THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 20 OF 2018

[Coram : R. Butera,DCJ, C.Bamugemereire & C.Gashirabake, JJA]

(Arising from High Court Mbale Civil Suit No. 26 of 2012)

UGANDA REVENUE AUTHORITY==========APPELLANT

VERSUS

1. M/S URGENT CARGO HANDLING LIMITED
2. GERRY ANDREW MSAFIRI } **RESPONDENTS**

[Appeal from the decision of the High Court at Mbale in Civil Suit No. 26 of 2012 presided by Hon. Mr. Justice Henry. I. Kaweesa delivered on 25th April 2017]

JUDGMENT OF CHRISTOPHER GASHIRABAKE, JA

1. Background.

The Respondents herein lodged the suit in the High Court at Mbale wherein they sought for orders of; recovery of a truck, an award of damages for trespass to property and loss of earnings for the unlawful seizure of their truck, unlawful arrest and imprisonment of the 2nd Respondent. The Respondents' Plaint was lodged on 24th October 2012 based on facts that:

A. The 1st Respondent is the sole legal owner of truck No. **KAS 322H/ZC1076** and the 2nd Respondent was employed as a driver of the truck.
B. On 8th July 2012, the truck was allegedly unlawfully seized by the agents or employees of the appellant, in the ordinary course of their employment, between Busitema Customs check point and Malaba Customs check point.

C. The truck, at the time of the seizure, was enroute from Uganda to Kenya without carrying any cargo whatsoever. It remained in the Appellant's customs yard at the time of lodging the suit.

D. The 2nd Respondent was on the same day, 8th July 2012, at the instance of the servants or employees of the Appellant, arrested and detained by the Uganda Police Force. He was given Police Bond on 15th July 2012.

E. The 2nd Respondent was never charged with any criminal offence and therefore suffered unlawful arrest and detention and is seeking general damages for the suffering.

F. The 1st Respondent claimed for demurrage charges arising out of hiring a live container No. MSCU829698/1 which was on the impounded truck in the custody of the appellant.

G. The 1st Respondent, at all material times, had the relevant documents pertaining to the entry of the said truck from Kenya to Uganda.

H. The Respondents pleaded Special damages of pre-litigation costs amounting to UGX 15,000,000/= and loss of earnings at 33,650 USD per month until release of the 1st respondent's truck.

The Respondents sought the following declarations and orders:

I. An order of unconditional release of the 1st Respondent's truck No. KAS 322H/ZC1076 or payment of its market value.

II. An order of payment of compensation of 33,650 USD per week from 8th July 2012 until the release of the truck.

III. General damages for trespass, false arrest and detention.

IV. Costs

V. Interest

In the Written Statement of Defence lodged on 4th December 2012, the Appellant denied the claim and contended that:

a. On 2nd July 2012, one Wandera Paul, for and on behalf of Larimina Enterprise Company Ltd hired container MRKU 759632/2 from APM Terminals and the same was loaded on Truck No. KAS 322H/ZC1076 allegedly being driven by a one Charles.

b. While at Larimina Stores at Banda, Jinja road, the container was loaded with wet salted hides and skins and was removed from the premises on 6th July 2012.

c. On 14th July 2012, the said truck and container was intercepted at Malaba as it attempted to cross to Kenya. However, upon searching, the container was found empty.

d. Upon questioning the 2nd Respondent, who was driving the truck, he confirmed that the truck had indeed carried wet salted hides and skins belonging to a one Wandera John Paul and the same had been offloaded and the container washed at Naluwerere Trading Centre.

e. On 27th July 2012, the Appellant sought information from Damco Logistics Uganda Limited regarding the said container and the particulars of the conveying truck, identity of exporters, customs documents/ export entries and the Bill of lading.

f. On 1st August 2012, Damco Logistics responded and noted that the container MRKU 759632/2 among others were released to Frascopel Investments Ltd ALIAS, Kahama Investments Ltd ALIAS Larimina Enterprises Co. Ltd with the contact persons being Wandera John Paul of Banda Industrial Area, Tom and Iralio Genardini.

g. Upon inquiries from the owner of the motor vehicle and Maersk Shipping Line, the Appellant confirmed that the truck had been loaded with wet salted hides and skins weighing 25,000kg belonging to Larimina Enterprises Company Ltd and destined to Hong Kong.

h. Subsequently, the truck and container were seized for carrying uncustomed goods in contravention of the provisions of the East African Community Customs Management Act.

i. Iralio Genardini since reported a case to Kampala Central Police Station vide CRB 5134/12 on the theft/disappearance of wet salted hides that were stolen by Wandera John Paul while on its way to Mombasa.

The Appellant contended that the truck conveyed uncustomed goods and was thus liable to seizure and forfeiture. It was further contended that all actions by the appellant were lawful, within its authority and mandate and none of these actions caused any loss to the 1st and 2nd respondents.

2. Decision of the High Court

By way of summary, in the decision, the learned Justice Henry I. Kaweesa held that the Appellant did not conduct a defence to the suit, having filed a written statement of Defence and witness statement, did not avail their witnesses and exhibits and therefore had no evidence before Court. The matter was determined on the basis of evidence led by the Plaintiffs/Respondents.

On issue One, which was whether the Plaintiff had loaded uncustomed goods, the learned Judge held that the Plaintiff adduced evidence that there were no uncustomed goods found by the Defendant/ Appellant. The witnesses PW1 *Horsborne Ongoli Arungah* testified that the truck and its driver were detained. PW2 *Jerry Msafiri* testified that he loaded hides and skins on the truck which later developed complications. He offloaded the cargo at Bweyogerere and proceeded with an empty truck. PW3 *Wilfred Ogollah Onyango* testified that no seizure notice for the truck was issued. In addition, the Plaintiffs exhibited 12 documents to this effect. The evidence demonstrated on the balance of probabilities that they did not load uncustomed goods.

On issue two, which was whether the Defendant unlawfully seized the vehicle, the learned Judge found that the Defendant acted on speculation and there was no reasonable ground for seizing the truck, as there was no evidence to that effect. The issue was found in the positive. In addition, the learned Judge found Issue 3, whether the 2nd Plaintiff's arrest was unlawful, in favour of the Plaintiff on the basis that the evidence was uncontroverted.

The learned trial Judge ordered that the Plaintiff is entitled to recovery of the truck as it was at the time it was impounded or its current market value stated to be US $46,000 . In addition, the Plaintiff was entitled to recover lost earnings valued at $33,600 per month from 8th July 2012 till date of release of the truck. He also ordered that the 2nd Plaintiff is entitled to recover UGX 5,000,000/= as punitive damages for the illegal detention. The Plaintiffs were allowed costs of the suit.

3. Grounds of Appeal

The Appellants lodged a memorandum of Appeal in this Court on 25th January 2018 and raised the following grounds of appeal therein;

I. The learned trial Judge erred in law and fact and occasioned a miscarriage of justice when he awarded the 1st Respondent recovery of the truck as it was at the time it was impounded or its current market value stated to be at US $46,000.

II. The learned trial Judge erred in law and fact in awarding the 1st Respondent lost earnings valued at US $33,600 per month from 08.07.2012 till date of release of the truck.

III. The learned trial Judge erred in law and fact in awarding the Respondent punitive damages of UGX 5,000,000/=.

4. Representation.

When this Appeal was called for hearing on 24th November 2022, Mr. Ronald Baluku, an Acting Manager, appeared for the Appellant. The 1st and 2nd Respondents were represented by Mr. James Okuku and Mr. Justine Semuyaba.

At the hearing, leave was granted by the Court to the parties to proceed by way of written submissions. I have considered the submissions of the parties duly lodged in the Court and the authorities thereunder in the preparation of this judgment.

5. Submissions by the Appellant

The Appellant submitted, in respect of Ground One of the Appeal, that the learned trial Judge erred in law and fact when he awarded the 1st Respondent recovery of the truck as it was at the time and the current market value of the motor vehicle at the time. Counsel stated that the Respondents did not prove the market value of the truck. Pg. 103 of the record of appeal which contains the amended Plaint did not plead any evidence of the value of the motor vehicle at the time it was impounded.

In addition, counsel for the appellant averred that the 1st respondent's witness, Mr. Horsborne Ongoli stated in his witness statement that the value of the Motor Vehicle was USD 46,000. However, he did not attach any documentary evidence showing proof of the same. Counsel for the Appellant relied on the decision in **Uganda Telecom Limited v Tanzanite Corporation; Supreme Court Civil Appeal No 17 of 2004 [2005]** to aver that special damages must be specifically pleaded and proven.

In relation to Ground two, counsel for the Appellant submitted that the learned trial Judge erred in law and in fact, when he awarded lost earnings of USD 33,600, because he did not apply the principles governing compensation of future loss to the extent that the said earnings were not based on the actual income which the 1st respondent was earning at the time the vehicle was impounded. Counsel relied on the decision in **Robert Cuossens v Attorney General; CA No. 8 of 1999** to assert that future earnings must be based on the actual income and not speculations. In addition, Counsel relied on the decisions of **Daly v General Steel Navigation Co Ltd [1980] 3 ALL ER 696 (CA), Billingham v Hughes [1949] 1 KB 643** to support his argument.

In relation to Ground three, counsel submitted that it was erroneous for the learned trial Judge to award punitive damages. This is on account of the reason that the Appellant's actions of detaining the 2nd Respondent were justified as a result of the 2nd Respondent refusing to stop at the customs post and later attempting to cross the border point with the truck. According to **Section 153 of the East African Customs Management Act, 2004**, the Appellant has a statutory duty to stop and search any vehicles. In addition, **Section 156** of the **East African Customs Management Act, 2004** provides for the powers of arrest which were exercised in this case.

Counsel submitted that the courts should be reluctant to restrain a public body from doing what the law allows it to do, and the courts should consider and take into account the wider public interest. It was submitted that between the conflicting interests of the public at large and the interests of a few individuals, the interest of

the public at large must prevail. The Appellant prayed that the award of UGX 5,000,000 was manifestly excessive and should be set aside.

The Appellant prayed that this Honourable Court allows the appeal in totality with costs.

6. Submissions by the Respondents

On the other hand, the Respondents, in their written submissions lodged on 31st October 2022, raised several objections to the effect that the appeal is manifestly defective and ought to be struck out.

The first objection is that the Appellant should have first applied to set aside the judgment of the High Court. This is premised on the contention that the learned trial judge proceeded under **Order 17 rule 4 of the Civil Procedure Rules SI 71-1**. The Appellants duly participated in the trial at the high court and even cross-examined the Plaintiffs' witnesses but only failed to conduct their defence case. The Respondents submitted that the only option available to the Appellant in this matter was to apply to the High Court of Uganda at Mbale to set aside Ex-parte proceedings that ensued after the Appellant failed to conduct its defence.

The Second objection is to the effect that the Notice of Appeal lodged by the Appellant should be struck out. The document purporting to be a notice of appeal in this case was lodged on 17th November 2017 and not within the required 14 days after the judgment of Court was delivered on 25th April 2017. According to the Respondents, the lodgement of a Notice of Appeal goes to the root of this matter because without it the Court has no jurisdiction to entertain the matter and the appeal is incompetent. Counsel relied on the decision in **Makhangu v Kibwana [1995-1998] 1 EA 175** wherein it was held that an appeal is incompetent once there is no notice of appeal. The Respondents submitted that they have never been served with the Notice of appeal which also makes this appeal incompetent. They referred to the

case of **Reamaton Ltd v Uganda corporation Creameries Ltd and Henry Kawalya; CACA No. 53 of 1997** for this contention.

In relation to Ground One, counsel for the Respondents submitted that the High Court properly addressed the issue of the recovery of the motor vehicle. The trial Judge found that the Appellant, whatever the reason, acted on speculation and had no reasonable ground for seizing the truck, as no hides and skins were found in it. They relied on the decision in **Mohindra vs Mohindra (1953) 20 EACA 94** wherein the East African Court of Appeal held that the material date on which property is to be ascertained is the date of final judgment. They further relied on the evidence in Paragraph 24 and 25 of Pw1's witness statement to state that the motor vehicle was in a deplorable state having been vandalized and gives USD 46,000 as the current market value.

In relation to Ground Two of the Appeal, the Respondents submitted that the High Court properly addressed the issue of lost profits. The prayers were under Paragraph 9 of the Plaint, and were supported by the evidence of Hosborne Ongoli in his witness statement. It was further submitted that the court aimed to restore the Respondents' position to what it would have been before the incident in the case happened. The court properly concluded that the Respondent was entitled to lost profits. The Respondents averred that the appellant did not contest the claim because they did not offer any witnesses to defend the case and yet they had the opportunity to do so.

The Respondents submitted that the lost profits constitute damages. Special damages, because of their peculiar nature, require the Plaintiff to give warning in the pleadings of the items constituting the claim for damages with sufficient specificity in order that there may be no surprise at the trial. They cited the decisions in **Musoke v Departed Asians Custodian Board [1990-1994] EA 219; Uganda Telecom v Tanzanite Corporation [2005] EA 351; Mutekanga v Equator Growers (U) Ltd [1995-1998] 2 EA 219; Uganda Breweries Ltd v Uganda Railways Corporation; Supreme Court Civil Appeal No. 6 of 2001 (unreported)**

In relation to Ground Three, the Respondents submitted that the learned Judge had power to award damages implicit from the provisions of **Section 14(2) (c) and 14(3) of the Judicature Act, Cap 13**. The assessment of damages is principally the duty of the trial court. It was submitted that the appellate Courts will not engage in assessment of damages except in the most exceptional circumstances. Pursuant to the decisions in **Fredrick J. K. Zaabwe v Orient Bank & Others ;Supreme Court Civil Appeal No. 4 of 2006 citing Greer LJ in Flint v Lovell (1935) 1 KB 354** the appellate court will only reverse or question the trial Judge's amount of damages if the appellate court is convinced that the learned Judge acted upon some wrong principle of law or that the amount awarded was so extremely high or very small as to make it, in the judgment of the appellate court, an entirely erroneous estimate of the damage to which the Plaintiff is entitled. Counsel submitted that the award of UGX 20,000,000/= for the first Plaintiff and UGX 5,000,000/= for the Second Plaintiff would adequately atone for the damage and were issued on the right principles.

The Respondents implored this court to dismiss the Appeal on this account.

7. Resolution of the Appeal

The duty of this Court as a 1st Appellate Court.

The duty of a first appellate Court is to make its own findings and arrive at its own conclusions from the evidence on record. It is also the duty of this court to place/ attach the greatest weight to the opinion of the trial judge who saw the witnesses. A court of appeal will not substitute its own opinion for that of the trial court, and a judgment of fact will be upheld unless it is satisfactorily shown to be unsound or contrary to the weight and evidence on record. See **Rule 30 of the Judicature (Court of Appeal rules) Directions SI 13-10,** the decisions of **Watt v Thomas [1947] 2 ALL ER 584 & Okeno v Republic [1972] EA 32.**

This may be summarized as the Court's duty to re-evaluate the evidence and reconsider all the materials which were before the trial judge. See: **Kifamunte Henry v Uganda, Supreme Court Criminal Appeal No. 10 of 1997, Banco Arabe Espanol v Bank of Uganda [1999] UGSC 1**

The illustration of the above duty of Court was elucidated by the Court of Appeal of England in **Coghlan v Cumberland (1898) 1 CH 704,** quoted with approval by the Supreme Court of Uganda in **Father Narsensio Begumisa & 3 others v Eric Tibebaga,SCCA No. 17 of 2000 [2004] KALR 236** wherein it was stated that:

> "*...Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the judge with such other materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong.... When the question arises which witness is to be believed rather than another and that question turns on manner or demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not, and these circumstances may warrant the court in differing from the judge even on a question of fact turning on the credibility of a witness whom the court has not seen...*"

Being mindful of the Court's duty stated above, I shall proceed to evaluate this Appeal, commencing with the preliminary objection raised by the Respondents in their written submissions.

Preliminary objection No. 1: Whether the Appellant ought to have lodged an application to set aside the judgment of the High Court as opposed to an appeal.

According to Counsel for the Respondents, this appeal is defective as the Appellant did not have an appeal as an available remedy. The Respondents contend that the Appellant ought to have lodged an application in the High Court to set aside the *ex-parte* order and proceedings that ensued. Therefore, the Appellant does not have a right of appeal from the resulting decree. The Respondents did not direct this Honourable Court to any precedent to support this averment. On the other hand, the

Appellant contended that the judgment pronounced was a decision on its merits and therefore the Appellant has an automatic right of appeal against the same.

It is not, in my view, to be assumed that there is a right of appeal in every matter which comes under the consideration of the court. Such right must be given by statute and does not exist independently of any such provision. Therefore, once a challenge to a right of appeal is raised, it ought to be properly assessed as it affects the jurisdiction of the Court.

Section 25 of the Civil Procedure Act Cap 71 provides :

> *"The court, after the case has been heard, shall pronounce judgment, and on that judgment a decree shall follow; except that:*
>
> *a) If the defendant does not enter such appearance as may be prescribed, the court may give judgment to the Plaintiff in default.*
> *b) In cases for which the rules have been made under Section 41(2) (k) of the Judicature Act, it shall not be necessary for the court to hear the case before giving judgment."*

Section 66 of the Civil Procedure Act Cap 71 provides :

> *"unless otherwise provided under this Act, an appeal shall lie from the decrees or any part of the decrees and from the orders of the High Court to the Court of Appeal"*

Section 67 of the Civil Procedure Act Cap 71 provides :

> "1) *An appeal may lie from an original decree passed ex-parte*

On the other hand, the **Civil Procedure Rules SI 71-1** provide :

Order 9 rule 27

"*In any case in which a decree is passed ex parte against a defendant, he or she may apply to the court by which the decree was passed for an order to set it aside ...*"

Order 44 rule 1(c)

"*An appeal shall lie as of right from the following orders under section 76(h) of the (Civil Procedure) Act: -*

(c) An order under rule 27 of Order IX rejecting an application for an order to set aside a decree passed ex parte."

In the resolution of the instant matter, this Court ought to first establish whether the judgment of the High Court being considered was indeed an *ex-parte* decision, before an assessment on whether the right to appeal accrues therefrom is made.

The **Black's Law Dictionary, 9th Edition**, defines '*ex parte*' on page 657, as:

> "*on or from one party only, usu. without notice to or argument from the adverse party <the judge conducted the hearing ex parte>*"
> *Done or made at the instance and for the benefit of one party only, and without notice to, or argument by, any person adversely interested; of or relating to court action by one party without notice to the other, usu. for temporary or emergency relief <an ex parte hearing> an ex parte injunction>*"

The Dictionary further defines 'ex parte proceedings' on page 1324 as:

> "*A proceeding in which not all parties are present or given the opportunity to be heard. - also termed ex parte hearing.*"

Under the Civil Procedure Rules, S.I. 71-1, the law envisages two scenarios under which court may proceed ex-parte. The first is under **Order 9 rule 11 (2)** where it provides that:

"*Where the time allowed for filing a defence or, in a suit in which there is more than one defendant, the time allowed for filing the last of the defences has expired and the defendant or defendants, as the case may be, has or have failed to file his or her or their defences, the plaintiff may set down the suit for hearing ex parte.*"

The second is under Order **9 rule 20 (1) (a)** where it is provided :

"Where the plaintiff appears and the defendant does not appear when the suit is called on for hearing—
(a) if the court is satisfied that the summons or notice of hearing was duly served, it may proceed ex parte;"

From the record of appeal in this case, it can be discerned that the scenario being considered in this Appeal is the second one. It is not in contest that the Appellant and counsel lodged a written statement of defence and even attended the initial proceedings of the suit, wherein they cross- examined the respondents' witnesses and only failed to turn up for the defence hearing. Upon that failure, the Respondents applied to proceed to ex-parte and the learned trial Judge granted the application and proceeded to enter judgment in their favour. I therefore find that the judgment entered by court in the matter was ex-parte.

Order 9 rule 27 of the Civil Procedure Rules SI 71-1, cited above, provides a solution to the effect :

"*In any case in which a decree is passed ex parte against a defendant, he or she may apply to the court by which the decree was passed for an order to set it aside; and if he or she satisfies the court that the summons was not duly served, or that he or she was prevented by any sufficient cause from appearing when the suit was called on for hearing, the court shall make an order setting aside the decree as against him or her upon such terms as to costs, payment into court, or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit; except that where the decree is of such a nature that it cannot be set aside as against such defendant only, it may be set aside as against all or any of the other defendants also.*" **(Emphasis added)**

Court

The question of whether a party aggrieved by an *ex-parte* judgment should apply to set it aside or lodge an appeal can be described as within the choice of the party. Although the Appellant, in this matter, had the option of applying to have the judgment set aside, that is not a bar to seeking to appeal it instead considering that Section 67 (1) of the Civil Procedure Act Cap 71 expressly confers such a right. The right to appeal a decision accrues to a party dissatisfied with the court decision, regardless of the same being rendered *ex-parte.* A litigant, unless estopped by his or her conduct, or by former adjudication, or by law, is not foreclosed or otherwise prevented from a determination of the merits of his or her case by means of any available remedies. Litigants are at liberty to choose one out of several means afforded by the law for the redress of an injury, or one of several available forms of action. In an exercise of election of remedies, selection of one makes the party lose the availability of the other remedy. By way of analogy, if one chooses to pursue an appeal, they lose the right to apply to set the decision aside, and vice versa.

Mullar on Code of Civil Procedure, 16th Edition, further notes that an appeal against a decree passed *ex-parte* is possible even if the Appellant did not exhaust or exercise the remedy provided (*to set aside the ex-parte decree and proceedings*). The only limitation is that the Appellant will not be allowed, on appeal, to challenge the order posting the suit for *ex-parte* hearing by the trial court. He can only challenge the merit of the suit.

In the present case, it can be discerned that the grounds of appeal, as drafted by the Appellant seek to challenge the decision of the High Court on its merits, and not the decision of the Court to post the suit for hearing and determination *ex-parte.* Therefore, I find that the Appellant duly has the right of appeal.

The objection is overruled.

Preliminary objection No. 2: Whether the Appeal ought to be dismissed on account of the Notice of Appeal being lodged out of statutory permitted time.

The Respondents submitted that the Notice of Appeal by the Appellants was lodged out of time and ought to be struck out on that account.

The Appellant made an application for extension of time to lodge this appeal in *Court of Appeal Civil Application No. 234 of 2017; Uganda Revenue Authority v M/S Urgent Cargo Holding Ltd and another*, wherein it was the appellant's case that they were not able to attend the hearing to defend the suit because they were not duly served with the hearing notice for 13th December 2016. According to the affidavit of Mr. Haluna Mbeeta, a supervisor in the legal services and Board Affairs of URA, the order to close the Defendant's case was granted by court on the basis of affidavit evidence being the affidavit of service of a one Erap Roberts, who averred that he found an unnamed male receptionist whom he served the hearing notice yet the legal department had no reception nor male receptionist. That evidence was not controverted by the Respondent by way of an affidavit in rejoinder. This court found that affidavit evidence satisfactory and based on that evidence, this court issued orders allowing the application to extend time within which the appeal should be filed.

This Court has considered, in other matters, the issue of affidavits of service and whether summons have been properly served. In **Ali Muteza vs. Jessica Nakku Aganya & Patrick Kasumba; C.A. Civil Appeal No. 271 of 2019**, Kiryabwire, JA, observed:

> "*I am inclined to agree with the finding of Justice Remmy Kasule that more than just the proper exercise of discretion, it is evident that the affidavit of service was far too general to meet the requirements of personal service. I would like to add that the quality of affidavits of service used in the Courts is increasingly falling below required legal standards. Courts should take particular care in accepting affidavits of service especially where it is averred that service has taken place but party so alleged to have been served does not show up. An erroneous reliance on a defective affidavit leads to a miscarriage of justice and an unnecessary lengthening of judicial proceedings to correct the error instead of resolving the underlying dispute in Court. As a general rule, ex-parte and/ or default Judgments cannot be regarded in the same way*

as Judgments on merit, and can be, for just cause, in the interest of justice, set aside..." (Emphasis mine)

Further, it was the Applicant's case that they were not informed by Mr. Kitaka who was in personal conduct of the matter and he left the applicant's employment without informing them of the conclusion of the case. The above evidence was not controverted by the respondents by way of an affidavit in rejoinder. As it stands, it is uncontested. In **Wanyama Bwadene Seperia vs. Kampala Capital City Authority; Civil Application No. 26 of 2021,** this Court considered the issue of uncontroverted evidence. It cited its earlier decision in **SEREFACO Consultants Ltd vs. EURO Consult BV; C.A. Civil Application No. 16 of 2007**, where the Court of Appeal considered an application where no affidavit in reply was filed and held that:

"*In the application before me, there is the uncontroverted affidavit evidence of Mr. Chaapa Karuhanga, the chairman of the applicant company. It is settled law that if the applicant supports his application by affidavit or other evidence and the Respondent does not reply by affidavit or otherwise, and the supporting evidence is credible in itself, the facts stand as unchallenged.* ***See H.G. Gandesha and Kampala Estates Ltd and G.J. Lutaya, SC Civil Application No. 14 of 1989.***" (Emphasis added)

Considering the Appellant's uncontroverted evidence and the ruling of this Court granting extension of time within which to file the appeal, we are to proceed as if everything done by the Appellant was done within the statutory permitted time. The reasons for extension are stipulated thereunder in the ruling of the Court, I need not delve into them.

The objection is therefore overruled.

Ground One: The learned trial Judge erred in law and fact and occasioned a miscarriage of justice when he awarded the 1st Respondent recovery of the truck as it was at the time it was impounded or its current market value stated to be at $46,000 USD

The crux of this ground from the Appellant's perspective is that the learned Judge erred when he awarded the 1st Respondent recovery of the Motor Vehicle at the market value at the time of filing the suit said to be US $46,000 without evidence of the value of the Motor Vehicle. It is averred that although the 1st Respondent set it out in the Plaint, it was never proven in evidence.

On the other hand, the Respondents contend that the High Court properly addressed the issue of the recovery of the motor vehicle. The trial Judge found that the Appellant, whatever the reason, acted on speculation and had no reasonable ground for seizing the truck, as no hides and skins were found in it. They relied on the decision in **Mohindra vs Mohindra (1953) 20 EACA 94** wherein the East African Court of Appeal held that the material date on which property is to be ascertained is the date of final judgment. They further relied on evidence in Paragraph 24 and 25 of Pw1 to state that the motor vehicle is in a deplorable state having been vandalized and gives US $ 46,000 as the current market value.

It is a time-tested principle that he who alleges the existence of facts much prove such facts exist. In civil proceedings, this is on the balance of probabilities. [**See Phipson Law of Evidence, 14th Edition, Cross and Tapper on Evidence 8th Edition at Pg. 121, Sections 101 and 103 of the Evidence Act, Cap 6 Laws of Uganda**]

The general rule is that the Plaintiff is required to prove his claim, regardless of whether the suit proceeded *ex-parte* or not. This Court in **Clovergem Fish and Foods Limited (in Receivership) v John Verjee & Another; Court of Appeal (*Mukasa-Kikonyogo DCJ, Mpagi-Bahigeine and Kavuma JA)* Civil Appeal No. 20 of 2001** held that the Plaintiff ought to formally prove his claim even where the court proceeds under Order 15 rule 4 of the Civil Procedure Rules.

In the instant matter, the Respondents pleaded for "*an order of unconditional release of the 1st Plaintiff's truck No. KAS 322H/ZC1076 or payment of its market value*" (Pg. 117 of the Record). I do not observe any Annexture to the Plaint on the record wherein the value of the truck was stipulated. The Amended Plaint, in paragraph 9 thereof provided for a prayer of "*recovery of the truck or its market value of $46,000 USD.* I do not observe any documentary evidence annexed to that effect. There is no

other evidence on the record to show that the truck was vandalised. The question that arises thereunder is whether the evidence contained in the Respondents' witness statements is sufficient to determine the value or the condition of the truck?

The Appellant did not participate in presenting its case at trial, it can be discerned from the Appellant's Written Statement of Defence on record (*pg. 107-110 of the Record of Appeal*) that the Appellant pleaded that the motor vehicle was seized for carrying uncustomed goods in contravention of the provisions of the East African Community Customs Management Act. Therefore, from a factual standpoint, it was duly established that the Respondents' truck No. KAS 322H/ZC 1076 was indeed seized. The Appellant therefore bore the evidential burden to show/ demonstrate that the seizure was in accordance with the law or for a justified purpose. Considering that the matter proceeded *ex parte* at the stage of hearing the Appellant's case, they failed to discharge this burden.

The value of the truck constitutes special damages, being a quantifiable sum. It is the position of the law that special damages must be specifically pleaded and proved, on the balance of probability, by the party claiming the same, where a suit proceeds *inter parties* or *ex parte*. [**See W. M. Kyambadde v Mpigi District Administration [1984] HCB, McGregor on Damages 4th Edition at Pg. 1028**] Special damages must be strictly proved, meaning that the evidence adduced in the during the hearing must show particularity in accordance with the pleadings, and must be based on precise calculation to enable the court and the other party access facts on which such calculation was made.

I have not come across any evidence on the record which may assist a court to know how the value of the truck as US $46,000 was arrived at by the Respondents, besides including it in the Plaint, or in Paragraph 25 of Hosborne Ongoli's witness statement. There was no evidence of ownership, being a logbook or any other sufficient document to enable the court to know the make and model of the vehicle. In addition, there was no agreement or document evidencing purchase to which reference could be made to ascertain the value. Finally, there was no evidence of an expert or other witness to establish the extent of damage of the vehicle, or an analysis of the cost of a new/ replacement vehicle. I find that the evidence was insufficient to establish the

value of the Motor Vehicle, and it therefore could not be the basis of the award of Court.

I therefore find merit in this ground of appeal which is answered in the affirmative.

Ground Two: The learned trial Judge erred in law and fact in awarding the 1st Respondent lost earnings valued at $33,600 USD per month from 08.07.2012 till date of release of the truck

The crux of this ground from the Appellant's perspective is that the trial Judge erred in law and in fact when he awarded lost earnings of USD 33,600 because he did not apply the principles governing compensation of future loss to the extent that the said earnings were not based on actual income which the Respondent was earning at the time the vehicle was impounded. Counsel relied on the decision in **Robert Cuossens v Attorney General,CA No. 8 of 1999** to assert that future earnings must be based on the actual income and not speculations.

On the other hand, the Respondents submitted that the lost profits constitute damages. Special damages, because of their peculiar nature, require the Plaintiff to give warning in the pleadings of the items constituting the claim for damages with sufficient specificity in order that there may be no surprise at the trial. They cited the decisions in **Musoke v Departed Asians Custodian Board [1990-1994] EA 219; Uganda Telecom v Tanzanite Corporation [2005] EA 351; Mutekanga v Equator Growers (U) Ltd [1995-1998] 2 EA 219; Uganda Breweries Ltd v Uganda Railways Corporation Supreme, Court Civil Appeal No. 6 of 2001 (unreported)**

The law on special damages posits that not only must they be specifically pleaded but they must also be strictly proven. **See Hajji Asuman Mutekanga v Equator Growers (U) Ltd; SCCA No. 7 of 1996, Masaka Municipal Council v Semogerere [1998-2000] HCB 23, Musoke David v Departed Asians Property Custodian Board [1990-1994] EA 219.** Special damages compensate the party for quantifiable monetary losses such as; past expenses, lost earnings. Unlike General damages, calculating special damages is straightforward as they are based on actual expenses and losses.

In **Bonham v Hyde Park Hotels Ltd (1948) TLR 177,** court held :

> "*on the question of damages...the plaintiff must understand that if they bring an action for damages, it is for them to prove their damages, it is not enough to write down the particulars and so to speak, throw them at the head of the court saying; this is what I lost; I ask you to give me these damages. They have to prove it...*"

A first appellate court may only interfere with the award of damages by a trial court if there exists sufficient reason justifying that interference. In **Crown Beverages Ltd v Sendu Edward, Supreme Court Civil Appeal No. 01 of 2005,** the Supreme Court emphasised that:

> "*...An appellate Court will not interfere with the award of damages by a trial court unless the trial court acted upon a wrong principle of law or the amount awarded is so high or so low so as to make it an entirely erroneous estimate of the damages to which the plaintiff was entitled*"

The major contention against the award in this case by the Appellant is that the learned Judge did not apply the principles governing compensation of future loss to the extent that the said earnings were not based on actual income which the Respondent was earning at the time the vehicle was impounded, so basically that the Judge acted on a wrong principle of the law.

In the case of future loss or expenses to be incurred in the future, assessment is quite difficult as the prospective loss may not be viewed as special damages because it has not been sustained at the time of trial, but rather general damages. The Plaintiff, in such instance should be entitled, in theory, to the exact amount of his prospective loss if it could be proved to its present value at the date of trial. See **Robert Cuossens v Attorney General, CA No. 8 of 1999,** in which case Oder JSC as he then was stated:

> "*An estimate of prospective loss must be based in the first instance, on a foundation of solid facts; otherwise, it is not an estimate, but a guess. It is*

therefore important that evidence should be given to the Court of as many solid facts as possible. One of the solid facts that must be proved to enable the Court to assess prospective loss of earnings is the actual income which the plaintiff was earning at the time of his injury. The method of assessment of loss of earning capacity after the facts have been proved, is in my view, persuasively stated by ***Mc Gregor on Damages 14th Edition, Pg. 797 at paragraph 1164*** as follows:

"The Courts have evolved a particular method of assessing loss of earning capacity, for arriving at the amount which the plaintiff has been prevented by the injury from earning in the future. This amount is calculated by taking the figure which, while based upon the number of years during which the loss of earning power will last, is discounted so as to allow for the fact that a lumpsum is being given now instead of periodic payments over the years. This figure has long been given called the multiplier, the former figure has now come to be referred to as the multiplicand. Further adjustment however may have to be made to the multiplicand or the multiplier on account of a variety of factors; viz, the probability of future increase or decrease in the annual earnings, the so-called contingencies of life and the incidence of inflation and taxation"

Discussing the "multiplicand" in conditions of diminution of annual earnings ..... the starting point in the calculation has long been the amount earned by the plaintiff before the injury"

In the instant case, the Plaintiffs (Respondents herein) pleaded in Paragraph 9 of the Amended Plaint that they sought loss of earnings at $33,650 USD per month from 8/7/2012 until release of the truck to them. In the 1st Plaintiff's witness statement deposed by Horsbone Ongoli at Para 21, it was stated that:

"By this detention, urgent cargo was deprived of the truck and income. This truck was one of the four assigned to Track Freight express lines one of our trading partners to transport goods from Mombasa to Wau in Southern Sudan because it had a double differential locking system that enabled it to travel on very rough roads as requested by our trading partners, giving us a projected gross income of $17,000 per loaded return journey"

The documentary evidence (*in addition to the pleadings)* in support of the claim for loss of earnings was an agreement dated 26th June 2012 between M/S Track Freight Express Lines Ltd of P.O. Box 3553, Mombasa Kenya and Urgent Cargo Handling Ltd for transportation of Cargo from Mombasa to South Sudan (*Pg. 92 of the record of Appeal).* Clause 2 of the said agreement provided for a sum of USD 15,000 as transport charges from Mombasa to WAU and USD 2000 being transport charges for an empty container back to Mombasa. Clause 3.2 of the Agreement provided that container detention charges incurred after 7 days from the time containers are picked from WAU shall be on account of Urgent Cargo Handling Ltd. This document was duly tendered in Court in the presence of counsel for the Appellant, for which no objection was made.

In paragraph 23 of the same witness statement, it was stated that the net loss to the company was found to be $33,650 per month, allowing a 5% margin of error plus or minus. This was supported by a document authored by the 1st Respondent titled *"projected income from KAS 322H"* signed by the Finance Manager, Urgent Cargo Ltd (*Pg. 95 of the Record of Appeal). T*he document itemises the loss of earnings as a result of the impounding of the truck KAS 322H. According to this document, the loss for the month of July 2012 was US$ 19,950 while the subsequent losses per month from August being US$ 33,650. The projected loss constitutes Income from Mombasa to South Sudan of US$ 37,500 less expenses of costs including salaries per month for driver and turn man, fuel costs, allowances and road user transit, as well as truck maintenance costs. There was no explanation afforded for the variance in the figures presented in the estimate in the Finance Manager's projected income, and that of the invoices and receipts presented. Regarding this document, it clearly constitutes speculation in my view. Special damages cannot be based on speculation. See **Stanbic Bank Ltd v Kiyimba Mutale; SCCA No. 2 of 2010.**
I therefore find that the learned trial judge erred when he considered the figure of USD 33,650 as the net monthly loss and yet there was insufficient evidence to prove that this was the amount earned at the time of the seizure of the Motor Vehicle.

Ground 2 of the Appeal therefore succeeds.

Ground Three: The learned trial Judge erred in law and fact in awarding the Respondent punitive damages of UGX 5,000,000/=.

Having found as I have, on grounds one and two, I do not deem it prudent to evaluate or consider ground three.

In the discussion of the remedies available to this Court, reference is made to the powers of this court enumerated below.

Rule 2(2) of the Court of Appeal Rules SI 13-10 provides :

> "*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 that power shall extend to setting aside judgments which have been proved null and void after they have been passed, and shall be exercised to prevent abuse of the process of any court caused by delay*"

Rule 32(1) of this Court's rules provides :

> "*On any appeal, the court may, so far as its jurisdiction permits, confirm, reverse or vary the decision of the High Court, or remit the proceedings to the High Court with such directions as may be appropriate, or order a new trial, and make any necessary, incidental or consequential orders, including orders as to costs*"

Furthermore, **Section 80 (1) (e) of the Civil Procedure Act** empowers the Appellate court to order a new trial where the trial court fails to make a determination in a manner dictated by law. A re-trial will be ordered when (i) the original trial was null or defective, (ii) that the interest of justice require it, (iii) no injustice will be occasioned to the other party if an order of retrial is made. See **Hwan Sung Limited vs. M. & D. Timber Merchants and Transporters Limited; S.C. Civil Appeal No. 02 of 2018**.

Basing on the findings of the court in grounds 1 and 2 above, and further having found that there was no proper service of the hearing notice, in the High Court, upon the appellants, it would be prudent that they are given an opportunity to defend the

suit. It is upon that hearing and considering that defence that the High Court would answer all the issues on merit. This will not only serve the interests of justice but it will put an end to protracted litigation on procedural matters. I find that the interests of justice in this matter will be best served through a re-trial before another judicial officer.

I would allow this appeal with the following orders;

1. The lower court decision is hereby set aside.
2. The matter is remitted back to the High Court to be heard and determined on its merits before a different Judge.

I so order.

Dated at Kampala this ....17th..... day of ....April..... 2024

CHRISTOPHER GASHIRABAKE
JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 20 OF 2018

(Coram: R. Buteera DCJ, C. Bamugemereire & C. Gashirabake, JJA)

UGANDA REVENUE AUTHORITY :::::::::::::::::::: APPELLANT

VERSUS

M/S URGENT CARGO HANDLING LTD AND GERRY ANDREW MSAFIRI :::::::::::::: RESPONDENT

JUDGMENT OF RICHARD BUTEERA, DCJ

I have had the benefit of reading in draft the Judgment of C. Gashirabake, JA in respect of this appeal. I do agree with his reasoning, decision and orders he proposed.

Since C. Bamugemereire, JA, also agrees, this Appeal succeeds in the terms and orders as proposed by C. Gashirabake, JA in his lead judgment.

Dated at Kampala this ....17th.... day of ....April..... 2024

Richard Buteera
DEPUTY CHIEF JUSTICE

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

Civil Appeal No.20 of 2018

(ARISING FROM HIGH COURT MBALE CIVIL SUIT No.026 OF 2012)

UGANDA REVENUE AUTHORITY :::::::::::::::::::::::::::::::: APPELLANTS

VERSUS

1. **M/S URGENT CARGO HANDLING LIMITED**
2. **GERRY ANDREW MSAFIRI** **::RESPONDENTS**

[Appeal from the decision of Henry. I. Kaweesa J, in High Court Civil Suit No.026 of 2012 delivered on 25th April 2017 at the High Court of Uganda at Mbale]

JUDGMENT OF CATHERINE BAMUGEMEREIRE JA

I have had the privilege to read, in draft, the Judgment of my learned brother, Christopher Gashirabake, JA. I concur with his reasoning and conclusion, and I agree that the matter should be resolved in the terms he has proposed.

Dated this 17th day of April 2024.

CATHERINE BAMUGEMEREIRE
JUSTICE OF APPEAL