THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

CORAM: ODOKI, CJ; ODER; TSEKOOKO; KAROKORA, AND MULENGA, JJS.

CIVIL APPEAL NO. 15 OF 2002

B E T W E E N

PEARL MOTORS LTD: :::::::::: APPELLANT

A N D

BANK OF BARODA (U) LTD: :::::::::: RESPONDENT

(Appeal from the judgment of the Court of Appeal the Hon. Justice L. E. M. Mukasa-Kikonyogo, DCJ, G. M. Okello, JA, and C. N. B. Kitumba, JA, Dated the 16th day of May 2002, in Civil Appeal No. 32 of 2001)

<u>REASONS FOR THE JUDGMENT OF THE COURT:</u>

On 7th October, 2004, we heard this appeal and dismissed it with costs. We promised to give our reasons which we now give.

The background facts of the case were as follows:

The respondent, a limited liability company, is a commercial banking institution. The appellant is also a limited liability company, a dealer in motor vehicles and had an account No. 017/60/07475 with the respondent bank. By its letter dated 24th June 1992 (Exh. D1), the respondent agreed to grant credit facility to the appellant by way of an

overdraft in the sum of Uganda Shillings 200,000,000=. The appellant obtained the loan on 24th April 1993. The terms and conditions of the loan were stipulated in the Exh. D1. The loan was payable within 12 months and the interest rate was 24% p.a. The appellant had to provide a number of securities to the respondent which included inter alia - Plot No. 13 Jinja - Road which belonged to East African General Insurance Company, Block 236, Plot No. 722, Bweyogerere, Plot No. 22 Block 635, Kireka.

The appellant used the loan money to import vehicles for sale. Vehicles were imported hut owing to market conditions they were sold at loss.

By 26th April 1996, the appellant had paid a sum of Uganda Shillings 307,097,916= to the respondent which included the principal sum and some interest. The appellant had contended that by so doing it had discharged its indebtedness to the appellant. It therefore, demanded for the return of the four above mentioned securities. The respondent refused to return the securities on the ground that the appellant had not paid unapplied interest amounting to Uganda Shillings 79,913,308=. The appellant sued for the return of the Certificate of titles. The respondent counter-claimed for the said unapplied interest. The unapplied interest of Shs. 79,987,916= which, because of the Bank of Uganda Regulations, had never been reflected in the appellant's bank statement. So the appellant did not know how it was arrived at. The appellant believed that the interest had been waived. It therefore, disclaimed liability to pay such interest. On lst December 1994, the appellant's account was classified as a non-performing asset. This was done in accordance with the Regulations of the Bank of Uganda Norms on Assets Quality For Financial Institutions (Exh. D10). That meant that any interest could not be debited to the appellant's account from the date of classification of the account as a non-performing asset. That interest had to be kept on a suspense account. Then according to the evidence of Margaret Matovu (DW2), Director of the Commercial Banking of the Bank of Uganda, the respondent had to keep the appellant's account according to the

Bank of Uganda Regulations. The appellant was bound to pay unapplied interest unless it was waived by the respondent.

Appellant's suit was dismissed with costs by the learned trial judge. Further the learned trial judge entered judgment for respondent on the counterclaim for the sum of Shs. 79,913,484=. The appellant was ordered to pay interest on the counterclaim at 24% p.a. from the date the counterclaim was filed till payment in full.

The appellant's appeal to the Court of Appeal was dismissed with costs hence this appeal.

Originally the appellant had tiled two grounds of Appeal. However, at the hearing of the appeal, counsel for the appellant applied to tile amended Memorandum of Appeal. Mr. Kanyemibwa, counsel for the respondent opposed the proposed amended memorandum of appeal. After hearing both counsel on the application, we allowed the proposed amended memorandum of appeal to be tiled. It states that:

> ***"That the learned Justices of Appeal erred in law when they did not subject the evidence on record to a fresh scrutiny as an appellate court ought to have done and therefore, failed to find (as they ought to have done) that the appellant had discharged its obligations under the overdraft facility and that its securities ought to have been released by the respondent Bank."***

Mr. Matovu, counsel for the appellant submitted that the Justices of Appeal did not evaluate and subject the evidence on record to fresh scrutiny as appellate court ought to have done and therefore, failed to find that the appellant had discharged its obligation under the overdraft facility and that its securities ought to have been released by the respondent. He contended that right from the High Court to Court of Appeal, the wrong document Exh. D 1 dated 24th June 1992, was considered to be a contract document when the matter came to court whereas the relevant document of contract was not considered. Counsel submitted that Exh. D1 was a wrong document and that the document governing the contract was Exh. D 7 dated 29th December 1994.

Mr. Kanyemibwa, counsel for the respondent submitted that the appeal had no merit. He submitted that counsel for appellant had not shown any other document of contract which the courts failed to consider other than Exh. D1.

On the unapplied interest, the respondent was awarded by the trial court the interest on the counter-claim amounting to Shs. 79,913,484=. There was no appeal against that award before the Court of Appeal. In the circumstances, the appellant could not get their securities until they paid the interest. He therefore, prayed for the appeal to be dismissed with costs.

It is convenient at this stage to consider and dispose of Mr. Matovu, counsel for the appellant's submission that the two courts below wrongly considered Exh. D1 dated 24th June 1992, to be the contract document whereas the document governing the contract was Exh. D7 dated 29th December 1994.

With respect, we think that counsel for the appellant was neither honest nor serious in his submission. In our opinion the letter Exh. D7 dated 29th December 1994, though not very legible was complaining about the appellant's failure to repay the loan. The letter, Exh. D7, stated in part on page 2 as follows:

> ***"..... It is regretting to note that despite several reminders/letters to you, there is no positive response for repayment of the loan/overdraft facility sanctioned. We therefore, request you to settle the credit extended to you within 14 days from the date of receipt of this letter failing which we shall he constrained to proceed against you legally to recover the outstanding dues, which means auctioning the property mortgaged to the hank to recover the above credit/facility.***

Having carefully perused both Exh. D1 and Exh. D7, we think that Exh. D7 was raised as an afterthought, because clearly there was no way either the High Court or the Court of Appeal could have treated Exh. D7 as a contract, having come in existence only when the respondent was complaining about the appellant's failure to repay the loan/overdraft granted to them under Exh. D1. That was long after the contract had been made.

The appellant further complains about failure by the Court of Appeal to evaluate evidence as required by Rule 29 of the Rules of the Court of Appeal and section 12 of the Judicature Act. With respect to learned counsel, we are unable to appreciate the relevancy of section 12 in this appeal.

Section 12 of the Judicature Act provides that:

> ***"For the purpose of hearing and determining an appeal, the Court of Appeal shall have all the powers, authority and jurisdiction vested under any written law in the court from the exercise of the original jurisdiction of which the appeal originally emanated."***

Rule 29(I) states that:

"On any appeal from the decision of the High Court acting in the exercise of its original jurisdiction, the Court of Appeal may:

(a) ***re-appraise the evidence and draw inferences of fact.***

(b) ***In its discretion, for sufficient reason, take additional evidence or direct that additional evidence be taken......"***

The power of a first appellate court to re-evaluate evidence is not a new principle. In ***Coghlan - v- Cumberland (3) [1898] 1 ch 704,*** the Court

of Appeal in England held, "*.....**where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the judge with such other materials as it may have decided to admit. . . .***

In ***Peters - v - Sunday Post [1958] EA 424*** the Court of Appeal for Eastern Africa stated inter alia that:

> ***".....an appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand."***

In our recent decision of Kifamunte Henry - v - Uganda, Cr. Appeal No. 10/1997 we reiterated that it was the duty of the first appellate court to rehear the case on appeal by reconsidering all the materials which were before the trial judge and make up its own mind.

It is trite that failure by a first appellate court to re-evaluate the material evidence constitutes an error in law. See also ***Pandya - v - R [1957] EA 336.***

In the instant case, with respect, we think that the contention of Mr. Matovu were not well founded. The lead judgment of Lady Justice Kitumba, JA, contains a full re-evaluation of the evidence adduced before the learned trial judge and how the learned trial judge had handled the evidence. For instance at page 31 of the record of Appeal, Lady Justice Kitumba, JA, while re-evaluating the evidence as adduced before the learned trial judge stated that:

> ***"The learned trial judge in her judgment said that both parties did not dispute Exh. D1 which set down the terms and conditions of the overdraft agreement. One of the terms was the payment of interest. She examined the correspondence between the parties which were exhibited at the trial. She observed that some of the letters of demand from the respondent mentioned the amount owed by the***

appellant to the respondent. Those letters stated what was the principal sum and what was the interest "

Further, in her re-evaluation of the evidence, lady Justice Kitumba, JA, considered the letter dated 11th November 1994, where defendant had mentioned the amount owed by the plaintiff differentiating the principal from the interest. The letter stated in part.....:

"Refer to your letter PSM/SK/95/94 dated 4/11/94, requesting us to extend repayment of your overdraft to 31/12/94. You are aware this overdraft is long overdue and present balance of Shs. 244,802,823= is in excess of the sanction limit of Shs. 200 million we therefore, propose that if you wish that we should approach our authorities for extension, you should offset the interest amounting to Shs. 45 million immediately."

The learned lady Justice of Appeal quoted several letters on the subject where in the respondent was demanding repayment of the loan. She in particular referred to a letter dated 10/10/95 (Exh. D5) which concluded as follows:

"We therefore request you to submit your repayment plan and arrangement to clear all dues not later than 15/12/95. For your information present outstanding debit balance on the account is Shs. 194,567,591= after credit of 25 million on 27/09/95. It does not include unapplied interest which has accumulated to Shs. 43,121,966=."

The learned Justice of Appeal thereafter cited the appellant's letter addressed to the respondent dated 14/11/95, (Exh. D6) in which the appellant acknowledged the indebtedness. That letter stated in part as follows:

"Re: Outstanding Overdraft.

First and foremost we would like to thank you for your patience with us in recovering the above outstanding overdraft. Although its clearance has not been on schedule we are committed to getting it cleared within a short time

(4) And as we write, we are negotiating with one Indian Investor prepared to offer Shs.15 million per acre for 15 acres, total Shs. 225 million."

Apparently, later the appellant paid Shs. 194,647,591= mentioned in Exh. D5, but failed to pay the interest. When the appellant demanded for the release of the securities, the respondent refused to release them before interest was paid.

The learned Justice of Appeal agreed with the finding of the learned trial judge that the appellant had not discharged its contractual obligation under the overdraft agreement. She held that the respondent's refusal to release the securities was not a breach of contract. She dismissed the appeal with costs. The other two Justices of Appeal concurred with her. We are satisfied that the Court of Appeal as a first appellate court re-evaluated the evidence properly before it dismissed the appeal. In our opinion, this appeal has no merit.

It was because of the foregoing reasons that we dismissed the appeal with costs.

Dated at Mengo this 21st day of December 2004.

J.B. ODOKI
CHIEF JUSTICE

A. O. ODER
JUSTICE OF THE SUPREME COURT

J. W. N. TSEKOOKO

JUSTICE OF THE SUPREME COURT

A. N. KAROKORA
JUSTICE OF THE SUPREME COURT

J. N. MULENGA
JUSTICE OF THE SUPREME COURT