THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT MENGO

(CORAM: WAMBUZI C.J, ODER, TSEKOOKO, KAROKORA AND KANYEIHAMBA JJ, S.C) CIVIL APPEAL NO.6 OF 1999

BETWEEN

FRANCIS SEMBUYA::APPELLANT

AND

ALLPORTS SERVICES (U) LTD::::::::::::::::::::::::RESPONDENT

(An appeal from the decision of the Court of Appeal at Kampala (Manyindo-DCJ, Mpagi-Bahigeine, Twinomujuni .JJ.A) dated 2nd December, 1998 in Court of Appeal Civil Appeal No. 23 of 1997).

JUDGMENT OF TSEKOOKO. JSC.

This is an appeal from the decision of the Court of Appeal, which dismissed the appellant's appeal against the decision of the High Court.

The respondent was the plaintiff in the trial Court. There the appellant, Francis Sembuya, and one Julius Kamanyi were defendants. The facts of the case of the respondent which were accepted by the two courts below can be stated as follows.

The Appellant Francis Sembuya and Julius Kamanyi (PW2) had been school-mates at Namilyango College. From the appellants evidence the two had not met since 1984. From 1990 to 1993 the two did some business together most probably in the name of an unregistered business name styled Aero International (U) Ltd. Together with some other people the appellant employed Kamanyi to supervise construction of a building to house an entertainment enterprise called Club Pulsations Ltd. in 1993. At that time the Government of Uganda was engaged in the reconstruction of Northern Uganda under the name Northern Uganda Rehabilitation Programme. Cement was required for the programme. The respondent, All-Ports Services (U) Ltd. carried on the business of clearance and general business, which included the purchase and sale of cement.

According to Natukunda (DWI), the appellant and other people also operated a business in computers. It was called African Technology Company (ATC Sembule) and had an office in

Kampala. Some non- Africans like Anil Kumar worked there. The appellant used to appear in that office daily mostly at lunchtime. The appellant was the General Manager. ATC is or was an American Company.

During August 1993, the appellant and Julius Kamanyi won a tender to supply cement to Northern Uganda Rehabilitation Programme. The cement required was 20,000 bags. The appellant and Kamanyi did not have the money to purchase the cement and supply it to the programme. They thought for ways and means of fulfilling the tender. They appear to have agreed to subcontract. So they sought assistance. They were put in contact with the respondent by one Kiiza (PW3), who had previously sold paints to the appellant for use on Club Pulsations. There were negotiations between the appellant, Julius Kamanyi (who acted as the Operations Manager of Aero International Ltd.) and one Thomas on the one hand, and Francis Kateiguta (PWI), on behalf of the respondents, on the other had. The negotiations were conducted at ATC in the appellant's office, which I have alluded to already. All parties agree about the existence of this office at the time.

As a result of the discussion, it was agreed that the respondent would supply 20,000 bags of cement to the appellant and Julius Kamanyi at Shs.12,500!- per bag. It was also agreed that to formalise the agreement an LPO should be issued be issued by the two men to the respondent for the supply of the said cement. Implementation of the agreement appears to have moved very fast. Some bags of cement were delivered before the LPO dated 18/9/1993 (Ex.P1) was issued to the respondent. Exh.Pl is an order in the form of a letter on the letter-head of Aero International Ltd. The first condition in Exh. P1 (the contract) states that ***'All payments are made by cheques which mature in 21 days'***

Kamanyi stated he and the appellant agreed that payment for the cement should be made by personal cheques. Kamanyi further testified that pursuant to an agreement between the two, (the appellant and Kamanyi) Kamanyi issued to the respondent a post-dated cheque (Exh. P2) drawn on Kamanyi's own Bank account for 200/= million in respect of cement supplied and more yet to be supplied. The respondent delivered more cement to the two men. Eventually, when the respondent presented the cheque (Exh P.2) the same was dishonoured because of lack of funds on the personal bank account of Kamanyi. Kamanyi claims that the appellant was expected to get the proceeds of the sale of cement and give money to Kamanyi who

would then deposit in on Kamanyi's account for purposes of payment for the cement. After the dishonour of the cheque, Kamanyi used Aero International letter-head to write to the respondent a letter (Exh. P.3), apologising for the dishonour of the cheque and asked the respondent to hold on up to Wednesday 20/10/1993 promising that all the money would be paid soon. Kamanyi and the appellant became elusive. Francis Kateiguta (PWI) begun hunting for the two men, the debtors, namely the appellant and Kamanyi. Eventually, according to Kamanyi, *Shs.53/-* million was got from Club Pulsations Ltd and paid to the respondent. The appellant and Kamanyi promised to pay more later. According to Francis Kateiguta the two men started dodging him. When no more payment was forthcoming, Kateiguta involved the police who had Julius Kamanyi arrested, charged with and convicted of the offence of issuing a dishonoured cheque. Kamanyi was sentenced to imprisonment for five years. At the same time during November, 1993, Kateiguta (PWI) involved ISO men such as John B and Policemen such as Kaunda who interrogated the appellant in connection with the cement transaction. Indeed the appellant was arrested, interrogated and charged in Nakawa Court with obtaining goods (the cement) by false pretences. According to the appellant the case remained in Nakawa Magistrate's Court for about a year after which it was dropped.

In 1995 the respondent instituted a civil suit from which this appeal arose against Julius Kamanyi as the first Defendant and the appellant as the second defendant. The respondent sought to recover *Shs.147.5M/=* jointly and severally from the two defendants. For his part, Kamanyi filed a written statement of defence admitting liability. The appellant filed a separate defence denying liability.

When the suit came up for hearing, on 19/1/1996, Mr. Byenkya, counsel for the appellant applied under 0.6 r.29 of the Civil Procedure Rules and asked the court to strike out the defence of Kamanyi on the ostensible ground that the defence was frivolous and vexatious. The reasons for referring to that defence as frivolous and vexatious are because in his defence Kamanyi admitted liability. Although the respondent's counsel, and that of Kamanyi, opposed the application, the learned trial judge curiously acceded to the application, struck out the defence of Kamanyi and entered judgment against Kamanyi. I find the procedure adopted at that stage of the proceedings wholly irregular. I think that the application to strike out Kamanyi's defence and the order striking it out lacked a sound basis. I would have expected the respondent, as a plaintiff, to ask for judgment to be entered against Kamanyi because of

the provisions of 0.11 r. 6 of the Civil Procedure Rules, which empower a trial Court to, inter alia, enter judgment against a defendant who admits liability in his defence.

Be that as it may, the suit was tried. The respondent called three witness who included Julius Kamanyi. The appellant called five witnesses inclusive of himself. The appellant in his evidence admitted he knew Kamanyi whom he employed in 1993 to supervise construction of his building, which houses Club Pulsations Ltd. He denied knowledge of Aero International Ltd. He admitted he was General Manager of ATC and used to visit offices of ATC daily. He denied purchasing any cement from Kateiguta or the respondent. He denied previous knowledge of the latter until this case started. He admitted the police and ISO officials harassed him because of the cement transaction. The trial judge believed the plaintiff's version of the story. The learned judge rejected the defence of the appellant and gave judgment against the appellant. The appellant was ordered to pay 147m/= as special damages and 15m/= as general damages with interest and costs. The appellant appealed to the Court of Appeal the appeal was dismissed by that court. The appellant instituted this appeal from those proceedings and framed four grounds of appeal.

Grounds 1,2, and 3 would appear to offend rule 81(1) of the Rules of this Court because they are argumentative, I think. This will be apparent as I shall quote and discuss those grounds in the course of this judgment. Further, I note that the four grounds of appeal are in reality a reproduction of grounds 2,3,4 and *5* respectively, which formed the basis of the appeal in the Court of Appeal. Indeed the submissions of Mr.Byenkya, learned counsel for the appellant, are substantially the same arguments, which he raised in the trial Court and in the Court of Appeal.

Ground one of the appeal reads as follows:

(1) The learned judges erred in law and in fact in upholding the findings of the High Court Judge that the appellant had a particular partnership relation with his co-defendant and in particular erred on the following points:

a) The learned judges had earlier found that there was no evidence of a partnership relationship and their final conclusion was a clear contradiction of that finding.

b) The learned judges had also stated that they were certain that there was no legal partnership between the two co-defendants and the final conclusion aforestated was clearly inconsistent with that finding.

c) The findings of the judges of the Court of Appeal were not based on the pleadings of the parties or indeed the evidence of the plaintiff's witness, which were both aimed at sustaining a claim of a general partnership between the appellant and his codefendant under the name and style of Aero International Ltd.

The above points, i.e. (a), (b) and (c) are the arguments which were the essential objections to the decision of the Court of Appeal made by Mr. Ebert Byenkya, Counsel for the appellant. Learned Counsel cited *Banco Arabe Espanol v. Bank of Uganda* Supreme Court Civil Appeal No.8 of 1998 (unreported) to support the well known view that a first appellate Court's duty is to re-evaluate evidence of a trial court and draw its own conclusions on the facts. In his view the Court of Appeal did not address itself to the evidence. Counsel criticised the Court of Appeal for its reliance on section 18 of the Partnership Act. He relied on the decision of *Hudgell Yeates & Co. v. Watson* (1978) 1QB *451* to illustrate the operation of the doctrine of holding out and contended that the evidence of PWI does not show that the respondent relied on representation to give credit to the appellant. Counsel also cited *Interfreight Forwarders Ltd. v. E.A Development Bank* Supreme Court Civil Appeal No.33 of 1992 (unreported) to support the proposition that in a trial a party should not depart from his pleadings. He contended that by relying on particular partnership, the respondent had departed from its pleadings, which averred general partnership.

Mr. Tibesigwa, Counsel for the respondent supported the decisions of the two courts below. First he argued that this being a second appeal in which the two courts below had made concurring findings of fact, we should not disturb those findings. For this proposition, he relied on *Uganda v. Kabali (1975)* EA 185 and *Ephraim Ongom Odongo and another v. Francis Benega Bongo* Court of Appeal Civil Appeal No.10 of 1997 (unreported). He contended that in the Court of Appeal, the only issue raised was that there was not partnership at all and not that a particular partnership never existed. He cited *K.Spicer v. Mersell* (1979) 1 W.LR.333 which I don't find useful on the contest in these arguments.

I think that *Kabali's* case is distinguishable and is inappropriate to the proposition put forward by Mr. Tibesigwa. The case of ***Kabali*** (supra) is a criminal matter and was decided in conformity with the provisions of s.337(1) of the **Criminal Procedure Act** which allows second appeals from the decisions of Magistrates via High Court to the Court of Appeal only on points of law but not on a matter of fact or of mixed fact and law. Therefore the Court of Appeal of East Africa was correct when it held that it was bound by the concurring findings of fact by the trial Magistrate and the High Court. Similarly consideration of the appeal in ***Odongo's*** case, which originated from a Magistrate's Court was limited to law by virtue of s.74 (1) of the Civil Procedure Act. That provision was the basis of that decision and Oder J.S.C, reproduced the sub-section to illustrate the point. The findings of fact by the trial Magistrate and later by the High Court, as a first appellate court, was binding in law and that is the effect of s. 74 of the Civil Procedure Act, which reads as follows:

"(1) Save where otherwise expressly provide in this Act or by any other law for the time being in force, an appeal shall lie to thee Supreme Court from every decree passed in appeal by the High Court, on any of the following grounds, namely that: -

a) the decision is contrary to law or to some usage having the force of law;

b) the decision has failed to determine some material issue of law or usage having the force of law.

c) *a substantial error or defect in the procedure provided by the this Act or by any other law for the time being in force, has occurred which may possibly have produced error or defect in the decision of the case upon the merits"*

I think that in matters of second appeals to this Court involving cases decided by the High Court in the exercise of its original jurisdiction, section 7(1) of the Judicature Statute, 1996, is instructive. It states:

"7(1) *An appeal lies as of right to the Supreme Court where the Court of Appeal confirms, varies or reverses a judgment or order including interlocutory order given by High Court in the exercise of its original jurisdiction and either confirmed, varied or reversed by the Court of Appeal"*

These provisions are clearly distinguishable from the provisions of either s.337(1) of Cr.P.A or S.74(1) of CPA.

Again the rule 29(1) of the Rules of this Court amplifies this point and it reads as follows:

"Where the Court of Appeal has reversed, affirmed or varied a decision of the High Court acting in its original jurisdictions the court may decide matters of law or mixed law and fact."

From the foregoing provisions, I cannot, with respect, accept Mr. Tibesigwa's submission that in this case this court is barred from a reconsideration of concurring findings of fact by the two courts below. I think that this is the position taken by Wambuzi, Chief Justice, in *Bank of Uganda v. Transroad Ltd* Supreme Court Civil Appeal 3 of 1997 reported in (1998) Supreme Court. (Civil Judgments)at page *5.* Naturally and normally any concurring findings of facts by the High Court as a Court of trial and the Court of Appeal, as a first appellate Court, will be accorded due respect by this Court I would observe generally that where it is necessary to disturb such findings, disturbing such findings would obviously be based on a sound basis. In saying this, I must not be understood to be laying down any hard and fast rule on the matter.

Arguments raised in support of ground one overlap into ground two. I will however discuss ground one separately and where necessary ground two also separately. Mr. Byenkya submitted that the Court of Appeal did not reevaluate the evidence so as to form its own conclusions as is required of a first appellate Court. The lead judgment of the Court of Appeal was delivered by Mpagi Bahigeine, JA. I have considered the judgment. I would accept Mr. Byenkya's submission if he meant to say that the Court of Appeal did not go into details of the evidence. But that is really a question of style. There is really no set format to which the re-evaluation should conform. A first appellate Court is expected to scrutinise and make an assessment of the evidence but this does not mean that the court should write a judgment similar to that of the trial Court. I have no doubt that in this case; a general assessment of evidence was made relating to the matters calling for decision.

In considering the contentions raised by Mr. Byenkya arguing while grounds 1, I will first refer to the pleadings.

In paragraph 3 and 4 of the plaint, the respondent as the plaintiff averred that. "3. *The defendants were at all material times carrying on business as partners in the style and name of Aero International Ltd., an unregistered company.*

4. In 1993 in Kampala the plaintiff at the request of the defendants supplied to them bags of cement valued at 200,000,000/="

Pausing here for a moment, it appears that the respondent pleaded general partnership between the appellant and Kamanyi. But it can also be argued that the averment that the "defendants were at all material times carrying on business as partners in the style of Aero International" can be construed to mean that on the facts of this case, at the time material to the cement transaction the appellant and Kamanyi behaved as partners.

In his defence, Kamanyi admitted liability as well as the existence of a partnership between himself and the appellant. On his part, the appellant filed a separate defence and in paragraph 2 thereof averred that:

"2. *The second defendant denies the contents of paragraph 3 of the plaint and shall aver that he has never operated under the style and name of Aero International Ltd. in partnership with the 1st defendant and neither has he*
ever held out to be a partner of share holder in the said unregistered company. The plaintiff shall be put to strict pro of thereof"

Therefore the appellant denied the existence of a partnership between himself and Kamanyi under the name of Aero International Ltd.
At the commencement of the trial, four issues were agreed upon for determination by the trial judge. The first issue was framed thus:
"1. Whether *there was a partnership between the1st and 2nd defendant under the name and style of Aero international Ltd."*

In view of the form in which this issue was framed the issue of a general or a special partnership is open to argument. On the face of it, this issue required a decision on whether there was a partnership under Aero International Ltd. I think that the plaintiff's averment in para 3 of the plaint that Aero International Ltd. was an unregistered company raised the possibility that the so called company was "ad hoc"

The principal witnesses on the issue were Francis Kateiguta (PWI) the Director of the respondent, and Kamanyi (PW2). The appellant himself gave testimony consistent with his defence by denying the existence of any partnership. The learned trial judge made two findings as regards the question of partnership. The judge first considered the evidence and answered initially the first issue by saying *"that there existed a partnership between the and 2' defendant under the name and style of Aero International Ltd."* At page 15 of his typed judgment, the learned trial judge stated:

"*I have found the evidence to have established the existence of a partnership relationship between the Ist and 2nd defendant in the form of a particular partnership for purposes of purchasing 20,000 bags of cement, reselling the same and distributing the profits accruing there from among the partners. The protestation of the 2nd defendant about the existence of the partnership are not believable"*

This conclusion by the trial judge did in away answer the first issue. The appellant certainly contested the existence of a partnership called Aero International. He did this in the pleadings and in his evidence. It seems the learned trial judge was ambivalent about the answer to the issue framed. This is because later in his judgment at page 18 of his typed judgment he again made the following finding:
'77 *there existed a partnership between the 1st and 2nd defendants under the name and style of Aero International Ltd."*

This is the answer to the first issue. In the Court of Appeal, very much the same arguments as raised here were raised in that court. So the question that arises is whether on the facts in these proceedings, there is or there is no justification for the view taken by the trial judge and the Court of Appeal that the evidence established a particular partnership and that the appellant is bound by that particular partnership.

Mr. Byenkya argued that the conclusions of the Court of Appeal are erroneous because the findings are contradictory. The Court of Appeal held that:

"*There was no evidence on which the learned judge could base a finding that of (sic) the existence of a partnership per Se. But that is not the end of the matter*"

Latter, the court held that "there was no legal partnership" I do not, with respected to Mr. Byenkya, consider these two statements to be inconsistent findings on the same issue by the Court of Appeal. This is because in the end the Court held that "the learned judge therefore rightly found the evidence to have established the existence of a partnership relationship between the 1 and 2'' defendants in the form of a particular partnership for purposes of purchasing 20,000 bags of cement, reselling the same and distributing the profits accruing there from among the partners"

This is a definite finding by the learned Justices. In my opinion the two conclusions by Justice Mpagi Bahigeine are not contradictory or inconsistent to each other. In my view this is a question of style of language. It appears to me that the learned Justice found that Aero International Ltd. was an unincorporated company because it was not registered. The learned Justice however, concluded that the appellant and Kamanyi operated as and appeared to be partners in the cement transactions giving rise to this case. I understand the learned Justice to find that even though there was no general partnership because evidence showed that Aero International Ltd. did not exist as a company in law because it was not registered, there was a partnership between the two men (Kamanyi and the appellant).

This matter depends on the view to be taken in respect of the evidence of Francis Kateiguta (PWI), Kamanyi (PW2) and the appellant who testified as DW3, I find it hard to believe that Kateiguta (PW1) Kamanyi, (PW2) and Kiiza (PW3) could have made up a story and come up with the evidence which the two courts below believed that Kamanyi and the appellant were jointly engaged in the cement transaction. The evidence in summary shows that the appellant had an office at ATC. Kiiza (PW3) who was the contact man between Kamanyi, the appellant and Kateiguta, took Kateiguta to ATC for purposes of discussion of the cement transactions. That a secretary called Sada worked in the appellant's office. Sada typed the invoice (Exh P1). In cross examination the appellant acknowledged the presence of Sada in his office. Kamanyi introduced Kiiza to the appellant that Kiiza had found a person to supply the necessary cement. Even if it is assumed for the sake of argument that Kamanyi may have

tried to protect himself, there can be no denying the fact that up to and until the supply of the cement Kamanyi and the appellant were very close to each other. The appellant testified that while he and Kateiguta had a meeting with Kihiika and police, he asked “Kateiguta why he was involving him in this business when he knew he has sold no cement to me. He said he would use whatever methods and tricks to get his money back”

The statements appear to me to mean more than what appears on their face. The words mean that Kateiguta had supplied the cement; they mean that Kateiguta knew exactly what had happened and who had got the cement. The words mean that Kateiguta knew it was the appellant who had the money from the cement transaction. As I noted earlier the appellant acknowledged that in his ATC offices he had a secretary called Sada.

But the appellant asserts that be never directed her to type EXh.P 1. It may be that in the plaint, the respondent averred that the appellant and Kamanyi were partners under the style of Aero International Ltd. But the respondent further averred that this name was not registered. I take it to mean that this was meant to show that Aero International was not a legal entity and in effect this meant that the transaction between these two men was ad hoc. This is strengthened by the averment in para 4 of the plaint when the respondent pleaded that it supplied cement worth 200m!= at the request of the two men.

The evidence of the respondent established that the two men had got a contract to supply cement to Northern Uganda Rehabilitation Programme. Evidence showed that the two men would sell the cement and share out the profits. The evidence of Kateiguta, which was believed by the trial judge, shows that the two men were engaged on the same task of getting and selling cement and one was working with the other on that task. In matters of business transactions, Courts are enjoined to enforce transactions, which have been performed as a matter of substance and not as matter of technicality. In his testimony the appellant wholly denied any business dealings with Kateiguta and Kamanyi. However the appellant does not specifically deny the claim by Kamanyi that *Shs.53m1-* which was paid to the respondent was from Club Pulsations Ltd. of which the appellant was the owner. He admits employing PW2 in connection with Club Pulsations. What does this mean? On the evidence available to us, I think that the appellant was not being straight forward about his relationship with Kamanyi. This is understandable since the appellant would wish to avoid liability because of his association with Kamanyi.

However, the evidence of Kateiguta leaves no doubt that Kamanyi and the appellant gave him the impression that the two men were engaged on a particular enterprise. He testified:

"Julius introduced me as the one who would supply the cement. They informed me they had a tender to supply cement to Northern Rehabilitation Programme. They said they could not meet the supply in time and as such they wanted to sub contract. I agreed I would supply 20,000 bags at Shs. 12,500 per bag. I insisted I need an LPO to show I was working with these people. I eventually got the LPO"

Later on he continued……

"when the cheque was dishonoured I approached Julius Kamanyi who told me he would meet Francis Sembuya. We met him in the office and they told me they themselves had not been paid and so should hold on the fist time I got the money from Parliament Avenue an office called A TC where Francis Sembuya used to sit"

Kateiguta was cross-examined on his evidence. In due course he answered some questions to the effect that.

Mr. Byenkya sought to rely on the case of ***Hudgell Yeates*** (supra) for the view that although there was discussion between Kamanyi and the appellant, the appellant did not hold out Kamanyi as representing the appellant and or Aero International.

For reasons I have given when quoting evidence above, I do not accept that there was no holding out. First of all the evidence accepted by the courts below, portions of which I have referred to above, shows that Kamanyi was in business with the appellant. What sound explanation can be given for the fact the Kamanyi introduced Kateiguta to the appellant as the person who will supply cement. Further when Kateiguta and Kiiza demanded for an invoice, how come that Sada, the secretary of the appellant was the person who typed the invoice (Exh.Pl) which invoice was on the headed paper of Aero International? Kiiza was made to wait in the appellant's offices at ATC twice for the invoice. It was in ATC offices where discussions had taken place previously culminating in the sealing of the deal to supply cement. The fact that Kamanyi was found in ATC offices where the appellant was the General Manager and where Sada the secretary had typed the invoice, (EXh.P 1) to my mind support

the view that Kamanyi was held out in this case as partner of the appellant. In any event that is the impression I had formed on the basis of the evidence to which I have alluded.

Again Mr. Byenkya cited *Interfreight Forwarders* (supra) for the proposition that a party should not be allowed at the trial to depart from his pleadings. I think that that case is distinguishable.

In *Interfreight Forwarders* (supra) the plaintiff engaged the defendants to transport the former's new car from Mombasa to Kampala. During the course of transportation an accident occurred resulting in extensive damage to the car beyond repair. The plaintiff sued Interfreight. The plaintiffs claim was based on breach of contract and negligence on the part of the defendant, Interfreight. Particulars of breach of contract and negligence were given. The first and principal issue framed for determination by the trial court in *Interfreight* case was:

"In the course of carrying the vehicle was the defendant guilty of negligence"

The trial court found negligence proved on the part of the defendants' driver. The court found in the alternative that if defendant was not liable in negligence, then the defendant was liable as a common carrier. The Court found on appeal that the accident was inevitable and therefore negligence was not established. The Court held further that the defendant could not be held liable as a common carrier first because the plaintiff never pleaded that the defendant was a common carrier. Secondly the issue of common carrier was not framed. Thirdly no evidence was adduced indicating that the defendant acted as a common carrier. Moreover the delivery form contained some restrictions regarding liability of the defendant. It exonerated the defendant in respect of liability based on common law doctrine of a common carrier. Clearly the facts in the present case are distinguishable from those in the *Interfreight Forwarders.* What do we have in the present case? In para 3 of the plaint, partnership, albeit general partnership, was pleaded. Again the first issue related to the determination of partnership. The evidence of Kateiguta Kamanyi and Kiiza was about relationship between the appellant and Kamanyi. But Kamanyi certainly pleaded and gave evidence about partnership. In these circumstances, I think that this case is distinguishable from the of *Interfreight Forwarders.*

I find it unnecessary to consider the case of *Keith Spicer v. Mansell* (1970) 1 WLR 331 because the decision in that case does not add or remove any thing from the view 1 have taken in this case. Further more in my opinion, section 18 of the Partnership Act appears to support the conclusions, which I have arrived at on this ground of appeal.

In conclusion I think that the two courts below were correct in their findings that a particular partnership had been established. I think that ground one must fail.

The second ground reads:
2. The learned Judges of the Court of Appeal erred in law and fact in applying S. 18 of the Partnership Act to find (or appear to find) the appellant liable for having held himself out as a partner and in particular erred on the following points:
a) The plaintiff's pleadings could not sustain a claim based on alleged misrepresentation and no particulars of such misrepresentation were supplied as required by law.

d) There was no evidence on record to show that the respondent had ever given credit to the alleged firm or Aero International while acting on the strength of an alleged representation by the appellant that he was a partner nor was there evidence that he would not have otherwise given credit to the firm if he had not believed the appellant to be a partner.

e) The learned trial Judge had right concluded that the principles of holding out did not apply to the ease and it was not open to the Court of Appeal to entertain arguments on the matter or to make a finding on it without it being stated as a ground for affirmation in the manner required by the Court of Appeal Rules.

Mr. Byenkya, relied on the same arguments he made in respect of the first ground. He contended that as the respondent had not pleaded s. 18 of the Act, the Court of Appeal misdirected itself when it relied on the section. That as the respondent did not cross-appeal as required by rule 90 of the Rules of the Court of Appeal, that Court should not have applied the doctrine of holding out to the appeal.

Mr. Tibesigwa for the respondent conceded that courts should not normally grant a relief if not pleaded. He, however, contended that there are exceptions to this rule and cited *Dhanji Ramii v. Rambhai (1970) E.A 515.* He contended that paragraph 2 of the written

statement of the appellant's defence suggests that the appellant was prepared to meet pleadings relating to particular partnership and holding out. Counsel submitted that in any case the appellant gave evidence on the unpleaded issues and therefore there was no prejudice. I have already reproduced the contents of paragraph 2 of appellant's defence. The facts in ***Ramiji*** case were generally similar to this case. The respondent sued the appellant and another man as trading in the name of a firm and alleged that they were carrying on business in partnership. The appellant's defence denied that he was a partner in the firm. The trial judge found that the appellant had been introduced to the respondent as a partner in the firm and that it had not received notice of any retirement of the appellant. He therefore held that the respondent was entitled to treat the appellant as a partner in the firm. The appellant appealed, contending that liability to be treated as a partner was not pleaded, was inconsistent with the respondent's cause of action, and that the judge was not entitled to give judgment on unpleaded issues:

The Court of Appeal for East Africa held: -

(i)The facts relied upon to make the appellant liable as an apparent partner should have been pleaded.
(ii) Such a claim could have been joined with an allegation of actual partnership;
(iii) To appellant was prepared to meet a case of apparent partnership as most of the evidence in support of it was elicited by the appellant's cross-examination and the judge was addressed on it;
(iv) There was no prejudice to the appellant, as the unpleaded cause of action became an issue in the trial.

In his judgment Law JA, referred to ***Gandy v. Capair Air Charter Ltd*** (1956), 23 E.A C.A 139 and said;
"In that case, the trial judge had found in favour of a party on ground that had not been pleaded. In the course of his judgment on appeal, SIR RONALD SJNCLAR, V-P said;
"The object of pleadings is, of course, to secure that both parties shall know what are the points in issue between them, so that each may have full information of the case he has to meet and prepare his evidence to support his own case or to meet that of his opponent. As a rule relief not founded on the pleadings will
not be given"

In the case now under consideration, Mr. MC. Patel admitted that he and his advocate knew, before the plaint was filed, that the Registrar of Business Names had been notified that the appellant ceased to be a partner before the goods the subject of the plaint were ordered and supplied. That being so, I agree with Mr. Khanna that if it was sought to make the appellant liable as an apparent partner the plaint should have pleaded facts which would justify the application of s.40(1) of the Partnership Act, and in particular that the plaintiff (to whom I shall henceforth refer to as the respondent) knew the appellant to have been a partner in the firm before his retirement on l January 1967, that the respondent and the firm had dealings before that date, that after the change in the constitution of the firm the respondent supplied goods and gave credit to the firm in the belief that the appellant was still a partner, and that at such time the respondent has no notice actual or constructive that the appellant had ceased to be a partner. A plaintiff might not know for certain whether a defendant was an actual or only an apparent partner at any particular time, and I can see no reason why both causes of action should not be pleaded as alternatives. It is however clear that none of the matters which might have brought s. 40 (1) of the Partnership Act into operation were pleaded in the plaint, or in a pleading subsequent to the defence, nor was any application made in the course of the trial for leave to amend the plaint accordingly. The question therefore arises, was the judge entitled to decree against the appellant on the basis of apparent membership of the firm, when, the only basis pleaded was actual membership? The answer to this question depends, I think, on whether any prejudice was caused to the appellant, in that judgment was given against him on an unpleaded cause of action which he had no reason to anticipate and no opportunity to prepare to meet. There are indications on the record that the appellant was prepared to meet a case based on apparent membership, although the ingredients required to found such as a cause of action had not been pleaded. One is that in para 3 of his defence, as already noted the following appears: -

"Defendant will also contend that he never had any dealings with the plaintiff in respect of the said firm"

This appears to be directed against a possible contention by the respondent that there were dealings between the parties before the appellant ceased to be a partner in the firm, which is one of the ingredients of cause of action based on apparent membership. Another indication is that the judge was able, on the evidence, to make findings of fact as

to all the ingredients necessary to just the application of s. 40 (1) of the Partnership Act, and it is significant that this evidence was almost entirely elicited from the plaintiff's witnesses by defence counsel, which to my mind again shows that the appellant was prepared to meet a case based on apparent membership. Furthermore the respondent's advocate in his final address referred to s.40(1) of the Partnership Act, and Mr. Khanna replied on the point, and there can be no doubt from reading the judgment that the judge considered that the case had been left to him to decide on alternative causes of action based on actual as well as apparent membership of a firm. I consider that the failure to plead facts justifying the application of s. 40(1) of the Partnership Act was an irregularity, and a serious irregularity, but one which is not fatal to the judgment pronounced in this case, because it was cured by the course of events taken at the trial, which as it proceeded was fought out on a basis which shifted from the pleaded cause of action of actual membership to the unpleaded cause of action of apparent membership, a shift which did not in my view cause prejudice to the appellant as he had obviously come prepared to meet that unpleaded cause of action and was largely responsible for making that unpleaded cause of action an issue in the suit"

This is a decision from a Ugandan case. It is good authority on decisions made by a Court on basis of unpleaded issues.

In the *Dhanji* case the Court of Appeal for East Africa considered the provisions of s.40 (i) of the Partnership Act. The provisions relate to the rights of persons dealing with a firm against apparent members of the firm. By analogy or parity of reasoning, section 18 which is quoted below, cannot be said to have been erroneously relied on by the Court of Appeal in the present case:

"Any person who by words spoken or written or by conduct represents himself or who knowingly suffers himself to be represented, as a partner in a particular firm is liable as a partner to any one who has, on the faith of any such representation, given credit to the firm, whether the representation has or has not been made or communicated to the person so giving credit by or with the knowledge of the apparent making the representation or suffering it to be made"

Mr. Byenkya argued that as the trial judge had found that holding out was inapplicable and there was no cross-appeal, the Court of Appeal erred when
it found that the doctrine applies to the case. The trial judge referred to this point in the following words.

"Since I have already found that in fact the 2nd defendant was a partner in the partnership Aero International Limited the doctrine is not really applicable to the instant case"

I think that what the judge meant was that because he had held that there was partnership, he did not have to consider whether the doctrine was applicable. This issue of holding out was canvassed before the trial judge. I think that as a matter of practice, he should have made a finding in case there would be an appeal, which has happened. I think that as this matter was canvassed in trial Court of Appeal, the Court of Appeal was right in considering and making a finding thereon.

I have already disposed of the issue of holding out. The evidence of Kateiguta, Kamanyi and Kiiza and PW3 established the matter beyond any dispute.

In my opinion ground two ought to fail.
Ground three reads as follows:

3. The learned judges of the Court of Appeal erred in law and in fact in upholding the findings of the learned trial (sic) that the plaintiff had proved special damages to the required standards in particular erred on the following points.

a) Failure to properly evaluate the oral evidence of the plaintiff's witness whereby each of the three witnesses gave contradictory evidence of the quantities and value of cement allegedly supplied while at the same time giving evidence inconsistent with the claim in the plaint.

b) Appearing to take into consideration as evidence of special damages a cheque purportedly issued by the alleged partnership when in fact the said cheque was drawn on the personal account of the appellant's co-defendant and could not in law be treated as evidence of supply or consideration as against the appellant who was not a party to it.

c) Failing to take into account the fact that the alleged supply and delivery of cement could only be strictly proved by the production of the delivery books whose existence he plaintiffs main witness had admitted in his evidence or the oral evidence of the person to whom delivery was alleged to have been made.

In his submissions, Mr. Byenkya referred to the evidence of the plaintiffs witnesses and repeated arguments set out in (a) (b) and (c) above. He contended that the special claim of 147,500,000/= was not proved strictly and that the figures did not tally. However, Mr. Byenkya conceded, quite properly in my view that none of the plaintiff's witnesses were across examined on nor asked to explain the differences. He referred us to the decision of this Court in *A. W. Biteremo v. D. Munyanda Situma* (supra) Court Civil Appeal No.115 of 1991 (unreported) at page 2 of the judgment of Platt JSC, where the learned Justice held that a party who departs from his pleadings should be treated as untruthful and should not have been allowed to testify outside the pleadings. The point, which Justice Platt discussed in his judgment, concerned the different dates given by the defendant Munyanda Situma, which were difference from those given in his defence. I do not therefore think that Biteromo's case is useful to the case of the appellant on damages.

Be that as it may, Mr. Tibesigwa for the respondent contended that the respondent had to prove that the cost of cement was Shs.200m/=, that the appellant purported to pay 200m/= that that payment never materialised and that only Shs.53m/= was paid; that there was a balance of Shs.147m/= Counsel submitted that evidence was adduced to prove these matters and the courts below accepted the evidence and therefore decided that dispute in favour of the respondent.

He referred us to *H.H.llang v M Manyema* (1961) *E.A* 705 at para FH.. .He also cited *S.Sharriff v Singh* (1961) E.A 72 at page 78 for the view that the appellant was liable as partner.

The problem with this ground of appeal is that as the appellant denied liability or any connection with the purchase of cement, he took the course of not challenging the figures pleaded by the respondent. Indeed Francis Kateiguta (PWI) the principal witness for the respondent who testified about the figures of Shs.200rnI- and Shs.147m1- was not cross examined on the differences by Mr. Byenkya who conducted the defence of the appellant.

I have considered the evidence on record particularly that of Kateiguta who testified that because he was paid Shs.53m/- the appellant now owes him Shs.147,500,000/= I have no doubt in my mind that the respondent established the claim for recovery of Shs.147m/- and that the appellant and Kamanyi were liable jointly and severally.

Ground three must fail, in my opinion.
In the last ground (four) the complaint is that:

4. The learned judges erred in law in upholding the trial judge's findings on general damages in the admitted absence on any supporting evidence and in considering principles that would be more relevant to a claim of loss of profit (special damages) or a claim for interest.

The objections in this ground are confusing. I understand the complaint to be:
a) that there was no evidence to support the award of general damages and,
b) that in awarding damages, the trial judge based himself on the principles governing award special damages or interest and that this was wrong.
The learned trial judge awarded the respondent 15m/= as general damages.
At page 23 of his typed judgment, the trial judge said this:
"General damages are discretionary and are intended to place the plaintiff in as good a position in monetary terms as he would have been had the injury complained of not taken place. Phillips v. Ward (1956) 1. ALLER 874. The normal practice is for the plain4ff or his counsel to guide the court as to the quantum of general damages to be awarded, say by illustrating the measure of loss sustained as a result of the act complained of In this case no such guidance was given. In the absence of such guidance, I have however noted that the plaintiff being a commercial enterprise, it must have suffered loss of the use of its 147,000,000/= plus profits that could have accrued from further commercial activities. Doing the best in the circumstances. I award the plaintiff 15,000,000/= in general damages for breach of contract"

This lamentation by the judge conveys the idea that the plaintiff did not show how he was entitled to general damages and that the learned trial judge had to use his god sense of judgment to decide the amount of general damages.

The key witness on damages is Francis Kateiguta (PW1). He described how the transaction was established. How the cheque for Shs.200m/= was dishonoured. How he started looking for the two men. How they became elusive following the dishonour of the cheque. He then prayed for various relief including general damages. In his submissions Mr. Tibesigwa submitted that his client was entitled to general damages among other reliefs. On behalf of the appellant, Mr. Byenkya submitted during the trial, that the respondent has not proved that he had suffered damage. Learned counsel contented that there was no contract and therefore there was no breach.

Did the judge rely on factors irrelevant to the award of general damages?
An appellate Court normally interferes with award of damages on certain principles. To justify an appeal court reversing the amount of damages awarded by a trial judge, the appellate court should be satisfied either that the trial judge acted on some wrong principle of law or that the amount awarded was so extremely high or so very small as to make it, in the judgment of the appellate court, an entirely erroneous estimate of the damages to which the plaintiff is entitled: See *Patel vs. Patidar* (1944) 11 EACA 1, *TRAILL v. Bowker* (1947) 14 EACA 20 and *Obungo v. Municipal Council of Kisumu* (1971) EA 91 at page 96.
On damages, Kateiguta at the end of his examination in chief testified as follows:

"*I am praying payment of Shs.147, 500, 000/= costs and interest on this money which I would otherwise have used. Therefore I ask for general damages* ".

It appears that because of s.49 (1) of the Sale of Goods Act, the remedy for the respondent is to recover the price of goods. In this case it is Shs.147, 500,000/=. It is rare that in contract cases involving sale of goods where the property in the goods has passed to the defendant as in this case, that substantial damages are awarded in additional to interest. In cases like the present, an award of interest is a form of award of damages because interest is, in a way, compensation for loss of use of money, which the plaintiff would have had. This is the principle stated by **Mc-Gregor on Damages** 15th edition,

paragraph *578,* where the following cases are quoted; *Kemp v. Tolland (1956)* **2 Lloyd's Rep 681,** *Miliangos v. George Frank* (Textiles) (1975) Q.B 487 and subsequently as Miliangos (No.2) (19770 **Q.B.489.** The award of such interest is based on the commercial basis that if the money had been paid at the appropriate commercial time, the other side would have had the use of it. In the result I think that the award of Shs.15*m/*= as general damages is wrong and I would allow the appeal to this extent by setting aside the award of 15m/= as general damages. I would however uphold interest on shs.147, 500,000/= at 22% to run from 1/11/1993 till payment. Subject to the conclusions on ground four, I would dismiss the appeal with costs here and below.

Delivered at Mengo this l5 day of February 2000.

J.W.N. TSEKOOKO
JUSTICE OF THE **SUPREME COURT.**
I CERTIFY THAT THIS IS A
TRUE COPY OF THE ORIGINAL
W.MASALU MUSENE
REGISTRAR. THE SUPREME COURT.

JUDGMENT OF WAMBUZI C.J.

I had the benefit of reading in draft the judgment prepared by the learned Tsekooko, JSC. I agree with the criticism of the learned Justice of Supreme Court regarding the memorandum of appeal, which is in essence a written submission. Of late we have time and again referred to rule 81 of the Rules of this Court regarding the form of a memorandum of appeal which must set forth concisely, under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against, specifying the points which are alleged to have been wrongly decided.

I also agree that the pleadings and the evidence accepted by the trial court justify the conclusion that there was a particular partnership between the parties and the appeal against that decision must fail.

Although the matter was not alluded to by the Court of Appeal, I also agree that it was odd for the trial court to strike out a defence on the application of a fellow defendant. On

the face of it, a written statement of defence is an answer to a plaint not to a defence of a fellow defendant. The plaintiff is entitled to judgment if the defendant admits liability, which appears to have been the case here.

I also agree that the damages for breach of contract to pay a sum of money are normally in the form of interest on the amount due. To that extent, I would also allow the appeal. As the other members of the Court also agree with Tsekooko JSC, there will be orders in the terms proposed by the learned Justice of the Supreme Court.

Dated at Mengo this... 15th day of February 2000

S.W.W WAMBUZI

CHIEF JUSTICE.

JUDGMENT OF ODER JSC.

I have had the benefit of reading in draft the judgment of Tsekooko, JSC, with which I agree. The appeal should fail except in respect of general damages for breach of contract. I agree with the orders proposed by Tsekooko,JSC. I have nothing useful to add.

Dated at Mengo this 15th day of: February 2000

A.H.O.ODER

JUSTICE OF THE SUPREME COURT

JUDGMENT OF KAROKORA. J.S.C.

I have had the benefit of reading in draft the judgment prepared by my learned brother, Tsekooko, JSC. I agree with his findings and the orders he proposed. I have nothing useful to add.

Delivered at Mengo this... 15th .day of February 2000

A.N.KAROKORA

JUSTICE OF THE SUPREME COURT.

JUDGMENT OF KANYEIHAMBA J.S.C.

I have had the benefit of reading in draft the judgment of Tsekooko, JSC, with which I agree.

The appeal should fail except in respect of general damages for breach of contract. I agree with the orders proposed by Tsekooko, JSC. I have nothing useful to add.

DATED AT MENGO THIS 15th day of February 2000

G.W. KANYEIHAMBA

JUSTICE OF THE SUPREME COURT.