja holders. Without going into the legality or otherwise of such pronouncement, it is very clear to me that this case is distinguishable from one concerning landlords and tenants in this country. The second respondent is not being evicted as a tenant but as a judgment debtor. I am not aware of any law that stops any such eviction, so long as it is done in accordance to law. In fact, retaking possession with assistance of government agents, if government agents they were, was wrongful and punishable under

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Section 107 (1) (h) of the Penal Code Act, Cap. 120. Under Sub section 3 thereof, the provisions of Section 107 “shall be deemed to be in addition to and not in derogation of the power of the High Court to punish for contempt of court.” Mindful of the fact that under Section 34 of the Civil Procedure Act all questions arising between the parties to the suit in which the decree was passed, or their representative, and relating to the execution, discharge, or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit, I am of the considered view that the applicant herein deserves court intervention in the matter. He has been kept out of his property for over a year now for no fault of his. Decisions of court should never be in vain.

Accordingly, the application is allowed. The applicant shall at the respondent’s expense get vacant possession of the Kibanja and developments formerly belonging to the second

respondent and located at Namungoona I LCI Lubya Parish Rubaga Division within fourteen days from the date of delivery of this order. In the event of non-compliance, the second respondent shall be prosecuted for contempt of court. The respondents shall meet the applicant's costs of and incidental to this application.

Orders accordingly.

Yo ro ka mw'

JUDG

30/04/2009

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ORDER:

Since I am currently based up-country doing a criminal session, this Ruling shall be delivered on my behalf by the Deputy Registrar on Thursday 07/05/2009.

Ba mwi ne

/2009

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

HCT-OO-CV-CS-0699-2006

JEPHTAR & SONS CONSTRUCTIONS &

ENGINEERING WORKS LTD::::::::::::::::::::::::::::::::::::PLAINTIFF

VERSUS

THE ATTORNEY GENERAL ::::::::::::::::::::::::::::::::::::DEFENDANT

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

JUDGMENT:

The plaintiff's claim against the defendant is for a sum of Shs.137,711,079/=, general damages, interest and costs of the suit. In the course of time, the defendant conceded to the plaintiff's claim in respect of the contractual sum. The parties failed to reach an agreement on damages, interest and costs. They decided to address court by way of written submissions

without any evidence being led by either party on those three aspects of the case. Hence this judgment.

Briefly, by an agreement between the plaintiff and the Government of Uganda represented by the National Authorizing Officer, the plaintiff agreed to renovate 13 community centre buildings, construct pit latrines at some centres, install water tanks and fence off some premises in Nebbi, Arua, Moyo and Adjumani Districts at a total contract price of Shs.275,422,157/=. A copy of the works contract is on record.

The defendant made a down payment of 30% of the contract sum as agreed at the commencement of the contract but defaulted on the balance. Hence the suit.

Some payments were later made after the filing of the suit. When the suit came up for hearing, the defendant admitted liability for the amount due. However, issues arose as to measure of damages, interest and costs of the suit. In view of the defendant's admission of liability, court has been invited to decide:

1. Whether the plaintiff is entitled to any damages.
2. Whether the plaintiff is entitled to interest claimed.
3. Whether the plaintiff is entitled to costs.

Representations:

Mr. Okecha Micheal for the plaintiff.

Ms. Jacinta Anyinge for the defendant.

Issue No. 1: General Damages.

Compensatory damages, also called actual damages, are typically broken down into two broad categories: General and Special. Special damages are not in issue, the defendant having admitted liability for the outstanding balance agreed at Shs.40,189,000/=. What is in issue is general damages.

General damages are given for losses that the law will presume are natural and probable consequence of a wrong. The general principle is

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that they are awarded to compensate the plaintiff, not as punishment to the defendant.

From the records, annexture 'A' to the plaint, the activities, the subject matter of the contract, were being wholly funded by the European Commission under a funding agreement between the European Commission and the Government of Uganda, out of funds allocated to improving sexual and reproductive health programme.

The contract was signed in August 2004. The funding ceased in December 2004, when the contract was still in force.
It is not in contention that the plaintiff entered into a contract with the defendant for a consideration, did the work to the defendant's satisfaction and that to-date the plaintiff has not been fully paid. The plaintiff has submitted that it is a construction company whose business is entirely to perform contractual works and has severely suffered due to the defendant's conduct when he refused to pay the outstanding debt and yet the plaintiff incurred a lot of expenditure in performing the contract. The plaintiff prays for a sum of Shs.15,000,000/= as general and exemplary damages. There is no prayer for exemplary damages in the plaint.
In response, learned counsel for the defendant has submitted that the prayers for general damages and interest are misconceived. This submission appears to be a re-echo of paragraph 5 of the Written Statement of Defence in which the defendant contends that it is not liable for any loss or damages claimed by the plaintiff as there was no breach of contract. In the defendant's submissions it is indicated that
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reason for non-payment was due to the abrupt stopp the European Commission. By reason of the out of c am unable to tell whether the matter of sto communicated to the plaintiff as reason for the de payment. Either way, frustration was never pleaded case. In its written statement of defence, the defend existence of a cause of action, without any elaborati information on record on it is at best evidence from th
In my view counsel's argument would only hold if liability for the principal sum. This has been admittec consent judgment. It would not hold in respect of
interest and costs. I am of the considered view that enterprise, the plaintiff has suffered a loss for€ defendant by being kept out of its money, money that otherwise put to profitable and productive use i business and turned over several times. And this whether or not the plaintiff knew where the money was to come from. However, believing as I do that t of an award of general damages is to place the plaii financial position as if the contract had been
perf(believing as I do that an order for payment of the out to the plaintiff would have that effect, I am of the con the plaintiff is entitled to a verdict in its favour not damages but also for interest and costs. I am saying the look of things, the plaintiff has suffered inconver expenses in trying to recover the amount due. Eve think that an award in the region of Shs.15m/= woulc these circumstances, I can do no better than awan

ige of funding by)urt settlement, I page was ever ay in processing as a fact in this nt chose to deny

on. Much of the e Bar.

he issue was on I by virtue of the eneral damages, as a commercial seeable by the could have been n the plaintiff's is regardless of it would be paid e general effect tiff in the same rmed, and also tanding balance sidered view that only for general so because from ience and some h then, I do not be justified. In ping the plaintiff

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general damages in the sum of Shs.2,500,000/= (two million five hundred thousand only).

Issue No. 2: Interest

I have already stated my position on this issue. The plaintiff's prayer is for interest on the decretal amount as from the date of breach till payment in full.

In virtue of the consent judgment, the decretal amount is now known:

Shs.40,189,000/= (fourty million one hundred eighty nine thousand only).

The principle that emerges from numerous authorities, notably ***vs Noble Builders (U) Ltd SCCA No. 31 of 1995*** is that where a person is entitled to a liquidated amount or specific goods and has been deprived of them through the wrongful act of another person, he should be awarded interest from the date of filing the suit. In keeping with this principle, I would award interest on the decretal sum at the commercial rate of 25% per annum from the date of filing the suit till payment in full.

As regards costs, the usual result is that the loser pays the winner's costs. I see no good reason or at all to deny the plaintiff the costs of the suit. The same shall be awarded to them.

Orders a

Yorokami wine

JUDGE

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24/04/ 09:

Mr. Waniala Allan for plaintiff

Parties absent.

Court:

Judgment delivered.

Yoro ka

JUDGE

24/04/09

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