THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

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

CIVIL APPEAL NO. 08 OF 2003

B E T W E E N

GOUSTAR ENTERPRISES LTD: :::::::::: :::::: APPELLANT

VS

JOHN KOKAS OUMO: :::::::::: :::: RESPONDENT

(An Appeal arising from the Judgment and Orders of the Court of Appeal {S. G. Engwau and A. Twinomujuni, C. Byamugisha, JJA,} dated 26th August, 2003 in Court of Appeal Civil Appeal No:27 of 2001).

JUDGMENT OF KAROKORA - JSC:

This is an appeal from the decision of the Court of Appeal which allowed the respondent's appeal against the decision of the High Court in High Court Civil Suit No. 1093 of 1999.

The brief facts of the case are that on 20th February 1997, the appellant entered into a memorandum of understanding, Exh. D1 with the Uganda National Farmers Association hereinafter referred to as

"the Association" to supply tractors and their implements to members of the Association. The respondent who was a member of the Association made an order through the Association to be supplied with 3 tractors with their implements.

The price for 3 tractors with their implements plus tax, according to Exh. D2, was Shs. 105,679,140=. Furthermore, according to Exh. D2, the respondent was required to deposit 50% as first instalment. Pursuant to that requirement, the respondent paid Shs. 53,584,500= to the appellant towards the purchase of the 3 tractors. In July 1997, the appellant supplied the tractors. The tractors were tested in the presence of a representative of the appellant. Two of the three tractors were found to be defective. These two tractors had been collected from the appellant by the respondent and had been parked in the verandah of the respondent's home. One tractor had a hydraulic problem. The other was overheating.

Thereafter the respondent rejected the two tractors and the appellant, took them back. The appellant claims that it took them back to be repaired/or serviced while the respondent claimed that he had rejected them as he could not start repairing new tractors. When they failed to agree, the respondent filed the suit in the High Court claiming refund of shs28,389,685/= which was later amended and reduced to shs25,421,685/= being the adjusted amount sum from the original amount deposited towards the purchase of the three tractors.

The learned trail judge made the following orders:

(a) ***the defendant shall deliver one of the two bare tractors (without extra) to the plaintiff at the unit cost without any further payment.***

(b) ***The defendant refunds to the plaintiff Shs. 7,244,685=***

and may do so by supplying to the defendant implements up to this value at the plaintiff's option.

(c) ***One of the two tractors be retained by the defendant, its purchase having been avoided.***

(d) ***Each party bears his own costs of this suit.***

(e) ***The cash refund at "b" above bears interest at 12% from the date of filing the suit on 22-09-1999, to the date of full settlement thereof.***

Both parties were dissatisfied by the above orders and so the current respondent appealed to the Court of Appeal while the current appellant cross-appealed. The learned justices of the Court of Appeal allowed the appeal and made the following orders:

(1) ***The appellant is entitled to a refund of shs 18,355,120/= with interest at the rate of 12% pa from 19th sept1999 till full payment***

(2) ***The appellant will have costs of the appeal and in the lower court.***

(3) ***The cross-appeal is dismissed with costs to the appellant***

(4) The cross-appellant pays shs 5,000,000/= in general damages to the appellant.

The cross-appellant has appealed against the decision of the court of appeal to this court on the following six grounds :

(1) The learned justices of the Court of Appeal erred both in fact and

in law in failure to evaluate the evidence on record that showed that the defects in the tractors occurred as they were under possession, control and prior use by the Respondent and his Agent.

(2) That the learned Justices of the Court of Appeal erred both in fact and in law in holding that the tractors were rejected when they were sent back to the appellant for repair.

(3) That the learned Justices of the Court of Appeal erred both in fact and in law in failing to cancel out the orders of Justice Okum-Wengi that the cross-Respondent retain one tractor and hand over the other to the appellant after finding that the Judge was wrong.

(4) That the learned Justices of the Court of Appeal erred both in fact and in law for basing on the fact of terrain in Kumi to hold that the tractors could not work in the terrain when the issue was defects and not specifications.

(5) That the learned Justices of the Court of Appeal erred in law in not considering and overlooking the question of warranty and came to a wrong conclusion to the effect that since the appellant had given a warranty of 12 months and the defects came up after two months the appellant was in breach of contract.

(6) That the learned Justices of the Court of Appeal erred both in fact and in law by failing to take the Mathematical Calculations by the cross-Appellant that what was awarded to the Respondent in Shs. 7,244,685= was erroneous, unjustifiable and worked injustice to the Appellant.

Each party filed written submission through their counsel. Counsel on

both side rightly submitted that it is the duty of the first appellate court to re-evaluate the evidence recorded at the trial and come up with its own decision. See ***Banco Arabe Espanyol - vs - Bank of Uganda Civil Appeal No. 8 of 1998 (SC), Habre International Co. Ltd. - vs - Abraham Alayakha & Others, Civil Appeal No. 4/98 (S.C), Muluta Joseph - vs - Katama Sylvano Civil Appeal No. 11 of 1999 (S.C.) and Rule 29(1) of the Rules of the Court of Appeal for the above proposition.***

On the 1st ground of appeal M/s. Tashobya & Co. Advocates, counsel for the appellant submitted that whether the two tractors were defective at the time of testing was not denied by the appellant at the trial, because the two tractors failed to work. One failed to engage the plough and the other overheated after a short time of work. The first and second tractors which had defects and could not work were the tractors driven from Mbale to Kumi and packed at the respondent's place . The third tractor which was brought by the appellant's representative, Guo Dong DW1 on the day they were tested worked well.

On the issue of whether the tractors had those defects when they were supplied or developed after they were delivered to the respondent, counsel contended that from the evidence of DW1 the defects developed as a result of missing spares i.e. parts which were removed when the tractors were in possession of the respondent who used the tractors before they were trained by DW1. Counsel submitted that according to the Memorandum of Understanding Exh. D1 entered into by appellant and the Association – clause 7, thereof had stated:

"That Guostar shall offer training to buyers (operators) on cost price but charge after sales services for the same."

Counsel submitted that the use of the tractors before training the

operators coupled with the tampering/removal of some spare parts was the cause of the defects in the tractors, when they were in the respondent's possession.

Counsel submitted that in view of the acknowledgment by the Lady Justice Byamugisha, JA, that respondent's workers had used the tractors before they were tested and in light of the unchallenged evidence of DW1 and his contention as to the cause of the defects, the plaintiff had failed to discharge the burden of proof.

In the alternative, learned counsel argued that because of the uncertainty of the time when the tractors developed defects, there is a doubt which should be resolved in favour of the appellant.

In conclusion, counsel submitted that section 35 of the Sales of Goods Act ought not to have been invoked against the appellant in the instant case since the respondent as a buyer acted contrary to the conditions of sale set out in the memorandum of understanding. In view of the above, counsel for appellant submitted that the Justices of Appeal were in error to hold that the appellant was responsible for the defects in the tractors. He therefore prayed that ground one should be upheld.

M/s. Omoding, Ojakol & Okallang Advocates for the respondent contended on this ground in their written submission that the lead judgment of Lady Justice Byamugisha, JA, reveals that the Court of Appeal re-evaluated the evidence while considering the appeal. It was their contention that in evaluating the evidence on record, the lead judgment of Lady Justice Byamugisha, JA, referred to the evidence of DW1 who had testified that:

"***when he went to test the tractors in the month of August, two tractors were defective. The tractors were supplied in July and kept at the home of the appellant waiting to be tested."***

She then noted in her judgment that:

"DW1 in cross-examination was clear about the other two tractors. One was overheating and the other second had a hydraulic problem."

Counsel submitted that there was no evidence to indicate that at the time of the delivery in July, the tractors were devoid of those defects that were observed at the time of testing them.

In conclusion, counsel submitted that the respondent was in breach of its contractual obligation of supplying tractors fit for the particular purpose and therefore, submitted that the first ground had no merit and should be rejected.

This being a second appeal, the position regarding the evaluation of evidence on second appeals was succinctly stated in ***Habre International Co. Ltd. - vs - Abraham Alayakha & Others,*** (supra), that where it is apparent that the evidence on record has not been subjected to adequate scrutiny by the trial judge or the first appellate court, as the case may be, the appellate court has an obligation to do so. This court reiterated the view in the case of ***Banco Arabe Espanyol - vs - Bank of Uganda*** (supra), that as a second appellate court, except in the clearest of cases, we are not required to re-evaluate the evidence like a first appellate court. However, we stated in the case of ***Kifamunte Henry, - vs - Uganda Cr. Appeal No. 10 of 1997,*** that where the Court of Appeal has failed to do so or has applied wrong principles as in that case, we must correct any errors committed. See also P***andya - vs - R (1957) EA 366 & Bogere Charles - vs - Uganda, Cr. Appeal No. 10/98 (SC).***

In the instant case, the lead judgment of Lady Justice Byamugisha, JA, with which other Justices concurred, shows she re-evaluated the entire evidence on record and held that there is no evidence to indicate that at the time of delivery in July, the tractors were devoid of the defects which became apparent upon testing and they were fit for the purpose. There was no independent evidence adduced to show that the defects occurred after they were delivered.

The Lady Justice cited the case of ***Kinyanjui - vs - D T Dobie & Co. (Kenya) Ltd. [1975],*** where it was held that the communication by the buyer to the seller of the purpose for which the goods were required is sufficient to show the seller that the buyer relies on the seller's judgment. See also ***Sugar Corporation of Uganda Ltd. - vs - Lawsam Chemical (U) Ltd. SC, Civil Appeal No. 5 of 2001.***

In her re-evaluation of the evidence, the learned Justice of Appeal concluded that in order to succeed the buyer had to prove that he had relied on the seller's skills and judgment to supply him with the tractors fit for the terrain of Kumi, since the evidence showed that the seller was a supplier of tractors for use by farmers. DW1's evidence showed that he was an agricultural specialist and confirmed that the buyer had given through the Association the required specifications of the tractors he wanted and therefore, the buyer relied on judgment and skills of the seller to supply tractors fit for the purpose.

In conclusion on whether the seller supplied the tractors which conformed with the buyer's specifications, Byamugisha, JA, stated that:

"There was no independent evidence to determine whether the tractors were fit for the purpose. But the evidence from the respondent was its responsibility to test the tractors and train the appellant and other workers on how to use them.

Again DW1 testified that when he went to test the tractors in the month of August, about two months after they were supplied, two tractors were defective. The tractors were supplied in July and kept at the home of the appellant waiting to be tested. Admittedly, some workers of the appellant tried to use them before the respondent had tested them. But one of them was working. DW1 in cross-examination was clear about the two tractors. He clearly stated that two of the tractors failed to work. One was overheating and the second had a hydraulic problem. These defects were seen barely two months after the tractors had been supplied and yet the respondent had given a warranty of 12 months. In my view, the learned trial judge was wrong to hold as he did that the appellant had no choice but to take a bare tractor in addition to the one he had kept. He was wrong for failing to hold that the respondent was in breach of its contractual duty of supplying tractors fit for the particular purpose. The appellant through the Uganda National Farmers Association made his specifications for tractors he wanted. He therefore relied on the respondent's skill and judgment. The respondent let him down. The orders made by the trial court would therefore be set aside."

(Reference in the above passage to the appellant and the respondent is to the present respondent and the appellant respectively).

Clearly, the above conclusion was arrived at after a thorough re-evaluation of the entire evidence. The learned Lady Justice cited section 35 which is now section 34 of the Sale of Goods Act which provides that:

"Where goods are delivered to the buyer which he has not previously examined, the buyer is not deemed to have

accepted them unless and until he has had a reasonable opportunity of examining them for purposes of ascertaining whether they are in conformity with the contract."

The learned Lady Justice rightly in my opinion held in her lead judgment that the respondent had not accepted the tractors, because he had not had a reasonable opportunity to inspect them and ascertain for himself whether they were fit for the purpose for which he bought them.

Clearly, the opportunity for the respondent to ascertain whether the delivered tractors conformed to his specifications was afforded to him when they were tested in presence of both the respondent and the appellant's agent in the respondent's farm. According to the evidence of both the respondent and the appellant, the two tractors failed to perform – one had hydraulic problems whilst the second one overheated. In my view, if the defects in those two tractors came about as a result of the respondent's tampering with them, the appellant should have counterclaimed for money incurred in repairing them, which it never did.

Therefore, ground one must fail.

The complaint in ground 2 was that the learned Justice of Appeal erred both in fact and in law in holding that the tractors were rejected when they were sent back for repair. This ground is related to 1st ground of cross-appeal before the Court of Appeal which was dismissed by the Court of Appeal as having no merit.

On the issue of whether there was evidence to show that the respondent rejected the tractors and if so, at what point in time or whether he avoided his obligation of collecting the tractors back after they were repaired, counsel for the appellant submitted that there was

ample evidence by DW1 that the appellant repaired the tractors within 2 days of the delivery to it and informed the respondent to collect them but there was no evidence to support the respondent that the appellant failed to repair the tractors. Counsel further submitted that when the respondent asked the appellant to repair the tractors, that did not amount to a rejection of the tractors, because rejection must be an unequivocal and unambiguous act on the part of the buyer to the seller.

In opposition, respondent's counsel submitted that in order to resolve the issue of whether the appellant accepted the tractors or not, it is necessary to consider the provision of Section 34(1) of the Sale of Goods Act, (supra).

Counsel contended that the operative words in section 34(1) are that the respondent, ***is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for purposes of ascertaining whether they are in conformity with the contract.***

Counsel submitted that according to the evidence of the respondent, the opportunity to examine the tractors was when the tractors were tested in the field in the presence of the appellant's agents. Upon seeing the defects in the two tractors, the respondent rejected them.

The respondent described what happened on the day of testing the tractors in the following words:

"The Agric Department people were informed , I reported there as their farmer. Guodong was not there. When he came I called the Mechanics and we went to the field. The first tractor was driven. They tried to fit the plough but it could not

be fitted on to the tractor. We drove it to the verandah. The Goustar Mechanics tried so hard to engage the hoe and manipulated the system such that it could engage the plough. They failed. We left the first tractor.

The second tractor on trial was driven. It engaged the plough and went to plough. It ploughed two or three times then steam gushed out with hot water out of the tractor. People ran away from the bubbling water. Mr. Oluka was the one driving. He ran away on stopping the tractor and left the fuming tractor. It was later driven to the verandah when it had cooled down. Then another one went to the third tractor. This was reversed to the plough. It engaged and proceeded to the field. It ploughed properly. After that we went back to the home. Engineers of Guostar then went to try to repair the plough lever to lower and raise. The system on the first tractor failed and we left it. The second vehicle was overheating. The third was o.k. I decided not to be repairing new tractors.

Guodong then agreed to take the tractors to Kampala. I provided transport. Two trips were made to transport the tractors. This was because I also rejected the small trailers."

Clearly, the above evidence shows that the respondent had not accepted the two tractors as he had not had a reasonable opportunity to inspect and ascertain for himself whether they were fit for the purpose for which he had bought them. The tractors were tested in the presence of Guodong who also stated in evidence that they were tested in the field and found to be defective. In my opinion the respondent was entitled to reject the defective tractors.

In the result, ground 2 must fail.

The complaint in ground 3 was that the Justices of Appeal erred both in fact and in law in failing to cancel out the order of Justice Okum Wengi, that the cross-Respondent, retain one tractor and hand over the other to the appellant after finding that the judge was wrong. I must say that this ground does not make sense. Moreover, no submissions were made by counsel to support it.

In her lead judgment, Byamugisha, JA, stated:

"I accept that the trial judge was wrong to make the orders in the manner that he did. The judgment itself was a contradiction of . . . . . sorts. The understanding was that the cross-appellant would supply three tractors with their implements. Therefore, the order of the court was in contradiction with the memorandum of understanding which was, the basis for the supply of the tractors."

I agree with the above conclusion and I find no merit in this ground which must fail.

The complaint in ground 4 was that the Justices of Appeal erred both in fact and in law for basing on the fact of terrain in Kumi to hold that the tractors could not work in the terrain when the issue was defects and not specifications.

Whereas the Court of Appeal held that in order for the appellant (now the respondent) to succeed he had to show that he relied on the appellant's skills and judgment to supply him tractors fit for the terrain of Kumi, the overall consideration in determining the appeal was whether or not the tractors could perform the work/job for which the respondent had purchased them. In resolving this issue, the Court of Appeal relied on section 16 of the Sale of Goods Act which is

now s. 15 of the 2000, Revised Edition of the Laws of Uganda. It provides that:

"Subject to the provisions of this Act and of any Act in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:

(a) ***where the buyer expressly or by implication, makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment, and the goods are of description which it is in the course of the seller's business to supply whether he be manufacturer or not, there is an implied condition that the goods shall be reasonably fit for such purpose.***

(b) ***Where goods are bought by description from a seller who deals in goods of that description, whether the seller is the manufacturer or not, there is an implied condition that the goods shall be of merchantable quality; except that if the buyer has examined the goods, there shall be no implied condition as regards defects which the examination ought to have revealed;***

(c) ***. . . . . .***

(d) ***. . . . . .***

The lead judgment of Byamugisha, JA, rightly relied on the case of

Kinyanjui - vs - DT Dobie & Co. (Kenya) Ltd.(supra). See also ***Manchester Liners - vs - Rea [1922] 2 AC 14*** in which Lord Buckmaster held:

"If goods are ordered for a special purpose, and that purpose is disclosed to the vendor, so that in accepting the contract he undertakes to supply goods which are suitable for the object required, such a contract is, in my opinion, sufficient to establish that the buyer has shown that he relies on the seller's skill and judgment."

In that same case Diplock L J held inter alia . . . . :

"***the communication by the buyer to the seller of the purpose for which he requires the goods is sufficient to show that he relies on the seller's skill or judgment, for there is no other reason why the buyer should make known his purpose to the seller."***

Clearly, the evidence which was before court was that the appellant was a supplier of tractors for use by farmers. DW1 had testified before court that he was an agricultural specialist. In the memorandum of understanding between the appellant and the Association the type of tractors that the respondent required were specified and DW1 confirmed in his testimony that he was given the required specifications. Therefore, the respondent had relied on the appellant's judgment and skill to supply tractors fit for the respondent's use.

If, as the evidence showed, the hydraulic system failed as a result of which one tractor could not lift and lower the ploughs, then that tractor never fitted the purpose for which the respondent wanted it. Further, if the second tractor overheated on being tested in the presence of the

appellant's agent, then that tractor failed to fit the purpose for which the respondent wanted to buy it.

Consequently, this ground must fail.

The complaint in ground 5 was that the Justices of the Court of Appeal erred in fact and in law in not considering and overlooking the question of warranty and came to a wrong conclusion to the effect that since the appellant had given a warranty of 12 months and the defects came up after 2 months the appellant was in a breach of contract.

Counsel for the appellant, in his written submission contended that the defects in the tractors were not the responsibility of the appellant, and added that even if it was, which was denied, he reiterated that the appellant's responsibility would be to correct the defects in the tractors. He contended that this would be a breach of warranty which would not entitle the buyer to reject the goods but to seek damages.

Opposing this ground, counsel for the respondent quoted the holding of Newbold, JA, in ***Kampala General Agency 1942 Ltd. - vs - Mody's EA Ltd [1963] EA 549***, that a condition in a contract of sale is an obligation the performance of which is so essential to the contract that if it is not performed the other party may fairly consider that there has been substantial failure to perform the contract. Counsel further submitted that the breach in the instant case never amounted to breach of a warranty as it was submitted by counsel for the appellant, which would entitle the buyer to claim damages because warranty as defined by section 1(0) of the Sale of Goods Act (Revised Edition 2000 is:

"***An agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purposes of***

such contracts, the breach of which gives rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated."

Byamugisha, JA, rightly found that the respondent had made specifications of the tractors he wanted through the Association. The appellant confirmed the specifications having been made by the respondent. Therefore, the Court of Appeal was right to hold that the respondent had relied on the appellant's skills and judgment which imputed an implied condition that the goods would be reasonably fit for the purpose he wanted them. As stated in section 15(1)(a) of the Sale of Goods Act, the breach of such condition would entitle the buyer to reject the goods as opposed to a case of breach of warranty, which would entitle the aggrieved party to claim damages for such a breach.

In my view, the disposal of grounds 2, 3 and 4 more or less disposes of this ground. As the two tractors failed to meet the purpose for which they were purchased, the appellant was in fundamental breach of its contractual obligation of supplying tractors fit for respondent's purpose.

Therefore, ground 5 must fail.

Ground 6 complained that the Justices of Appeal erred both in fact and in law by failing to take the mathematical calculations by the cross-appellant that what was awarded to the respondent in Shs. 7,244,685= was erroneous, unjustifiable and worked injustice to the appellant.

Counsel for the appellant submitted that the contention by counsel for the respondent that the respondent had repudiated the contract was an afterthought because the respondent never expressly rejected the tractors.

Counsel adopted the submission made before the Court of Appeal on 3rd ground of appeal when the counsel was dealing with calculation of the amount of money each tractor would cost, taking into account the cost of spare parts for repair of the two tractors. Counsel submitted that the Justices of Appeal erred to hold that the respondent was entitled to a refund of Shs. 18,356,120= when the respondent had already taken delivery of the tractors, accepted them and above all, used them. He contended that if the appellant was to resell these tractors, it would be at a loss. He prayed that the order of the Court of Appeal be set aside and for the appeal to be allowed with costs to the appellant.

Counsel for the respondent submitted, rightly in my view, that after making necessary calculations basing on Exh. D2, Lady Justice Byamugisha, JA, found that since the value of 3 tractors with their implements plus tax was Shs. 105,677,140=, the cost of one of the 3 tractors would be Shs. 105,677,140= divided by 3 which would be Shs. 35,226,380=. However, since the respondent had already deposited Shs. 53,584,500= towards the purchase of the tractors, he would be entitled to a refund of the amount deposited less the amount equivalent to the value of one tractor which would be Shs. 53,584,500= minus Shs. 35,226,380= which would be Shs. 18,358,120.

The learned Lady Justice found, rightly in my view, that since there was no counter-claim pleaded regarding the cost of the repair of the two tractors, no relief would be granted on the issue of costs for repair of the tractors.

I agree with the above conclusion. It is well settled that no decision must be made or relief granted by any court of law on a ground which was not pleaded. See the case of ***Candy -vs - Caspair Air Charter Ltd. [1956] EACA 139 at page 140*** where Sir Ronald

Sinclair VP, stated that:

"The object of pleadings is of course to secure that both parties shall know what are the points in issue between them, so that each may have full information of the case he has to meet and prepare his evidence to support his own case or to meet that of his opponent. As a rule, relief not founded on the pleadings will not be given."

See also the case of ***Francis Sembuya - vs - AllPorts Services (U) Ltd. Civil Appeal No. 6 of 1999 SC,*** which reiterated the holding in ***Candy case*** (supra).

In the instant case, the pleadings show that the appellant never counterclaimed for the costs it allegedly incurred on repairing the tractors. Therefore, the respondent did not defend himself on this issue before the trial court. I would therefore not fault the lower courts for having not considered it. In the result, ground 6 must fail.

In conclusion, this appeal should be dismissed with costs here and in the courts below.

JUDGMENT OF ODOKI, CJ

I have had the advantage of reading in draft the judgment of my learned brother Karokora, JSC and I agree with him that this appeal should be dismissed with costs to the respondent.

As the other members of the Court also agree, this appeal is dismissed with costs to the respondent in this Court and the Courts below.

JUDGMENT OF ODER, JSC.

I have had the benefit of reading in draft the judgment prepared by my learned brother, Karokora, JSC. I agree with him that the appeal should be dismissed with costs to respondent.

JUDGMENT OF TSEKOOKO, JSC

I have had the benefit of reading in draft the judgment prepared by my learned brother, Karokora, JSC. I agree with his conclusions that the appeal should be dismissed with costs here and in the Courts below.

In this case no scheduling conference was held and no issues were framed before the trial begun.

I would like to make observations on the need to hold a scheduling conference and the necessity for trial judges to frame issues preferably before a trial begins in civil cases.

SCHEDULING CONFERENCE

The learned trial judge did not hold a scheduling conference. There is no explanation on the record why this was not done. By the time the suit was filed in 1999 and eventually heard, the **Civil Procedure (Amendment) Rules 1998,** had come into force (see SI 1998 No.26) having come into force on 18th May, 1998. The amendment introduced the holding of what I think is a mandatory scheduling conference. In so far as relevant **Order XB Rule I** (I) (b) of the Civil Procedure Rules reads: -

(b) Where no application for interrogatories and discoveries has been made under rule 1 of Order X, then within twenty eight days from the date of the last reply or rejoinder……,

the court shall hold a scheduling conference to sort out points of agreement and disagreement, the possibility of mediation, arbitration and any other form of settlement…… (*underlining supplied*).

As I understand this rule, its objective is to assist in expeditious disposal of civil cases by trial courts. As the rule states, its application helps a trial judge and parties before the trial begins to dispose of matters that are not contentious such as admission of unchallenged documents and therefore if a conference is properly conducted the case can be concluded early.

Indeed subrule (2) provides that where the parties reach an agreement, orders shall immediately be made in accordance with rules 6 and 7 of **Order 13. Rule 7** of that **Order** empowers court to pronounce judgment where an agreement is reached between parties to a suit. I make this observation because I have noted in a number of appeals coming to this Court that some trial courts do not bother to make use of the above provisions and therefore trial courts spend their

valuable time on receiving evidence on matters which could have been admitted at the scheduling conference.

FRAMING ISSUES

The second point is about framing issues. This is regulated by o.13 of CP Rules. Normally it is the duty of a trial judge to ensure that issues are framed at the beginning of a trial. **Order 13 Rule 1 (5)** of the Civil Procedure Rules, states: -

> **"*(5) At the hearing of the suit, the Court shall after reading the pleadings, if any, and after such examination of the parties or their advocates as may appear necessary, ascertain upon what material propositions of law or fact the parties are at variance, and shall thereupon proceed to frame and record issues on which the right decision of the case appears to depend.*"**

In my opinion, this subrule is complementary to the one regulating scheduling conference.

The subrule requires that after preliminary matters are done during discovery, interrogatories, if any, followed by a scheduling conference, issues should be framed to define the dispute. Thereafter only relevant evidence is adduced to prove or disprove disputed matters. Embarking on a civil case trial in which two or more parties are at variance before framing issues is like sailing on the high seas without a radar and compass. That really means that valuable time will be spent on receiving all manner of evidence from witnesses. The learned judge framed issues in this case while writing his judgement without in put from parties. As the Court of Appeal correctly observed, in the process, the learned judge appears to have attempted to please each side in his judgment.

JUDGMENT OF KANYEIHAMBA, JSC.

I have had the benefit of reading in draft the judgment of my brother Karokora, JSC. I agree with him that this appeal should be dismissed with costs here and in the Courts below. I also concur with the observations, my learned brother Tsekooko, JSC, has made in his judgment in this appeal.