THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CORAM: HON. DEPUTY CHIEF JUSTICE L.E.M. MUKASA-KIKONYOGO,
HON. LADY JUSTICE C.N.B. KITUMBA, JA
HON. MR. JUSTICE S.B.K. KAVUMA, JA

CIVIL APPEAL NO.9 OF 2001

KYAGALANYI COFFEE LTD :.::APPELLANT

VERSUS

STEVEN TOMUSANGE ::RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Uganda given Kampala on the 1st September 2000 (Justice Herbert Ntabgoba presiding) in H.C.C.S 981 of 1997)

JUDGMENT OF THE HON. JUSTICE L.E.M. MUKASA-KIKONY000, DCJ

This appeal is lodged to this Court by Kyagalanyi Coffee Ltd, 30 hereafter to be referred to as the appellant. It is brought against the judgment and decree of the High Court delivered at Kampala on 1st September 2000.

The brief facts are that in December 1989, Steven Tomusange, the respondent, started dealing with the appellant by selling to it processed coffee. At that time the respondent was using his own capital which was in the sum of 20-30 million shillings. As his business grew and due to his hard work, an arrangement was made between them where the appellant agreed to pre-finance the respondent. The agreement was that the respondent would be advanced with various amounts of money depending entirely on the discretion of the appellant's administrative manager, one Ms. Miranda M.C. Laughlan until the coffee buying session was over.

In short the pre-financing agreement would be for a specific coffee period. On its expiry another one would be made or the existing one extended. It was also agreed by the parties that repayment

would be in-kind, namely by delivering coffee to the appellant equivalent to the amount advanced to him in cash.

As a pre-financing condition precedent the respondent was required to do the following:

a) **To deposit his land title on which there is a nightclub and other buildings valued at shs. 180.000.000/= comprised in Singo Block 160 Plot 54.**

b) To sign a transfer of the above land in favour of the appellant to be used in the event of default.

c) To provide a post dated cheque as further security.

The respondent fulfilled the above three requirements.

In December 1996 it appears a misunderstanding occurred between the respondent and appellant and they fell apart. The new and last pre-financing agreement between them was on 9/11/96 Exh. 22 for a maximum of Ug. Shs. 80 million. According to the respondent from 9/11/96 he was advanced with various sums of money below the value of the security cheque shs. 80.000.000/= and he correspondingly delivered all the coffee that was due. For all the period the respondent was advanced with money, he made post-dated cheques as security. He never paid back in cash but in kind, that is by delivering coffee.

Further, the respondent claimed that he was forced to sign two acknowledgments of indebtedness dated 20th and 21st December 1996. He was subsequently handed to the police for prosecution, on the dishonoured cheque; he allegedly fraudulently bounced on the appellant. He was later charged and prosecuted under **S. 385 (1) (b) of The Penal Code Act.** He was convicted and sentenced to 2 years imprisonment by Magistrate's Grade 1 Buganda Road Court. He was, however, acquitted on appeal after he had served 8 months imprisonment.

On the other hand it was the appellant's case that they had agreed to finance the respondent on a revolving basis. Sometime in 1996 the respondent failed to deliver coffee or pay back sums of money advanced to him by the appellant. The appellant, hence, decided to enforce the securities

given to it. It first banked the cheque worthy shs. 80 million which was dishonoured. When the said cheque bounced, the appellant decided to take over the respondent's nightclub.

Further the respondent signed an agreement Exh. D24 to acknowledge he owed money to the appellant and had presented a cheque which was unpaid. He also signed another agreement Exh. D 25 to acknowledge his total indebtness to the appellant. When the respondent failed to either supply coffee or refund the cash which had been advanced to him, the appellant handed him over to the police and had him prosecuted. On his release the respondent filed this suit against the appellant in the High Court. The complaints in his plaint included wrongful arrest, malicious prosecution and defamation. He also made a claim for financial loss.

The appellant, too, filed a counter claim for shs. 87.215.051/= together with general damages for breach of contract and costs. The counterclaim was disputed by the respondent.

At the close of both the appellant and respondent's cases the learned trial judge entered judgment for the respondent and awarded him the following reliefs.

(i) shs- 11.550.000/= for legal fees in the High Court and Magistrate's Court.

(ii) shs- 75.000.000/= for loss of income from the night club.

(iii) Shs- 20.000.000/ for malicious prosecution

(iv) Shs- 1.000.000/= for injury to the reputation and

(v) Shs- 10.000.000/= for the trespass damage to the night club

(vi) Order to return Kasisira Night Club to the respondent

(vii) Permanent injunction against further trespass against Kasisira club.

The learned trial judge, however, pointed out to the appellant that as for the securities given to it by the respondent for securing pre—financing agreement, it was free to enforce them in accordance with the law. The appellant was ordered to pay the costs of the suit and counterclaim. The rate of interest was fixed at 20% p.a from the date of judgment till payment in full.

Aggrieved by the judgement and orders of the High Court the appellant instructed its counsel, Mr. Shonubi, to file this appeal. The memorandum of appeal contains the following seven grounds: -

1. The learned, trial judge erred in law and fact when he relied on wrongly recorded evidence of one of the appellant's witness one Miranda Jane Bowser (Ms) DW2 the consequence of which caused or mistrial.

2. The learned trial judge misdirected himself as to the law governing mortgages.

3. The learned trial judge misdirected himself on the facts and the law regarding bounced cheques and postdated cheques and cheques which are issued as security.

4. The learned trial judge misdirected himself as to the facts and the law governing signed documents and duress.

5. The learned trial judge misdirected himself on the facts and law regarding defamation.

6. The learned trial judge erred in law and facts, when he failed to appraise properly all the evidence adduced in the suit which caused him to arrive at a wrong conclusion, had he to have appraised properly all the evidence on record he would have found in favour of the appellant.

7(i). The learned trial judge erred in law and fact when he allowed a sum of shs-11.550.000/= as legal fees when there was no evidence to show that that money had been paid out by the respondent who confirmed in evidence that he had paid shs. 2 million only against the lawyer's fee note.

(ii) The learned trial judge erred in law and fact when he awarded a sum of shs. 75.000.000/= for loss of earnings from property which had been voluntarily surrendered by the respondent to the appellant and where no loss as such had been proved.

(iii) The learned trial judge erred in law and fact when he awarded shs. 20.000.000/= to the respondent for malicious prosecution when there were valid reasons to justify the arrest prosecution and detention and where no loss as such was proved.

(iv) The learned trial judge erred in law and fact when he awarded shs. 1.000.000/= to the respondent for injury to his reputation when his arrest, prosecution and detention were justified and no such injury had been proved.

(v) The learned trial judge erred in law and fact when he awarded shs. 10.000.000/= for trespass yet the appellant occupied the respondent's property by consent. Counsel prayed court to allow the appeal set aside the judgment and orders of the trial court aád grant the following reliefs.

(a) Order to set aside the decree of the High Court
(b) An order for a retrial or
(c) In the alternative to enter judgement for the appellant for shs. 87.2 15.051
(d) An order for fore closure be issued
(e) Costs to the appellant in this Court and the High Court
(f) Any further relief

Counsel for the appellant proposed to argue grounds 1 and 6 together, 2 and 3 separately, 4 and 5 together and eventually 7 last and separately. I also propose to adopt the same approach 20 when considering the submissions of both learned counsel.

Grounds 1 and 6

As far as the appellant is concerned, its counterclaim against the respondent amounted to shs. 87.215.015/=. The said counterclaim was dismissed by the learned trial judge on the ground that it had not been proved. The gist of the appellant's complaint in grounds, 1 and 6 is that the learned trial judge did not properly evaluate the evidence which caused him to make wrong conclusions. He also misrecorded some of the evidence. The appellant is not challenging the record of proceedings but was only pointing out that there was misrecording by the judge. There

was no need, therefore, to invoke **Rule 86(8) of The Rules of the Court** as suggested by counsel for the respondent.

Further, counsel pointed out that Kabula Auditor's Report was misunderstood by counsel for the respondent. He explained that the indebtness complained of by the appellant relates to the year 1996. Accumulations leading up to shs. 87.215.015 million were incurred after the year 1995 and the Kabula Auditors Report. Counsel also referred this Court to Exhibit D12 at page 237 of the record entitled "Advance Account".

Paragraph 4 which reads as follows:
"The seller also agrees that his account as of to-day before the advanced sum is given stands at zero. Any discrepancies raised over the outstanding balance have now been resolved to the seller's full satisfaction by his own accountants Kabula & Co of Mityana".

To counsel, this was a clear manifestation that no money was owed to the respondent. He submitted, that it was also a confirmation that the accounts were correct as presented but not as found by the learned trial judge. In a nutshell, the contention of the appellant is that it was entitled to payment of the counterclaim by the respondent and did not owe any money to him.

For the respondent, it was submitted by his counsel that on the 30 evidence before the trial judge the counterclaim was not proved. He rightly dismissed it with costs. Counsel argued that the evidence of DW1, Paulo Mugambwa and DW2, Mrs. Miranda Jane Browser, stating the respondent's indebtness was contradictory and therefore, unreliable. DW2, clearly, stated that the respondent did not owe any money to the appellant. Counsel for the respondent submitted that it was too late to challenge the recording of the evidence particularly in view of the provisions of **Rule 86(8) of the Rules of this** Court which read as follows: -

> **"Each copy of the record of appeal shall be certified to be correct by the appellant or any person entitled under rule 22 to appear on his or her behalf".**

As counsel at page 1 of the record of appeal certified that the record of appeal was correct, it must be taken as it is. The proper inference for Mr. Nkuriziza is either that the witness was unreliable or was not telling the truth. Further, when the post dated cheque, the respondent had given to the appellant bounced; he was under duress made to sign two agreements of indebtness on 20th and 21st December 1996 in the presence of the police. The respondent, although believed may have owed the appellant some money, had expected to have reconciliation of accounts done as indicated by his own admission that

"I believe I might owe them some money since we have not sat with them to discuss".

To counsel for the respondent, the above statement tallied with the finding of the learned trial judge that the counterclaim was not proved. In his opinion, instead of reporting the matter to the police and prosecuting the respondent under **S.385 (1)(b) of the Penal Code Act** for the bounced cheque, the appellant should have proceeded under the proper procedure laid down under The Mortgage Decree. The appellant did not enforce the securities in accordance with the law which the learned trial judge considered detrimental to the appellant's counterclaim.

I have had a careful perusal and conclusion of all the arguments advanced by both counsel as well as the record and relevant provisions of the law. As the first appellate court we have a duty under **Rule 29 of The Rules of** this Court to appraise the evidence on record and come out with our own conclusions on the issue or issues before court. There is documentary evidence to show that shs. 80 million was advanced to the respondent in accordance with the pre-financing agreement. There is also evidence that confirms some other small amounts paid to the respondent which made up the final figure of shs. 87.215.015/= claimed in the counterclaim. In any case the respondent does not dispute the advance of shs. 80 million and the post dated cheque in that sum which bounced on presentation to the bank. There is no doubt the respondent must have been indebted to the appellant at that time for that amount. I, however, agree with counsel for the respondent that the cheque had been deposited with the appellant as security, for a loan in cash to enable the respondent buy coffee.

It is true there were some discrepancies which were admitted by counsel for the appellant but they were minor in my view. In any case they were satisfactorily explained away. Further, as rightly pointed at by Mr. Shonubi, there were also similar contradictions in the respondent's case which the appellant treated in the same way and ignored.

With regard to the observation by the learned trial judge that due to non compliance with the laid down law namely **sections 7 and 8 of the Mortgage Decree** the appellant failed to determine the correct amount, this was satisfactorily answered by counsel. Moreover, counsel for the appellant argued that all the evidence including the respondent's signature showed that the respondent owed shs 87.205.015/= to the appellant. He again pointed out that as much as a secured loan was shs. 80 million the cumulative amount owed by the respondent vary on daily basis. It cannot be disputed, therefore, that at least the respondent owed shs. 80 million to the appellant for which he had issued the bounced cheque. I cannot be persuaded to believe that the respondent would have written out that cheque and deposited it as security if he had delivered all the coffee due. On a close examination of the learned trial judge's evaluation, it comes out clearly that the respondent apparently does not dispute the indebtedness as such. All that he says is that the figure was not determined and not proved.

I am inclined to accept Mr. Shonubi's submission that had the learned trial judge properly appraised the evidence he would have reached a different decision. He would have found that the respondent was indebted to the appellant. Here I am fortified by the learned trial judge's concluding remarks on the counterclaim that:

> **"I must, however, point out that so far as the securities deposited with the defendant to secure the pre-financing agreement, the defendant is free to enforce them in accordance with the law."**

This statement confirms liability. If as he had found, the respondent was not indebted to the appellant, why did he not order for the return of the securities to the respondent but advised the appellant to keep them and use them to recover its claims. The appellant is at least entitled to recover shs. 80 million from the respondent. In the premises grounds 1 and 6 must succeed.

Ground 2

With regard to ground 2, it was contended on behalf of the appellant that the learned judge was mistaken that there was foreclosure in this case when there was not. The prayer in the counterclaim asks for foreclosure as an alternative. The procedure adopted in this case was different from the foreclosure of mortgages defined by the learned trial judge, instituted by way of a plaint or originating summons. Counsel agreed that the procedure expounded by the learned trial judge was not wrong. However, in the instant case the appellant took possession of the security by virtue of agreement under Exh. D 24 and Ex D25 but not by the way of foreclosure of the mortgage in accordance with The Mortgage Decree.

In accordance with the respondent's consent in the agreement 30 Exh. D24, counsel for the appellant argued that there was no trespass committed by the appellant. It was invited to the land. The question of Section 2 of The Mortgage Decree did not arise. This Court was referred to the case of **Barclays Bank vs. Gulu Millers Ltd 1959 EA 540** where the Court of Appeal of Uganda held that **"the issue of a plaint to enforce an equitable mortgage would be sufficient notice to satisfy the requirements".** As conceded by counsel for appellant, the learned trial judge stated the correct position of the law relating to foreclosure of mortgages. He also conceded that the learned judge rightly found that there was no foreclosure.

For the respondent it was argued that even if there was no foreclosure in accordance with the provisions of The Mortgage Decree, still taking possession in the manner it was done was unlawful and mounted to trespass.

I accept the submission of counsel that the learned trial judge cannot be faulted on his finding on the definition of foreclosure of mortgage. The appellant should have complied with the provisions of the relevant provisions of the law whatever method it chose. However, according to its counsel, it had not intended to apply for the foreclosure of the mortgage at that stage. It decided to take mere possession in accordance with the respondent's consent under Exh. D24. Be that as it may, even if the act of taking possession was not done in accordance with the laid down procedure the respondent was still indebted to the appellant.

My concluding observation is that although there was non-compliance with the laid down procedure to foreclose a mortgage or to take possession of the land in accordance with the law, that act was not of much consequence except with regard to the damage caused to the property and the failure by the appellant to mitigate costs. It is, for example, hard to find the reason for locking up the nightclub, Kasisira, instead of operating it and make accountability. Clearly, the omission led to financial loss. A pending suit could not stop operation of the nightclub as it was suggested by counsel for the appellant.

However, I do not agree that the appellant committed trespass because there was an agreement between the parties on the matter. I have not been able to find evidence to support the learned trial judge's finding that the respondent was through undue influence, and duress forced to sign it and that in fact was done in a high handed manner. I, however, agree that the respondent was in a bad financial state but did not dispute the indebtness. This of course did not give the appellant liberty to violate the respondent's other rights. This ground must fail.

Grounds 3 and 7(iii)

With regard to ground 3, I do not accept the submission of counsel for the appellant criticizing the trial judge for misdirecting himself on the law regarding bounced cheques and post dated cheques and cheques which are issued as security. In view of the pre-financial agreement between the appellant and the respondent the bounced cheque did not fall under the ambit of S. **385(1) of The Penal Code Act** which reads as follows:

> **"Any person including a public officer in relation to public officer in relation to public funds**
> **(b) issues any cheque in respect of any account with any bank when he or she has no reasonable ground, proof of which shall be on him or her to believe that there are funds in the account to pay the amount specified on the cheque within the normal course of banking business".**

In the context of the pre-financing agreement, the bounced 10 cheque was offered and deposited with the appellant as security. This was acknowledgment of a loan advanced to him on the

agreement between the parties. It was post dated because he did not have the funds. In the present case the respondent's post dated cheque was not a representation that on that date there would be sufficient funds to repay the loan of shs. 80 million. I am mindful of the two documents signed by him admitting issuing the cheque fraudulently, those were written after he had failed to deliver coffee and had no cash either. He, apparently, was under a precarious financial position. The respondent's case did not come under **S. 385 (1) (b) (supra)** because the repayment was not in cash but in kind. He repaid by delivering coffee equivalent to the amount of cash advanced to him. There had never been any default until the bounced cheque.

It cannot, therefore, be correct to say that the respondent fraudulently bounced the cheque for 80 million shillings on the appellant. I, therefore, reject the submission of the counsel for the appellant that the appellant had reasonable and probable cause to report the matter to the police. The respondent had not issued the said cheque to bounce but as security to acknowledge the loan advanced to him. When issuing the cheque the respondent did not make representation to the appellant that there were funds on the account. The agreement between them was to deliver coffee. Even if the cheque was not dated that per se would not be evidence of fraud. When issuing the cheque both parties knew that there were no funds on his bank account. This position is in my view similar to that of a post dated cheque where in the case of **Abdallah vs. Republic 1970 E.A 657** it was held inter alia that **"the giving of a post dated cheque is not representation that there are sufficient funds to meet the cheque".**

The learned trial judge stated the correct position of the law relating to bounced, post dated cheques and those deposited for security. He, therefore, came to a correct decision that, the appellant should not have treated the case of the bounced cheque as a criminal case under S. **385 (1) (b).** Malicious prosecution was proved. There was no justification for handing the matter over to the police.

With regard to the quantum, the appellant is contesting the award of shs. 20.000.000/. From my observation above I do not accept the submissions of counsel for the appellant that there were valid reasons for the arrest, prosecution and detention of the respondent. On the arguments relied on by counsel and as admitted by him, it is clear the appellant feared financial loss, realizing the

precarious financial position the respondent was in and handed him over to the police. As the record stands the three ingredients of malicious prosecution were established.

They are as follows:

a) **the appellant instituted the proceedings**

b) without reasonable or probable cause

c) the respondent suffered damages and the proceedings were terminated in his favour.

The appellant, despite the understanding between the parties, handed the respondent to the police, had him charged and prosecuted. In view of the previous dealings and relationship between the parties the appellant had no probable and reasonable cause to take that action. There is no doubt the respondent suffered damages as will be seen including serving a sentence of imprisonment. The proceedings were terminated in his favour when he was acquitted by the High Court. I reject counsel's submission that the respondent guaranteed the appellant that the money would be there. The respondent in my view did not commit any offence, he was just desperate due to the bad financial situation the appellant admitted, he was in. This was clearly proved by the criminal proceedings which were determined in his favour. I agree it was actuated by malice which is the basis of this suit. Relevant authorities to this point include **Egbema vs. West Nile District Administration 1972 EA 60** and **Mbowa vs. East Mengo Administration 1972 EA 352, Kateregga vs. Attorney General 1973 EA 287.**

In view of the aforesaid observations, the award of shs. 20.000.000/= was not excessive. Even if there was no duress as described by the learned trial judge, the respondent suffered considerably. At the time of signing the two agreements Ex. D24 and 25, he saw the threat of arrest. He was subsequently arrested, charged with issuing a fraudulent cheque, prosecuted convicted, and sentenced to 2 years' imprisonment. He served 8 months' imprisonment. On leaving prison he found his nightclub locked up and in a sorry state. I would uphold the award of shs. 20 million as appropriate.

The criticism on ground 4, that the trial judge misdirected himself as to the facts and the law governing signed documents under duress, I agree with some of the findings of the trial judge but

not entirely. I differ from him and I would refrain from holding that duress was used to force the respondent to sign Exh. D.24 & 25. It is true, however, that, considering his dealings with the appellant the matter should not have been handled in such a harsh manner. Knowing that the respondent was indebted to the appellant he had no option but to admit the indebtness. It is true he was in a precarious financial position and as such had no financial bargaining power but that cannot in my view be described as duress. He owed the appellant money. Besides, as it was rightly submitted by counsel for the appellant, there was no proof of the presence of a policeman. The agreements talk of handing him over to the police in default which was subsequently done. I concede that the appellant was attempting to protect its genuine and legitimate business and commercial interests. However, considering the dealings between them for all those years, the appellant should not have reported the matter to police and treated the respondent the way he was.

On grounds 5 and 7(iv), the gist of the complaint by the appellant is that the learned trial judge misdirected himself on the facts and law relating to defamation and reputation. The trial judge was faulted for considering reputation in connection to foreclosure, when in fact there has never been any. The respondent's nightclub was lawfully possessed with the consent of the respondent. Counsel argued that defamation of himself or business could not arise. The allegation that some defamatory words were uttered during the taking over of the nightclub cannot be true. This is because PW3, Kefa Nyanzi, testified that there was no one present when they took over. There was nobody to utter those words to. Further, counsel argued that the statement contained in the plaint, paragraph 14, cannot be described as defamatory since it is true. The respondent issued a bounced cheque. Court was referred to **"Arnold vs. Hattonley (1908) 2K.B. 151** reported in Introduction to the law of Tort by **Syed Shah Zeyaur Rahman** at page 51 where it was held that

> **"If the defendant can prove that defamatory statement is true he has an absolute defence, however malicious or spiteful he may have seen. It is not necessary that the defendant should justify the truth of every word used so long as the whole statement is substantially true."**

In the instant case counsel argued that the respondent's reputation was not proved or shown to be affected. The evidence showed that the alleged reputation of the respondent was connected with money. It reduced when his financial position waned.

For the respondent, his counsel replied that the fundamental question the trial judge was considering was whether the reputation of the respondent and that of his business was injured by the acts of the appellant. To illustrate this point, when the respondent was released from prison people kind of shunned him. He was called a crooked person who had stolen shs. 80 million from the appellant. His customers abandoned him. The respondent was a famous man in the area so his good name was tarnished. He had to leave Mityana because after the imprisonment he was no longer trusted by any customer. He was forced to move to Mubende. A part from business the respondent was a very good Christian and used to give donations to Church. As far as the respondent is concerned, the learned trial judge rightly found that defamation was proved.

On the evidence on record the respondent's reputation was tarnished. The circumstances in which the respondent was imprisoned speak for themselves. They had to affect his reputation. Nobody would respect a businessman or anybody who was arrested, charged with fraudulently issue of a cheque, or theft, convicted and imprisoned. There is undisputed evidence that his customers deserted his nightclub. He was forced to remove himself from Mityana to Mubende. As the evidence stands on record defamatory statements about the respondent were uttered.

Although it is true the respondent issued a bounced cheque, the appellant did not have to handle his case the way it did. There was no evidence of fraud or intention to convert 80 million to his own use. There was no justification for prosecuting him. Their money could have been recovered through other respectable ways. I am unable to fault the learned trial judge for the finding on the reputation of the respondent and business. The award of 1 million was also appropriate. Ground 7(iii) and (iv) must fail.

Lastly under ground 7, which has been partly dealt with the appellant expressed dissatisfaction with the awards of damages given to the respondent, on the rest of the subheads and asked court to set them aside.

The principles governing interference or review of awards of damages by a trial court are well settled. It has to be shown that it was based on a wrong principle or it was inordinately high or low and in fact resulted in miscarriage of justice. These principles have been reiterated in a number of cases including: **Mbogo and Another vs. Shah 1968 EA. 93 and Robert Chossens vs. Attorney General C.A. No. 8 of 1999 (SCU).**

With regard to ground 7(i) the complaint by the appellant is that the learned trial judge should not have awarded shs. 11.550.000/= without evidence that it had been paid. No documentary evidence was produced to prove payment of legal fees. In any case there was no malicious prosecution of the respondent. The respondent produced no receipts at all but only fee notes Exh. 5 and 6 on page 213 and 214.

For the respondent, it was rightly conceded that special damages must be pleaded and proved. However, as it was rightly pointed out by counsel for the respondent production of receipts or documentary evidence is not the only method of proof. In the instant case the respondent in his testimony stated the amount required to meet he expenses incurred in connection with his defence both in the High Court and magistrate's court.

I agree with counsel for the appellant that documentary evidence especially receipts is very reliable evidence of payment. However, it is not exclusive. In the instant case, the respondent's oral evidence of the money required. The trial judge who saw and heard him, believed his evidence. He saw his demeanour but we did not. In the circumstances I have no reason to interfere with his award. In **CA No. 10 of 2002(unreported) SCU Lutaya vs. Attorney General,** following with approval the decision in **Kampala City Council vs. Nakaye 1972 EA 446, the Supreme Court** gave some guidelines on the award of special damages. There is nothing to stop a court from basing an award of special damages on oral evidence if believed and found reliable. Such award was upheld by the **E.A Court of Appeal** in the case of **Kampala City Council vs. Nakaye 1972 EA 446.** The court accepted oral evidence as to the plaintiff's loss and claim when she proved to court that the receipts were lost.

Coming back to the present case, I find it similar to the two cases and for the same reasons; I would not interfere with the award given to the respondent for legal fees. It appears he convinced the court that shs. 11.550.000/= was the total fees he had to pay to his advocate.

Another award of damages contested is shs.75 million for loss of earnings. Counsel complained that it was not based on any documentary evidence but on Nansubuga's guessing. As far as counsel was concerned the trial judge did not properly exercise his discretion. The award of shs. 75 million was, hence, not justified. Further, counsel pointed out that damages for loss of earnings had to be specifically proved which was not done here. It was wrong for the trial judge to award such a high sum of money in light of the evidence that when the appellant took over the club it was not functioning and had been abandoned.

In reply, counsel for the respondent argued that shs. 75 million was awarded as general damages and not special damages. In any case he argued that it is permissible to award general damages for loss of earnings where special damages have not been specifically proved.

In this case there is evidence to show that the respondent was earning income from the nightclub. The respondent based his claim at the rate of shs. 3,620.0001= per month and interest at 20% p.a. There was also the oral evidence of Annet Nansubuga, PW2, to the effect that she used to sell drinks like, sodas or beer earnings from the nightclub. The learned trial judge examined in detail the sources of income in the respondent's nightclub. Clearly, there was evidence of financial loss but the witnesses and in particular Nansubuga were not sure of the figures. The learned trial judge decided, therefore, to award the respondent general damages instead of special damages as PW2 had no access to the records which had been locked in the appellant's access to the records.

With regard to the quantum in my view it was appropriate in the circumstances including the imponderables. The respondent was in prison, there is no way he would have properly managed his nightclub during that time. This Court was referred to the case of **Benedicto Musisi vs. Attorney General 1996 KAR 91** where Nyamuchoncho JA held that

“The respondent is entitled to general damages as a consequence of the detention of his bus since he cannot prove his actual earnings.”

This case is almost on all fours with the present one. The respondent had been imprisoned on the report of the appellant. Subsequently, his nightclub was taken over and locked up. No attempt was made to operate it with view of mitigating damages. The award of shs. 75 million was justified. It is upheld.

Another subhead of damages challenged is shs. 10.000.000/= for trespass to the respondent’s nightclub. It was contended for the appellant that there was no trespass committed. The occupation was by invitation under the agreement Exh. D 24. The nightclub had been offered as one of the securities. It was submitted that no damages to the property was caused by the appellant.

In reply, counsel for the respondent argued that liability for trespass is strict so that any person entering on the land of another is sufficient ground for an action in trespass and neither mistake nor inadvertence will afford a defence.

Upon listening to the submissions of both counsels on this issue I am inclined to accept the submissions of the learned counsel for the appellant. The respondent having made an agreement in which he consented to giving possession to the appellant, he would be estopped to complain of trespass. With respect, I do not agree with the learned trial judge that the circumstances in which the appellant took possession of the nightclub amounted to trespass. This subhead must succeed.
In the result I would allow the appeal in part and as Kitumba JA and Kavuma JA also agree, this appeal is allowed in part and judgment is hereby, entered in the terms and orders set out below: -

A **(1) Awards and orders to the appellant**

(i) **The order of the High Court dismissing the counterclaim is hereby set aside and substituted with judgment for the appellant against the respondent for special damages in the sum of shs. 80 million (bounced cheque).**

(ii) **The award of shs. 10 million given to the respondent against the appellant for trespass and damage to the respondent's property is hereby set** aside**.**

(iii) **The securities deposited with the appellant under Exh. D 24 & D 25 be retained by the appellant till payment of the outstanding debt.**

(iv) **The appellant is at liberty to enforce the securities by way of foreclosure or any other mode in accordance with the law**

B (2) The following awards of damages made by the trial court 10 in favour of the respondent against the appellant are upheld.

(i) **Shs- 11.550.000/= being legal fees in the criminal proceedings in the High Court of Uganda and Magistrate's Court.**

(ii) **Shs- 75.000.000/= being loss of income from the respondent's Kasisira nightclub.**

(iii) **Shs- 20.000.000/ for malicious prosecution**

(iv) **Shs- 1.000.000/= for injury to the reputation**

The appellant is awarded ¼ of the costs and the respondent is given 3/4 of the costs on each award both in this Court and the court below with interest fixed at 20% p.a. from the date of judgment till payment in full.

JUDGEMENT OF C.N.B. KITUMBA, JA.

I have had the benefit of reading in draft the judgement of Hon. Mukasa Kikonyogo, DCJ. I entirely agree with it.

However, I would like to make the following observations. The appellant's action of reporting the respondent to the police and initiating criminal proceedings against him for the bounced cheque was to say the least, an abuse of legal process. The appellant was well aware that the respondent did not have money in the bank when he issued the cheque. The cheque was issued in good faith as a security for the debt. It was wrong for the appellant to waste police and the criminal court's time on matter that was purely a business transaction and civil. The learned trial

judge was right to find the appellant liable for malicious prosecution and defamation and to condemn it in damages.

JUDGMENT OF S.B.K. KAVUMA, JA.

I have had the benefit of reading in draft the judgment of Lady Justice 25 L.E.M. Mukasa-Kikonyogo, DCJ. I concur and have nothing useful to add.

Dated at Kampala this 8th day of February 2006.

L. E. M. Mukasa
HON. DEPUTY CHIEF JUSTICE

C.N.B. Kitumba
JUSTICE OF APPEAL

S.B.K. Kavuma
JUSTICE OF APPEAL