THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

(CORAM: ODOKI, CJ., TSEKOOKO, KITUMBA, TUMWESIGYE, KISAAKYE, JJ.S.C.

CIVIL APPEAL NO. 19 OF 2009

BETWEEN

KABU AUCTIONEERS & COURT BAILIFFS
MULJIBHAI MADHV ANI & CO. LTD.:: APPELLANTS

AND

F. K. MOTORS LIMITED :: RESPONDENT

[Appeal arising from the Ruling of the Court of Appeal at Kampala (Mpagi Bahigeine, Byamugisha and Kavuma, JJ.A) dated 16tft July, 2009, in Civil Miscellaneous Application No. 72 0/2006, arising out 0f Court 0f Appeal Civil Appeal No. 920/2003]

JUDGMENT OF KISAAKYE, JSC.

Kabu Auctioneers & Court Bailiffs (the 1st appellant) and Muljibhai Madhvani (the 2nd appellant) instituted this appeal against the ruling of the Court of Appeal by which the Court ordered the appellants to pay to the respondent, F. K. Motors Ltd, 2,300,000,000/= Uganda Shillings, as the value of goods seized in distress.

The brief background to this appeal is as follows. The respondent was a tenant of the second appellant at Plot 11, Old Port Bell Road, from November 1st 1999. The respondent defaulted in the payment of their rent and by March 28th, 2001 owed the second appellant 32,154 US Dollars in rental arrears. The respondent made several arrangements with the second appellant to pay off the arrears, which all failed to yield the desired results. Subsequently, the second appellant issued several reminders and demands which were too not heeded.

On March 28th, 2001, the first appellant, acting on the orders of the lawyers of the second appellant, Shonubi Musoke & Co. Advocates, closed up the premises which the respondent was renting for non-payment of rent. All the property the respondent had inside the premises was locked up.

Following the closure of the respondent's premises, the respondent filed H.C.C.S. No. 501 of 200 1 against the appellants for general damages for breach of contract of its Tenancy Agreement; specific damages and costs for the unlawful closure of its rented premises and for the retention of its property, contrary to the Distress for Rent (Bailiffs) Act. The respondent subsequently filed an amended plaint where it prayed for the following orders:

> *" (a) release of their property worth US $109,000 that was still locked up;*
>
> *(b) specific damages of Shs. 147,000,000/=*
>
> *(c) general damages of loss of business image;*
>
> *(e) interest on (a) and (b) from the date of fitting till payment in full.* "

The specific damages the respondent sought were laid out in paragraph 12 of the amended plaint as follows:

*"**particulars of specific damages***

(i) *Loss of daily earning of 1,000,000/= for 70 days with effect from the 28th March 2001, i.e. 70,000,000/=;*

(ii) *Loss of Avis franchise deposit 25000… i.e. 63, 000,000/=*

(iii) *Loss of wage bill 14,000,000*

(iv) *Repair indemnity 23,000,000/=."*

Although the sum total of the respondent's claims was higher, it apparently excluded the last head of repair indemnity and only made a gross claim of specific damages of 147,000,000/= Uganda Shillings.

The case was heard by Justice Zehurikize, who dismissed the suit with costs to the appellants and also entered judgment in favour of the 2nd appellant for, among others, rental arrears of US $32,154. The learned Judge also allowed the second appellant to sell off the respondent's properties, to satisfy the appellants' decree. He also ordered that the respondent was free to take the remainder of its properties after the satisfaction of the appellants' decree.

The respondent, being dissatisfied with that decision, filed Civil Appeal No. 92 of 2003 in the Court of Appeal. On 22nd November 2005, the Court of Appeal allowed the appeal in part and held that the first appellant had acted unlawfully when it levied distress against the respondent's property without first obtaining a Certificate to act as a Bailiff, as was required by the Distress for Rent (Bailiffs) Act. It ordered the appellants to return the respondent's property which they had unlawfully locked up in

the premises the respondent had been renting. The appellants failed to return the respondent's goods.

On 29th July 2006, the respondent filed Miscellaneous Application No. 72 of 2006 by Notice of Motion citing the old Rule 1(3) which is actually Rule 2(2) of the Judicature (Court of Appeal) Rules. The respondent sought for orders that the appellants pay the monetary value of its properties which the appellants unlawfully attached and for the costs of the application.

On 16th July 2009, the Court of Appeal allowed the application and ruled that the value of the respondent's property was 2,310,000,000/= billion Uganda Shillings.

The appellants, being dissatisfied with the ruling of the Court of Appeal, filed this appeal, basing it on 12 grounds of appeal, which are reproduced and considered later in this judgment.

The appellants sought for the following orders:

a) that the appeal be allowed

b) that the ruling/order of the Court of Appeal be set aside/quashed

c) *That the Application No. 72 of 2006 be struck out;*

d) *In the alternative, that the Court refers the matters back to the trial court for retrial of the issue of ascertaining the value of the goods;*

e) *Any other remedy the Court deems fit.*

The appellants were represented by Noah Mwesigwa, Kenneth Sabagayunga and Andrew Kibaya from Shonubi, Musoke and Company, Advocates, and Kampala Associated Advocates. The respondent was represented by Andrew Bagaya and

Mathias Sekatawa. Both counsel for the appellants and the respondent made oral submissions.

Counsel for the appellants argued grounds 1,2,3, 5 and 11 together; grounds 4, 6, 7, 8 and 11 together and lastly, grounds 10 and 12 together. On the other hand, counsel for the respondent argued all the grounds together, with a specific focus on two issues: the inherent powers of the Court of Appeal to entertain the respondent's miscellaneous application and the value of the respondent's goods. I will first consider and dispose of grounds 1, 2, 3 and 5 together. Thereafter, I will consider ground 4 alone and conclude by considering the remainder of the grounds of appeal.

1. *"That the Learned Justices of Appeal erred in law in that they ruled that the application was brought under the wrong law and/or rule and yet proceeded to entertain and substitute the wrong rule or law."*

2. "That the Learned Justices of Appeal erred in law in that they proceeded to substitute the wrong law with an equally inapplicable and irrelevant rule in the circumstances of the matter."

3. "That the Learned Justices of Appeal erred in law in that they did not properly appreciate, assess and interpret the decisions in the cases relied upon."

5. "That the Learned Justices of Appeal erred in law in essentially sitting in appeal of their own decision and which was not supported by law or the facts of the matter."

The main issue which arises from grounds 1, 2 and 5 of appeal is whether the Court of Appeal erred in entertaining the Miscellaneous Application No. 72 of 2006.

With respect to grounds 1 and 2, counsel for the appellants submitted that the Court of Appeal could not apply its inherent powers under Rule 2(2) where there is a specific rule, and where it would result in the Court sitting in appeal of its own decision. Appellants' counsel argued that the Court of Appeal erred when it entertained the respondent's application after the Court found that it had been brought under the wrong rule [2(2)]. Appellants' counsel further faulted the Court of Appeal for substituting the wrong rule with yet another wrong rule (Rule 36), which was not only inapplicable but was also irrelevant.

Counsel argued that the right procedure was for the respondent to apply under rule 30 to adduce new evidence which they did not do. Appellant's counsel prayed that the court allows the appeal and sets aside the ruling of the Court of Appeal. In the alternative, they prayed that this court orders that the matter be referred back to the trial court to review and take evidence on the value of the property.

Counsel for the respondent supported the ruling of the Court of Appeal.

As I pointed out earlier, the respondent brought Misc. Application No. 72 under Rule 2(2) of the Judicature (Court of Appeal) Rules. This Rule provides as follows:

> *"Nothing in these Rules shall be taken to limit or otherwise affect the inherent power of the court, or the High Court, to make such orders as may be necessary for attaining the ends of justice or to prevent abuse of the process of any such court, and tit at power shall extend to setting aside judgments which have been proven to be null and void after they have*

been passed, and shall be exercised to prevent abuse of the process of any court caused by delay."

During the hearing of the application, counsel for the appellants raised a preliminary objection to the same having been brought under rule 2 (2). The Court of Appeal ruled against the objection at page 1 0 of its Ruling as follows:-

"It is trite rule 2(2) *vests the court with unlimited power to rectify any injustice howsoever caused where there is no specific remedy prescribed. Rule* 36, *however, is prescribed for correcting errors and omissions.... We would however not dismiss the application on account of having been brought under the wrong rule. We would only substitute the wrong rule with the correct one, rule* 36(1) *and* (2) *in order to rectify an injustice. This procedure has been held to be in order as it does not cause any injustice to the opposite party."*

Thereafter, the Court heard and disposed of the respondent's application under rule 36 (1) and (2). It is this decision to proceed to hear the application that counsel for the appellants argued was an error on the part of the court.

Rule 36 of the Judicature (Court of Appeal) Rules, which is headed "Correction of Errors", provides as follows:

(1) A clerical or arithmetical mistake in any judgment of the court or any error arising in it from an accidental slip or omission may, at any time, whether before or after the judgment has been embodied in a decree, be corrected by the court concerned, either of its own motion or on the application by any interested person so as to give effect to what was the intention of the court when judgment was given.

(2) An order of the court may at any time be corrected by the court, either of its own motion or on the application of any interested person, if it does not correspond with the judgment or ruling its purports to embody or, where the judgment or order has been corrected under sub rule (1) *of this rule, with the judgment or order as so corrected."*

Before arriving at its decision, the Court of Appeal quoted at length and relied on the case of *Vallabhdas Karsandas Raniga v. Mansakhlal Jirura &Others (1965) EA 700,* which considered the principles that apply to amending or varying an order of the court. "The learned Justices then concluded as follows:"

"We think there can be no better authority for the inherent matter than this. We are satisfied that rule 36 (1) *and* (2) *is applicable and not rule 2* (2). "

Appellants' counsel contended that the applicable rule should have been Rule 30 and not Rule 36(1) and (2), as was held by the Court of Appeal.

(1) On any appeal from a decision of the High Court acting in the exercise of its original jurisdiction, the court may-

(a) reappraise the evidence and draw inferences of fact; and

(b) in its discretion, for sufficient reason, take additional evidence or direct that additional evidence be taken by the trial court or by a commissioner. (2) When additional evidence is taken by the court, it may be oral or by affidavit and the court may allow the cross-examination of any deponent.

(3) .....

(4) ....."

I have carefully considered the submissions of counsel for the appellants. I partially agree with them on the point that Rule 30 was applicable to the extent of permitting the Court of Appeal to take additional evidence, if, in its discretion, it deemed it necessary to do so. In this particular case, however, the Court of Appeal indeed re-evaluated the evidence but did not take additional evidence because it arrived at the conclusion that there was enough evidence on the record to reach its decision.

I disagree with the submissions of counsel for the appellants that rule 36 was not applicable and relevant. Rule 36 is the one that vests power in the Court of Appeal to correct errors or omissions. The application before the Court was for an order to correct an omission on the part of the Court to make an alternative order that the appellant should pay the monetary value of the respondent's goods, in the event that the respondent's goods were no longer available. Rule 36 was therefore very relevant and applicable.

The above notwithstanding, appellants counsel's submission that the Court of Appeal should only have proceeded under Rule 30 is not valid. A reading of Rule 30 does not show that it only applies in a mutually exclusive way with Rule 36. In my opinion, Rule 30 would only come into play in dealing with the substantive issue of determining the monetary value of the respondent's goods. However before the court could do so, it needed to resolve the question whether it had jurisdiction to hear the application, before it, which it did by ruling that it was vested with these powers under Rule 36.

I have noted that the Court of Appeal in hearing the respondent's application was fully conversant with its duty and role, which it summarized at page 11 of its ruling *As follows:*

"The application before court is for compensation in monetary terms of the applicant's goods, which were unlawfully distrained by the 1st respondent at the instance and application of the 2nd respondent. At the hearing of the appeal, it was never disclosed by the respondents that the goods had already been sold. The court then proceeded to give judgment for the return of the goods unaware that there were no goods to be returned but which fact was very well known to the respondents. There was therefore no alternative order for payment of their value which is the usual standard order, leaving discretion with the court to make an appropriate order under the circumstances of the case. Though it was vehemently contended for the respondents that no alternative order was sought, the prayers in the memorandum of appeal, read in part:

> *'It is proposed to ask the court for an order that:-*
>
> *1.……*

2. *This appeal be allowed and judgment entered for the appellants as prayed in the amended plaint in the lower court.*

3. *Any other remedy deemed fit and proper for the appellants'*

> *It is thus not correct that no alternative order was prayed for. We inadvertently omitted to utilize and give effect to this prayer* (3) *under the mistaken belief that the goods were in existence. "*

It is clear from the above quotation that the learned Justices clearly and rightly understood the application as requiring them to correct an omission to order for

payment of monetary value in the event that goods could not be returned. Rule 36 was applicable and relevant. I would therefore find no merit in Grounds 1 and 2 which should fail.

With respect to Ground 3, counsel for the appellants did not make any specific submission on this ground. Since counsel for the appellants failed to specifically canvass this ground, I take it that they abandoned it, hence making it unnecessary for me to rule on it.

On ground No.5 of the appeal, appellant's counsel did not make any submissions to show how the learned justices of Appeal had sat in appeal of their own decision.

It is an undisputed fact that the Court of Appeal has power, under Rule 36, to correct its judgments and orders before or after passing judgment, provided the conditions set out in the rules are met. This position has been well spelt in Raniga v. Jivraj *(supra)* and in *Lakamashi Brothers Ltd. ~ Raja & Sons* (1996) *EA 313.* This Court has also pronounced itself on this issue in the case of *Uganda Development Bank v. Oil Seeds (U) Ltd. Supreme Court Civil Application No. 15 of* 1997, where it laid down three principles upon which the court will exercise jurisdiction to correct errors in its decisions.

The Record of Appeal and the Court's ruling clearly focused on the issue of the determining the value of the respondent's goods, which could not be returned as ordered, because they were non-existent by the time the Court of Appeal ordered for their return. In hearing this application, the Court of Appeal was merely exercising the powers vested into it under Rule 36 of the Judicature (Court of Appeal) Rules. I have found no reason to fault the learned Justices for their decision. Ground 5 of appeal should fail.

I find that the Court of Appeal was right to entertain this application under rule 36. I also find that the application clearly fell under the ambit of the rule and the principles laid down in *Uganda Development Bank Ltd. v. Oil Seeds Ltd. Civil Application No. of* 1997, when the Court would be entitled to correct mistakes or omissions in its judgment so as to show its intention in the judgment.

I will now consider ground 4 of this appeal, which was framed as follows:

> *"That the Learned Justices of Appeal erred in law in that they held that the applicant was entitled to the monetary value of the goods attached."*

Counsel for the appellants contended that the learned Justices of Appeal erred in holding that the respondent was entitled to the monetary value of the goods the appellants unlawfully held. Counsel for the appellant also faulted the learned Justices of Appeal for failing to take judicial notice of the fact that execution had already been levied on the respondent's goods by themselves and other third parties, prior to the disposal of Civil Appeal No. 92 of 2003.

Counsel for the respondent, on the other hand, supported the ruling of the Court of Appeal. He submitted, on the issue of the appellants' challenge of the inherent powers of the Court of Appeal to order the payment of the monetary value of the respondent's goods. He argued that once the Court of Appeal found that distress was unlawful, the next consequential order was to order for the return of the goods.

He further argued that the Court of Appeal, however, did not order for the return of the goods because the appellants did not bring it to the Court's attention that by the time Civil Appeal No. 92 of 2003 was disposed off, the goods were no longer in existence. He further contended that if the appellants had informed the Court that the goods were no longer in existence, then the Court would not have made an order for the return of goods, but rather for payment of the value of the goods

which had been unlawfully retained. Lastly, respondent's counsel argued that the respondent did not know if the goods had been taken out of disputed premises.

I have reviewed the submissions of both counsels. I disagree with appellants' submissions made in support of this ground. In making their submissions and preferring ground 4 of the appeal, appellants' counsel were fully aware of the decision of the Court of Appeal in Civil Appeal No. 92 of2003, where the court had ordered for the return of the respondent's goods. The appellants did not appeal this decision. In addition, the record of appeal contains various correspondences originating from appellants' counsel to the respondent's counsel, informing them that the respondent's goods were no longer available. Given all the above, it was clear, even to appellants' counsel, that by the time the respondent filed Miscellaneous Application No. 72 of 2006, the Court of Appeal's decision in Civil Appeal No. 92 of2003 was not capable of being enforced, because the respondent's goods were no longer in existence. In the circumstances, an Order that the respondent was entitled to the monetary value of the goods was appropriate and necessary in order to give effect to the Court of Appeal's decision in Civil Appeal No. 92 of2003.

In light of the above, I find that the Court of Appeal did not err in holding that the respondent was entitled to the monetary value of its goods which the appellants had unlawfully distressed on, after it established that the goods it had ordered to be returned in its judgment in Civil Appeal No. 92 of 2003, could not be returned. This principle was reaffirmed by this court in *Joy Tumushabe & Another v. Anglo-African Ltd. & Another, Supreme Court CA. No. 7 of* 1999, where the court ordered for the return of the appellants' property as was proved to have been unlawfully removed and listed in accordance with the findings of the trial court or the payment of its value.

I have found no merit in Ground 4 of the appeal and it should fail. I will now consider grounds 6, 7,8,9, 10, 11 and 12 of appeal.

They were framed as follows:

6. *"That the Learned Justices of Appeal erred in law and in fact in that they purported to rely on and apply evidence that had neither been called nor canvassed at the hearing of the appeal."*

7. "That the Learned Justices of Appeal erred in law in that they adopted a figure as the monetary value of the goods unlawfully distrained and yet the same had neither been specifically pleaded nor specifically proved. "

8. ***"That the Learned Justices of Appeal erred in law in that they found that the value of the goods pleaded in the Plaint was never proved and yet adopted a figure that was not pleaded or proved. "***

"That the Learned Justices of Appeal erred in Law when they relied on the evidence of a witness who was not competent or qualified on the basis of the facts available to the court.

10. ***"That the Learned Justices of Appeal erred in law in that they sought to shift the burden of proof from the respondent to the appellant. "***

11. ***"That the Learned Justices of Appeal erred in law in that they sought to base their findings on a now settled ineffective prayer for 'any other remedy deemed fit and proper' without any further***

submission, evidence or proof and without the respondents having prayed for the value. "

12. "That the Learned Justices of Appeal erred in law in that they did not take judicial notice of the fact that execution had been levied pursuant to lawful court execution orders against the respondent's goods by the appellant and third parties and as a result of which their order would unjustly enrich the respondent."

Counsel for the appellants made several arguments in support of these grounds of appeal. First, they contended that the learned Justices of Appeal erred in law when

they granted the respondent's application, after they had found that the respondent failed to prove its claim of $109,000 United States Dollars as pleaded in its amended plaint at the hearing of the suit by the High Court.

Secondly, counsel for the appellant submitted that the Court of Appeal erred when it adopted the figure of 2,300,000,000/= billion Uganda Shillings as the value of the respondent's goods which the appellants had retained and later sold. Counsel argued that adopting this figure was wrong because it had not been included in the respondent's pleadings and also because it was far in excesses of the 109,000 US Dollars that the respondent had claimed in its Amended Plaint.

Appellant's counsel further argued that Order 6 rule 1 and 9 of the Civil Procedure Rules required the respondent, as the party that brought the original suit in the High Court, to set out its claim in full and to also plead the facts upon which it was basing its claim. Counsel also cited Order 6 rule 7 of the Civil Procedure Rules in support of their submission that a party who wishes to depart from their pleadings would only do so through amendment of their pleadings. Appellants' counsel contended that if the respondent had wanted to amend its claim to be 2,300,000,000/= billion Uganda

Shillings, they should have done so as is provided for under the Civil Procedure Rules, but they never did so.

Counsel for the appellant relied on the case of *Interfreight Forwarders (U) Ltd. v. East African Development Bank, Supreme Court Civil Appeal No.* 33 *of* 1992, where this court declined to find the defendants liable for the crush and damage of the Plaintiffs brand new Volvo as a common carrier under common law. The court based its decision on the fact that the plaintiffs did not plead the matter of common carrier; did not frame it as an issue and did not lead any evidence to that effect during the hearing of the suit.

Counsel for the appellant also relied on the case of *Walji v. Semakula, Supreme Court Civil Appeal No. 40 of* 1995, where this court declined to award damages to the respondent even if it were to be assumed that the evidence adduced tended to prove special damages, on grounds that the respondent had not pleaded them in his pleadings.

Furthermore, counsel for the appellants submitted that having found in the substantive appeal No. 92 of 2003 that there was no unjust enrichment; the Court of Appeal erred when it subsequently adopted the same figure of 2,300,000,000/= billion Uganda Shillings that it had rejected earlier on.

Counsel for the appellants also drew court's attention to the fact that the trial judge ordered that the appellant were free to sell the respondent's property which was in their custody to satisfy the awards the court made in their favour. He therefore submitted that the appellant did not wrongfully sell the respondent's property as was alleged, as this was only done after judgment had been delivered by the High Court.

Appellant's counsel further submitted that execution took place before the respondent filed the appeal and that since the respondent never applied for a stay of execution, their lack of diligence should not be visited on the appellants.

Lastly, counsel contended that since the respondent failed to prove the value of its goods, the Court of Appeal should have either taken additional evidence or referred the matter back to the trial court.

Counsel for the respondent opposed the appeal in its entirety. In response to the appellants' contention that the respondent had only claimed 109,000 US Dollars in their pleadings, counsel for the respondent made several contradictory

submissions.

First, he asserted that while it is true that the respondent only claimed 109,000 US Dollars in its pleadings, it turned out in the course of the hearing that the goods were worth much more, amounting to 2,300,000,000/= billion Uganda Shillings. Despite this knowledge, counsel contended that there was no need for the respondent (the plaintiff then) to amend its pleadings filed in the High Court because the respondent's prayer was for return of goods. However, in response to the learned Justices' inquiry, he conceded that that there had been an oversight on the part of the respondent.

Counsel for the respondent later contended that despite this oversight, the value of the goods was properly established at the High Court through the testimony of PW2 and the Counter Certification of Value which had been tendered into evidence. He contended that the "veracity of PW2’s evidence had been tested during the hearing, by way of cross-examination by counsel for the appellants (then defendants) and the court."

He also submitted that the appellant never led any evidence on the value of the goods to controvert PW2' s evidence and yet they had been in position to do so, by calling their own Valuer and/or by producing the Valuation Report which had been produced by their Valuers.

He concluded his submissions by supporting the decision of the Court of Appeal and by contending that the evidence the respondents led at the trial, together with the Counter Certification of Value which had been tendered into evidence as *Exhibit P* 1, were the rightful basis on which the learned Justices of Appeal were justified to base their decision. He argued that there was no other basis on which the Court of Appeal could have reasonably relied on.

He prayed that the court denies the appellants' prayer for an order of a re-trial on the issue of the value of the respondent's goods. He argued that it could not be granted because the appellants had failed to adduce evidence on the value of these goods which was available to them during the hearing of the original suit and the appeal. He urged this Court to dismiss this appeal with costs on grounds that the Court of Appeal rightly found the value of the goods to be returned to be 2,300,000,000/- billion Uganda Shillings.

The major issue that emerges from grounds 6, 7, 8, 9, 10, 11 and 12 of this appeal is whether the Court of Appeal erred in ruling that the value of the respondent's property, on which the appellants had unlawfully levied distress, retained and later sold, was 2,300,000,000/= billion Uganda Shillings. It was indeed evident from the submissions of counsel for the appellants and the respondent respectively, that this issue constitutes the major crux of this appeal.

I have considered the submissions of counsel for the appellants and for respondent on these grounds. I disagree with the respondent's submission that it proved that the value of its goods was 2,300,000,000/= billion Uganda Shillings.

First, as counsel for the appellants rightly pointed out, the respondent did not at any one time plead the 2,300,000,000/= billion Uganda Shillings as the value of its property in its original or amended Plaint. The Record of Appeal clearly shows that the respondent pleaded for 109,000 United States dollars, as the value of its goods. This is clearly borne out in paragraph 8 of its Amended Plaint which was filed in June 2001, and which reads in part as follows:

> " ... *That as a result of the unlawful closure and unlawful subsequent retention, the plaintiff's property worthy* 1 *09,000 US dollars continues to be retained"*

It is also borne out in paragraph 16 of its Amended Plaint, where the respondent, who was then the plaintiff at the High Court, prayed as follows:

"WHEREFORE, the plaintiff prays this court to issue an order for:

a) *Release of the plaintiff's property worth US $109,000, which is still locked up. "*

Secondly, nowhere in its pleadings or on the Record of Appeal did the respondent ever provide particulars of the goods it claimed it had in the appellant's premises prior to its eviction.

Thirdly, among the agreed issues at the hearing of the suit was Issue No.3 which was framed thus:

> *"3. Whether the Plain tiff is entitled to the reliefs claimed in the Plaint?"*

To successfully tackle issue no. 3, the respondent would only have discharged its burden of proof by pleading and showing, among other things, that it had property which had been locked up by the appellants and which it was demanding for its return, and which was worth 2,300,000,000/= billion Uganda Shillings. To discharge this burden, the respondent should have adduced credible evidence in the trial court as what kind of property had been detained in the locked up premises, by providing a detailed breakdown and description of what property it had in the premises at the time of its eviction, its value and how it had arrived at these values.

I have perused the record of appeal and it does not show anywhere that this evidence was ever adduced by the respondent. Indeed, if the respondent had adduced this evidence during the hearing of this case, the learned trial judge would have referred to it in his judgment and the list of the properties retained by the appellants would have been one of the Exhibits tendered into evidence by the respondent.

The learned Justices of Appeal relied on the evidence of PW2 in arriving at the value of the respondent's goods. Counsel for the respondent supported this finding and urged this court to do the same. It is indeed true that during the hearing of the suit, the respondent led evidence through PW2 about the property that had been retained in the locked up premises and how he had done a Valuation Report. The evidence ofPW2, David Kubai Manyara, was as follows:

> *"Last year in October, I was approached by Alenyo & Co. Advocates to go and do the valuation for the property of F.K. Motors. I visited the premises and saw the property in question and I also saw the certificate of valuation made by Shonubi, Musoke & Co. Advocates. I went through the report.*

They had already listed the plaintiff's property and written the costs ... The purpose was to see the things that were to be valued.... I gave a value to these things. I prepared a valuation report. This is a counter certification of value. I made it and signed it. My valuation for motor vehicles was 45 *million, workshop machinery and equipment was Shs. 93 million, office furniture and equipment Shs.* 37 *million, spare parts Shs. 2,135,000,000/= all totaling Shs. 2,300,000,0001=."*

During cross-examination by the appellants' counsel, PW2, however, testified as follows:

" *... I have a higher Diploma in Mechanical Engineering. I am entitled to make a valuation report. I have no qualifications in valuation. I visited the premises in October 2001. We spent almost three days at the premises. I have the report whose total is the same as in Exhibit PI. The report is not yet complete. My written report was ready by 3/12/2001 but it is only the typing and binding that is remaining. I have been able to complete the typing and binding in the three months since 3/12/2002. Yard Engineering Services is my company incorporated in Uganda. It provides mechanical engineering such as workshop maintenance, maintenance of motor vehicles, i.e. panel beating and spray painting. We also deal with steel fabrication. "*

The Court of Appeal cited and relied in its ruling on the evidence of PW2 and values he gave and argued that there was "no meaningful challenge" made by the appellants of this evidence. The Counter Certification of Value which the respondent tendered in evidence as *Exhibit P* 1 and from which PW2 drew the values of the various properties he gave in his testimony, read as follows:

P. O. Box 11439 *KAMPALA Tel. 071-850865* *COUNTER*

CERTIFICATION OF VALUE

Upon counter valuing the items belonging to F. K. Motors Ltd in Port Bell Road ii we hereby return the following values.

- *Motor vehicle .....45,000,000/=*
- *Workshop Machinery and equipment .....93,000,000/=*
- *Office Furniture and Equipment .....*3 7*, 000, 000/=*
- *Spare Parts . .....2,135,000,000/=*

GRAND TOTAL *2,300,000,000/=*

Two billion three hundred million shillings only.

For and on behalf of:

YARD ENGINEERING SERVICES LTD

DA VID KUBAI MANYARA (Higher National Dip. Mech.
Eng. Mombasa Polytechnic)

Dated: 3rd Dec. 2001."

It is worth noting that the Counter Certification of Value did not contain adequate information about the various properties that were allegedly valued. For example, the document did not indicate the number of vehicles that PW2 found at the premises, their registration numbers, their make and year(s) of manufacture, the

name(s) of the registered owner(s) as per the respective motor vehicle registration cards, etc.

During his re-examination, PW2 claimed that the respondents had provided him with a manual showing how they had brought their properties. The same witness also claimed that when he visited the place where the properties were being kept, he not only saw the property in question, but also the Certificate of Valuation that had been made by the Valuers who had been engaged by the appellants' lawyers, Ms. Shonubi, Musoke & Co. Advocates. He also claimed that he also saw a list of· the property that the appellants' Valuers had already made.

There is no reason why PW2 did not refer to or attach these documents in his

Report or why he did not prepare his own list of the respondent's property, when he visited the premises and inspected the goods in question. This is especially surprising since he had been specifically engaged by the respondent to undertake the valuation of their goods.

Counsel for the respondent argued and the Court of Appeal agreed with them that the Valuation of the respondent's goods had been a joint exercise. Counsel for the appellants disagreed with this contention and so do 1. The evidence on record merely showed that PW2 visited and inspected at the respondent's property in the presence of the second appellant's representatives and their Valuers. Furthermore, PW2' s testimony was that he saw a Valuation Report which had already been prepared by Shonubi, Musoke & Co. Advocates, that he went through the Report and that he made his own Valuation Report, which had not yet been typed by the time he gave his evidence. This testimony does not support a finding that the Valuation was a joint exercise rather it supports the appellant's submission and my conclusion that PW2 purported undertook the valuation separately.

Lastly, PW2 also claimed that he had made a Valuation Report at least 3 months earlier which was not ready by the time he gave evidence. Clearly, the respondent could have sought an adjournment to ensure that PW2's Valuation Report, which was a key document, was ready before putting PW2 on the stand.

From the above evidence on record, it is proper to conclude that the respondent had access to all the information regarding its properties which the appellants had retained. It chose not to submit the list of these properties and a proper Valuation Report into evidence. Furthermore, the respondent, for reasons best known to its officials and its counsel, chose not to amend its pleadings with respect to the value it had initially claimed and the value that PW2, as their Valuer, had later given.

Since the respondent neglected or failed to amend its pleadings to reflect its claim of *2,300,000,000/=* billion Uganda shillings as the value of its goods, even as it prepared to lead evidence to that effect, it is proper to conclude that this claim for more money than they pleaded cannot stand in law.

It should be borne in mind that according to the Record of Appeal, one of the agreed documents was a Valuation Report by Yard Engineering Services, which, from the evidence ofPW2, had not been typed by the time he gave evidence in court.

I have studied the Counter Certification of Value which the respondents tendered in evidence as *Exhibit P* 1. Given the scanty contents and the evidence ofPW2 to the effect that the Valuation Report was not yet typed, I find that the Counter Certification of Value cannot in any circumstances be taken to be the Valuation Report that was expected to be tendered into evidence by the respondent at the hearing of the original suit. The respondent should have, at the very least, submitted a Valuation Report as an Exhibit in court.

Furthermore, the title of *Exhibit PI* clearly stands out as Counter Certification of Value and not as Valuation Report. If the respondent had wanted to use this former document as opposed to the latter, it should have amended its List of Documents to Be Relied Upon and also included it in their documents. Unfortunately, it did not do so and I cannot construe it as the respondent's Valuation Report.

The Court of Appeal's ruling on this issue was clearly contrary to the evidence on the record. In evaluating the evidence as to the value of respondent's property, the Court found as follows:

> *"A figure of us $109,000 was pleaded in the Amended Plaint (paragraph 8). This however was never specifically proved. Nonetheless, during the trial, evidence was adduced (DW2 David Kubai Manyara) of the value of Shs. 2,300,000,000/= attached to the property ... Though he confessed to having no qualification to do the valuation it is clear that he carried out the valuation in the presence of both parties' representatives."* .

The respondent, as the plaintiff in the High Court, had the burden of proving, on the balance of probabilities, that the value of its goods worth was 2,300,000,000/billion shillings. It sought to do so through the evidence ofPW2. Clearly, the evidence of PW2 had little probative value, since the witness had, by his own confession during cross-examination, no qualification to undertake Valuations. As a result, the respondent failed to discharge its burden of proving that the value of its goods was indeed 2,300,000,000/= billion Uganda Shillings. It was therefore wrong for the learned justices of appeal to rely on the value of 2,3 00,000,000/= billion Uganda Shillings that PW2 gave, in the absence of pleadings to that effect and a Valuation Report and which value was almost ten times more the Uganda

Shillings equivalent of $109,000 the respondents had claimed in their pleadings, going by the current exchange rate of Uganda Shillings 2,397/= to one United States dollar.

My conclusion is further supported by the respondent's own pleadings tiled in support of Miscellaneous Application No. 72 of 2006. In paragraph 9 of the Affidavit in Support of this Application that was sworn by counsel for the respondent and in paragraphs 8 and 9 of the respondent's Affidavit in Rejoinder, counsel merely averred that the monetary value of the respondent's property *"was stated at 2,310,000,000/= billion Uganda Shillings"* and that he avoided using the words "proven" as respondent's counsel argued during the hearing of this appeal.

I have also taken note of the fact that the other agreed document the parties listed at the scheduling conference which was held on 5th December 2001 was a Valuation Report by Messrs Adriko Associates. Unfortunately, this Report which was also one of the agreed documents was never tendered into evidence by either the appellants or the respondent. In light of all the above, the appellants prayer that the case be remitted back to High Court to determine the value of the respondent's goods cannot be accepted. *See the case of Karmali Tarmohamed & Anor. v. L H. Lakhani & Company, [1958] E. A.* 568, which set out that the principle that the appellate court ought not grant an opportunity to a party to produce evidence on appeal, where such evidence was in possession of the party seeking to have the evidence submitted to court at the time of the trial, or where, through proper diligence, such evidence might have been obtained and where the case has been decided adversely to the side to which the evidence was available.

Given the absence of the two Valuation Reports prepared by the Valuers of either side, I am left with no option but to respectfully differ with the learned Justices of

Appeal with respect to the monetary value of the respondent's goods. I find that the learned Justices of Appeal erred in law when they adopted the figure of 2,300,000,000/= as the monetary value of the respondent's goods. The value of 2,300,000,000/= billion Uganda Shillings was never pleaded in the original or amended plaint and it was never proved. Therefore, it cannot be awarded.

In view of my analysis of the evidence on the record, the law and my conclusions, I have found merit in grounds 6, 7, 8,9, and 10 of the appeal and they are allowed. My findings with respect to the above grounds have rendered it unnecessary for me to make specific findings on grounds 11 and 12.

I will now turn to consider the question of what was value of the respondent's property. As I noted earlier in this judgment, the respondent, in its amended plaint in H.C.C.S. No. 501 of2001 sought for the return of its property which the appellants were holding and which it claimed were worth $109,000 United States dollars.

Secondly, the record of appeal clearly brings out the fact that respondent had property in the 2nd appellant's premises at the time it was evicted. For example, one of the agreed facts that the record indicates at the Scheduling Conference which was held on 5.12.2001 was that Hon. *28.3.2001 the Defendants (now appellants) closed up the premises with the plaintiff's properties inside".*

During the hearing at the High Court, DW1 Kirit Koretcha also confirmed the existence of the respondent's property which his employer, the 2nd appellant had retained, as follows:

> *" ••• The premises were locked on 21.03.2011. After the closure, the Directors of F.K. Motors left the country. But negotiations continued with their lawyers ... In the end, we appointed the firm of Valuers, Adriko &*

Co. to do a Valuation Report/or the properties in the rented premises. The valuation was carried out and we got the Report in October 2001, i.e. on 22.10.2001. A copy was given to F. K. Motors through our lawyer. We have never received the outstanding rent. The premises are still closed. "

Lastly, I noted that the appellants never contested the fact that they were holding the respondent's property during the hearing of the substantive appeal by the Court of Appeal, the hearing of Miscellaneous Application 72 of 2006 and this Appeal.

In light of the above, I find that there was evidence on the record of appeal to show that the respondents owned some property which the appellants later sold to satisfy their High Court Decree and some of which was attached by other undisclosed third parties who were the respondent's creditors.

I have also concluded that the appellants were fully aware of the respondent's claim of $109,000 United States dollars, at the inception of H.C.C.S No. 501 of 2001, through the respondent's amended plaint. They however chose not to adduce the list of the respondent's property which they prepared, as was brought out by the evidence of PW2 and yet they had an opportunity to do so through the evidence of DW1 who was the 2nd appellant's property manager. They also chose not to call a witness from their Valuers, Ms. Adriko & Co. and not to tender into evidence the Valuation Report which they commissioned them to prepare. Their own witness, DW1, also admitted that this Valuation Report was ready and that a copy of the same had been provided to the respondent.

The appellants, having admitted during the trial, that they had locked up the premises the respondent was renting from them with the properties inside, had the burden of proving that those goods were not worth $109,000 United States dollars and that rather that they were worth the value that their Valuer, Ms. Adriko had

given as per his Valuation Report. They would have done this, among others, by tendering into evidence this Report. They opted not to do so.

Lastly, it should also be noted that the appellants did not lodge an appeal against the Court of Appeal's judgment in C.A. No. 92 of2003, which ordered them to return the respondent's property, which was in their custody.

Based on the record of appeal and my conclusions above, I find that the respondent discharged its burden of proving that it had property which was unlawfully locked up in the 2nd appellant' premises. Secondly, in the absence of the appellants' lack of challenge to the respondent's claimed value of$109,000 United Stated dollars, I find that they accepted this value. I would therefore award this value.

I will now turn to the issue of costs. The appellants and the respondent prayed for costs to be awarded to them, respectively. My review of the record of appeal clearly showed that both the appellant and the respondent failed to diligently prosecute their respective cases during hearing of the substantive suit by the High Court. In addition to the failure of both parties to submit their respective Valuation Reports, the respondent failed to provide the list of goods unlawfully distrained as well as their respective values, while the appellant failed to provide the details of the goods that they unlawfully attached and to also inform the Court of Appeal during the hearing of the appeal that it had already sold the respondent's goods. Hence both parties equally share the responsibility for meeting the costs of this protracted litigation, which could have been avoided if both parties had acted diligently. In view of these facts, I would order that each party bear its own costs in this court and in the Court of Appeal with respect to Miscellaneous Application No. 72 of 2006.

Accordingly, I would confirm in part the ruling of the court of Appeal that the respondent is entitled to the monetary value of its goods. I would however allow this appeal in part and set aside the order of the Court of Appeal granting the value of the respondent's goods at 2,300,000,000/= Uganda shillings as the monetary value of its goods and substitute it with the following orders:

(i) The respondent should be awarded 109,000 United States Dollars as value of its goods.

(ii) The above sum should carry interest at the rate of 6% per annum from the date of judgment till payment in full.

(iii) The appellants should offset any amount outstanding as rental arrears from the 32,154 United States dollars which the respondent owed to them, with interest at the rate of 6% per annum from the date of judgment till payment in full.

(iv) Each party shall bear its costs with respect to Court of Appeal Miscellaneous Application No. 72 of 2006 and this Appeal.

Dated at Kampala this 31st day of .... May..... , 2011.

DR. E. M. KISAAKYE

KAMPALA

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA
AT KAMPALA

(CORAM: ODOKI C.J; TSEKOOKO, KITUMBA, TUMWESIGYE AND KISAAKYE, JJ.SC.)

CIVIL APPEAL NO. 19 OF 2009

KABU AUCTIONEERS & COURT BAILIFFS} ::::::::::::::::::::::::::::::::: APPELLANTS

MULJIBHAI MADHVANI & CO. L TD}

AND

F.K. MOTORS LTD :::RESPONDENT.

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[Appeal from the judgment of *the Court* of *Appeal at Kampala (Mpagi Bahigeine, Byamugisha and Kavuma JJ.* A) *dated 16th July 2009 in Civil Miscellaneous Application No.* 72 of *2006 arising out* of *Civil Appeal No.* 92 of *2003]*

I have had the advantage of reading in draft the judgment prepared by my learned sister, Kisaakye, JSC, and I agree with it and the orders she has made.

As the majority of the members of the Court also agree, this appeal is allowed in part with orders proposed by the learned Justice of the Supreme Court.

Dated at Kampala this 31st .. day of May 2011.

B.J.ODOKI

CHIEF JUSTICE **THE REPUBLIC OF UGANDA**

IN THE SUPREME COURT OF UGANDA AT KAMPALA

{CORAM: ODOKI, CJ, TSEKOOKO, KITUMBA, TUMWESIGYE & KISAAKYE, JJSC.}

CIVIL APPEAL NO.19 of 2009

1. KABU AUCTIONEERS & COURT & BAILIFFS

2. MULIBHAI MADHVAN & CO. LTD. ::::::::::::::::::::::::::::**APPELLANTS**

AND

F.K. MOTORS LTD ::**RESPONDENT**

{ Appeal from the ruling of the Court of Appeal at Kampala (Mpagi-Bahigeine, Byamugisha and Kavuma, JJA) dated 10' July, 2009 in Civil Misc. Application No. 72 of 2006)

JUDGMENT OF TSEKOOKO, JSC.

I have read in draft the judgment prepared by my learned sister, the Hon. Lady Justice Dr. Kisaakye, JSC. I agree with her conclusions on grounds 1, 2, 3 and 5 of the memorandum of Appeal. For different reasons I agree with her partially on her conclusion on the rest of the grounds on the principle that the respondent is entitled to some damages.

I want to comment on the contention by appellant's Counsel that the respondent did not claim the money in the plaint and that it

failed to adduce evidence in proof thereof. This is the gist of ground 7 in the memorandum of appeal. The facts of this appeal have been set out in the judgment of my learned sister. For purposes of clarity I need only set out those facts that are relevant to the question of pleading and evidence proving damages.

The respondent was a tenant of the 2nd appellant. The respondent defaulted in payment of some rent. The 2nd appellant instructed the 1st appellant to evict the respondent. The appellants did not employ lawful procedure in evicting the respondent and distraining its properties for non-payment of the rent.

The respondent sued the appellants in the High Court to, inter alia, recover its properties or their value. It must be admitted that the drafting of pleadings by Counsel for both sides left a lot to be desired. Be that as it may, in paragraph 3 of its amended plaint, the respondent (as plaintiff) claimed that:-

> *"The plaintiff brings this action for general damages for breach of contract / Tenancy AgreeI11ent and for specific daI11ages and costs for unlawful closure and retention of property contrary to the Distress for Rent [Bailiffs] Act and damages for business repute."*

Further in paragraph 8 of the same amended plaint, the respondent averred, inter alia, that:-

"----------as a result of the unlawful closure, and unlawful subsequent retention the plaintiff property worth 109000 = Us $ continue to be retained."

In their joint written statement of defence and counterclaim the appellants [as defendants] denied liability contending that ***the suit is frivolous and vexatious and an abuse of Court process.***

They contended that appellants lawfully exercised their right to re-enter the premises following the respondent's breach of the terms of the Tenancy Agreement.

Before framing issues and during a scheduling conference parties agreed on certain facts. These include admission of the respondent's property valuation report made by D.K. Manyara, PW2.

Thereafter the trial judge framed issue No.2 thus-

"2 ***whether the [appellants] acted lawfully in detaining the [respondent's] property......"***

By coaching the 2nd issue in this manner, the parties to the suit and the learned trial judge agreed that the respondent's properties were locked up in the second appellant's building rented by the respondent. In his judgment the learned trial judge came to that conclusion and decreed that because the

respondent had failed to pay rent, the 2nd appellant was entitled to detain the properties and sell the same to realize the unpaid rent. That is why the learned trial judge dismissed the suit. The respondent appealed to the Court of Appeal.

The Court of Appeal found that the distress levied against the respondent's properties by the appellants' agents, [the 1st appellant] was unlawful. The Court reversed the judgment of the High Court and ordered the appellants to return to the respondent its properties which had been seized for nonpayment of rent. Because the properties could not be traced and returned, the respondent subsequently moved the Court of Appeal by notice of motion to modify its decision by giving monetary value of the properties. After hearing the motion, the Court ordered the appellants to pay to the respondent Shs.2,300,OOO,OOO/ = as the value of the properties. The appellants were dissatisfied with that order and so they filed this appeal from the ruling of the Court of Appeal.

It is pertinent to point out at this stage that the appellants did not appeal to this Court against the principal decision of the Court of Appeal that the 2nd appellant should return the respondent's properties. The appellants' main complaint is that the Court of Appeal erred in its ruling in awarding the amount of Ug.Shs.2,300,OOO,OOO/ = as the value of the properties. Counsel for the appellants contended that the Court erred because the respondent neither pleaded the amount in its plaint

nor adduced any evidence to prove that amount. Learned counsel further contended that the Court of Appeal sat in appeal against its own decision. This is the gist of ground 5.

I note that at page 10 and 11 of his typed judgment, the trial judge held that the appellants' detention of property was justified. Indeed throughout the trial the detention of respondent's properties was an accepted fact. The evidence from both sides' shows that before the suit was instituted both sides sent agents to value the properties. David Kubai Manyara (PW2) of Young Engineering Services valued the property on behalf of the respondent and produced a report which was admitted in evidence first during the scheduling conference on 5/12/2001 and later, on 7/2/2002, while he was testifying. It was marked by the trial Judge as exh.PI. The Court of Appeal accepted PW2's testimony that he and Adriko, the valuation expert for the 2nd appellant, were allowed into the premises by an agent of the 2nd appellant who opened the premises for the

two. This is how PW2 testified in part.

> *"I know the plaintiff. Last year In October I was approached by Mr. Alenyo and Co Advocates to go and do the valuation for the property of F.K. Motors. I visited the premises and saw the property in question and I also saw the certificate of valuation made by Shonubi Musoke and Co. Advocates. I went through the report. They had already listed the plaintiff's properties and written the costs. The properties were at their workshop near Meat*

Parker's. I went to the premises with Adriko - the man who was doing the valuation for Shonubi Musoke & Co. Advocates. There was also one representative of Madhvani who opened the premises. Madhvani is the 2nd Defendant. We moved around together. The purpose was to see the things which were to be valued. We saw all the things that were to be valued. I gave a value to these things. I prepared a valuation report. This is a Counter Certification of Value. I made it and signed it. My
valuation for motor vehicles was 45m/-, workshop machinery and equipment was Shs.93m/-, office furniture and equipment Shs.37m/- spare parts Shs.2, 135,000,000/= all totaling Shs.2,300,000,000/=.

During cross-examination, by appellant's Counsel, PW2 stated:

"I have a Higher Diploma in Mechanical Engineering. I am entitled to make a valuation report. I have no qualification m valuation. I visited the premises m
October 2001. We spent almost three days at the premises.
I have the report WHOSE TOTAL IS THE SAME AS IN EXHIBIT P.1"

He was not challenged about his ability to make valuation report even though he had no formal valuer's qualification. Indeed the appellants did not challenge this witness on the properties he saw nor on the values he attached to the properties. There is no evidence showing that PW2 lied on anything. So his

evidence must be accepted. This evidence was justifiably relied upon by the learned Justices of the Court of Appeal.

I go to these lengths to show that the contention by counsel for the appellants that properties monetary value was not proved has no basis. The matter of Shs.2,300,OOO,OOO/= was addressed upon in the trial Court. It therefore became an issue and it was left to the trial Court for decision. **Odd Jobs Vs Mubia (1970) EA 476** and **Nkalubo Vs Kibirige (1973) EA 102** are authority for the view that a Court may base a decision on an un pleaded issue if it appears from the course followed at the trial that the issue has been left to the Court for decision.

The trial judge could have made a finding about it had he not dismissed the suit on the basis that the detention of the respondent's properties was lawful. As a matter of fact valuation of the properties is not in dispute. The appellant offered Kirit Kotecha (DW1) as the only defence witness. In his evidence he stated (at page 178 of the record) that:

> *"We appointed the firm of valuers, Adriko & Co., to do a valuation Report for the properties in the rented premises.*

The valuation was carried out and we got the report in October 2001, i.e., on 22/10/2001. A copy was given to E. K. Motors through our Lawyers. The premises are still closed".

(The report alluded to here by DW 1 must be the same report which PW2 read while preparing to value or as he valued the properties.)

I must point out that although Adriko's valuation report was admitted during the scheduling conference, I am unable to trace it on the record of appeal which was prepared and filed by Counsel for the appellants. It could have been left out deliberately for obvious reasons. As far as I am concerned the main decision by the Court of Appeal about the return of the respondent's properties was not challenged by way of appeal to this Court. At our level, we administer substantial justice and in this case, Art.126 (2) *(e)* of the Constitution would apply.

As the appellants did not appeal against the decision of the· Court of Appeal that the appellants should return the properties, I do not think it is proper for this Court to be bogged down because of inconsequential defects in the pleadings. If I may repeat for emphasis, in my opinion the admission, without any objection by appellants' counsel, of Exh.Pl in evidence at the scheduling conference as well as at the trial by in effect took care of the need for amending the plaint, if there was any. In any case, it is a practice in our jurisdiction that where admissible evidence is tendered in Court in a trial by one side and the opposite side does not challenge such evidence, that evidence is normally acted upon by Court. Indeed by virtue of Section 57 of the Evidence Act, admitted facts need not be

proved. I believe that that is one of the reasons why these days trial courts hold scheduling conferences. Thus under Order XII of the Civil Procedure Rules, a trial Court holds a scheduling conference to sort out agreement and disagreen1.ent between or among the parties so that evidence is produced only on contested issues. In this case at the scheduling Conference there was no dispute about the authenticity of exh.Pl and the detention of properties.

As I have indicated already issue No. 2 was framed, quite correctly, to the effect that the parties agreed that the Respondent's properties were locked up in the 2nd appellant's premises. The trial judge so found. The Court of Appeal confirmed this. There was no appeal on that finding. There is therefore no justification for us to interfere about presence of property in this appeal which arises from an interlocutory application. The purpose of that application was to give effect to what was the intention of the Court of Appeal when it found

that appellants wrongfully retained respondent's properties, by giving value to those properties. In my view, the Order of the Court of Appeal for payment of Shs. 2.3 billion is making enforcement of its decision in the appeal practical.

Counsel for the appellants contends that the Court of Appeal sat in appeal against its own decision. With respect to the learned counsel, in this case that contention is misplaced if not misconceived. There are many decisions of this Court which

support the course adopted. They include those cases which were cited by both sides to the Court of Appeal to support or oppose the application and procedure adopted by that Court. See for instance V. K. Raniga Vs M. Jivraj (1965) EA 700

Concerning pleadings, it's true that normally in a. case like the present one, claimants should plead particulars of property and or special damages which they claim.

The respondent certainly pleaded that its properties were wrongfully detained.

Before concluding, I have observations to make. Counsel for the parties and the learned trial judge were casual in handling the scheduling conference. Thus page 167 of the record of appeal shows that many documents were admitted at the scheduling conference. Initially none was marked as exhibit. These documents included among others, Exh. P1, Adriko Associates valuation report [produced on behalf of the appellants]. There is no explanation why the judge did not give the exhibits serial numbers at that stage. The good practice is that where documents are admitted at the scheduling conference without contest, they should be marked. Further Adriko's valuation report is not on the record yet it was admitted at the scheduling conference. Again, the respondent filed a reply to the written statement of defence and counter-claim. Counsel for both sides addressed Court on it. The learned trial judge refers to it in his

judgment. No reason is given why it is not on record which was compiled and filed by counsel for the appellant. Yet the appellants' counsel went out of his way to include in the record of appeal unnecessary matters such as all the authorities he had cited in the Court of Appeal (See pages 224 to 339). This is wholly undesirable and it makes the record unnecessarily bulky. This must stop.

Finally, considering that in civil cases, proof is on the balance of probabilities, it is my opinion that on the evidence available, the respondent proved its case. I would dismiss the appeal with costs to the respondent. I would modify the Orders of the Court of Appeal as follows:-

a) According to PW2, the value of properties retained was worth Shs.2,300,OOO,OOO/=. The respondent is entitled to that amount less admitted rent arrears.

b) The respondent should get the costs of this appeal.

c) The costs in the Court of Appeal and the High Court should be as ordered by the Court of Appeal in both its ruling from which this appeal arises and in the substantive appeal

2. JWN

d) The decretal amount will carry interest at Court rates

Delivered at Kampala this ..*31st* day of May 2011.

JWN TSEKOOKO

JUSTICE OF THE SUPREME COURTIN THE SUPREME COURT OF UGANDA AT KAMPALA

(CORAM: ODOKI CJ., TSEKOOKO, KATUREEBE., KITUMBA., TUMWESIGYE., KISAAKYE., JJ.S. C.)

CIVIL APPEAL NO. 19 OF 2009

BETWEEN

KABU AUCTIONEERS &COURT BAILIFFS::: APPELLANTS
MULJIBHAI MADHV ANI & CO.L TD .

AND

F.K. MOTORS LIMITED :::RESPONDENT

[Appeal arising from the Ruling of the Court of Appeal at Kampala; (Mpagi-Bahigeine, Byamugisha and Kavuma JJ.A) dated 16th July 2009, in Civil Miscellaneous Application No. 92 *of 2003]*

JUDGMENT OF KITUMBA, JSC.

I have had the benefit of reading in draft the judgment of my learned sister Kisaakye, JSC.

I agree with her reasoning and the decision that the appeal succeeds in part and the orders as to costs proposed therein.

Dated at Kampala, this -------31st ---------- day of --May------------ *2011*

C.N.B. KITUMBA

JUSTICE OF THE SUPREME COURT

3.

(CORAM: ODOKI, C]; TSEKOOKO; KITUMBA; TUMWESIGYE; AND KISAAK]]SC.)

CIVIL APPEAL NO: 19 OF 2009

BETWEEN

KABU AUCTIONEERS & COURT BAILIFFS

MULJIBHAI MADHVANI & CO. LTD ::::::::::::::::::::::::::::::::::: APPELLANTS

AND

F.K. MOTORS LTD :: RESPONDENT

[An appeal from the Judgment of the Court of Appeal at Kampala (Mpagi- Bahigeine, and Kavuma, JJ.A) dated 16th July 2009 in Civil Miscellaneous Application No. 72 of 2006 arising out of Civil Appeal No. 92 of 2003.]

I have had the benefit of reading in draft the judgment prepared by my learned sister, Hon. Lady Justice Kisaakye, JSC. I entirely agree with it and I have nothing to add.

Dated at Kampala this 31st day of May.....2011.

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JOTHAM TUMWESIGYE
JUSTICE OF THE SUPREME COURT