THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: ODOKI, CJ., TSEKOOKO, KAROKORA, MULENGA, AND KATUREEBE JJ.SC.).

CIVIL APPEAL NO. 17 OF 2001

BETWEEN

MPUNGU & SONS TRANSPORTERS LTD APPELLANT

AND

1. ATTORNEY GENERAL] RESPONDENTS
2. KAMBE COFFEE FACTORY (COACH) LTD]

[Appeal from the decision of the Court of Appeal of Uganda at Kampala (Kato, Engwau, Twinomujuni JJ.A), dated 27th April, 2001 in Civil Appeal No. 63 of 1999].

JUDGMENT OF KATUREEBE, J.S.C.

This is a second appeal, the original suit in the High Court was dismissed, and a subsequent appeal to the Court of Appeal was also dismissed. Hence this appeal.

The appellant, a bus-operator, had been granted a licence by the Transport Licencing Board (TLB) to operate the route known as **SCL 2A: MASINDI - KAFU - NAKASONGOLA - KAMPALA** (herein referred to as "the route"). Another company called Super Coach had also been granted a licence to operate on the same route. Subsequently, the 2nd respondent was also granted, first a temporary and later a 5 year, licence to operate the same route, thus making a total of three bus operators on the route. It is this third licence that is the source of the dispute. The appellant felt that it was not economical for three operators to be licensed for the route and that this had badly affected its economic returns and driven it into financial difficulties. More seriously however, it contended that the manner in which the 2nd Respondent had been awarded the licence by the officials of the TLB was based on fraud, bad faith, and unfair play. It claimed that it should have been given a hearing by the TLB before any licence was granted to the 2nd respondent since such grant would affect its interests. The hearing was never granted and, according to the appellant, thereby violating the well known rule of natural Justice known as **Audi Alteram Partem**. In its original suit, the appellant sought from court a declaration that the licence granted to the 2nd respondent was invalid. It also claimed general and aggravated damages, exemplary damages and special damages and costs

therein. It also sought an injunction to restrain the 2nd Respondent from operating the route. The High Court examined a number of documents submitted in evidence as exhibits and also heard oral testimonies of witnesses. It found the suit to be without merit and dismissed it. As already stated above, the appeal to the Court of Appeal was unsuccessful.

The appellant filed this appeal on three grounds of appeal framed as follows:-

1. That the learned Justices of appeal erred in mixed fact and law in holding that the appellant did not prove the alleged fraud to the required standard.

2. That the learned Justices of appeal erred in mixed law and fact in admitting the oral testimony of DWI (Bushoberwa) in preference to the documentary evidence on the record regarding the alleged fraud and unfair play.

3. That the learned Justices of Appeal erred in not granting the reliefs sought by the appellant".

Mr. Kibedi, Counsel for the Appellant, argued grounds 1 and 2 together, and for ground 3 he adopted his submissions in the Court of Appeal. I am constrained to observe, however, that what Counsel said in the Court of Appeal criticising the trial Judge could not be

applicable in this court when criticising the Justices of Appeal, which in essence is the substance of ground 3 of appeal in this court.

Be that as it may, Counsel strenuously argued his two first grounds of appeal. He submitted that the Court of Appeal had abdicated its duty to properly re-evaluate and weigh the evidence on record and had therefore come to a wrong conclusion. He submitted that evidence of fraud had arisen at 3 stages: at the initial stage of granting the temporary license to the 2nd Respondent, at the renewal of that license, and lastly at the grant of the 5 years licence. He submitted that evidence of that fraud at the first stage was to be found in the testimony of PW1 whose evidence to the effect that in so far as the TLB had not called him and given him a hearing before granting a temporary licence to the 2nd respondent. Thus, the TLB had violated the **Audi Alteram Partem** rule and this amounted to fraud. Counsel cited section 90 of the Traffic and Road Safety Act, 1970 as amended by **The Traffic & Road Safety Act (Amendment)** Decree 18/73 to support his submission. Other supposed evidence of fraud cited by counsel were exhibits P4, P.8 and P 9A, which indicated that the 2nd respondent had been advised to look for another route, but had instead continued to operate on the route. Counsel pointed to inconsistencies in the documents and submitted that these inconsistencies amounted to fraud or unfair play and *malafides.*

Counsel cited a number of authorities in support of his submissions. He referred us to section 154(c) of the evidence Act on the credibility of a witness in relation to previous correspondence. He referred to

SARKAR'S LAW OF EVIDENCE and the case of **MILLY MASEMBE -Vs- 1. SUGAR CORPORATION, 2. KAGIRI RICHARD, (S.C.) Civil Appeal No. 1 of 2000** (unreported), and **Section 90 of the Traffic & Road Safety Act**. He also referred to the case of **FARM INTERNATIONAL -Vs- MOMAMED HAMID EL-FATHIA CIVIL APPEAL NO. 16/93 (S.C.V)** on the issue of fraud. On the basis of these authorities he invited us to find that the Court of Appeal had misdirected itself on the law and facts.

For the 1st Respondent, Mr. Oryem Okello supported the findings of the Court of Appeal. He submitted that the court had correctly re-appraised the evidence on record and had correctly affirmed the decision of the High Court. He argued that the appellant had the duty to prove fraud and had failed to do so. The alleged inconsistencies in the tendered documents P4, P8, P9A and P 9B did not prove fraud. The apparent inconsistencies had been explained in court on oath by DWI whom the trial court had believed. The Court of Appeal had seen no reason to interfere with that finding. He argued that proof of fraud had to be to a standard higher than that required in ordinary civil matters, and cited the case of **Kampala Bottlers Ltd -Vs- Ddamanico (U) Ltd Civil Appeal No. 22/1992**, (S.C) (unreported) in support of that argument. He also submitted that in terms of sections 101 and 103 of the Evidence Act, the burden to prove fraud lies on the appellant. He submitted that exhibit P 9A which were minutes of a meeting was not signed whereas exhibit P.9B which was minutes of the same meeting was signed after mistakes in P.9A had been

corrected. He therefore submitted that the court had correctly found that exhibit P9A had no evidential value.

On the issue of whether the Transport Licencing Board had acted correctly within the law, he submitted that in terms of section 91 of the Traffic & Road Safety Act, 1970 and section 87 of decree 18/73, the Board had considered the public interest and taken into account the interests of the appellant before granting the licence to the 2nd respondent. In counsel's opinion, there was no legal requirement to invite the appellant, although in fact he had been invited to attend a meeting of all the operators but had refused to do so. On ground 3, counsel submitted that the appellant was not entitled to any reliefs and that this was not a case that merited an award of exemplary or aggravated damages.

For the 2nd respondent, Mr. Ogalo submitted that the appellant had failed to prove any fraud at any stage of the proceedings leading to the grant of the licenses to the 2nd respondent. Counsel contended that, the appellant should have proved dishonesty on the part of the 2nd respondent. No evidence of dishonesty had been produced in the Court. Counsel further contended that the appellant had no right to be heard before the Transport Licensing Board. In any event, the finding of the Court of Appeal was that his interests had been taken into account by the Transport Licensing Board. He submitted that the Court of Appeal had fully re-appraised the evidence and come to the right decisions and that there was no basis for this Court to interfere with the decision and findings of the Court of Appeal. He cited the

case of **Maddumba - Vs - Wilberforce Kuluse, Civil Appeal 9/2002** (S.C.) (unreported) in support. He submitted that a second appellate court could only depart from the concurrent findings of the lower courts only if special circumstances justified it to do so. He submitted that no special circumstances existed in this case.

On the question of damages, he submitted that appellant had failed to prove his claims. The 2nd respondent had not conceded to Shs.200, 000/=. He had merely answered a question as to what he earned. Counsel prayed for the dismissal of the appeal.

As already stated, this is a second appeal. It is therefore necessary to examine the law and basis upon which this court may interfere with the findings of the lower court with regard to facts. In **ERISAFANI MUDDUMBA -Vs- WILBERFORCE KULUSE,** (supra) this Court held that a second appellate court will only depart from the concurrent findings of fact by the lower courts only if special circumstances justified it in doing so.

In that case, Oder, JSC, stated at page 4 of his Judgment:

> ***"The Court of Appeal was the second appellate court in this matter. As such, it could only depart from the concurrent findings of fact by the trial Magistrate's Court and the appellate High Court if special circumstances justified it doing so. This is trite law on the role of a second appellate court regarding findings of fact."***

In an earlier case of **PETERS -Vs- SUNDAY POST LTD, (1958) E.A. 424,** the Court of Appeal for Eastern Africa made a similar decision after reviewing a number of English cases on the subject.

Thus **Sir Kenneth O'Connor, P, cites the following passage from the Judgment of Viscount Simon, L.C in the Case of WATT -Vs- THOMAS {1947} A.C.484:**

> ***"My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge: - …….Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law……..an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand: but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great***

weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."

The role of a second appellate court in the evaluation of evidences is also well articulated upon by this Court in **MILLY MASEMBE -Vs- SUGAR CORPORATION AND ANOTHER, CIVIL APPEAL NO.1 OF 2000**, (supra). The test seems to be whether the trial judge failed to take into account any particular circumstances or probabilities or whether the demeanor of the witness whose evidence was accepted was inconsistent with the evidence generally. In the **Milly Masembe Case** *(supra).* Mulenga, JSC, observed:-

"In a line of decided cases this Court has settled two guiding principles at its exercise of this power. The first is that failure of the first appellate court to re-evaluate the evidence as a whole is a matter of law and may be a ground of appeal as such. The second is that the Supreme Court, as a second appellate court, is not required to, and will not re-evaluate the evidence as the first appellate court is under duty to do, except where it is clearly necessary."

In that case, the Court of Appeal had differed from the trial court on findings of fact and conclusions drawn therefrom, and the Supreme Court decided that in those circumstances, it was necessary to re-evaluate the evidence.

The appellant has alleged fraud, bad faith and unfair play on the part of the respondents. What evidence was adduced to support this? As already noted, the appellant sought to rely on alleged inconsistencies in exhibits P4, P8, P9A and P9B. In my view the trial court as well as the Court of Appeal appropriately addressed their minds to this evidence and both courts correctly decided that it was insufficient to prove fraud. They both found credible explanations for the alleged inconsistencies in the evidence of DW1, which evidence was not impeached by the appellant. Both courts made similar findings on both facts and law and independently came to the same conclusions.

In his lead judgment, Kato, JA, having considered the finding of fact by the trial judge with regard to fraud, said,

> ***"I agree with that finding of fact by the trial judge. As for the alleged contradictions in exhibit P9A and exhibit P9B, DW1 explained, while under cross examination, that there was an error in exhibit P9A which was corrected in exhibit P.9B and that is why the former was not signed but the latter was signed. The learned trial judge must have accepted this explanation as genuine before he made his above quoted finding. Exhibit P4 and exhibit P8, were***

letters from the Secretary to the Board stopping the second respondent from plying the route in dispute and informing it of the Board's intention to allocate it a different route. The trial judge dealt with the two exhibits in his judgment and ruled, quite rightly in my view, that the two documents did not entitle the appellant any remedy ……there is nothing in them (letters) suggesting that there was fraud on part of the Board. The mere fact that the second Respondent was an undisciplined operator does not per se amount to fraud. Fraud must be strictly pleaded and proved……."

Having carefully listened to Counsel Kibedi's arguments before us and perused the record of proceedings, I am not persuaded that there is any cause for this court to interfere with the lower courts' appraisal of the evidence and findings in regard to the allegations of fraud. In ***Kampala Bottle's Ltd_-Vs- Daminico (U) Ltd,*** Wambuzi, *(supra)* CJ., observed:

"Further, I think it is generally accepted that fraud must be proved strictly, the burden being heavier than on a balance of probabilities generally applied in civil matters."

This court further elucidated upon the proof of fraud in ***FAM International Limited -Vs- Mohamed Hamid El Fatih (Civil Appeal No. 16 of 1993).*** **(supra) in which** Odoki, JSC, (as he then was) stated thus:

"It seems to me that while the statement quoted from Halburys Laws of England (Supra) represents the law on the standard of proof in fraud cases in general terms, it does not go far enough to emphasise that in fraud cases the standard is more than a mere balance of probabilities though less than proof beyond reasonable doubt…."

In the instant case, the learned trial judge found that the appellant had not even proved his case on a balance of probabilities. He stated in his Judgment thus:

"The third issue was whether the purported license of the second defendant to operate in the same route with the plaintiff was done fraudulently. I included this issue while considering issue No.2 I do not see any fraud or bad faith on the part of the TLB and leave alone violation of the principles of natural justice ……It would appear that the defendant wanted to extract from the defendant on such ……..evidence. He has failed to prove his claim on a balance of probabilities and as such the suit be dismissed with costs."

The Justices of Appeal agreed with this finding. Having reviewed the law, the evidence and submissions of counsel, I have found no reason to interfere with their concurrent findings.

In arguing his two combined grounds of appeal, counsel for the appellant dwelt on the alleged unfair play which, he submitted, was to

be found in the documentary evidence. He submitted that the Appellant had not been given a hearing before the grant of the license to the 2nd respondent so that he could have defended his interests. Failure to give him a chance to be heard, he submitted, amounted to breach of the **Audi Alteram Partem Rule.** He cited the case of **MARKO MATOVU AND TWO OTHERS -Vs- MOHAMMED SSEVIRI AND ANOTHER, CIVIC APPEAL NO. 7 OF 1978** to support the proposition that the **Audi Alteram Partem Rule** is so central to Uganda's system of Justice that it must be observed by both Judicial and administrative tribunals.

I agree that the **Audi Alteram Partem** rule is a cardinal rule in our administrative law and should be adhered to. Simply put the rule is that one must hear the other side. It is derived from the principle of natural Justice that no man should be condemned unheard. **(See Black's Law Dictionary) 6th Edition**. However one would have to prove that one had a right to be heard which had been breached, and that the decision arrived at by the administrative authority had either deprived him of his rights or unfairly impinged on those rights thereby causing damage to the individual concerned. Most cases involving the right to be heard have dealt with situations where a person was being deprived of his property or livelihood. But each case has to be looked at on its own merits

Thus, in the case of **Russell -Vs- Nolfolk {1949} 1 All ER 109 Turker, L.J,** stated: "The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules

under which the tribunal is acting, the subject matter that is being dealt with, and so forth."

In the instant case, the appellant cited Section 90 of **the Traffic and Road Safety Act,** as amended by **Decree 18/73** as the basis for his right to be heard. For better appreciation of that Section, I have set it out in full thus:

> ***90." (1) Within one month of the receipt of the information under subsection (2) of section 87A of this Act, the Secretary to the Board shall cause to be published in the Gazette for the information of the public and prospective public omnibus and country taxicab operators and shall invite applications from such operators to assist the Board in its subsequent deliberations.***
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> ***(2) Not less than two months after the advertisement has been published under sub-section (1) of this section, the Board shall meet to consider, allocate and offer one or more of the previously advertised routes or packages of routes to prospective transport operators.***
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> ***(3) The Board shall not offer, grant or renew a public omnibus or country taxicab operator's licence to any person who,***
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> (a) has been convicted of an offence involving fraud or dishonesty;
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> (b) is in breach of a condition of any previously held operator's license;

(c) has had a public service operator's licence of any type cancelled under this or any other Act,

and shall have due regard to the reliability, character and financial stability of that person, the condition of his motor vehicles and the facilities at his disposal for the general maintenance of service on the route or routes or combination of routes." (emphasis is mine).

The Board took the above factors into account before granting a licence to the appellant. It is not being sought to deprive the appellant of his licence .

This section makes reference to section 87A which deals with the factors that have to be considered while compiling the routes and package for routes. These factors are: **" a) the needs of the public;**

b) **the desirability of providing services which are both efficient and economic;**

c) **the coordination, in so far as may be possible, of all forms of passenger transport both in any particular area and in the whole of Uganda;" ……(section 87A (2).**

It is noteworthy that Section 90 (3) provides that in granting or renewing omnibus license, the TLB shall ***"have due regard to the reliability, character and financial stability of that person, the condition of his motor vehicles and the facilities at his disposal for the general maintenance of service on the route or combination of routes"*** This is more or less repeated in Section 91(2) which sets out the factors the TLB must have due regard to in granting a private and contract omnibus operator's licence.

It appears to me that neither of these sections establishes for any party already operating a route any right to be heard before another operator is granted a licence. The board has to consider the totality of the factors listed in those sections. The evidence, both documentary and oral, shows that after the appellant complained, it was in fact invited for meetings to discuss the matter. One such meeting called for 11th December, 1996 the appellant refused to attend. Furthermore, the appellant did not establish that the route had to be operated by only two operators, nor did it show that a decision had been made to deprive it of its license. The Trial Court and the Court of Appeal believed the evidence of DW1 that the TLB had considered not only the interests of the Appellant but also the interests of the public as demanded by the law. In considering whether the route was economic, the Transport Licencing Board had taken into account that the route had previously been operated by 3 operators until the bus of one was burned in Northern Uganda. Therefore licencing another operator, although increasing competition for the Appellant, was promoting the interest of the public, even

though it could possibly mean a drop in the revenue of each operator. Further evidence on record, which was unchallenged in cross examination, was to the effect that whereas the Appellant's vehicle on the route was an old Tata Bus, the 2nd Respondent's vehicle was a newer Isuzu favoured by the public. Here once again one has to bear in mind factors which the Transport Licencing Board has to consider in granting an omnibus licence, set out in Section 91(2) (d) thus:

> ***"The reliability, character and financial stability of each applicant for a licence, the condition of the motor vehicles to be used, and the facilities at his disposal for the general maintenance of the service on such route or routes or combination of routes."***

Bearing the above provisions of the law in mind, and taking into account the evidence of DW1 and his explanation of the apparent contradictions in the evidence, I do not see that the appellant had a right to be heard which was violated. The **Matovu case** (supra) is not applicable to this case as there was no violation of the **Audi Alteram Partem Rule.**

In my view, grounds 1 and 2 of appeal ought to fail. The Court of Appeal properly directed itself to the law and the evidence and came to the right decision in dismissing the appeal, and confirming the decision of the trial court.

With regard to the reliefs sought, counsel for the appellant submitted that the trial judge failed to assess the damages claimed. He

submitted that special damages of Shs.500,000/= net income per day had been admitted by the 1st respondent. He prayed for exemplary and aggravated damages, general damages and costs. All this was opposed by Counsel for the respondents in reply. Nonetheless, the Court of Appeal did find that the trial judge should have gone ahead and made an assessment of damages even though he had dismissed the case. In the lead Judgment, Kato, JA, said:

> ***"With respect, I do not agree with the Counsel for the respondents that there was no basis upon which the assessment could have been made. There were figures given by PW1, arbeit contradictory, upon which the assessment would have been based. The judge was wrong in not carrying out part of his duty of assessing damages although he had dismissed the suit. In my view, this failure by the trial judge did not result in miscarriage of justice to justify interfering with his judgment."***

Kato, JA, was correct because it is good practice for trial courts to assess damages they would have given to save time of sending back the case for assessment of damages. It is also correct to hold that failure to assess damages does not cause a failure of justice. In this case, since there are no damages to assess the complaint has no merit. In my view, if counsel had wanted us to interfere with the decision of the Court of Appeal in this matter, he should have addressed us on it and offered us strong reasons in support. But since I am of the view that the first two grounds of appeal do fail, no useful purpose would be served now to consider the question of reliefs sought.

In passing, I wish to observe that this was not the type of case where a court would consider exemplary and aggravated damages. The facts of the case do not bring out oppressive, and unlawful conduct as submitted by the Appellant. The appellant retained his licence, only that it now had two competitors instead of one. It was up to it to put on the route the type of bus that would probably compete much more favourably with the others.

In the result, I would dismiss this appeal with costs in this court and the courts below.

JUDGMENT OF ODOKI, CJ

I have had the advantage of reading in draft the judgment prepared by my learned brother, Katureebe JSC and I agree with him that this appeal should be dismissed with costs in this Court and the Courts below.

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

JUDGMENT OF TSEKOOKO, JSC

I have had the benefit of reading in draft the judgment prepared by my learned brother, Katureebe, JSC, which he has just delivered and I agree that this appeal has no merit whatsoever and therefore it should be dismissed.

I also agree that the appellant should pay the respondents their costs here and in the Courts below.

JUDGMENT OF KAROKORA, JSC:

I have had the benefit of reading in draft the judgment prepared by my learned brother, Katureebe, JSC, and agree with him that the appeal has no merit and should be dismissed with costs here and in the courts below.

I have nothing of jurisprudential value to add.

JUDGMENT OF MULENGA, JSC

I had the advantages of reading in draft the judgment of my learned brother Katureebe JSC. I agree with him that the appeal be dismissed with costs and have nothing to add.

DATED at Mengo this 14th day of March 2006.