

**THE REPUBLIC OF UGANDA  
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA  
CIVIL APPEAL NO 41 OF 2009**

**COOPER MOTORS CORPORATION (U) LTD.....APPELLANT**

**VERSUS**

1. GENESIS TRANSPORTERS  
2. CHRIS KATURAMU  
3. ABEERA GRACE KATURAMU

..... **RESPONDENTS**

**CORAM: Hon. Mr. Justice Kenneth Kakuru, JA  
Hon. Mr. Justice Ezekiel Muhanguzi, JA  
Hon. Lady Justice Percy Night Tuhaise, JA**

**Judgment of Hon. Mr. Justice Kenneth Kakuru, JA**

I have had the benefit of reading in draft the Judgment of my brother Lord Justice Ezekiel Muhanguzi, JA.

I agree with his reasoning and the conclusion he arrived at that, the appeal has merit and ought to be allowed. I also agree with the orders he has proposed.

By majority decision, we hereby make orders as set out in the Judgment of Hon. Mr. Justice Ezekiel Muhanguzi, JA.

**Dated at Kampala this.....19<sup>th</sup> day of.....Nov:.....2018.**



.....  
**Kenneth Kakuru  
JUSTICE OF APPEAL**

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*[Appeal arising from the judgement/orders of Hon. Justice Anup Singh Choudry dated 28<sup>th</sup> November 2015, in the High Court Civil Suit No. 93 of 2008]*

**JUDGEMENT OF PERCY NIGHT TUHAISE, JA**

I have had the benefit of reading in draft the judgement of my learned brother Hon. Justice Ezekiel Muhanguzi JA.

I agree with him that ground 2 of this appeal ought to succeed. KAT

The record clearly reveals that the issue of jurisdiction had been settled earlier by the court when it made a finding that it had jurisdiction to entertain the matter. The matter was not a subject of appeal or review. The trial Judge in his wisdom appears to have attempted to address what he perceived to be a glaring irregularity. However, there being no appeal or review from the previous ruling

The record of appeal indicates that, the trial commenced with cross examination of PWI on his witness statement where the trial Judge also took a very active role. The court adjourned the trial to another date but also ordered the plaintiff's counsel to file several documents. He also ordered both counsel to file expert reports. He then set a date for judgement, that is, 5/11/2008. On that date, when the matter was called for hearing, the plaintiff's counsel informed court that he had filed in court the documents they were required to file and had also come with the author of those documents whom he intended to call as a witness. At that point the trial Judge raised a preliminary point of law which however, in my opinion, initially appeared to be a point of fact since court merely inquired about whether the plaintiff's clients paid monies before they released the buses by the Hire Purchase company.



After a lengthy dialogue, the trial Judge stated that the plaintiff had no *locus standi* in the matter, then went on to explain why this was so. This was followed by arguments and counter arguments between the trial Judge and both counsel. Some of them, in my opinion, were matters of evidence which could have been considered during trial rather than on a point of law which is normally based on the plaint. In the course of exercising his judicial duty of appreciating or understanding the intricacies of the transactions under dispute the learned trial Judge may have gone overboard to the extent that his mind became clouded. Eventually the trial Judge made a ruling that the suit be struck out under Order 11(a) because the plaintiff had no privity of contract.

The ruling appears to be based on both the preliminary point of law raised by the learned trial Judge as well as the evidence so far adduced from the plaintiff's witness. It is not clear which was which. The record shows the other witnesses lined up by the plaintiff whose witness statements were on record were not called by the learned trial Judge to be cross examined on their witness

*her from detachedly or objectively appreciation and adjudicating upon the issues.*

- iii) *A judicial officer should refrain from questioning a witness or the accused in a way that may intimidate or disconcert him or her or unduly influence the quality or nature of his/her replies and thus affect his/her demeanour or impair his/her credibility.”*

The foregoing principles are to an extent reflected in the Ugandan Judicial Code of Conduct and in the Ugandan laws on procedures and evidence. The then Court of Appeal in Uganda reflected some of them in **Libyan Arab Uganda Bank & Another V Adam Vasiliadis Civil Appeal No. 9 of 1985** where Odoki JA, as he then was, noted:-

*“It is a well established law that excessive intervention in the proceedings by a trial Judge may amount to misconduct justifying the grant of a new trial.”*

He went on to state however that that an appellate court may refuse a retrial unless it is convinced that the reason of the Judge had become so clouded.

In this case, it appears from the record that the learned trial Judge interested himself in the question of whether the appellant had the *locus standi* to file the case which my decision above shows had already been dealt with by another Judge in the same court. The learned trial Judge raised a preliminary point of law on 05/11/2008 when court had resumed to continue with cross examination of the plaintiff's witnesses. The entire proceedings for that day reflect a marathon of arguments between court and both counsel where the trial Judge often backed by the defendants' counsel kept expressing his views or opinions that the proceedings are irregular. On page 68 the learned trial Judge stated;-

For the foregoing reasons I would uphold grounds 2 and 4 of the appeal.

This would also of necessity touch on ground 5 of the appeal which states that the learned trial Judge erred both in law and fact when he ignored and or failed to properly and judiciously evaluate evidence before the Court and held that:

- a) The plaintiff had no claim in respect of the purchase price for the buses.
- b) The personal guarantees issued by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are vitiated as there is no subject matter or liability to the Plaintiff by the defendants

In this case as already analysed above the learned trial Judge only focused on the evidence of one witness instead of analysing the evidence of all other witnesses. In purporting to deliberate on a point of law posed by himself he also addressed the evidence of PW1 yet he had not allowed all the other witnesses from both sides to give their evidence. He did this as he also kept referring to the plaint and its annexures and made a decision. In my opinion, he ignored the principles of natural justice of hearing both sides and observing his duty as a judicial officer to evaluate the evidence of both parties before coming to a conclusion.

This also flows over to ground 6 of the appeal which states that the learned trial judge erred in law and fact when he made an order that the suit be struck off in a ruling on a point of law raised by the Court. The issues under this ground were addressed and answered in the course of deliberating grounds 1, 4 and 5 of the appeal above.

In the result I would allow all the grounds of the appeal. I would in principle agree with the conclusion of my learned brother in the lead judgement that the issues which would have caused the matter to be referred back to the High

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5 **COOPER MOTORS CORPORATION (U) LTD.....APPELLANT**

**VERSUS**

**1. GENESIS TRANSPORTERS**

**2. CHRIS KATURAMU**

**3. ABEERA GRACE KATURAMU.....RESPONDENT**

10 *(Appeal from the judgment and orders of the High Court of Uganda at Kampala before honorable justice Anup Singh Choudry in High Court Civil Suit No. 93 of 2008).*

**JUDGMENT OF EZEKIEL MUHANGUZI, JA**

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**Introduction**

20 This is an appeal from the judgment and orders of Honorable Justice Anup Singh Choudry dated 28/11/2008 in High Court Civil Suit No.93 of 2008. The appellant sued the respondents jointly and severally for breach of hire purchase agreements, agreements for sale of a generator, rear brake linings and spare parts.

25 The facts giving rise to this appeal as stated in the plaint filed on the 6<sup>th</sup> day of February 2007, are that, on the 31<sup>st</sup> December 2004, the 1<sup>st</sup> respondent purchased 3 Nissan diesel buses, model CB46 registration numbers, UAF821W, UAF825W, UAF834W from the appellant at a price of U.S Dollars 339.000 and it paid a deposit of U.S Dollars 222,094. The



5 balance was payable in 24 equal monthly installments at 12% interest per annum. The 1<sup>st</sup> respondent did not pay the next installments to date. On the 31<sup>st</sup> April 2005, the 1<sup>st</sup> respondent purchased a diesel bus model CB46 registration No. UAG 994C from the appellant at a price of U.S Dollars 113,000 and it paid a total deposit of U.S Dollars 18,689. The balance was payable in 24 equal monthly installments at 12% interest per annum. The 1<sup>st</sup> respondent failed to pay the balance in accordance with the agreed terms.

10 On the 30th September 2005, the 1<sup>st</sup> respondent purchased a Nissan diesel bus registration No. UAG 673U from the appellant at a price of U.S Dollars 117,200. It paid the first installment of U.S Dollars 14,894 and the balance was payable in 24 equal monthly installments at 12% interest.

15 The 1<sup>st</sup> respondent purchased a Suzuki generator model SV 7500E from the appellant on 3<sup>rd</sup> March 2005 at of Uganda shillings 5,300,000/- and it paid 2,700,000 shillings only. It also purchased rear brake linings and spare parts at a price of Uganda shillings 2,583,900/- which he has not paid to date.

20 At all times, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents were personal guarantors to the 1<sup>st</sup> respondent.

The appellant prayed for judgment against the respondents jointly for;

- 25
- a) The outstanding balance of Uganda shillings 257, 255,580/-;
  - b) General damages;
  - c) Interest in (a) at bank rate p.a from the date of breach till payment in full and on (b) from the date of judgment till payment in full;
  - d) Costs of the suit; and

*e) Interest on (d) at bank rate p.a from the date of taxation till payment in full.*

The trial court found that the appellant had no privity of contract or authority to sue on behalf of the creditor and ordered that the suit be struck off under Order 7 Rule 11(a). That the guarantees by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents are vitiated as there is no subject matter or liability to the appellant by the respondents. No order was made as to costs.

The appellant was dissatisfied with the whole of the decision of the High Court hence this appeal.

The appellant filed a memorandum of appeal raising six grounds of this appeal. They are as follows;

1. *That the learned trial judge erred when he adopted a procedure that is not provided for under the rules of procedure.*

2. *That the learned trial judge erred in law and in fact when adjudicated on the matter of jurisdiction which had already been determined by the same court.*

3. *That the learned trial judge erred in law and in fact when he held that the plaintiff had no locus standi to bring the above suit.*

4. *That the learned trial judge erred in law and in fact when he descended into the arena of advocacy while conducting the trial.*

5. *The learned trial judge erred in law and in fact when he ignored and or failed to properly and judiciously evaluate the evidence before court and he instead held that;*

a) *The plaintiff had been paid in full in respect of the said buses and had no claim in respect of the purchase price for them*

b) *The personal guarantees issued by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents were vitiated and did not constitute*





*independent contracts upon which an action could be sustained against the respondents.*

6. *The learned trial judge erred both in law and fact when he made an order that the suit be struck off in a ruling on point of law raised by the court.*

The appellant thus prayed for orders that; the decision of the High Court dated 28<sup>th</sup> November 2008 be set aside and the suit be reinstated and heard on merit. Costs of this appeal and in the court below be awarded to the appellant.

At the hearing of this appeal, Learned Counsel Mr. Andrew Kibaya appeared for the appellant while Learned Counsel Mr. Maxim Mutabingwa appeared for the respondent.

#### **Submissions by the appellant**

Counsel submitted that, the entire proceedings before the learned trial judge were irregular and the orders resulting there from are a nullity. Further, that the procedure adopted denied the appellant fair hearing thus the orders made should not be allowed to stand. Counsel argued that, the judge took evidence of one witness for plaintiff out of the three witness statements that were filed in court as ordered by him.

On ground 2, Counsel submitted that, when the suit came up for hearing, the respondents raised a preliminary objection on the ground that the court had no jurisdiction to hear the matter because the hire purchase agreements vested jurisdiction in the Kenyan courts and the addenda attached to the agreements were invalid. He submitted that, the objection was heard and dismissed on the grounds that the court had jurisdiction and that the defendants were estopped by conduct



from denying the genuineness of the hire purchase agreements and the addenda.

Counsel further submitted that, the judge delved into the issue of whether the addenda were binding yet he was fully aware that the matter had been adjudicated upon by another judge.

Counsel relied on ***Kahumbu v National Bank of Kenya, (2003) EA 475 CAK***, and submitted that, court stated that a court order is valid and binding unless it is appealed against, amended or set aside.

10 In respect to ground 3, Counsel submitted that, the learned judge had no jurisdiction to entertain and adjudicate upon a matter that had already been adjudicated upon by a judge of the high court. He contended that, there was no application for review of the same before him. Further that, the defendants were bound by their pleadings and  
15 could not depart from them without an amendment and thus are bound by the addenda and are estopped from saying that the addendum were inoperative.

As regards ground 4, Counsel submitted that, the learned judge erred in  
20 law and fact when he raised a preliminary objection on a point of law and then went ahead to make judgment on the same. That in so doing, the judge had a conflict of interest and this denied the plaintiff a fair hearing. Counsel relied on ***Libyan Arab Bank for Trade and Development & Another v Adam Vassiliadis, Court of Appeal Civil***  
25 ***Appeal No.9 of 1985*** where the court of appeal reiterated the principle stated by the Court of Appeal in East Africa, that a judge should not descend into the arena where his vision may be clouded by the dust of the conflict.

Counsel submitted on ground five that, the learned judge failed to properly evaluate the evidence of both parties, he argued that, the trial judge relied on the evidence adduced by the plaintiffs in isolation of the defendant's evidence. Further, that the learned judge failed to consider  
5 the witness statements of the defendants wherein they had admitted that they had entered into a hire purchase agreement with the plaintiff. Counsel relied on ***Alex Twinomugisha & Others v Uganda, Court of Appeal Criminal Appeal No. 35 of 2002***, where it was stated that the evidence of the prosecution should be examined and weighed against  
10 the defense evidence so that a final decision is not taken until all the evidence has been considered.

Counsel argued that, the learned judge erred in law and fact when he held that the personal guarantees by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants are vitiated as there was no subject matter or liability to the plaintiff by the  
15 defendants.

On ground 6, Counsel argued that, the issue of *locus standi* was not one of the issues that had been pleaded, it was the trial judge that raised the objection and went ahead to make his judgment. Counsel  
20 contended that, that was a conflict of interest on part of the judge and that this prejudiced the plaintiff's right to fair trial.

### **Submissions by the respondent**

Counsel submitted by opposing this appeal. He contended that there  
25 are three companies, that is; CMC Holdings Ltd a Kenyan company which is not party to the suit, Genesis Transporters a Ugandan company and CMC (u) Ltd which is not party to any hire purchase agreement with the respondents (Genesis Transporters).



Counsel argued that, Hon. Justice Bamwine dealt with the issue of jurisdiction and the learned trial judge dealt with the issue of *locus standi*. Counsel argued that the addenda is not an addenda and affects both issues of jurisdiction and *locus standi*. Further that, the only issues  
5 before this court are; Jurisdiction and *Locus standi* and prayed that this appeal be dismissed with costs.

### **Consideration by court**

Rule 86 of the Court of Appeal Rules states as follows;

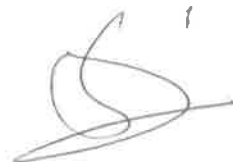
#### **Rule 86; Contents of memorandum of appeal.**

10 (1) *A memorandum of appeal shall set forth concisely and under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against, specifying the points which are alleged to have been wrongfully decided, and the nature of the order which it is proposed to ask the court to*  
15 *make.*

In the instant case, grounds one and four of this appeal are not precise but rather too general. Counsel for the appellant should have considered raising the two grounds stating what the judgment of the High Court specifically erred. They are thus struck out for that reason.

20 Grounds two and three zero down to one issue of jurisdiction and *locus standi*. Counsel for the appellant contends that the two issues of jurisdiction and *locus standi* were adjudicated upon by a judge of the same court thus the trial judge should not have considered them in his  
25 judgment. Counsel relied on ***Kahumbu v National Bank of Kenya, (2003) EA 475 (CAK)*** where court stated that;

*“a court order is valid and binding unless it is appealed against, amended or set aside. If anyone had any misgivings about the*



*efficacy of such an order, any remedy thereto does not lie in any grant from this court..."*

In his Ruling, Justice Bamwine extensively discussed the issue of jurisdiction stating that;

5       *"...even though parties had exclusively conferred jurisdiction to a foreign court, the High Court of Uganda has discretion whether or not to order stay of action or proceed with the hearing of the case"*

10       The learned judge also commented on the issue of the addendum stating that;

*"...the respondent's attacks on the validity of the documents are attacks as to form not the substance".*

I am convinced by this reasoning and uphold the same.

15       **Clause 3** of the addendum dated 26/10/2004, states that the appellant is the owner instead of the CMC Kenya, and this is a clause, the respondent agreed to by appending its signature, the appellant thus has capacity to bring this suit contrary to the respondent's contention that the appellant had no *locus standi* to bring this suit since the party  
20       to the hire purchase agreements was CMC Kenya not CMC Uganda limited. I find that the respondent was estopped by record and conduct from denying the appellant's capacity to which he admitted. **Section 114 of the Evidence Act** provides that;

25       *"When one person has, by his or her declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon that belief, neither he or she nor his or her representative shall be allowed, in any suit or*

*proceeding between himself or herself and that person or his or her representative, to deny the truth of that thing”.*

It was stated in **Alexander Okello v M/s Kayondo &Co. Advocates**, Supreme Court Civil Appeal No.1 of 1997, that,

5       *“it is a principle of justice and equity that when a man by his words or conduct, has led another to believe that he may safely act on the faith of them and the other does act on them he will not be allowed to go back on what he has said or done when it would be unjust or inequitable for him to do so”.*

10       Therefore, with all due respect, I find that the learned judge erred when he considered the issues of jurisdiction and *locus standi* which had already been determined conclusively. Even if the action had failed on contract, it would still have been sustainable in tort. The appellant would still have been able to recover the buses on account of detinue and or conversion. In **Christine Bitarabeho v Prof Edward Kakonge**,  
15       Supreme Court Civil Appeal No. 4 of 2000, it was held inter alia that;

*“The plaintiff in detinue does not abandon his property in the goods. The cause of action arises from the defendant’s refusal to return the goods on demand”.*

20       In the instant case, the appellant would have brought an action in tort where the 1<sup>st</sup> respondent refuses to return the buses upon demand as the appellant retained the property in the goods in this case the buses so purchased.

25       In respect to ground five, the appellant submitted that, it is the duty of court to evaluate the evidence of both parties before it can come to its conclusion and relied on **Alex Twinomugisha and others v Uganda**, (*supra*)

It is my view that the trial judge properly evaluated the evidence. The law on hire purchase agreements is clear, in that, the hirer does not become the legal owner of the goods until when all balances are paid. The owner can repossess the goods where the hirer fails to pay the remaining installments. The appellant admits to have taken the buses back to recover the outstanding balances. According to the sale agreement dated 5<sup>th</sup> July 2006, the appellant sold the said buses to Blue Nile bus service (u) Ltd at a consideration of UGX 400,000,000/-(four hundred million shillings). The outstanding balance owed by the respondents to the appellant according to the plaint is UGX 257,255,580/-(two hundred and fifty seven million, two hundred fifty five thousand, five hundred and eighty shillings). This is a question of simple arithmetic, the appellant made UGX 142,744,420 extra money from what was owed to them by the respondents. In my view, they repossessed the buses and paid themselves by selling the buses to another party.

The law on guarantees is to the effect that the guarantor is only liable for the outstanding balances the hirer fails to pay. Since the appellant took the initiative to pay themselves for the balances by selling the subject matter of the contract, then the 2<sup>nd</sup> and 3<sup>rd</sup> respondents are not liable to pay anything.

In regards to ground six, it is my opinion that the same issue raised in this ground was answered in the above consideration by court.

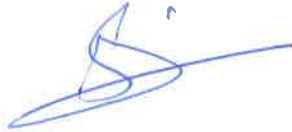
## 25 Conclusion

In the result, I would allow this appeal on grounds two, three and six and disallow ground 5. I find no reason to refer the matter back to the



High Court for re-trial, as I have determined the issues before the parties under Rule 30(1) of the Rules of this court. I would so order.

5 Dated at Kampala this..... 19<sup>th</sup> day of..... Nov..... 2018



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**EZEKIEL MUHANGUZI**  
**JUSTICE OF APPEAL**

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