THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA
AT MENGO

(CORAM: ODOKI,CJ., ODER, TSEKOOKO, KAROKORA AND KANYEIHAMBA.JJ.S.C.)

CIVIL APPEAL No.10 OF 2004.

BETWEEN

BANK OF BARODA (U) LTD……APPELLANT

AND

WILSON BUYONJO KAMUGUNDA…….RESPONDENT

[Appeal from a decision of the Court of Appeal at Kampala before (Okello, Engwau and Byamugisha.JJ.A.) dated 3rd March, 2004 in Civil Appeal No.66 of 2002]

JUDGMENT OF TSEKOOKO, JSC

This is a second appeal. It arises from the decision of the Court of Appeal which overturned the judgment of the trial judge, Katutsi, J., who had dismissed a suit instituted by the respondent to recover shs 80m/= from the appellant.

For easy reference I shall refer to the appellant as the defendant and to the respondent as the plaintiff. The facts of this case are as follows:

Two brothers named Ham Kamugunda and Godfrey Katanywa, owned land upon which they lived in Lake Mburo National Park in Mbarara District. Ham Kamugunda had a son called Wilson Buyonjo Kamugunda, the plaintiff. At some point in time, probably in 1980s, the Uganda Government acquired the land of the two brothers, evicted them from the land and undertook to compensate them. The two brothers died in 1988 before receiving the compensation for their land. The plaintiff got letters of Administration to administer the estate of his father. In the course of his search for the compensation, he learnt from officials of the Ministry of Lands and from the Bank of Uganda that compensation had in fact been effected and that a cheque for shs 80m/= had been issued in the names of the two dead brothers and that the proceeds were in Baroda Bank (U) Ltd, the present defendant. It transpired then that indeed a Uganda Government cheque No.E003100764 for shs 80m/= had been issued on 23rd December, 1996 in the names of the dead brothers.

Apparently, some strange persons impersonated the two dead brothers, got the cheque and with the help of one David Mukasa were allowed by the defendant to open an account in the names of the two deceased in the defendant's Kampala Branch.
Thereafter the impersonators withdrew the money and disappeared in thin air with that money.

The plaintiff failed to get the money. He instituted a suit in the High Court against the defendant and David Mukasa claiming for shs 80m/= as special damages, interest at 26% and general damages. The claim was based on negligence, conversion and fraud. Later, the plaintiff withdrew the suit against David Mukasa.

The basis of the plaintiff's claim was that the defendant acted negligently when it allowed David Mukasa and the other strangers to open an account in the names of the dead beneficiaries of the cheque and negligently allowed those strangers and Mukasa to bank the cheque and also to withdraw the proceeds without verifying whether the persons drawing the money were the true owners. In its defence, the defendant admitted that it collected the cheque in the course of its ordinary business and placed the proceeds to

the credit of **Ham Kamugunda** and **Godfrey Katanywa** account and that it had received payment thereof in good faith and without negligence. It averred that **Ham Kamugunda** and **Godfrey Katwanywa** appeared at its premises and identified themselves. It relied on S.82 of the **Bills of Exchange Act** in defence. It denied negligence.

During what appears to have been a scheduling conference, the trial judge recorded the following as facts agreed upon between the parties:

> ***"Defendant on or about 23/12/96 in its Kampala Branch opened an account-current is (sic) the names of Kamugunda and G. Katanywa and admitted a cheque No.E003100764 to the said account. Bank of Uganda cheque drawn in the names of it. Kamugunda and G. Katanywa for shs 80,000,000m/=(sic). The money was collected and credited to that account and subsequently disbursed."***

Two issues were framed for determination by the trial judge. The first issue which was the substantial one was -

> ***"Whether the bank was negligent in opening a bank account in the names of it (sic) Kamugunda and G. Katanywa."***

The second issue was about reliefs.

After trying the suit in which three witnesses testified for the plaintiff, and the defendant offered no evidence, the learned trial judge answered the issue in the negative and so he dismissed the suit. Upon appeal by the plaintiff, the Court of Appeal, by a majority of two to one, held that the plaintiff established his claim. It set aside the judgment of the trial judge and instead awarded the plaintiff special damages as claimed in the sum of shs 80m/= with interest at 26% from 23rd December, 1996 till payment in full. The defendant has appealed against that decision to this Court based on nine grounds.

Mr. Kanyemibwa and Mr. Ahimbisibwe represented the defendant at the hearing of this appeal but it was Mr. Kanyemibwa who actually argued the appeal. He proposed to argue grounds 1,2,8 and 9 separately but ground 3,4,6 and 7 together. It is convenient to discuss ground 1,2 and 3 together.

The complaints in these grounds are framed in these words -

"1. The learned majority Justices of Appeal erred in law in awarding a sum of shs 80,000,000/= to the respondent as money had and received by the appellant.

2. **The learned majority Justices of Appeal erred in law and fact in holding that in its pleading, the appellant did not dispute the respondent's title or claim to cheque No.E003100764 in the sum of shs 80,000,000/=.**

3. **The learned majority of the Justices of Appeal erred in law and failed to properly evaluate the evidence on record in holding that the respondent adduced sufficient evidence proving title to the said cheque."**

Arguing the first ground, Mr. Kanyemibwa contended that the plaintiff did not aver in the plaint for "money had and received." Counsel relied on **Paget's Law of Banking, 12th Edition**. Learned counsel further contended that the Court of Appeal erred in awarding the whole of shs 80m/= to the plaintiff who had not proved a portion of the money to which he was entitled. For that contention Counsel relied on **Joshi Vs Uganda Sugar Factory** (1968) EA 570.

Mr. Keneth Kakuru, counsel for the plaintiff, opposed the appeal. On the first ground, learned counsel submitted that the defendant admitted receipt of the money. As regards the second ground, Mr Kakuru contended that there was no need to adduce evidence to prove plaintiff's title to the cheque because title to the cheque was admitted and that is why at the trial no issue in that regard was framed for determination.

It is instructive to refer to relevant pleadings.

In his plaint, the plaintiff averred that -

(a) His father H. Kamugunda and G. Katanywa owned the land which was taken over by the Uganda Government.

(b) On 23/12/1996 cheque No.E.003100764 for shs 80m/= in compensation for the said land was issued payable to his father H. Kamugunda and G. Katanywa.

(c) By 23/12/1996, H. Kamugunda and G. Katanywa had died. The cheque was therefore fraudulently obtained by one David Mukasa who obtained the proceeds of the cheque through the defendant.

(d) That the defendant was negligent in that it allowed David Mukasa to use the cheque to open an account in the names of the two dead men without verification of those men and in allowing the withdrawal of the money without satisfactory identification of those entitled to it.

(e) That one Joseph Lukanga, a servant of the defendant provided unsatisfactory identification of the two men before Mukasa withdrew the money on account of H. Kamugunda and G. Katanywa.

In the 1st paragraph of its written statement of defence, the defendant contented itself by just stating that it did not admit the relationship between the plaintiff and H, Kamugunda or that the plaintiff was the administrator of Kamugunda's estate.

In paragraphs 4 and 5 of the same written defence, the defendant expressly admitted receipt of the cheque in the sum of shs 80m/= and the collection of the amount which was put on the account of Ham Kamugunda and G. Katanywa. Indeed, as noted earlier in this judgment before the trial began it was agreed between the parties that that was the position. However the defendant relied on S.82 of the **Bills of Exchange Act** for the proposition that it received the cheque, its proceeds and operated Kamugunda and Katanywa account according to law. It therefore denied negligence.

Mr. Kanyemibwa relied on **Joshi's case** (supra) for the view that in pleadings, an averment of not admitting facts alleged by the opposite party amounts to a denial and so the other side must prove its case. In my considered view the plaintiff adduced sufficient evidence at the trial to establish his relationship with the deceased and his entitlement to the cheque and its proceeds. Furthermore, I think that pre 1998 judicial decisions such as **Joshi's case** on the effect of pleadings must be evaluated in the light of the provisions introduced by the **Civil Procedure (Amendment) Rules, 1998**. For instance, Order 6 Rule 1 of CP Rules as amended requires parties to summarise the evidence

and to list the witnesses and documents they propose to rely on at the trial. Accordingly the defendant indicated in its summary of evidence that it would produce evidence to prove that persons entitled to the cheque were properly verified. It also named three witnesses.
No such evidence was adduced. So **Joshu's case** is not helpful.

During the trial, the plaintiff and two other witnesses testified that his father Ham Kamugunda and his brother Katanywa died in 1988, that is 8 years before the cheque for compensation was issued in 1996. This evidence had been substantially set out in the summary of evidence which was annexed to the plaint. The plaintiff testified further that he is the administrator of the estate of his father. He was supported by Dawson Rugigi (PW1). The plaintiff was hardly cross-examined on his evidence. Nor was he challenged on the relationship with the deceased nor on the fact of his status as the lawful administrator of the estate of his dead father. Indeed the defendant elected not to give evidence, not even to call David Mukasa who was described in the statement of defence as a long standing customer of the appellant who had introduced **"Ham Kamugunda and Godfrey Katanywa."** Neither did the defendant call any of its employees to whom the two persons were allegedly identified when the account was opened in the names of the two dead brothers.
In its written defence, the defendant averred, in para 5, that *"the said Ham Kamugunda and Godfrey Katanywa were duly introduced to the defendant by David Mukasa a long standing customer of the defendant and their account was opened in a regular manner."*
Yet despite that express admission of the involvement of David Mukasa in the opening of the account, the learned trial judge surprisingly accepted the submission at the trial by defendant's counsel that -

> ***"……. the plaintiff undertook to prove that the account in question was opened at the instance of David Mukasa but there is no any iota of evidence that the said person was so involved."***

In this, the learned trial judge erroneously acceded to misleading contentions of defence counsel, because the involvement of David Mukasa at least in the opening of the

account was admitted by the defendant in its statement of defence and in the summary of evidence annexed to that defence.

Mr. Kanyemibwa's contention that the plaintiff never pleaded money "had and received" in order to be entitled to it is, with respect, no basis for saying that the plaintiff was not entitled to the money. Clearly, on the facts of this case, the father of the plaintiff together with his brother (Katanywa) were entitled to the cheque and the money. Undoubtedly there is no evidence showing how much of shs 80m/= was due to each of the two dead brothers. This may be so probably because the two brothers might have been joint owners of the land. This is explicable on the basis that a single cheque was issued in their joint names, instead of two separate cheques. Further the plaintiff was not challenged in cross-examination about what portion of land did not belong to his father. Since the plaintiff is the lawful administrator of his father's estate he is entitled to claim the money. Nobody else has come forward to lay claim on any part of the money. Needless to say, the defendant is not entitled to any portion of that money. So the defendant cannot be the one to require the plaintiff to establish title to only a portion of the money.

In her lead judgment with which another member of the court concurred, Byamugisha, JA., said this-

The plaintiff averred in paragraph 4(a) and (b) of the plaint facts which show his claim or title to the cheque. The paragraph was couched in the following words:

> ***"4(a) The plaintiff's father H. Kamugunda owned land in Mburo National Park together with the late G. Katanywa. The said land was taken over by Government.***
>
> ***(b) on 23rd December, 1996 a cheque No.E003100764 for shs 80,000,000/= ……. drawn on the Bank of Uganda was issued payable to H. Kamugunda and G. Katanywa being compensation for the above land."***

The learned Justice of Appeal then noted that in its reply the defendant simply averred that it had no knowledge of the matters alleged in the above paragraph. Consequently

she concluded that the averments by the defendant did not dispute the plaintiff's title or his claim to the cheque.

As title to the cheque was not made an issue for determination the learned justice held that it was not necessary to call evidence to prove matters that were not disputed by the respondent although she found that the plaintiff had in fact adduced evidence at the trial to prove title to the cheque.

I respectfully agree with the view of the learned Justice of Appeal.
Mr. Kanyemibwa referred us to passages **in Paget's Book** (Supra). First the passage at page 483 under the heading **"Entitlement to Immediate Possession"** are not helpful to the defendant's case. According to the author, it is generally agreed, in stating the requisite for a plaintiff in conversion, that the plaintiff must have been entitled to immediate possession of the chattel at the date of conversion. The author cites cases explaining circumstances when a plaintiff in an action in conversion may or may not succeed. In the present case, there is no dispute that the father of the plaintiff was entitled to the cheque and to the proceeds of it. The plaintiff stood in the shoes of his father upon becoming the legal administrator of the estate of his father. As I stated earlier, title to the cheque and its proceeds is indisputable.

Earlier Mr. Kanyemibwa raised the question of lack of pleading **"money had and received"** in the plaint. At pages 490 and 491, **Paget's Book** (supra) relied on by counsel states, inter alia, that wherever conversion lies, and money has been received or negotiable instrument converted, the claimant many waive the wrong of conversion and sue for **"money had and received"** to his use. The author further opines that the claims are usually joined in the alternative and that this is the form in which the action is couched against a banker who has collected cheque for someone without title. This is not the case here.
All this does not require discussion because the plaintiff's action against the defendant was based on negligence whose basis was, inter alia, that the defendant did not identify David Mukasa properly and that it was negligent in allowing strangers to open an

account and draw the money in the name of the deceased persons.
As noted already, the learned trial judge dismissed the suit on the basis that the plaintiff failed to prove negligence.

In the Court of Appeal, the plaintiff, argued grounds 2 and 3 which were complaints against the findings of the trial judge that no negligence was proved against the bank. These grounds were framed as follows: -

> ***"2. The learned trial judge erred in law and in fact when he did not find that the plaintiff had on a balance of probabilities proved his case.***
>
> ***3. The learned trial judge erred in law and in fact by applying the wrong principles of law to the facts before him and thus reaching the wrong conclusion."***

The learned Justice of Appeal discussed arguments on these two grounds in these words:

> ***"These two grounds concern proof of negligence and who had the burden to prove it. Negligence when used in connection with a banking transaction like the one we are dealing with, refers to breach of duty to the possible true owner. The test to be applied was laid down in the case of TAXATION COMMISSIONER ENGLISH, SCOTTISH AND AUSTRALIAN BANK LTD (1920) AC 683 where it was held that the bank has a duty not to disregard the interest of the true owner. Therefore it has a duty to make inquiries if there is anything to arouse suspicion that the cheque is being wrongfully dealt with. Establishing the customers identity and the circumstances under which the cheque was obtained can assist in doing so."***

The learned Justice of Appeal referred to three other English Courts decisions in which provisions (similar to S.81 and 89 of our **Bills of Exchange Act)** were considered. She relied on the opinions of the English Courts in those three cases, re-evaluated the evidence in the instant case and concluded that -

- The plaintiff had averred in the plaint that the bank failed to verify the identity of David Mukasa who allegedly introduced the two impersonators to the bank.
- Although the Bank denied allowing Mukasa to open the account on which the cheque was deposited, the bank admitted in its defence that Mukasa introduced the two customers who brought the cheque and opened the account.
- The plaintiff proved that Ham Kamugunda and G. Katanywa were dead.
- That the bank admitted that it collected the cheque.
- That the plaintiff proved that the two pictures in possession of the bank were not of Kamugunda and Katanywa (two dead brothers).
- The bank had a duty to prove that in opening the account and collecting the cheque, it exercised due care. She observed that it is a well known recognised practice of bankers in this country not to open an account for a new customer without first ascertaining the respectability of the customer. This is done by obtaining references and letters of introduction from respectable customers of the Bank. In her view the defendant adduced no evidence of the steps and precautions it took to verify the identity of the two impersonators before opening the account and collecting the cheque.
- She concluded that this was negligence. Engwau, JA, concurred with these findings.

I respectfully agree with the opinion of the majority Justices of the Court of Appeal that the bank was negligent in not verifying the identifies of the two strangers before allowing those strangers to open an account upon which they deposited the cheque for shs 80m/=. This amount by ordinary standard was a huge amount of money. It should have aroused the curiosity of the defendant. I think that Byamugisha J.A., properly re-evaluated the evidence on the record before she concluded that the defendant was negligent.

Only one issue was framed at the commencement of the trial. The issue was whether the bank was negligent in opening a bank account in the names of Kamugunda and Godfrey Katanywa without verifying their identity. The contention of the plaintiff was that the bank was negligent in that it did not take obvious steps to verify the identity of the

two persons who opened an account in the names of the two dead brothers. The plaintiff proved that the land of the two had been acquired by Government, which undertook to give compensation to the owners. The plaintiff's investigations showed that the Government had issued out a cheque in the names of his father and his uncle in the sum of shs 80m/= and that that cheque had been banked with the defendant bank.
By the time the cheque was issued out on 23/12/1996 and banked the father and his brother had long died, having died eight year earlier in 1988. There was no evidence from the defendant bank to rebut this evidence. The bank stated in its written defence that the two people who opened the account were introduced by David Mukasa, a long standing customer of the Bank. The bank did not adduce any evidence showing who this David Mukasa, was and for how long he had been a customer to the bank for purposes of showing that he was a reliable and respectable customer upon which the bank could rely to allow the opening of a new account for purposes of depositing a big government cheque.

Byamugisha.J.A, relied correctly on S.106 of the **Evidence Act** for the view that the particulars of negligence pleaded in the plaint that related to the manner of opening the account and collecting the cheque, though pleaded by the plaintiff, were facts especially within the knowledge of the defendant bank and, therefore, the plaintiff had no burden to prove them. That section reads as follows: -

> ***"In Civil Proceedings, when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."***

On the basis of these provisions, Byamugisha, JA found, and I respectfully agree with her, that the burden was on the bank to call David Mukasa or evidence to show who opened the account. Since the bank averred in its statement of Defence and its summary of evidence that it was Mukasa who introduced the two persons in whose names the account was opened whereon the cheque was banked the bank bore the burden to establish this. On this basis it is more probable than not that the alleged David Mukasa was involved in opening the account and in the disbursement of its

proceeds.

By ordinary values, the amount of money involved was reasonably big. As opined by the learned Justice of Appeal, it is a notorious practice in Banks in this country for a new customer to be introduced by customers already known in the bank. The tendency is to require at least two referees. The referees should be reliable and respectable customers. From the bank's averment in its written defence, the two men were introduced by David Mukasa before the account was opened. That implies that the men were strangers in the bank. They did not operate or have an existing account with the bank. A Government Bank of Uganda cheque was involved. Surely the defendant should have inquired how the depositors were entitled to the money, who they were and from where they came. The defendant bore the responsibility of establishing whether the bearers of the cheque were the genuine payees or not before allowing them to deposit the cheque and to draw its proceeds.

I am satisfied that the respondent proved negligence against the bank. In these circumstance I agree that defendant is not protected by S.81 of the Bill of Exchange Act.

Accordingly grounds1 and 2 must fail.
Although Mr. Kanyimibwa initially intimated that he would argue grounds 3,4 6 and together, he actually argued ground 3 separately.

Mr. Kanyimibwa referred to various passages in the judgment of Byamugisha, JA in which the learned Justice of Appeal held that -

- The plaintiff adduced sufficient evidence to prove title to the cheque.
- The plaintiff's evidence was not hearsay.
- The bank collected the proceeds of the cheque.

Counsel then contended that plaintiff's evidence was hearsay and so counsel urged us to accept the dissenting opinion of Okello, JA, that the plaintiff failed to establish title to the cheque.

Mr. Kakuru argued grounds 3,4 and 5 together and supported the majority decision of

the Court of Appeal.

Okello, JA, dissented on the basis that the Plaintiff had failed to prove title to the cheque. According to the learned Justice of Appeal, this was because the evidence of the plaintiff and his first witness (PW1) did not establish that the cheque which was collected by the bank had been for compensation and intended for the dead brothers, **(Ham Kamugunda and Godfrey Katanywa)**, rather than those other persons who appeared at the defendant's Bank and opened the account in those names. Therefore according to the learned Justice of Appeal, the plaintiff failed to establish a prima facie case that he was entitled to the cheque. So the Bank was not negligent in paying out the proceeds of the cheque. With greatest respect, I think that the learned Justice of Appeal put a higher burden of proof on the plaintiff than was necessary. On the facts of this case it would be an extreme coincidence and highly unlikely that two totally strange persons would by coincidence bear names identical to those of the two dead brother, get also a government cheque bearing the same names and the same amount of money and deposit it in the same bank where the Bank of Uganda said the cheque for the dead brothers had been deposited.

Ground three has no substance. I have already covered it in my discussion of grounds 1 and 2. In my opinion, Byamugisha, JA., properly and adequately re-evaluated the evidence before she concluded that the plaintiff established title to the cheque.

Ground 3 must fail.

The complaint in Ground 8 is that the majority Justices of Appeal erred in law and fact in holding that although the particulars of negligence were not proved the defect was cured by admissions of the defendant as contained in the written statement of defence.

I disposed of this ground when I considered grounds 1,2 and 3. Anyway Mr.Kanyemibwa referred to pleadings of both parties and contended that the defendant in paragraph 6 of its WSD specifically denied that Mukasa opened and operated the account on which shs

80m/= were deposited. He contended that the Court of Appeal erred in holding that the burden of proof shifted to the defendant. Mr. Kakuru submitted that upon proof by the plaintiff that Ham Kamugunda and Katanywa were dead, the burden shifted to the defendant to prove that the men were the ones who opened and operated the account. Of course in para 5(ii) of its WSD, the defendant averred that Ham Kamugunda and Godfrey Katanywa were duly introduced to the defendant by David Mukasa, a long standing customer of the defendant and the account was opened in a regular manner. In 5 (iii) the defendant also averred that Ham Kamugunda and God Katanywa duly identified themselves to the defendant.

However the defendant neither explained in the same written statement of defence or the summary of evidence annexed thereto nor gave evidence to show how the two identified themselves. In compliance with the provisions of the Civil Procedures Rules as amended in 1998,the defendant, as stated earlier listed 3 witnesses as its witnesses. None was called. No explanation was offered why they were not called or why they could not testify.

Para 6 of WSD upon which Mr. Kanyimibwa relied was worded thus:

> ***"The defendant specifically denies tat the said account was opened by David Mukasa and operated by him in the names of Ham Kamugunda and Godfrey Katanywa as alleged in the plaint."***

May I point out at the risk of being lengthy that in its summary of evidence which was annexed to the defence, the defendant stated the following:

> ***"The first defendant shall lead evidence to the effect that on 31st December, 1996 it opened a savings account in the names of Ham Kamugunda and Godfrey Katanywa who appeared at the first defendant's premise at Plot 18, Kampala Road and introduced by David Mukasa, a customer of the first defendant. The said Ham Kamugunda Godfrey Katanywa and David Mukasa duly identified themselves to the first defendant's staff upon which the said account was opened. The first defendant accepted the deposit of the cheque of shs 80,000,000/= on the said account which on the face of it was drawn in favour of the said account holders. The said account was***

operated in accordance with the mandate given to the bank."

Needless to say, this summary of evidence is part of defence pleadings. Two features in this summary are worthy of note. First the two drawees of the cheque were introduced to the bank by David Mukasa who was alleged to be a customer of the bank. Second, the two drawees and David Mukasa then identified themselves to the staff of the bank before the account was opened and the cheque deposited on that account.

The defendant never gave evidence. Only two pictures of two strange men in whose names the account was apparently opened were shown to the plaintiff. The plaintiff denied knowledge of them and asserted that those were strangers. The pictures were even not produced nor formerly tendered in evidence. No document in possession of the bank relating to the opening of the account was ever produced in Court to show what steps were taken in verifying the identities of the two strange men and even of Mukasa. The bank claimed that the account was operated in accordance with the mandate given. This mandate was not produced in Court either. Summary of evidence listed that mandate among documents to be produced by the bank. There is no evidence of what the mandate looks like. Did the account operators provide names and specimen signatures? If so, how did they look like? If no signatures, what was the substitute? Again according to the list of documents, which is part of defence pleadings, Ham Kamugunda presented 7 cheques and three savings withdrawal slips. These were apparently in the possession of the defendant when this case was instituted in the High Court. These documents were listed as part of pleadings required by Order 6 Rule 1 as amended by SI 1998 No.26. These documents were not tendered in evidence. They were not shown to the plaintiff or to his witnesses so that he could establish whether, assuming his father Ham Kamugunda could write, he had signed those documents (the cheques, the withdrawal slips and the mandate). In such circumstances, it is legitimate to draw an adverse inference that if such evidence was adduced it would have been adverse to the bank to the effect that the bank was negligent in the manner it allowed the account to be opened and to be operated. The bank bore the burden to show that it was not negligent. In all probability the account was opened and operated by David Mukasa. Therefore ground 8 must fail.

No submissions were made on grounds 4,6 and 7. I take it that the appellant abandoned these grounds. They must accordingly fail.

The last ground is ground nine which was framed thus:

> ***"The learned Justices of Appeal erred in law in awarding excessive interest of 26% p.a from 23rd December, 1996."***

This ground was argued in the alternative for reasons I cannot appreciate. I think that this is an independent ground.

Be that as it may, Mr. Kanyimibwa cited **S.26 of CP Act** and our decision in **Milton Obote Foundation Vs Kennon Training Ltd (S.Ct**. Civil Appeal No.25 of 1995) (unreported) for the views that -

(a) Award of interest is discretionary.

(b) The action in this case arose from a tortuous act and not based on a commercial transaction.

(c) Court did not give reasons why it awarded interest at 26% from, 23/12/1996.

Learned Counsel urged us to grant the rate of 6%.

Mr. Kakuru was of contrary views. That 26% rate was proper because the court had to put the plaintiff in the same position as before. That this was a commercial transaction. That the Court rates applied only after judgment.

The plaintiff did not indicate in his plaint and when he gave evidence why he claimed interest at the rate of 26%. In written submissions at the trial, counsel for the plaintiff submitted that the defendant was a banking institution having a commercial relationship with the plaintiff who should get interest on his money for the use of which he was deprived unlawfully. The learned trial judge said nothing about these submissions other than dismissing the suit.

In the Court of Appeal all the three justices recorded Mr. Kakuru who appeared for the plaintiff (as appellant then) as having asked for interest at the rate of 21% p.a from 23/12/1996.

Starting with the submission on interest in the Court of Appeal the Court did not explain why it awarded 26% instead of 21% asked for by the plaintiff in that Court.

The law on the subject of interest is well known. By virtue of S.26 (2)-

> **"Where and in so far as a decree is for payment of money, the court may in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit with further interest at such rate as the Court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit."**

It is clear from these provisions that -

- Where there is no agreement between the parties as to the interest of rate payable, award of interest by Court is discretionary. The discretion must be exercised judiciously.

- Interest can be award as follows:
  - (i) Interest on principal sum prior to the institution of a suit.
  - (ii) On the principal sum at a given rate from the date of filing a suit.
  - (iii) Interest on aggregate sum reflected in the decree till payment or earlier.

It is evident that in awarding interest and at what rate the court is guided by the circumstances of the case.

An award of 26% as interest in this case is on the high side. The circumstances given do show that the plaintiff lost use of money due to him but they do not show why he should get the high interest rate of 26%. I would set aside the award of interest at the rate of 26% p.m. I would substitute the rate of interest as follows: -

(a) Interest at 10% p.a from 1/1/1997 to 31/12/1998 prior to the institution of the suit.

(b) Interest at the rate of 8% p.a from 31/12/1998 when the suit was instituted to 3/3/2004 when the Court of Appeal gave judgment in favour of the plaintiff.

(c) Interest at the rate of 6% p.a from date of judgment till payment in full.

So ground 9 succeeds partially.

I would dismiss the appeal with costs to the plaintiff in this court and in the courts below.

I would vary the decree of the Court of Appeal as regards the rate of the in the manner discussed above.

JUDGMENT OF ODOKI, CJ

I have had the advantage of reading in draft the judgment prepared by my learned brother, Tsekooko, JSC. I agree with him that this appeal should be dismissed with the orders he has proposed.

As the other members of the Court also agree, this appeal is dismissed with orders as proposed by Tsekooko JSC.

JUDGMENT OF ODER, JSC.

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

I agree with him that the appeal should be dismissed. I also agree with the orders proposed by him.

JUDGMENT OF KAROKORA, JSC:

I have had the advantage of reading in draft the judgment prepared by my learned brother, Justice Tsekooko, JSC, and I agree with him that this appeal has no

merit and must therefore be dismissed with costs to respondent as he has proposed.

JUDGMENT OF KANYEIHAMBA, JSC.

I have had the benefit of reading in draft the judgment of my learned brother, Tsekooko, J.S.C and I agree with him that this appeal be dismissed. I also agree that the respondent be awarded costs as varied by the proposed order of Tsekooko, J.S.C.