THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

HOLDEN AT MENGO

(CORAM: ODER MULENGA AND KANYEIHAMBA JJ.S.C.)

CIVIL APPEAL NO.15 OF 1995

BETWEEN

YONASANI B.KANYOMOZI:::::::::::::::::::::::::APPELLANT

AND

MOTOR MART (U) LIMITED::::::::::::::::::::::::: RESPONDENT

(Appeal arising from judgment and Decree of the High Court (Mr. Justice J.B. Katusi) at Kampala in Civil Suit No.37 of 1993 dated 1 January 1995).

JUDGMENT OF MULENGA JSC.

This is an appeal against a decision of the High Court dismissing a suit for breach of contract. The appeal was instituted in this Court on 23rd May 1995, before the Court of Appeal was established by the Constitution in October 1995. The appeal, however, had a chequered history of being dismissed for want of prosecution and subsequently being re-instated. It is unnecessary to detail that history here. Suffice to say that because of that history the appeal was not heard until 10th April, 2000, almost five years after it was instituted. The facts, which give rise to the suit, however date back to the late 1980's. I should first give a brief account of how the suit came about.

In 1987, the appellant, Yonasani B. Kanyomozi, whom I shall refer to as "Kanyomozi", owned a Bedford tipper lorry, to which I shall herein refer as *"the vehicle* ". At the material time, the vehicle was not functional, apparently as a result of its being used and mishandled by the army during the war. In or about April 1987, Kanyomozi, who was out of the country at the time, instructed his wife to take the vehicle to the garage for necessary repairs. The vehicle was inspected and an initial estimate of repair costs was made in June 1987. Subsequent estimates were made in July and August, 1987. Payment for the repairs, however,

was staggered and most of it was made in 1990. In or about December of that year the vehicle was returned to Kanyomozi in the belief that repairs were duly completed. However, upon being taken on road test immediately, the vehicle broke down. It was taken back to the garage.

It was alleged in the pleadings, but not repeated in evidence, that subsequently another road test was carried out with similar results. Whether the allegation was true or false however does not appear to affect the issues in this appeal and I shall not refer to it any more. At some stage subsequent to the vehicle breaking down while on road test, Motor Mart (U) Limited, to which I will herein refer as “Motor Mart”, undertook to bear the cost of the engine overhaul to be carried out by Leyland Daf (U) Ltd. The overhaul, however, was never carried out, and Kanyomozi finally decided to sue for breach of contract. He filed suit in January, 1993.

It is apparent that Kanyomozi and/or his legal advisers were unsure as to who was liable for the alleged breach of contract. initially the suit was brought against Motor Mart as sole defendant. However, in an amended plaint dated 12th March 1993, A.R.Mackenzie, General Manager of Motor Mart and Leyland Daf (U) Ltd., at whose garage the engine overhaul was to be carried out, were added as co-defendants. In his judgment, the learned trial judge held that the evidence before him showed that the contract for the repairs of the vehicle was between Kanyomozi and Motor Mart. There was no appeal or cross-appeal against that holding, and so this appeal proceeded, and my judgment is based, on that premise. On a final analysis in his judgment, the trial judge concluded, in effect:

(a) That Motor Mart had breached the contract in failing to satisfactorily complete the repairs between 1987 and 1990;

(b) That Kanyomozi had waived the rights that had accrued to him under the contract up to 1990, and he was stopped from suing in respect of any breach prior to 21 September 1992; and

(c) That with regard to what had transpired thereafter the suit was premature because time (for completion of engine overhaul) had not been made of the essence of the contract.

On that ground the suit was dismissed. Hence this appeal.

Before I consider the issues raised by the appeal, it is useful to note the case of each party as set out in the pleadings. In the amended plaint the material facts constituting the cause of action are contained in paragraphs 6,7 and 12 which read:

"6. Sometime in April 1987, the plaintiff contracted the defendant to repair the plaintiff's motor vehicle registration NO. (UXL. 225(hereinafter referred to as "the vehicle")

7. Subject to the above agreement the plaint ff made payments (to) the JSI Defendant (as hereinafter appearing) upon which the Defendant undertook on behalf of the Defendant to produce a road worthy vehicle for the plaintiff's use.

8-11……………………………………………………………………….

12. The plaintiff states that the Defendants have failed, neglected and/or refused to repair the plaintiff's vehicle for which they are in breach of contract and that the plaintiff is entitled to damages therefore."

Paragraphs 8,9 and 11 narrate allegations (in form of evidence) of two incidents when the vehicle broke down while it was on test run after repairs, and of the eventual undertaking by Motor Mart to meet the cost of overhauling the engine. Paragraph 10 contains the plaintiff's contention that the said break down resulted from failure to repair the vehicle sufficiently, or at all, during the period since 1987.

In the joint written statement of defence, apart from general denials, it was pleaded in answer to the said paragraphs of the plaint, first that the plaint disclosed no cause to action; and in the alternative, that the suit was time barred. These two pleadings, however, were not pursued, on trial. In the further alternative, several allegations, *(* in form of evidence),were made, from which it is not easy to discern Motor Mart's precise defence. The following sub-paragraphs in paragraph 6 of the defence, however, appear to represent its defence:

"(a) *The plaintiff contracted with M/s Bruce (U) Ltd to repair motor vehicle No. UXL. 225 in 1987.*

(b) M/s Bruce (U) Ltd. finished the repairs and handed in the vehicle to the plaintiff

(c) That while the motor vehicle No. (JXL 225 was in the custody of the plaintiff it developed new mechanical problems for which the l defendant was contacted to handle but it refused

and referred to the garage of the 3rd defendant.

(d)

(e)

(f) The plaintiff insisted that the 1st defendant who does not in anyway deal in motor vehicles and mechanical repairs of motor vehicles does repair the vehicle.

(g) The first defendant shall aver that it indicated to the plaintiff that it had engaged the 3' defendant to do repairs but that the repairs were on condition that the 3' defendant obtains spare parts from the United Kingdom.

(h) *The 1st and 3rd defendants shall aver that the said spare parts are not yet available and the plaintiff's car cannot therefore be repaired until they will be available."* (emphasis added).

I think this pleading can be paraphrased into the following three contentions, namely:

a) That the contract to repair the vehicle in 1987 was between Kanyomozi and Bruce (U) Ltd., and when the repairs were completed, the vehicle was duly delivered to Kanyomozi.

b) That subsequently the vehicle developed new mechanical problems. and Kanyomozi insisted that Motor Mart undertakes the repairs, where upon the latter instructed Leyland Daf (U) Ltd., to carry out the repairs, but only on condition that Leyland Daf first obtains the required spare parts from the United Kingdom.

c) That the spare parts were unavailable, and the vehicle could not yet be repaired.

It was from the foregoing pleadings that three issues were framed at the commencement of the trial. The issues, as framed, were:

"1. Whether there was a contract between the parties.

2. Whether there was a breach of the contract by the defendants.

3. If so, what remedies are open to the plaintiff"

The learned trial judge answered the first issue in the affirmative, in relation to Motor Mart, the 1 defendant. He said:

"From the entire evidence on record, PW2 (Kanyomozi's wife) visited the premises of BRUCE (L LTD., where she met a gentleman called KIMERIA. This Kimeria introduced her to a workshop manager who according to the evidence on record is called WALUSJMBI. First defendant recognised both Kimeria and Walusimbi as its agents and that they acted on

its behalf It is pertinent here to produce the letter of 21.6.90, exhibit P3 written on behalf of the first defendant to the Plaint"

After reproducing the letter, the learned trial judge went on, in his judgment, to say:
"In light of the contents of this letter the argument by Mr. Matovu (counsel for Motor Mart) that there was no contract between plaintiff and first defendant is not, with respect, tenable. There was a contract between plaintiff and first defendant evidenced by the document styled estimates exhibit P.3 dated 22.4.87 and referred to in the above letter."

In my view this holding is well founded as it is supported by evidence which the learned trial judge properly refers to. No evidence was adduced to prove the allegation in the written statement of defence, of a separate completed contract between Bruce (U) Ltd. and Kanyomozi. Besides, as I have noted earlier in this judgment there is no appeal against the holding. I therefore need not discuss it any further.

The answer to the second framed issue appears to be in three parts. The learned trial judge held:

(1) That Motor Mart was in breach of contract up to 1990;

(2) That by his conduct Kanyomozi waived all his rights under the contract arising prior to 1990, and therefore, was estopped from suing on basis thereof'; and

(3) That when Kanyomozi gave Motor Mart another chance to complete the repairs, time was not made of the essence of the contract, and consequently Motor Mart was not in breach after 21.9.92 so that the suit was premature.

It is this answer to the second issue, to which I shall now turn, that is the bone of contention in this appeal. I shall revert to the answer to the third issue later in this judgment.

Four grounds were raised in the memorandum of appeal. At the hearing of the appeal, however, Mr. Mulira who represented Kanyomozi abandoned grounds 3 and 4 for lack of merit. The remaining two grounds, which were argued together, read:
'(1) The learned Judge erred in fact and misdirected himself on the law when he held that appellant by his conduct had waived ALL of his legal rights under the contract that would

have been due to him up to 1990 when the suit vehicle was delivered to him in unsatisfactory state of repairs.

2. The learned trial judge failed to evaluate the evidence on record and erred in fact when he made the finding that from the entire evidence on record it appeared that this was a contract without any stipulation with regard to time, and that the appellant was estopped from raising any breach that was committed before 21st August 1992."

Basically Mr. Mulira's argument on these grounds was that the holdings complained of were not based on any pleading or evidence. He submitted that neither waiver nor estopped was pleaded by the defence, and that there was no evidence on either issue since Motor Mart and the co-defendants opted to adduce no evidence at all. The holdings, according to counsel, were a departure from the issues framed for determination by the court. Counsel further submitted that the learned trial judge had failed to properly evaluate the evidence as a whole and in particular Kanyomozi's explanation for not towing the vehicle away from the garage, and allowing Motor Mart another chance to complete the repairs.

In reply, Mr. Tumusingize, Counsel for Motor Mart, supported the holdings by the trial judge based on what he called two significant dates in the case, namely December 1990,when the vehicle was delivered to Kanyomozi in the belief that it was completely repaired; and 21 September 1992, when Motor Mart intimated that the engine of the vehicle was to be overhauled at its expense. According to counsel the finding of the court that the suit was premature was premised on Motor Mart's said intimation. He reiterated the reasoning of the learned trial judge that after waiting from 1987, during which period he was made aware of the difficulty in procuring spare parts, and then giving Motor Mart another chance to repair the vehicle, it was incumbent on Kanyomozi, before filing suit, to give notice that time had become of essence of the contract; and that in absence of such notice Kanyomozi was estopped from filing suit only four months after Motor Mart's undertaking to meet the cost of the engine overhaul.

In coming to the conclusions that he did, the learned trial judge just said this in his judgment:

"*On the second issue there is evidence to show that plaintiff delivered his vehicle to the first defendant as far back as 1987. In 1990 there was an attempt by the first defendant to deliver*

the vehicle. It was found to be in state of unsatisfactory repairs. The first defendant undertook to correct the situation. See Exhibit P.5. As a general rule, the low does not regard a promissory as discharged unless he had completely and precisely performed the exact thing that he agreed to do. Clearly at this stage the first defendant was in breach of contract. From the entire evidence on record it appears to me that this was a contract without any stipulation in regard to time. The only reasonable inference to be drawn therefore is that time was to be reasonable. In my judgment it could not be said with any stretch of imagination that a vehicle delivered in 1987 for repairs and delivered in 1990 still in unsatisfactory state of repair, the work was carried out in reasonable time.

That:

'Your vehicle is of a type which was never imported into Uganda in any quantity and has been out of production for many years, and therefore lacking spares for its satisfactory repairs would not avail any defense to the defendant "

The learned trial judge observed in effect, rightly in my view, that Motor Mart should not have undertaken the contract if it could not do it. Having said all that, however, the learned trial judge went on to say:

"But it seems to me that by his conduct plaint waived all of his legal rights under the contract that would have been available to him up to 1990 when the vehicle was delivered in unsatisfactory state of repairs. In his evidence he said:

'I abandoned the idea of towing it as earlier suggested by my advocates and agreed that they should go on with the repairs. The basis of my abandoning the towing is to be found in Exhibit P.5.'

Exhibit P.S is the letter written on 21st September, 1992. This suit was filed on 19th January, 1993. This is a period of about four months after Exhibit P.5 was received."

After quoting a passage from the judgment of Denning L.J., in *CHARLES RI CKARDS v. OPPENHEIM* (1950) ALL ER 420, the trial judge went on to hold:

"*In this case I would hold that the plaintiff is estopped from raising any breach that was committed before 22"' September, 1992. As I said before, this suit was filed on 19th January, 1993. There is no evidence that before this and between this date and 21st September, 1992*

plaintiff had given any notice to the first defendant demanding that he had to have his vehicle within a fixed period of time thus making time of essence."

Finally, after another quotation from the said judgment of Denning L.J., the learned trial judge concluded thus:

"*In the case before me, I am of the view that plaintiff having decided to give the first defendant another chance to try on the vehicle he should have protected himself by notice making time of essence... In the absence of this notice I am constrained to agree with counsel for the defendants that the suit was premature. I regret to have to come to this conclusion."*

It appears to me from the foregoing excerpts in his judgment, that the learned trial judge formed the view that Kanyomozi's rights under the contract had undergone change at some point in time between December 1990 and 21 September, 1992, and that the change came about as a result of Kanyomozi's conduct which amounted to a waiver of his rights. Although in the judgment that conduct is not expressly described, it is obvious that what is referred to, is the fact that Kanyomozi allowed Motor Mart to have another chance to carry out and complete the repairs on the vehicle, after the

Initial failure. Before considering whether that amounted to waiver, I think it is necessary to evaluate the evidence in order to put that fact in its proper context.
Kanyomozi testified that at the time he decided to take the vehicle for repairs the engine had collapsed and the vehicle was in a bad state. He asserted repeatedly, both in examination-in-chief and in cross-examination that it was mutually agreed, that the repairs were to put the vehicle in a road worthy condition and that for purpose of ascertaining that, a road test would be carried out upon completion of the repairs. On that understanding, estimates of repair costs were made after examination of the vehicle in June 1987 and were revised in subsequent months. Ultimately an invoice for work done was raised in the sum of 1.6m/= which he paid to Motor Mart. In 1990 when the vehicle was released to him, it was taken by Motor Mart's technicians for a road test. The vehicle broke down in the process.

When he contacted the General Manager of Motor Mart was told to return the vehicle to the garage. Eventually Motor Mart undertook to meet the cost of overhauling the engine of the

vehicle. It is not clear from Kanyomozi's evidence when this undertaking was first made, but it was confirmed in a letter written to him on 21 September, 1992. Earlier, Leyland Daf, at whose garage the vehicle was, has written to Kanyomozi a letter dated October *25*, 1991, Exh. D2, to say:

" *RE: YOUR VEHICLE BEDFORD TK UXL 225*
The above vehicle was presented in our workshop to repair the faulty braking system and engine overheating. On inspection, the breaking system needs completely overhauling and the overheating problem as that water is leaking from the engine
between the cylinder head and the crank case and needs extensive repairs.

Unfortunately spare parts for this type of vehicle are not available in Uganda and I wish to inform you that we are not able to carry out any repairs to this vehicle in our workshops."

To the extent that Leyland Daf wrote this letter, not as the party who contracted with Kanyomozi, but for all intents and purposes, on behalf of Motor Mart, I do not accept the submission by Mr. Tumusingize, that if matters had rested with that letter, Motor Mart would have had no more responsibility for the vehicle repair. That may well have been the case, if this letter had been written in 1987 when the vehicle was first inspected. However, it was written in 1991 after repairs had been attempted and had been paid for. The vehicle was in Leyland Daf's garage on Motor Mart's instructions for the purpose of making good the deficiency in the repairs carried out earlier. This is borne out in two subsequent letters. The first is the letter dated 2nd March 1992 written to Kanyomozi 's advocates by Motor Mart. It reads:

"RE; MOTOR VEHICLE UXL 225
Thank you for your letter of 18th February 1992. The purpose of our request to Mr. Kanyomozi was that Leyland Daf should ***establish whether the overheating problems experience related to earlier repairs carried out by Bruce*** *(Uganda)* ***Ltd.***
We regret we cannot accept responsibility for repairs, unless we have a proper technical evaluation by a competent engineer approved by ourselves." (emphasis is added).

Although the request that had been made to Kanyomozi, and the advocates' letter of 18th February 1992, to which it was a reply, were not brought out in evidence, it is reasonable to infer from the second letter, which is dated 21st September 1992, that Motor Mart was

eventually satisfied that the *"problems experienced related to earlier repairs"* and for that reasons accepted responsibility for them. The second letter is Exh. P5 which was addressed to Kanyomozi by the General Manager of Motor Mart. It reads;

"Thank you for your letter of 4, September, which came as a considerable surprise to me. I have given clear instructions to Mr. Risk Pronk of Leyland Daf that they should carry out an engine overhaul at our expense.

When last I checked they were working on obtaining spares *and they did say they were experiencing difficulties. Your vehicle is of a type, which was never imported into Uganda in any quantity; and has been out of production for many years.*

By copy of this letter I would request Leyland Daf to advise you and myself on ***current position."*** (emphasis added).

Again it is unfortunate that the contents of Kanyomozi's letter of 4, September 1992, which considerably surprised the General Manager, were not disclosed in evidence. Nonetheless in my view, the irresistible inference to draw from this letter is that the said ***"clear instructions"*** to Leyland Daf were given, not on the day, but earlier than the date when the letter was written; hence the intimation: ***When last I checked they were working on obtaining spares."*** The expression ***"last checked"*** coupled with the request that Leyland Daf advises on ***"current position"*** clearly indicates not only that there had been at least one other check before, but also that the instructions to Leyland Daf to overhaul the engine at Motor Mart's expense, had been given earlier still. So, although the undertaking to meet the expense is referred to in the letter, Exh. P5, it must have been made earlier than 21 September 1992.

This tends to tally with Kanyomozi's testimony that when he took the vehicle back to the garage at Luzira, after it broke down during the road test, Mackenzie, the General Manager of Motor Mart, undertook to repair it on his account. Furthermore, although Kanyomozi testified that the basis of abandoning the idea of towing away the vehicle from the garage was ***"to be found in Ex.P5"*** it does not necessarily mean that he first became aware of the undertaking from reading the letter; nor that this was the only reason why he allowed the engine overhaul to be undertaken after the initial failure. He gave his full explanation during cross-examination After acknowledging that he had received the letter of 2 March 1992, Exh Dl, he said:

"My understanding of the letter was that they were going to repair the vehicle at their expense I abandoned the idea of towing it as earlier suggested by my advocates and agreed that they go on with repairs. The basis of my abandoning the towing is to be found in exhibit P5. I was not informed of the problem of spare parts when I first took my vehicle to them. My vehicle was not a unique model"

Again after acknowledging that he had received the letter of October *25*, 1999, Exh. D2, he said:

"After *that I went to them and they indicated they would get the spares. One cannot wait for ternity (sic) I have not found out whether spares came. I inquired about whether the vehicle was finished. Mackenzie said the vehicle would be repaired I did not find it reasonable to withdraw the vehicle from the defendants and take it elsewhere. Defendants were agents of importing these vehicles. Waiting has limit. I was told it could take 2-3 months to repair the vehicle."*

As I have said earlier in this judgment, the two letters from Motor Mart tend to corroborate Kanyomozi's testimony. The defense did not offer any evidence to contradict or otherwise modify that testimony. The learned trial judge did not find the testimony, or any part of it, unreliable, and I find no reason to differ from that. The position as I find it, therefore, is, in a nutshell, as follows:

In 1987 Kanyomozi's vehicle was in a bad state, its engine, inter alia, having collapsed. Motor Mart agreed to repair the vehicle and put it in a roadworthy condition. For that work Motor Mart charged, and was paid about Shs. 1.6 million. When in 1990 the vehicle was returned to Kanyomozi it was discovered that Motor Mart had not performed its part of the contract because the vehicle broke down upon being put on a road test. Motor Mart accepted to take the vehicle back into the garage and to have the engine overhauled at its expense. Kanyomozi found that proposition reasonable, and accepted that Motor Mart should make good its performance. Motor Mart never made good its performance. Hence the suit. The learned trial judge found as a fact, and I agree with him, that according to the evidence there was no stipulation, at any stage, as to the time within which to complete the repairs. He then drew inference that ***"time was to be reasonable"*** Again I respectfully agree because in those circumstances the law imputes a term in the contract, that work would be performed within a reasonable time. The learned trial judge then held that the period from 1987 to 1990 was unreasonable, in the circumstances, and that lack of spare parts was no defence to Motor

Mart. Again I agree. What I find difficult to understand, however, is how and why the learned trial judge came to the
conclusion that thereafter the position changed. He did not indicate in what way Kanyomozi, or for that matter the law, discharged Motor Mart *from* its obligation to repair the vehicle within reasonable time. Nor did the he indicate how, if at all, lack of spares became available as a defence, to Motor Mart after 2l September, 1992.
It seems to me, with due respect to the learned trial judge, that he erroneously placed reliance on the decision in *RICKARDS v. OPPENHEIM* (supra) from which he quoted extensively. I should hasten to point out that while the passages he quoted from the judgment of Denning L.J. (as he then was) are quite sound, and the facts in that case are similar to those in the instant case, the two cases differ in material particulars. In the *RICKARD ‘s* case, unlike in the instant case, there was an express stipulation in the contract, making time for delivery, of the essence of the contract. When the stipulated time lapsed, the innocent party waived the stipulation by indicating that he would accept delivery on subsequent dates. After a couple of disappointments, however, the innocent party gave to the defaulting party, express notice that he would not accept delivery after four weeks. Delivery was offered long after the four weeks had expired and it was refused. In that case, unlike in the instant case, it was not in dispute that the innocent party had waived the initial stipulation as to time for delivery. The central issues for determination were whether after the waiver, the innocent party was entitled to give notice making time of the essence again; and if he was, whether the notice he gave was reasonable. It was held that he was entitled and that in the circumstances of the case the four week notice was reasonable. In the instant case there was no stipulation of time, and so, there was no stipulated time to be waived. Secondly in the instant case the question was not as to be reasonableness of any notice given by Kanyomozi, the innocent party, but rather the question was as to the reasonableness or unreasonableness of the time taken by Motor Mart without completing its obligation. The holding by the trial judge, that Kanyomozi ought to have protected himself by giving a fresh notice after 21 September 1992, making time of the essence, implies, in effect, that Kanyomozi had waived the term imputed by law that Motor Mart was to complete its contractual obligation within reasonable time.

I shall revert to the issue of waiver shortly. First, I should briefly dispose of the judge’s proposition that Kanyomozi needed to protect himself by giving notice that time had become of essence. With due respect, I think that proposition has no sound basis or justification. In *RICARD’S* case the holding was that the innocent party was entitled to give the express

notice that it did, not that the notice was a necessity. If no such notice had been given, the law would still have imputed a term that completion was to be within reasonable time. In the instant case that implied term was applicable and I would therefore hold that there was no legal necessity for Kanyomozi, after 21 September, 1992 or at any other time, to give notice that time was to be of the essence of the contract.

Next I have to consider whether Kanyomozi waived any legal right due to him as held by the trial court. As I have pointed out earlier in this judgment, what appears to have been held to constitute the waiver was Kanyomozi's decision to allow Motor Mart to make good the deficiency in repairs, instead of withdrawing the vehicle and file suit immediately after the initial failure. To my understanding, for an act, statement, or other conduct, to be construed in law as a waiver, it must be shown that there was ***mutual agreement*** to alter or otherwise affect the legal relationship of the parties. *BIRD v. HILDAGE* (1947) 2 All ER 7 was a suit between landlord and tenant, whose lease agreement stipulated dates on which the quarterly rent was payable. The landlord was in the habit, however, of accepting rent paid well after the due date. Subsequently, when, as usual, the tenant failed to pay on the due date, the landlord filed a suit for possession and refused to accept payment tendered on the date the suit was filed. In his defense the tenant paid the rent into Court. The English trial Court dismissed the suit. On appeal, the Court of Appeal held that where an act had to be done periodically, the fact that it had been done irregularly in the past, does not justify an assumption that the irregularity would be waived in the future. With reference to the facts of that case, the Court observed:

"Indeed, it would be most unfortunate if in such a case, mere forbearance by a landlord to exercise his rights of distress or re-entry on one or more occasions was held to bind him for the future, since landlords would then tend to be more harsh in the enforcement of their legal rights. There may, no doubt, be cases where the court can properly infer from the conduct of the parties a variation of the original agreement... We can find here no evidence of any such variation of the contract.."

I think similar observations may be made in respect of the instant case. Mere forbearance by Kanyomozi to exercise his right to sue in 1990, 1991 and 1992 did not justify an assumption that continued failure to complete the repairs would not be acted upon. It did not amount to a variation of the original contract, and consequently did not bind Kanyomozi in future in

regard to his rights under the contract. With due respect to the learned trial judge, I am constrained to say that he did not direct his mind sufficiently or at all to the necessary elements required for the application of the principle of waiver and the doctrine of estoppel. In a nutshell, his decision in this regard was that Kanyomozi was estopped from suing because he had waived his legal rights under the original contract. This however is erroneous. The two are distinct concepts independent of each other. Waiver arises from express or implied agreement between the parties. Estopped arises from a representation of one party to another on which that other acts.

This difference between waiver and estopped was highlighted by the Court of Appeal for Eastern Africa in *NURDIN RANDALl v. LOMBANK LTD* (1963) EA 304,where Newbold J.A. (as he then was) said at p.3 14:

"....the distinction between waiver and estoppel should be clearly appreciated. Waiver is based on a contract, express or implied, between the parties. Thus it arises from a term, express or implied, of a contract, and before any such term can exist a valid contract must be established. It is found that a contract is established and that it contains such term, then that term, like any other term in a contract, may found a cause of action." (and, I would add, a defence). *"Estoppel, on the other hand, is primarily a rule of evidence whereby a party to litigation is, in certain circumstances, prevented from denying something, which he had previously asserted to be true. Estoppel... can never found a cause of action, though it may enable a cause of action, which would otherwise fail, to succeed."*

The learned Justice of Appeal cited, with approval the description of that difference as set out in the judgment of the Privy Council in *DA WSONS' BANK LTD. v. JAPAN C077'ON TRADING CO. LTD.* (1935) A.I.R. PC 79 at p.82 part of which I find useful to reproduce here for emphasis. It reads as follows;

"These words, which are the true foundation of the judgment, disclose, in their Lordships' opinion, a confusion of thoughts upon the subjects of estoppel and waiver. Estoppel is a rule of evidence which comes into operation if (a) a statement of the existence of a fact has been made by the defendant of an authorised agent of his on his behalf (b) with the intention that the plaintiff should act upon the faith of the statement, and (c) the plaintiff does act on the faith of the statement. On the other hand, waiver is contractual, and may constitute a cause of action; it is an agreement to release or not to assert a right. If an agent with authority to

make such agreement on behalf of his principal agrees to waive his principal's rights then the principal will be bound, but he will be bound by contract not by estoppel. There is no such thing as estopped by waiver."

I agree with that description of waiver and estoppel. Upon applying the same to the instant case, I again find no difficulty in holding that Kanyomozi did not waive any of his legal rights because at no time was there any agreement between Kanyomozi and Motor Mart that the former would not assert his right or that the latter was released from its obligations in accordance with the terms of the contract. Secondly, going by the said description it is quiet it is evident that in the instant case, the issue of estoppel did not arise. Kanyomozi pleaded and adduced evidence, which proved that Motor Mart had failed to perform its part of the contract within reasonable time. It was not suggested in evidence at the trial, or in the judgment, that Kanyomozi had made any representation which he should be prevented from denying because Motor Mart had acted on the faith of the representation. In short there is no representation Kanyomozi was estopped from denying. In the circumstances, I think grounds 1 and 2 of appeal must succeed.

Before I take leave of the appeal, however, I have to consider if this Court should make any consequential orders. In the Memorandum of Appeal it was prayed that the decision of the High Court be set aside and that judgment be entered as prayed in the lower Court. The prayers in the amended plaint dated **12th** March 1993 were for, inter alia, special and general damages with costs and interest both on the damages and on the cost. There was an alternative prayer for "a ***road worthy lorry in good repair similar to the one in*** *issue."* Unfortunately counsel did not address this Court on the question of remedies. Ordinarily the appropriate order would have been to remit the case to the High Court for determination of the reliefs the plaintiff should be granted. Two reasons, however, convince me that in the interests of justice this litigation ought to be concluded here. The first is that the litigation has been protracted. I am aware that it is not uncommon for a civil suit in Uganda to last in the courts for as long as seven years and more. However, every opportunity possible should be utilised to expedite disposal of cases, recalling the time old maxim that ***"justice*** *delayed is justice* ***denied."*** Secondly, the trial court did consider what remedy would have been awarded if the suit had succeeded. Although the trial court did not go the full length to determine the quantum of damages, sufficient findings of fact to base an assessment on, were made. By virtue of s.4(2) of the Judicature Act, 1967 as amended by Statute No. 12 of 1987, (which

was the law applicable to this case) this Court has ***"the power, authority and jurisdiction vested in the*** *court from* ***which the appeal is brought."*** In my opinion this is a proper case in which to invoke those provisions and assess the damages.

For special damages the plaintiff claimed Shs. *75,515,650/=*. In the ***"particulars of special damages"*** six heads of claim were listed. The first five, totaling shs. 3,515,650/=, comprised amounts allegedly paid for spare parts and repair costs. The learned trial judge found that some of the heads were not proved while others were not claimable. I have no reason to interfere with that finding. The sixth head of claim for Shs. 72m/= was for loss of income from January 1991. The learned trial judge found that it had been proved that the vehicle was a commercial vehicle and that Motor Mart ought to have known that fact. He also found that it was also proved that Kanyomozi had previously earned income from hiring out the vehicle at the rate of s 50,000/= per trip, and that the vehicle used to make two trips per day. He did not compute the amount he would have awarded on this head, but observed that the total amount would have been subject to income tax.

However, there are other consideration that should affect the final award. The sum of 72/= appears to be equivalent of gross earnings at the aforesaid rate for 720 days or approximately 2 years. In my view, another legitimate deduction would have to be costs of operating the vehicle. Although no evidence was adduced on these aspects, it is imperative to take into account the inevitable, that Kanyomozi would have spent on fuel, general maintenance of the vehicle, and even on wages since he testified that he did not drive the vehicle himself. Then there are such imponderables as the likelihood:
(a) That the vehicle, being old, would occasionally require repairs, on which occasions it would be off duty; and
(b) That the vehicle would not have been hired on every day even when it was available, for it used to be hired ***"casually"*** rather than on permanent contract.

Taking all those factors (including income tax) into consideration, I think that 20% of the sum claimed would be close to the net income lost and I would award that as special damages. The learned trial judge made no comment on the claim for general damages. I think he was right as no basis was laid either in evidence or argument for that claim, which, in any event, is not usual in a suit for breach of contract. I would disallow it. I would also reject the alternative prayer, which is in effect for specific performance. In my view the wronged party

in the instant case, can be appropriately enforce his contractual right through suit, to take his vehicle for repair elsewhere, or to choose to write it off in view of its age.

In the result, I would allow this appeal. I would set aside the judgment of the High Court and substitute therefore, judgment for the appellant Yonasani B. Kanyomozi against the respondent, Motor Mart (U) Limited, in the sum of 14,400,000/= special damages, with interest at 6% p.a. from the date of filing suit till payment in full. I would also award to the appellant costs of this appeal and in the High Court.

DATED at Mengo this….l4th …day of …June. . .2000

J.N. MULENGA

JUSTICE OF THE SUPREME COURT.

I CERTIFY THAT THIS A

TRUE COPY OF THE ORIGINAL

W. MASALU MUSENE

REGISTRAR OF THE SUPREME COURT.

JUDGMENT OF ODER JSC

I have had the benefit of reading in draft the judgment of Mulenga, JSC, with which I agree. The appeal should be allowed.

As Kanyeihamba, JSC, also agrees, the order of the Court shall be as proposed by Mulenga, J.S.C.

Dated at Mengo this 14th day of ...June...2000

A.H.O. ODER

JUSTICE OF THE SUPREME COURT

JUDGMENT OF KANYEIHAMBA. J.S.C.

I have had the benefit of reading in the draft the judgment of my learned brother, Mulenga, J.S.C., and I agree with him that this appeal ought to succeed. I also agree with the orders he has proposed. I would award costs in this appeal and in the High Court to the appellant.

DATED at MENGO this 14th Day of . . .June..2000

G.W. KANYEIHAMBA

JUSTICE OF THE SUPREME COURT