THE REPUBLIC OF UGANDA

AT MENGO

(CORAM: WAMBUZI, C.J., ODER, J.S., PLATT, JS.C.)

CIVIL APPEAL NO. 33 OF 1992

BETWEEN

INTERFREIGHT FORWARDERS (U) LIMITED :::::::::::::::: : APPELLANTS

AND

EAST AFRICAN DEVELOPMENT BANK :::::::::::::::::::::: : RESPONDENT

(Appeal from the Judgement of the High Court of Uganda at Kampala (Ntabgoba, P.J.) dated 5th March, 1992 in High Court suit No. 635 of 1989).

JUDGEMENT OF ODER, J.S.C

This is an appeal from the judgement of the High Court of Uganda allowing a claim by the Respondent against the Appellant for the price of a new motor car that had been damaged beyond repair in a road accident while being transported from Mombasa to Kampala. The claim was founded on an alleged breach of contract and on negligence on the part of the Appellant. For convenience, I shall hereinafter refer to the Appellant and the Respondent by their designations in the suit as the Defendant and Plaintiff respectively.

As stated in the plaint the claim was that the Defendant had agreed for reward to clear the Plaintiff's Volvo motor car from Mombasa and deliver it at Kampala. The car was brand new and it had just been purchased at pound sterling 9465. An implied term of the agreement allegedly was that:

(a)the defendant would take due and proper care of the motor vehicle and

(b)the Defendant would take necessary precautions for its safe keeping and transportation. It was also averred that the Defendant had received the car for the purpose and on the terms aforesaid, but had negligently and in breach of the

contract failed to take proper care of the car. Particulars of the alleged breach of contract and negligence were that the Defendant:

(a) loaded the car on a carrier without being safely secured by chains or wire ropes;
(b) the carrier was driven without proper or sufficient look out;
(c) the carrier was being driven at excessive speed;
(d) the carrier was driven by one driver for long distance which made him to get tired and lose control;
(e) losing control of the carrier; and
(f) failure to apply brakes to the carrier so as to avoid the accident that occurred.

The Plaintiff then prayed for #4965 or the equivalent; or replacement value of the car in pounds sterling or equivalent in Uganda currency as may be determined at the date of judgement; and costs.

In its written statement of defence, the Defendant denied the alleged contract and negligence, and averred that in the purported contract it was agreed that the goods were to be carried at the owner's risk. It was also contended that the sisal ropes used to secure the vehicle on the carrier were the normal means used by modern transporters and that in the circumstances the accident did not suggest negligence on the part of the Defendant's driver. Further, it was not the Defendant's duty to insure goods received for its clients. The burden lay on the Plaintiff to provide insurance for the goods in question. At the trial of the suit, four issues were agreed, namely;

1. In the course of carrying the vehicle was the Defendant guilty of negligence?
2. If the Defendant was negligent did the Plaintiff suffer any damage and if so how much?
3. If the Defendant is liable is its liability excluded by the terms of the contract of carriage?
4. If the Defendant is liable. What damages and other relief is the Plaintiff entitled to?

The learned Principal Judge who tried the suit found for the Plaintiff and held that the accident in which the motor vehicle, the subject matter of the suit, was damaged had been negligently caused by the Defendant's driver for whose negligence it was vigorously liable: Alternatively, he held that if there was no negligence then the Defendant was liable as a common carrier. On the issue of exclusion of liability by terms of the contract, the judgement now appealed was silent but its effect appears to mean that the answer was negative on the ground that as the Defendant was a common carrier it owed strict liability to the Plaintiff for

non-delivery of the motor car. On damages suffered the by Plaintiff the learned Principal Judged found it to have been a total loss of the car, and awarded #10275, with interest at the rate of 36% and costs. Hence this appeal.

Five grounds of appeal were set out in the memorandum as follows:
1. Since the cause of action as stated in the plaint and as reflected in the issue which were framed by the parties was negligence the learned trial Judge erred in law when in the alternative he based his judgement on a different cause of action of a common carrier which puts strict liability on the carrier any damage of loss to the goods he accepts to carry.

2. The evidence on the record does not support the conclusion reached by trial Judge that the accident was not inevitable but was due to the negligence of the Appellant's driver.

3. The trial court followed wrong principles in assessing
damages and expressing the award in foreign currency.

4. The interest awarded was excessive, arbitrary and unjustified.

5. The decree does not tally with the judgement and was irregularly prepared and signed without the approval of Counsel for the Appellant.

Mr. Sendege the learned Counsel for the Defendant on the appeal took ground two first, and contended that evidence from James Mbugua (D.W.2) the Appellant's driver, the only eye-witness to the accident, indicated that the accident *was* inevitable. The evidence was not rebutted and yet the learned Principal Judge found it to have established negligence by the driver. In the circumstances, the learned Counsel urged for a re—evaluation of that evidence by this Court as, according to Counsel, there was no evidence to support a finding of negligence. In support of this contention, Counsel relied on the cases of Plotti vs. Acacia Co. Ltd (1959) E.A., 248 and Peters vs. Sunday Post Ltd (1958) E.A. 428. These cases are authorities for the Principle that an Appellant Court has jurisdiction to review evidence to determine whether the conclusions of the trial Judge should stand. This jurisdiction, however, must be exercised with caution. If there is no evidence to support a particular conclusion, or if it is shown that the trial Judge has failed to appreciate the weight or bearing of circumstanced admitted or proved, or has plainly gone wrong, the appellate Court will not hesitate so to decide.

The relevant part of the evidence of D.W.2 which explained how the accident occurred reads as follows:

"……..It was around 9.30 a.m. when I had the accident. The accident happened 50 km before Nairobi. It was roughly 110km from Mtito Andei to where the accident happened.

When I had an accident on a small hill. I was on top of the hill. I saw a bus coming from the opposite direction. It was at a very high speed. It came head on towards me. I was left with no space on the road. On realising the bus was reaching for me I swerved to the left. I went off the road so my vehicle left the road completely. It was driven off the road for about ten paces (i.e. about 20 ft). The trailer itself did not move from the road. When I saw the bus, I applied the brakes. In that process it was the impact of the brakes .1 applied suddenly which the vehicle to go of f. I was carrying seven vehicles. Only 3 vehicles went off the road. For all this long career, I have never met a similar accident. The accident was caused by the rough and old road. This together with the speed of the coming bus and my sudden braking. I had left the turn-boy in Mombasa The accident happened so suddenly that I could not see the bus number. It did not stop."

In cross-examination D.W.2 said:—

"…….Yes the accident occurred on top of the hill. The bus was climbing the hill when I saw it. The first time I saw it was not very far from me. It was about 30 yards away. It was a big bus carrying men (sic) passengers. It appeared to heading for me. I tried to apply lights but it was heading for me. If I had not stepped on the brakes I would have died.
It is not possible to drive the trailer on the high speed because the road was very bad. It is not true that I suddenly applied the brakes. The bus was an Isuzu. It climbs down and up hill at the same speed. The car carrier is about 50 ft. long and 8 1/2 feet. It is slightly heavy even if it was carrying 7 cars…… When the front of my vehicle went off the road the Volvo was thrown off for a short distance. The measurement of 5metres was taken from the middle of the trailer. When I flashed the lights the bus continued to come for me. It swayed when it was only about loft".

On the basis of this evidence the learned Principal Judge's finding of negligence was expressed in his judgement as follows:

“Unfortunately no accident report by the police was produced. It is unfortunate if we have to rely solely on the evidence given by James Mbugua who was alone and who obviously cannot give evidence as to incriminate himself. However, from the testimony he gave, I am convinced that if he made the accident, as he says because an
Isuzu passenger bus was coming towards him he was not quite alert. He panicked too much. My reason for saying this, is that he claims he saw the bus in a 300 feet distance. He gave flashing lights to warn the bus driver. He thought it was heading for him. He swerved to his left side of the road and ended up off the road. But he says that, the vehicle alone went off the road while the vehicle carriage trailer remained on the road. The three motor cars which were thrown of f the carriage, including the Plaintiff’s Volvo, were thrown off by the bus but due to the impact which was occasioned by the sudden braking. To me this means that when the driver suddenly saw the bus, he must have panicked after being taken off guard. Perhaps because he was driving with no one to talk to and he was too much concentrating. If the bus was speeding towards him, it would, I think, have hit the trailer which never swerved off the road. Had the driver been on guard, he would not have panicked so as to leave the road and brake suddenly. I find that the driver was in default. Panicking for no cause and thereby swerving and braking suddenly so as to cause the motor vehicles to throw off their carrier”.

In the absence of evidence other than what came from D.W.I think that the accident must be taken to have happened as he described it. A bus was coming from the opposite direction at a very high speed. D.W.2 first saw it from the top of a hill. The bus was heading towards him, causing him to swerve to the left and brake in order to avoid collision with the bus. Application of the brakes caused 3 motor cars on the carrier to be thrown off. The road was also rough. In short, in D.W.2’s own words:—

“……the accident was caused by the rough and old road together with the speed of on-coming bus and by sudden braking.”

No police accident report was produced in evidence. Consequently, no evidence was available to indicate how wide the road was. From the evidence describing what happened, I think it is reasonable to infer that with a bus heading towards him, D.W.2 did not have much room to avoid a collision with the bus without braking and swerving off the road. It is also difficult to reject D.W.2’s evidence that the road was rough and that he first saw the bus from the top of a hill when it was only 30 yards away. A police accident report might also have included skid marks (if any) of D.W.2’s vehicle. Such skid marks would have been relevant

in showing where D.W.2 first reacted by braking when he sighted the bus in relation to the crest of the hill.

Thus, considering the evidence as a whole, I would find it difficult to reject D.W.2' evidence as inconsistent with the matter in which the accident happened. In my view his evidence appears to be a plausible explanation of what occurred the explanation, with respect, does not seem to suggest that the driver suddenly saw the bus he panicked because he was taken off guard and too much concentrating on driving and that due to the panic, he left the road and braked suddenly causing the motor cars on the carrier to be thrown off. On the contrary, I think that if the bus suddenly appeared on the scene and in the manner described by him. D.W.2's reaction by swerving and braking was a reasonable one.
The Defendant contended in the suit and on appeal that the accident was inevitable and not caused by negligence. Inevitable accident can be a defence to a charge by negligence, but it cannot succeed unless the Defendant can prove that something happened, over which he had no control and the effect of which could not have been avoided by the exercise of care and skill; indeed the defence cannot be relied upon where the risk is reasonably foreseeable. The burden of proof lies on the Defendant setting it up. To succeed, the Defendant must show one of two things, namely either what was the cause of the accident and show that the result of that cause was inevitable, or he must show all the possible causes, one or other of which produced the effect, and must further show with regard to everyone of those possible causes that the result could not have been avoided. See Charles Worth and Percy on Negligence, 7th Edition, page 196.

In the instant case, the Defendant, in my view gave plausible explanation of the causes and effect of the accident. I would accept that explanation as given in D.W.2's evidence. In the circumstances I would think that the accident was not negligently caused by D.W.2. It was most probably an inevitable accident. I would think, therefore, that ground two of the appeal should succeed.

In an alternative finding the learned trial Principal Judge said that if the Defendant did not negligently cause the accident then it was strictly liable as a common carrier. This is the subject matter of ground one of the appeal which, I think, should also succeed. In this connection the learned Principal Judge referred, properly so in my view, to the definition of "a common carrier" as stated in "Funk and Wagnall's Standard Dictionary, International

Edition," where "a common carrier" as stated in the well-known "Anson's Law of Contract," 7th Edition.

Briefly, the law is that a common carrier has a common-law liability imposed on him arising from the nature of his business, and is said to warrant or insure the safe delivery of the goods entrusted to him. By this is meant that a common carrier promises to bring the goods safely to their destination, or to indemnify the owner for their loss or injury (i.e. damage), whether happening through his default or not. But his promise is defeasible upon the occurrence of certain excepted risks for example 'act of God' and the King's enemies, and injuries arising from defects inherent in the goods carried. This qualification is implied in every contract made with a common carrier, and the occurrence of the risks exonerates the common carrier from liability.

After stating the law, the learned Principal Judge proceeded to find the Defendants' liability in the following words:—

"From the fore-going authorities, more especially the definition of a common carrier, there is no way the Defendant can escape liability under the definition of a common carrier. In conclusion therefore, even if the Defendant's driver was not guilty of negligence in meeting the accident so that the Defendant is vicariously liable, the defendant as a common carrier is liable to the Plaintiff for the loss. The Defendant is not covered by the exceptions that exonerate common carriers from liability."

With respect I am unable to go along with learned Principal Judge in this regard. Firstly, because it does not appear to have been the Plaintiff's case as stated in the plaint that the Defendant was a "common carrier". Paragraphs 3 & 4 of the plaint which have a bearing on the issue did not indicate that the contract was made with the Defendant as "a common carrier." By all indications from the plaint and a letter dated July 19, 1988 (Exh.D.2) the contract appears to have been an ordinary one. Exhibit D2 is a letter which the Plaintiff wrote to the Defendant authorising the latter to clear from Mombasa and forward to Kampala a Volvo car which the former was expecting to arrive at Mombasa at the end of that month. No other documentary evidence of the terms of the contract was produced.

Secondly, no evidence was adduced indicating that the Defendant acted as "a common carrier" when it undertook to clear and forward the motor car in question for the Plaintiff. Mr.

Kateera, learned Counsel for the Plaintiff in the suit and on appeal submitted before this court that the evidence of the Defendant's Operations Assistant, Patrick Idro (D.W.1) was sufficient to show that the Defendant was a common carrier. The learned Counsel also contended that in so far as that evidence proved that the Defendant was a common carrier it was not necessary to plead that issue, since it was a matter of evidence the facts of which were only within the knowledge of the Defendant, on whom the burden of proving them lay. Section 105 of the Evidence Act (Cap. 43) on which the learned Counsel partly relied for this contention reads:

"105 In Civil proceedings when any fact is especially within the knowledge of any person the burden of proving that fact is upon him"

The evidence of D.W.1 to which the learned Counsel referred as showing that the Defendant was a common carrier does not seem to support that contention. D.W.1 was apparently cross-examined about a document known as "Delivery Note" dated 19.8.88 and issued apparently by M/S Interfreight (Kenya) Ltd. concerning the Volvo car in question. The document was produced as Exh. Dl. In cross-examination D.W.1 said that the form described as a common carrier the Defendant's sister company in Mombasa, which carried the goods as its Agent. Far from proving that the Defendant or its Mombasa Agent were common carriers the form, in fact, reads on the reverse side as follows:

"(1) The Company assumes no liability or obligation as a common carrier and is not to be held responsible for any loss, delay or damage to the goods to be forwarded."

In the circumstances, I think that the Defendant was not proved to be a common carrier by D.W.l's answers in cross- examination regarding Exh.D1.

The Plaintiff's contention that it was not necessary to plead in the plaint that the Defendant was a common carrier, I think has no merit. Nor do I think that Section 105 of the Evidence Act is relevant to this case for the reasons I will proceed to discuss. Order 6 Rule 1 of the Civil Procedure Rules provides that: —

"Every pleading shall contain, and contain only, a statement on a precise form of the material facts on which the party pleading relies for claim or defence as the case may be, but not evidence by which they are to be proved….."

Rule 2 provides that in all cases in which particulars are necessary such particulars shall be given.

The system of pleadings is necessary in litigation. It operates to define and deliver it with clarity and procision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the double purposes of informing each party what is the case of the opposite party which will govern the interlocutory proceedings before the trial and which the court will have to determine at the trial. See Bullen & Leake and Jacob's Precedents of pleading 12th Edition, page 3. Thus, issues are formed on the case of the parties so disclosed in the pleadings and evidence is directed at the trial to the proof of the case so set and covered by the issues framed therein. A party is expected and is bound to prove the case as alleged by him and as covered in the issues framed. He will not be allowed to succeed on a case not so set up by him and be allowed at the trial to change his case or set up a case inconsistent with what he alleged in his pleadings except by way of amendment of the pleadings.

For the above reasons, if the Plaintiff did not plead that the Defendant was a common carrier, I think that he cannot be permitted to depart from what clearly appears to have been his case as stated in the plaint and claim that there was evidence proving that the Defendant was a common carrier. As already found above no evidence, in fact, supported that contention.

Another reason for departure from the findings of the learned Principal Judge is that the issue whether the Defendant was a common carrier was not included in the issues framed by agreement at the trial of the suit. Earlier on in his judgement the learned Principal Judge on page 39 of the record of proceedings stated what he called "the Plaintiff's contentions" to be two. One of them was that the Defendant as a common carrier was liable to indemnify the Defendant whether there had been negligence or not. But the four issues which were then immediately stated as having been agreed and framed did not include that contention.

The success of the first two grounds would be sufficient to dispose of the appeal, but I will nonetheless consider the other grounds for they were argued by both parties.

Ground three of the appeal as I understand it consists of two parts. The first part complains about the principles followed in assessing the damages and the second concerns the award of damages in foreign currency. Taking the latter point first, Mr. Sendege, learned Counsel for

the Defendant, submitted on appeal that since the decision in cases such as Jugos Lavenska Providba vs. Castle Investment Co. md. (1973), 3 All E.R.. 498 (C.A.) and especially, Maliangos vs. George Frank, (Textiles) Ltd. (1975), 3 All E.R. 801, (House of a party to a contract can sue in foreign currency for money due under the contract. But in the instant case since the Plaintiff did not conduct his business in foreign currency for purposes of the contract in question, and the contract was not made, nor contemplated compensation, in foreign currency, there was no justification for departure from the general principle that transactions should be made in local currency. The general principle alluded to by the learned Counsel was stated in cases as Manners vs. Pearson (1898) I, Ch. 581, and Continental Agencies vs. A.C. Berril & Co. (1971) E.A. 205. But since the Miliangos (Supra) and similar case, for example "The Despinar" (1971) 1 All E.R. 421 the prevailing view is that awards of judgments expressed in foreign currency are valid. In the Miliangos case (Supra) it was held that where a Plaintiff brought an action for a sum of money due under a contract he was entitled to claim and obtain judgement for the amount of the debt expressed in the currency of a foreign Country if the proper law of the contract was the law of that Country and the money of account and payment was that of the same Country. If it was necessary to enforce the judgement that was to be converted into sterling at the date when leave was given to enforce the judgement. "The Despinar R" (Supra) appears to have widened the application of the principle in the Miliangos (Supra). For in the former it was held that even where the proper law of a contract and the contract specified a particular currency as the currency of account and payment in respect of all transactions arising under the contract, then any damages awarded under the contract were to be awarded in the currency of the contract since that was the currency with which the contract had a close connection. However, where it was not apparent from the terms of the contract that damages for breach were to be awarded in a currency specified for the satisfaction of the obligations under the contract, the damages were to be awarded in the currency which most truly expressed the Plaintiff's loss. In ascertaining that currency the questions to be asked were what the currency was which would as nearly as possible compensate the Plaintiff in accordance with the principle of restitution integrum, and whether the parties were to be taken to have had that currency in contemplation.

In the instant case, the contract did not specify a particular currency in which payment would be made in the event of damages. However, the Defendant knew that the plaintiff's car had been imported from overseas. The possibility of a currency that would enable the Plaintiff to import a similar car from overseas in the event of loss was one which, I think, should have

been foreseeable by the Defendant. Consequently, applying the principles in the Miliangos (Supra) and "The Despina R" (Supra), which I find persuasive, I think that the Plaintiff and the learned Principal Judge were justified in claiming its loss and awarding the damages respectively in a foreign currency which would be realised in local currency for purposes of enforcement of the judgement.

With regard to the principles followed in assessment of the damages, Mr. Sendege submitted that the learned Principal Judge had departed from the principles that the measure of damages based on the loss suffered at the time of destruction of goods or breach of contract. The Plaintiff's case not having been founded on detinue, the award of replacement value of the damaged Volvo car was not justified. The case having been based on breach of contract and tort the Plaintiff was entitled to the value at the time of the loss.

The evidence on the basis of which the sum of pound sterling 10,275 was awarded instead of pound sterling 9465, which had been claimed in the plaint, was that subsequent to the accident the Plaintiff ordered for another Volvo car similar to the one that had been damaged in the accident at a cost of 10,275 pounds, but as at the date of the trial of the suit the cost of a similar car had gone up to 12,000 pounds. Mr. Kateera Counsel for the plaintiff at the trial prayed for an award of 10,275 pounds in his closing address. In the circumstances, the learned Principal Judge's reason for making the award he did was expressed (at page 42) as follows: —

"Although the sum pleaded in the plaint is 9465.00 pounds I notice that in prayer (b) of the plaint the alternative prayer is the replacement value of the car in sterling equivalent in Uganda currency as may be determined at the date of judgement. These days of floating currency, it is difficult to predict how much Uganda shillings will fetch in terms of pounds sterling. Mr. David Mulira says that by now the vehicle should fetch 12,000 pounds I am afraid I cannot find the price of 12,000. If the Plaintiff wished to be awarded this sum they should have obtained a proforma invoice from the local dealers which would have been unassailable evidence. In the circumstances, I am prepared to award the plaintiff a sum of 10,275 pounds."

As I understand this part of the judgement the learned Principal Judge awarded the sum of 10,275 pounds because that was the new cost of a similar Volvo car to replace the damaged one, which had been pleaded in the alternative prayer. There was evidence proving that increased cost. I would have been prepared to award 12,000 pounds if the learned Judge

thought that was an issue under prayer (b). In the circumstance, I think that the learned Principal Judge was justified in awarding the sum he did. Indeed, the general principal of the law is that incases of destruction of goods, the normal measure of damages is taken to be the market value of the goods destroyed at the time and place to be the market value of destruction. For instance in ship collision case, it has always been said that the owners of the lost ship are entitled to restitutio in integrum. The basis of putting the Plaintiff into the position he would have been had the collision not occurred, which is what is required to effect a restitutio in integrum, is the award of the market value of the lost ship. See Liesbosch Dredger vs. S.S. Edison (1933) A.C. 440. But from the relevant authorities it appears to be possible to also recover consequential expenses made necessary by the tort or breach of contract. For instance in the case of Moore vs. D.E.R.Ltd1971.W.L.R.1476, where the Plaintiff's Rover car which was used by him in his practice as a dentist was rendered a total loss in an accident caused by the Defendant's negligence, the Court of Appeal held that the Plaintiff was entitled to recover the cost of hiring another Rover car for the 18 weeks it took to obtain a new Rover car. An argument that the claim for the cost of a substitute car should be substantially cut down because the Plaintiff could have bought a second hand Rover car within two weeks of the accident was rejected by the Court of Appeal. See Macgregor on Damages, 14th Edition page 706. In the instant case I think that the Plaintiff was entitled to recover the cost of a substitute Volvo car as awarded by the learned Principal Judge by way of consequential damages. In the circumstances I would think that ground four of the appeal fails. The Plaintiff did not pray for interest in it's plaint, but in his address to the Court at the trial Mr. Kateera, learned Counsel for the Plaintiff prayed for award of 10,275 pounds which was not sufficient to fetch a Volvo car due to fluctuations in the value of Uganda shillings then the interest of 36% would top it up . On appeal it was contended for the Defendant that the award of interest at 36% was arbitrary, especially as the Plaintiff did not pray for interest in the plaint and that since the award of damages was in foreign currency, no interest should have been given.

Section 26(2) & (3) of the Civil Procedure Act (Cap.65) provides that where a decree is for the payment of money, the Court may order interest at such rate as the Court deems reasonable to be paid on the principal sum adjudged to be paid. Where such a decree is silent with respect to payment of further interest on the aggregate sum provided for under sub-section (2) then the court shall be deemed to have ordered interest at 6% p.a. Section 26, therefore, leaves the rate of interest to be paid on a decretal sum at the

discretion of Court. Such discretion must, of course, be exercised judicially. In the instant case, Mr. Kateera conceded, right so in my opinion that the rate of interest was arrived at arbitrarily. He said that the rate of interest applicable was about 40% at the time of the judgement. Consequently 36% was not excessive.

I think that some interest was awardable on the sum adjudged. But while I think that the reasons given by the learned Principal Judge was an arbitrary one the rate of 36% does not appear excessive in the circumstances. I would, therefore, have declined to reduce the rate of interest in question.

Finally ground five, Mr. Sendege submitted that the decree giving 42% as it did, was wrong because it was in conflict with the judgement, contrary to Rule 6 Order 18 of the Civil Procedure Rules. Moreover, the decree had bee prepared by the Plaintiff without the consent of the Defendant. The decree as appearing on the record obviously contravenes Rule 6 of Order 18 of the C.P.R, which states that the decree shall agree with judgement. Mr. Kateera conceded this point and said that he did not support the interest rate of 42% provided for in the decree. He also conceded that the decree was drawn without the consent of the Defendant.

It is apparent, therefore, that the decree was not prepared in accordance with the provisions of Rule 7 of Order 18. It was apparently sealed and signed by the Registrar before it was approved by both the parties to the suit. It was also not settled by the learned Principal Judge who tried the suit. But since the Defendant's complaint in this regard relates to what the Registrar did, I think that it should not have been made the subject of an appeal to this Court; for Rule 8 of Order 46 of the C.P.R. provides that any person aggrieved by any order of a Registrar may appeal there from to the High Court. Moreover, as Mr. Kateera pointed out, the Notice of Appeal stated that the
Defendant intended to appeal against the decision of the learned Principal Judge. In the circumstances I would think that this ground of appeal should fail.

In the result I would allow this appeal in view of the success of grounds one and two of the appeal. Consequently I would order that the judgement of the High Court be set aside and the plaint of the Respondent be dismissed. I would also allow to the Appellant the cost of the suit and of the appeal since it has been successful on the main grounds.

Dated at Mengo this 2nd day of July, 1993

A.H.O. ODER
JUSTICE OF THE SUPREME COURT

JUDGEMENT OF WAMBUZI, C.J:

I have had the advantage of reading in draft the judgement prepared by ODER J.S.C. and I agree that this appeal should be allowed.

As regards ground one of the appeal the Respondent by its plaint alleged an agreement to clear and transport its Volvo car from Mombasa to Kampala. The Respondent further alleged that the Appellant,
"negligently and in breach of the said contract and the said terms
thereof ……"

damaged the car beyond repair. Particulars of the negligence were given. The cause of action was negligence which was denied by the Appellant in his written statement of defence alleging that the vehicle was transported at the owner's risk. There was no claim based on liability of a common carrier in the plaint and consequently there is no defence to that claim. The issues as framed were solely to ascertain whether or not there was negligence and again the question of liability of a common carrier was not in issue. Apparently the issue of liability of common carrier was first raised by Counsel for the Respondent during his submission at the close of the case in Lower Court to the effect that if the Appellant was not liable in negligence it was liable as a common carrier apparently having agreed to transport the Respondent's vehicle. Mr. Sendege who appeared for the Appellant pointed out that the matter had not been pleaded but even then there was no amendment to the plaint to allege liability of the appellant as a common carrier.

The learned trial Judge found in effect that the Appellant was a common carrier and was accordingly guilty of strict liability for the loss under common law.
I have not been able to find any authority directly in point but the nearest I could find is Plotti vs. The Acacia Co. Ltd. (1959) E.A. 248. I would like to refer to a passage in the judgement of Forbes, the learned Vice President at page 250 where he refers to a somewhat similar issue in that case in the following terms,

“For the appellant it is contended that the particulars of the contributory negligence found against him by the learned trial Judge were wholly different from those alleged against the appellant in the written statement of defence, and that the contributory negligence found was at no time alleged against the appellant, who consequently had no opportunity of denying the same……..

As regards the appellant’s first contention, it is certainly true that the particulars of contributory negligence found by the leaned trial Judge were not pleaded in the written statement of defence. The written statement of defence was framed on the basis that the appellant was fully aware of the chain on the lift gates and that he had never closed the gates of the lift or set the lift in motion: and it was pleaded in para. 7 –

“(c) that the plaintiff injured himself through his own negligence
(d) that the injuries were caused by the plaintiff’s own violent efforts negligently executed in reckless and insistent attempts to close the gates of the lift.”

This theory of the accident was, very properly on the evidence, rejected by the learned trial Judge.

Notwithstanding the pleadings, the fifth issue framed at the trial, with the agreement of the counsel, was
“5. was there contributory negligence”?

Counsel for the Appellant, however, contends that this issue, though framed in general terms, must be constructed with reference to the particulars of negligence pleaded, and is limited to those particulars; that the trial in fact proceeded on that basis, and that he never dealt with, or appreciated that he had to meet, a case of contributory negligence founded on an entirely different set of particulars.

There is, I think, force in the appellant’s contention. It is true that in Sagarmull vs. Gaistaun (1930) A.I.R.P.C. 205, a case in which the variation of an agreement was not pleaded, but was nevertheless put in issue, contested and proved the Privy Council said,

“Their lordships are satisfied that, notwithstanding the form of the plaint the suit was fought by the parties deliberately upon issues substantially as framed by the trial Judge and ought upon that footing to be determined.”

In the instant case, however, it does not appear that the issue of contributory negligence was contested on the basis of the particulars which the learned trial Judge held established it. The question whether the chain ought to have been seen was mentioned by Counsel for the appellant in his address, but this was apparently in relation to the question whether the chain was sufficient warning to the public not to use the lift. In view of r.3 0.XIV of the Code of Civil Procedure it was not unreasonable that counsel should regard the fifth issue as limited to the particulars of contributory negligence alleged in the statement of defence……."

In the case before us the cause of action pleaded was negligence, the issues were framed and the trial proceeded on that basis. I think it was misdirected in law on the part of the learned Principal Judge to base his judgement on a cause of action not pleaded and not being part of the issues upon which the parties fought the suit. I think the first ground of appeal must, therefore,succeed.

I agree that the second ground of appeal should also succeed. The only evidence available as to how the accident happened is the evidence of the appellant's driver, Mbugua (DW2). There is nothing to show that what he claimed happened did not in fact happen. With respect to the learned trial Judge I am unable to read panic into the driver's actions of swerving off the road braking suddenly to avoid a collision. Nor can I say that the on coming bus would necessarily have hit the trailer if the driver's claim that he swerved to avoid colliding with it was true.

I would allow the appeal on these two grounds and I find it unnecessary to deal with the remaining grounds of appeal as a matter raised therein do not arise.

As Platt J.S.C. agrees with the orders proposed by Oder J.S.C. there will be orders in the terms proposed by the learned Justice of the Supreme Court, Oder.

Date at Mengo this 2nd day of July 1993.

S.W.W. WAMBUZI

CHIEF JUSTICE

JUDGEMENT OF PLATT, J.SC

I have had the advantage of reading the judgments in draft of Wambuzi C.J. and Oder J.S.C. I

agree that the appeal must succeed on grounds one and two. Consequently I would order that the judgement of the High Court be set aside and the plaint of
the Respondent be dismissed. I would allow the Appellant the costs of the suit and this appeal, as the Appellant has been successful on the main issues regarding liability.

Dated at Mengo this 2nd day of July1993.

H.G. PLATT

JUSTICE OF THE SUPREME COURT