THE REPUBLIC OF UGANDA
IN THE SUPREME COURT
AT MENGO

[CORAM: ODOKI CJ, ODER, TSEKOOKO, KAROKORA AND KENYEIHAMBA, JJ.SC.]

CIVIL APPEAL NO.8 OF 2001

BETWEEN

NON-PERFORMING ASSET RECOVERY TRUST::::: APPELLANT

AND

1. KAPEEKA COFFEE WORKS Ltd.)
2. ABU KASOZI KADJINGO) :::::: RESPONDENTS

[Appeal from the decision of the Court of Appeal at Kampala (OKELLO, MPAGI-BAHIGEINE AND ENGWAU, JJ.A) dated 2nd March, 2001, in Court of Appeal Civil Appeal 53/2000].

JUDGMENT OF TSEKOOKO, JSC: This is a Second Appeal. It is from the decision of the Court of Appeal which reversed the decision of the Non-Performing Assets Recovery Tribunal rejecting contentions by the respondents (as defendants) that the amended plaint filed by the present appellant did not disclose a cause of action.

The background to this appeal can be simply stated. The first Respondent, Kapeeka Coffee Works Ltd., is a limited liability company of which the second

respondent, (Abu Kasozi Kadjingo), and one Haji Bamali Kadjingo are directors. In December, 1990, the first respondent applied for and obtained a loan from the Uganda Commercial Bank (UCB) for purposes of rehabilitating its coffee factory called Kapeeka Coffee Factory. On 13th December, 1990, UCB and the first respondent executed a loan agreement (Annexture E to plaint) under which UCB lent US$550159.21 to the first respondent. The agreement stated that the money was to be used exclusively for the financing and carrying out of the investment Project at Kapeeka Coffee Factory. The second respondent signed the said agreement for and on behalf of Kapeeka Coffee Works Ltd., the first respondent. Annexture "F" to the plaint is a UCB credit ledger card and it shows that on the same day on which the agreement was executed (13/12/1990), a credit ledger card was opened by UCB in the name of Kapeeka Coffee Hullery. On that ledger are written the words "Amount of loan shs.US$550159.21". Among the securities provided for the loan is a piece of land registered as Bulemezi Block 269 plot 37 and its registered proprietor is the first respondent.

In 1994, the Non-performing Assets Recovery Trust Statute, 1994 was enacted. The Statute established the Non-Performing Assets Recovery Trust (NPART), the present appellant. One of the principal

functions of NPART is to recover loans which are described by the Statute as Non-performing Assets. They are described as non-performing because they were not being serviced in the sense that the borrowers have defaulted in repaying the loans. Those assets were transferred by UCB to NPART under the provisions of the said Statute. Because the loan of the first respondent had been designated as a non-performing asset, on 7th December, 1995, the UCB by Deed of Assignment of same date assigned the loan to NPART, the appellant. The assignment was executed by virtue of Regulation 4(a) of the Non-performing Assets Recovery Trust Regulations, 1995 (hereafter called the regulations). The Statute also created a Tribunal through which some of the non-performing loans could be recovered by Court action.

The appellant instituted a suit in the Tribunal to recover the loan from the two respondents and a Haji Bumali Kadjingo. In their joint amended written statement of defence, the two respondents denied liability and averred that if the loan was given, it was advanced and disbursed to Kapeeka Coffee Hullery which is a different legal entity from Kapeeka Coffee Works Ltd.

When the suit was called on for hearing in the Tribunal on 15/2/2000, Counsel for the respondents

raised a preliminary point of law to the effect that as money was given to Kapeeka Coffee Hullery, a different legal entity, and not to the two respondents, the plaint did not disclose a cause of action against each of the two respondents. The same point of objection was raised on behalf of Haji Bumali Kadjingo. An additional point raised on behalf of the Haji was that because there was no Deed of Assignment showing that the Haji was liable to be sued by NPART, there was no cause of action against the Haji. The Tribunal overruled the objections. Thereafter only the present respondents appealed to the Court of Appeal. Haji Bumali Kidjingo did not appeal.

In the Court of Appeal, four grounds of appeal were raised. The first was that the Tribunal failed to appreciate that the Deed of assignment named Kapeeka Coffee Hullery as the debtor and not the appellants. The second ground was that the Tribunal erred in law "by failing to hold that the Respondent's plaint disclosed no cause of action against the appellants". The appeal was decided on the basis of ground two.

The Court of Appeal held that there was non-compliance with Reg.4 (b) which requires the bank to forward to the respondents a copy of the notice of assignment of the non-performing asset to the

owner, the borrower, and that the omission rendered the plaint defective as it thereby disclosed no cause of action against the present respondents. In the view of the Court of Appeal, forwarding of the notice under Regulation 4(b), was mandatory and omission to forward the notice was fatal to the case. So the Court of Appeal overturned the ruling of the Tribunal. The appellant has brought this appeal against that decision of the Court of Appeal. The respondents filed notice of grounds affirming the decision of the court.

The present appeal is based on two grounds. These are: -

1. The Honourable Justices of the Court of Appeal erred in law and fact in holding that the appellant's omission to plead notice under regulation 4(b) of the NPART Regulations, 1995, was non-compliance with a mandatory provision of the law rendering the appellant's plaint fatally defective and affected the right of the assignee to recover the debt.

2. The Honourable Justices of the Court of Appeal erred in law and fact in holding that for reason of the appellant's omission to plead notice, the amended plaint disclosed no cause of action against the appellant.

I think that these two grounds in effect complain about the same thing.

Submissions for both parties were written and are on the court record. The written submissions for the appellant are signed by Ms. Laurita Mulenga while those for the respondents are signed by an unnamed advocate from the firm of Messrs Lumweno & Co., Advocates.

Ms. Mulenga, counsel for the appellant, submitted that whereas Regulation 4(b) prescribed the form of notice of assignment and directed UCB to forward the notice of assignment to the owner of the Non-Performing Assets, the regulation does not create an obligation upon the appellant, as assignee, to make an averment in its claim in the plaint that the Bank had forwarded the said notice to the owner of the non- performing asset, as held by the honourable Justices of the Court of Appeal. She contended that the Court of Appeal erred when it relied on a procedure under S.136 of the Law of Property Act, 1925 of England which requires that all facts necessary to bring the case **within that section** must be set out in the statement of claim. Under S.136 of the Law of Property Act of England, the assignment of a debt is effectual in law only on the date the notice is given to the debtor of such assignment. She argued that the position under

the Non-Performing Assets Recovery Trust Statute and its Regulations is fundamentally different. Under the regulations, notice of assignment is forwarded to the debtor by the Bank as assignor and not by the assignee. The deed of assignment, notice of assignment and transfer of the documents, deeds of title and other instruments pertaining to the debt, comprise a transfer of the non-performing asset and not the assignment per se, which is itself by operation of law.

Counsel for the respondents first made general submissions on both grounds 1 and 2. Counsel submitted that the appellant's amended plaint failed to comply with the mandatory requirement of Regulation 4 (b) of the Regulations, rendering it incurably defective thereby disclosing no cause of action against the Respondents. He contended that Regulation 4(b) must be complied with before the appellant could maintain a cause of action against the first Respondent. The effect of its omission was therefore fatal to the appellant's plaint, as it was a non-compliance with a mandatory provision of the law.

Counsel contended that even if the appellant had pleaded all the other facts constituting its cause of action but omitted, as it did, to plead that the assignment was in writing and that notice in

writing thereof was duly given to the debtor, the appellant's amended plaint would still disclose no cause of action against the Respondents. He relied on **Bullen, Leake and Jacobs Precedents of Pleadings** 12th Edition at P 43 where the learned authors of that Book observed that:

"Again, in an action by the assignee of a debt, a legal chose in action, it is an essential requirement that the assignment was in writing and that notice in writing thereof was duly given to the debtor and such facts must accordingly be pleaded otherwise the plaintiff would have no title to sue".

Counsel again submitted that even if the appellant had pleaded all the other facts constituting its cause of action but failed, as it did, to comply with a mandatory provision of the law, namely Regulation 4(b), by requiring the Bank to give notice of assignment in the prescribed form to the first Respondent, as the borrower thereof, the appellant's amended plaint would still disclose no cause of action against the Respondents. Counsel further contended that the deed of assignment was not attached to the plaint.

In my view this last contention appears to be baseless because copies of the plaint on the Court record have the deed of assignment marked as

Annexture "A". Indeed, I think that even the fact of assignment is pleaded in paragraph 3 of the plaint. I note from the proceedings in the Tribunal that Counsel claimed to have read the Deed. There is no explanation given to show where defence counsel found and read the deed of assignment except from a copy annexed to the plaint which was served upon his clients.

In their written statement of defence, the contention of the two respondents was that they are not liable because the ledger card Annexture 'F' shows that the loan money was not disbursed to them but to Kapeeka Coffee Hullery which they claimed was a different entity. That defence was essentially the subject of the point of objection which Counsel raised in the Tribunal on behalf of the two respondents. It was only in the objection raised on behalf of Bumali Kadjingo, who did not appeal to the Court of Appeal, that the question of lack of notice of assignment was raised as an additional point of objection in favour of Haji Bumali.

I am a little puzzled by the contentions of respondents' Counsel that the appellant neither pleaded nor attached notice of assignment to the pleadings. As I indicated earlier, Mr. Lumweno, Counsel for the respondents, both in his opening

and replying submissions on the point of objection in the Tribunal, referred to the Deed of assignment. He did not say where he had seen the Deed to which he was referring. That Deed must have been the copy attached to the copies of the plaint served upon his clients or the Deed must have been given to his clients earlier.

Be that as it may, in the Court of Appeal, the decision was based on arguments revolving around ground two. In connection with that ground, counsel for the present respondents cited to that Court a statement of law and practice from **Bullen, Leake and Jacob's Precedents of Pleadings, 12th Ed.**, page 129 for the proposition that where a plaintiff's claim is based on an absolute assignment all facts necessary to bring the case within the provisions of section 136 of the English Law of Property Act, 1925 must be set out in the statement of claim, namely, that the assignment is absolute and in writing and that notice of assignment was given in writing to the debtor before the commencement of the action. Counsel again submitted in that Court that the plaint in the present proceedings did not show that the plaintiff was suing under assignment and that notice of assignment had been given in writing to the debtor before the commencement of the action. He therefore contended that failure by the plaintiff to so plead rendered its plaint

defective and consequently it did not disclose any cause of action against the present respondents. In response Counsel for the present appellant submitted in the Court of Appeal, and that Court rightly agreed with the submission, that the assignment, to the appellant, of non-performing asset by UCB was statutory and not contractual. The other contentions by the appellant were that the Deed of assignment dated 7/12/95, was merely a procedural signification of the handing over to NPART of the said non-performing asset, having been effected by operation of law. This latter contention was actually accepted by the Court of Appeal, and I respectfully agree that the transfer under S.11 of the Statute is by operation of law. Counsel for the appellant again contended that the respondents had failed to pay shs.839,030,583/= which was assigned to the appellant and which had been due to UCB as reflected in the Deed of assignment (Annexture A.) to the plaint. In his leading judgment, Okello, JA, quoted Section 11 of the Statute which deals with the transfer to the appellant of the Non-performing assets. The learned Justice also quoted Regulation 4 of the Regulations.

In my view that regulation provides the method or procedure to effect the transfer by UCB to the appellant of non-performing assets and documents

connected thereto. But the leaned Justice held that those provisions must be complied with. He then held : -

"In the instant case, paragraph 4 of the plaint shows that the respondent had a right which was assigned to it which the appellants (1st and 2nd defendants) violated causing the respondent (plaintiff) damage".

After setting out the whole of paragraph 4 of the plaint, the learned Justice of Appeal held that:-

"In my view the above paragraph 4 of the plaint is wanting in one important aspect in that it failed to comply with regulation 4(b). This regulation requires that notice of the assignment in favour of the Trust shall be forwarded by the bank to the owner.....

It is clear that the provisions of regulation 4(b) of the Regulations have not been complied with. The effect of this omission is fatal to the respondent's plaint, as it is non-compliance with a mandatory provision of the law. It affected the allegedly assigned right of the respondent which it claimed was violated by the appellant. On the principle in Auto Garage & Others (supra) the omission renders the plaint defective as it thereby

discloses no cause of action against the appellant."

I find some difficulty in reconciling the finding of the learned justice conveyed in the last sentence in the passage quoted above and the earlier holding where the learned justice found that-

"paragraph 4 of the plaint shows that the respondent had a right which was assigned to it which the appellant violated".

Moreover, it does not appear clear to me what it is for which the learned justice found the plaint defective. Was the defect caused by failure by UCB to forward the notice or was the defect due to non-pleading of notice of assignment?

Be that as it may, I think that the submissions, on the matter under consideration, by learned Counsel for the defendants both in the Court of Appeal and in this Court, were misleading and authorities cited were wholly out of context. The references in **Bullen Leake's Pleadings** are concerned with assignments under Section 136(1) of the English **Law of Property Act, 1925.** In olden days, at common law no action could be brought by the assignee of a chose in action against the debtor; in equity he could sue if he made the assignor a party to the

action. In England the right of an assignee to sue in his own name was clarified by Subsection (1) of S.136 of the Law of Property Act, 1925 which reads as follows:-

> **"Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal thing in action, <u>of which express notice in writing has been given to the debtor</u>, or trustee, is effectual in law (subject to equities having priority over the right of the assignee) to pass and transfer <u>from the date of such notice</u>: (a) the legal right to such debt or thing in action: (b) all legal and other remedies for the same and: (c) The power to give a good discharge for the same without the concurrence of the assignor".** (Underlining supplied).

Clearly, these statutory provisions refer to assignment by any creditor (assignor) who must give notice as required by these provisions in order to perfect the assignment. The assignment is imperfect until notice of assignment is served on the debtor. These provisions refer to a notice to be given by an assignor of things contemplated in that section. The commentary about pleadings set out in **Bullen &**

Leake (supra) which was extensively quoted and relied upon by counsel in the Court of Appeal, and here, is commentary about a plaint in respect of a claim arising because of assignment under the said S.136. In English court proceedings, therefore, the pleading must plead all necessary facts to bring the suit within the ambit of S.136 (1) of the Law of Property Act, 1925. The commentary does not refer to pleadings in respect of a claim which falls outside that section. According to section 50 of our Judicature Statute, 1996, the English Law of Property Act, 1925, is not one of the U.K. Statutes which have effect in Uganda. Accordingly, court case pleadings in Uganda do not have to follow the sample from ***Bullent, Leake and Jacob*** cited by learned counsel.

The law governing the vesting of rights in non-performing assets into the appellant is section 11 of the Statute. That section reads as follows:

> **11 (1) "Notwithstanding any law or agreement to the contrary, the Trust may direct the bank and the bank shall, upon such direction, transfer to the Trust such of its non performing assets -**
>
> **a) in existence at the commencement of the statute;**
>
> **b) as may exist as determined by a special audit and valuation undertaken in relation**

to the assets, at the commencement of this Statute and the cost of the audit and valuation shall be added to the balance of the non-performing assets.

(2) "All assets rights liabilities and obligations attached to a non-performing asset transferred by the bank to the Trust under this section, which immediately before the date of transfer were held by or subsisted against the bank shall, subject to any directions given by the Minister in writing, vest in, or as the case may be, subsist against the Trust".

It is my view that immediately any non-performing asset is transferred to the Trust, all assets, rights and liabilities attaching to that non-performing asset vest in the appellant, subject only to any written directions by the Minister. In my opinion, therefore, the vesting of the assets, rights and liabilities does not depend upon the operations of Reg. 4.

Regulation 4 provides as follows: -

"Upon direction in accordance with Section 11 of the Statute, the bank shall transfer to the Trust the Identified Non-Performing Assets in the following manner -

a) The bank shall execute a Deed of Assignment in respect of each Non-Performing Asset in favour of the Trust in the form prescribed in the first schedule to the Regulations;

(b) Notice of assignment in favour of the Trust shall be in the form prescribed in the second schedule and shall be forwarded by the bank to the owner.

(c) The bank shall deliver to the Trust on the date of execution of Deed of Assignment such Agreements, Mortgages Debentures, Instruments, Documents of Title, records and other documents in respect of the Non-Performing Asset. Where any or all such Agreements Mortgages, Debentures, Instruments, Documents of Tile, records and other documents in respect of the Non-Performing Assets have been registered the bank shall indicate in writing the particulars of such registration".

~~Moreover~~, In terms of Reg.5, all assets, rights and obligations attached to a non-performing asset transferred by the bank in the manner provided by Reg. 4 shall be deemed to have been transferred to the appellant with effect from 10th October, 1994.

I think that regulation 4 simply sets out the procedures to be followed to effect and formalise the transfer. There is no provision either in the statute or in the regulations which provides any sanction in case the Bank fails to notify the owner of the non-performing asset about the transfer or the assignment. Section 16(3) of the Statute provides that institution of cases in the Tribunal is regulated in a manner provided by the Civil Procedure Rules. The plaint in these proceedings was instituted in the manner prescribed by the Civil Procedure Rules. Paragraph 3 of the plaint was formulated as follows: -

> **"3 The plaintiff's claim against the defendants jointly and severally is for the total sum of shs.839,030,582/= with further interest from 30th September, 1995, being the outstanding sum owed in respect of the loan facility applied for by the defendant (sic) and advanced to the 1st Defendant by the Uganda Commercial Bank. (A copy of the deed of assignment of the debt to the plaintiff is herewith attached and marked Annexture "A")".**

I think that this paragraph pleaded the fact of assignment. True it could have been better formulated but it pleads assignment and I think

this is in conformity with the provisions of Orders 6 and 7 of the Civil Procedure Rules. It should be noted that Courts, both in Uganda, and in East Africa have held that annexing a document to a pleading (in this case to a plaint) has the effect of incorporating the contents of that document in the pleadings: See **African Overseas Trading Vs. Tansukh S. Acharya** (1963) EA. 468. and **Castelino Vs. Rodri-gues (1972) EA.** 223.

In my view, the annexture to the plaint of the Deed of Assignment was sufficient pleading of the contents of the deed and of the assignment itself.

As observed earlier, I am not certain whether the complaint is that the bank did not forward the deed to the defendants or whether the complaint is that the appellant failed to plead the fact of assignment or whether the complaint is about both non-delivery of the deed and non-pleading of it. Okello JA and Mpagi-Bahigeine JA both seem to have held that the complaint is both and that the plaint should have stated that the Deed was forwarded to the defendants.

I would point out that none of the provisions of the Statute nor the Regulation require the plaint to plead that the notice was served on the borrowers, the respondents. Moreover the provisions

of the two enactments do not provide a sanction to be imposed on the appellant because of the failure by the UCB to forward the notice of the Deed of Assignment to the respondents. On this basis and with respect, I think that the Court of Appeal erred in rejecting the plaint for the reasons given. In my view there is a distinction between S.136 and our S. 11. Sec. 136(1) makes it clear that the assignment becomes effective on the date of giving notice. On the other hand, under our S.11 (2), assignment is immediate upon assignment being effected regardless of when a copy of the deed is served upon the borrower. Besides, Regulation 5 puts the point beyond dispute by providing that assets, rights and obligations attached to a non-performing asset which is transferred are deemed to have been transferred with effect from 10/10/1994, a date which preceded the institution of the court action in these proceedings.

Secondly Regulation 4(b) does not specify the time within which the Bank should forward the notice or what happens if no notice is given. It would, therefore, seem that by serving the defendants with copies of the plaint to which a copy of the Deed of assignment had been annexed, the appellant achieved the objective of notifying the respondents.

Finally, in a letter dated 28/1/1995,(Annexture J to the plaint), written by the second respondent, on a letter head of the first respondent, and which letter was addressed to the General Manager, DFS - UCB, the second respondent stated in the third paragraph of the letter that: -

> **"Kindly therefore stay any intention to transfer us to the TRUST until March by which time our negotiations should be complete".**

This shows that the respondents were aware that they were to be transferred to the Trust. I note that in their amended written statement of defence, the respondents denied every paragraph in the plaint except paragraph 9, which refers to the giving of notice to sue.

For the reasons given, I think first that the vesting of the right for the appellant to sue is by operation of law. It does not depend on service of the Deed of Assignment upon the respondents by the Bank. In any case, Article 126(2)(e) would take care of the complaint raised here.

I think that as there is no time limit within which to serve the notice of assignment, the respondents

were, in this case, served with the deed upon receipt of copies of the plaint.

I accordingly think that the Court of Appeal erred when it held that omission to serve notice and omission to plead the fact of service rendered the plaint defective. In my opinion, both grounds 1 and 2 should succeed.

The respondents filed notice of grounds for affirming the decision of the Court of Appeal. The notice contains 5 grounds. Complaints in grounds 1 to 4 stated that **failure by the Bank to give notice of assignment to the first respondent as the debtor of the loan in issue meant:**

1. **That the appellant had no title to sue.**

2. **The appellant's cause of action was premature.**

3. **That the said loan still vested in the Bank and not the appellant.**

4. **That validity of the assignment of the said loan to the appellant was incompetent and therefore void in law.**

In ground five the complaint is that failure by the appellant to plead in its statement of claiming that the assignment was in writing and that notice

in writing thereof had been given by the bank to the first Respondent as the debtor thereof meant that the Appellant had no title to sue the Respondents.

The respondents' counsel filed written submissions in respect of these grounds. The appellant's counsel filed a reply thereto. I have read the record, considered all aspects of the case and I am satisfied that my discussion of grounds 1 and 2 of the memorandum of appeal disposes of these five grounds in the Notice for Affirming the decision of the Court of Appeal. Accordingly I think that all the five grounds should fail.

In the result, for the reasons I have endeavoured to give, I would allow this appeal and I would set aside the orders of the Court of Appeal. I would order that the hearing of the suit should proceed expeditiously in the Tribunal. I would award the appellant the costs of this appeal and in the Court of Appeal. I would dismiss the notice for affirming the decision of the Court of Appeal with costs to the appellant.

Delivered at Mengo this 23rd *day of* April *2002*

J. W. N. TSEKOOKO.
Justice of the Supreme Court

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

CORAM: ODOKI, CJ, ODER, TSEKOOKC, KAROKORA AND KANYEIHAMBA, JJ.S.C.)

CIVIL APPEAL NO. 8 OF 2001

B E T W E E N

NON-PERFORMING ASSET RECOVERY TRUST :::::: APPELLANT

A N D

1. KAPEEKA COFFEE WORKS
2. ABU KASOZI KADJINGO :::::: RESPONDENTS

(Appeal from the decision of the Court of Appeal at Kampala (Okello, Mpagi-Bahigeine and Engwau, JJ.A) in Civil Appeal No. 53 of 2001).

JUDGMENT OF ODER - JSC

I have had the benefit of reading in draft the judgment of Tsekooko, JSC, with which I agree. The appeal should ~~fail~~ succeed. I have nothing useful to add.

Dated at Mengo this 23rd day of April, 2002.

A. H. O. ODER
JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

[**CORAM**: ODOKI CJ, ODER, TSEKOOKO, KAROKORA AND KANYEIHAMBA JJSC]

CIVIL APPEAL NO. 8 OF 2001

BETWEEN

NON PERFORMING ASSETS RECOVERY TRUST..... APPELLANT

AND

1. KAPEKA COFFEE WORKS LTD }..... RESPONDENTS
2. ABDU KASOZI KIDJUNGO }

[Appeal from the decision of the Court of Appeal at Kampala (Okello, Mpagi Bahigaine, and Engwau JJA) dated 21 March 2001 in Civil Appeal No. 53 of 2000]

JUDGMENT OF ODOKI, CJ

I have had the advantage of reading in draft the judgement of Tsekooko, JSC and I agree with him that this appeal should be allowed with costs here and below and that the suit should be remitted back to the Tribunal for hearing.

As the other members of the Court also agree with the Judgment and orders proposed by Tsekooko, JSC there will be an order in the terms proposed by Tsekooko, JSC.

Dated at Mengo ...23rd.....day of .April.....2002.

B J Odoki
CHIEF JUSTICE

G.W. Kanyeihamba

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT

AT MENGO

(CORAM: ODOKI, C.J. ODER, TSEKOOKO, KAROKORA AND KANYEIHAMBA, J.J.S.C.)

CIVIL APPEAL NO. 8 OF 2001

B E T W E EN

NON-PERFOMAING ASSETS RECOVERY TRUST:::::APPLICANT

A N D

1- KAPEKA COFFEE WORKS LTD ::::::::::::::::::::
2- ABDU KASOZI KIDJUNGO ::::::::::::::::::::::::::::RESPONDENT

(Appeal ~~for~~ from the decision of the Court of Appeal at Kampala (Okello, Mpagi – Bahegeine and Engwau, J.J.A) dated 2nd March 2001. in Court of Appeal Civil Appeal 53/2000)

JUDGMENT OF KANYEIHAMBA, J.S.C.

I have read in draft, the judgment of my brother, Tsekooko, J.S.C. and I agree that this appeal should succeed for the reasons he has given. I also agree with the orders he has proposed.

Given at Mengo, this 23rd day of April 2002

G.W. Kanyeihamba

Hon. Justice G.W. Kanyeihamba
JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: ODOKI CJ, ODER, TSEKOOKO, KAROKORA, KANYEIHAMBA, JSC)

CIVIL APPEAL NO. 8 OF 2001

BETWEEN

Non-Performing Assets Recovery Trust ..... Appellant

AND

1. Kapeka Coffee Works ltd)
2. Abu Kasozi Kadjingo) .... Respondent

(Appeal from the decision of the Court of Appeal presided over by (Hon. Okello,JA, Mpagi-Bahigeine, JA Engwau, JA) delivered on the 2nd day of March, 2001 in Civil Appeal No. 53 of 2000)

JUDGMENT OF KAROKORA, J.S.C.

I have had the benefit of reading in draft the judgment prepared by my learned brother, Tsekooko, JSC and I do agree with him that this appeal must succeed with costs here and in the courts below. I would further dismiss the notice for affirming the decision of the Court of Appeal with costs to the appellant. I only wish to add a few comments

on whether plaintiff's failure to give Notice of the Deed of Assignment in favour of the Trust to defendant was fatal to plaintiff's suit.

The facts were clearly spelt out in the judgment of Tsekooko, JSC and therefore it is not necessary for me to repeat them here. Suffice it to say that the appellant, pursuant to the provisions of section 11 of the Non-Performing Assets Recovery Trust, Statute and Regulations (Statutory Instrument No. 76 of 1995) made under the Statute, filed a suit to recover a sum of Shs. 839,030,582/= with interest which the respondent owed to the Uganda Commercial Bank. When the suit came up for hearing before the Tribunal, the respondent raised a preliminary objection that the plaint disclosed no cause of action. It was submitted that the 1st defendant was a limited company. It was different from Kapeeka Coffee Hullery to which the loan was advanced. Besides, by the Deed of Assignment made on 7/12/95, Kapeeka Coffee Hullery (No. 5) was the debtor of the loan balance of Shs. 839,030,585/=. Morever, there was no proof that the money was disbursed to the Kapeeka Coffee Hullery. The right person to be sued was Kapeeka Coffee Hullery as was shown on the Deed of Assignment.

After hearing submissions from both Counsel, the Tribunal overruled the preliminary objection, because the claim against

"4 Upon direction in accordance with section 11 of the statute, the Bank shall transfer to the Trust the identified non-performing assets in the following manner.

(a) The bank shall execute a deed of assignment in respect of each non-performing asset in favour of the Trust in the form prescribed in the first schedule to the regulations.

(b) Notice of assignment in favour of the Trust shall be in the form prescribed, in the second schedule and *shall be forwarded by the bank to the owner.*

(c) .....

It is important to observe that after the Court of Appeal had cited paragraph 4 of the plaint, which enumerated a number of rights which were assigned to it which had been violated by the respondent, causing the appellant damage, Okello, JA, who wrote the leading judgment of the court with which the other two justices concurred, stated that:-

"In my view, the above paragraph of the plaint is wanting in one important aspect in that it failed to comply with regulation 4(b) of SI 76 of 1995. This regulation requires that notice of the assignment in favour of the Trust shall be forwarded by the bank to the owner". Ms. Mulenga submitted that paragraph 9 of the respondent's amended plaint disclosed that a

the defendants was made jointly and or severally. The tribunal ordered the case to proceed so that the issue is decided on merit.

The defendant appealed to the Court of Appeal which allowed the appeal, and struck out the plaint for disclosing no cause of action. They awarded costs of the appeal and in the Tribunal. The appellant appealed to this court on two grounds which have been carefully considered by Tsekooko, JSC in his judgment. In my view, the main objection by the appellant against the decision of the Court of Appeal is the 1st ground whose disposal can dispose of the whole appeal. The ground stated that:-

> *"The justices of appeal erred in law and fact in holding that the appellant's omission to plead notice under regulation 4(b) of the NPART Regulations 76/95 was non-compliance with a mandatory provision of the law rendering the appellant's plaint fatally defective and affected the right of the assignment to recover the debt."*

I think it is necessary to cite the provisions of Regulation 4(b) of the Non-Performing Assets Recovery Trust Regulations (Statutory Instrument No. 76 of 1995) in order to appreciate whether omission to plead notice of assignment in favour of the NPART having been forwarded by the bank to the owners was fatal to the appellant's/plaint. Regulation 4(b) provides as follows:-

notice was sent out to the debtor. Paragraph 9 of the amended plaint read thus:-

'9. Notice of intention to sue was served upon the defendant.'

The above is notice of intention to sue. It does not meet the requirement of regulation 4(b) above. That regulation requires that notice of the assignment in favour of the Trust which must be in a prescribed form, be forwarded by the bank to the owner. The owner is defined in paragraph 3 to mean the borrower in respect of a non-performing assets. It is clear that the provision of regulation 4(b) of the regulations has not been compiled with. The effect of this omission is fatal to the respondent's plaint as it is a non-compliance with a mandatory provision of the law. It affected the alleged assigned right of the respondent which is claimed was violated by the appellant. On the principle in Auto Garage & others the omission renders the plaint defective as it thereby discloses no cause of action against the appellant"

With respect, I would not agree with the Court of Appeal that Regulation 4(b) of the NPART Regulations imposes a duty upon the trust to give notice of the assignment in favour of the trust to the owner. Regulation 4(b) makes it a duty upon the bank to forward the notice of assignment to the owner of the debt. It does not impose a duty upon the trust to give notice of assignment to the owner. However, in the instant case, the appellant stated in the amended plaint, in paragraph 3 that a copy of the deed of assignment of the debt to the plaintiff was attached as Annexture "A" to the plaint which was served

upon the respondent. Therefore, the respondent was served with a copy of the deed of assignment by the plaintiff. In my view although the respondent denied having been served with a copy of the deed of assignment, this matter cannot be resolved on a preliminary objection. It has to be resolved when parties adduce evidence in court and the issue is resolved on merit. In the result, I would hold that the objection was prematurely raised and determined. Therefore in the circumstances, there was a cause of action disclosed by the plaint. Therefore ground one must succeed. Consequently, I would agree with the conclusions and orders proposed by Tsekooko, JSC.

Dated at Mengo this 23rd day of April, 2002.

.....
A.N. Karokora,
Justice of the Supreme Court.

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

CORAM: ODOKI, CJ., TSEKOOKO, KAROKORA, MULENGA

KANYEIHAMBA, JJSC

CIVIL APPEAL NO. 19 OF 2001

BETWEEN

RESTETUTA TWINOMUGISHA ..... APPELLANT

AND

UGANDA ALLUMINIUM LTD ..... RESPONDENT

(Appeal from the Judgment of the Court of Appeal of Uganda at Kampala before their Lordships Kikonyogo, DCJ, Twinomujuni and Kitumba, JJA dated 3rd August 2001 in Civil Appeal No. 22 of 2000)

JUDGMENT OF KAROKORA, JSC

This is an appeal against the decision of the Court of Appeal dated 3rd August 2001 which allowed the appeal reversed the decision of the High Court and ordered each party to bear its own costs in the Court of Appeal and the High Court.

The background to this appeal is briefly as follows:- The appellant's late husband, Tony Twinomugisha hereinafter referred as "deceased" was employed by the respondent as Chief Accountant prior to his death. The deceased had opened up a joint bank account with his wife, the appellant, in Uganda Commercial Bank, Industrial Area Branch. He was obtaining goods from the respondent company and apparently, without the knowledge of the appellant, he was paying for those goods by issuing cheques drawn and signed by the appellant on their bank joint account. The appellant signed several blank cheques in the cheque book which

the deceased kept in his drawer in the office. Whenever he wanted to pay for the goods he would ask the cashier of the respondent company, Ms. Frolence Tiko DW3 to fill the blank cheques. Tiko testified that her duties as cashier included receiving and banking of cash and cheques. The deceased was her boss and used to give her cheques signed by the appellant and instructed her to fill in the details that he would give her including the amount of money and the date. She stated that she filled two cheques of Shs. 4,000,000/= each namely No. 075339 (exh D4) and No. 175338 (exh D5) and a third cheque of Shs. 6,000,000/= vide cheque No. 075344. She stated that these cheques were issued in respect of goods supplied to the plaintiff in a shop called Tyresland on Ben Kiwanuka street, which her agents acknowledged. She pointed out that the cheque (exh D5) for Shs. 4,000,000/= was dated 3/9/93 after the deceased had died on 2/9/93.

After the deceased's demise, Ms Tiko opened the drawer of deceased's desk in his office in the presence of other staff members and found several documents which included several cheques bearing the appellant's signatures. Most of the cheques were dated by her after the deceased's death and presented to the bank for payment. Those cheques which were credited on the ledger of the account of Tyresland were dishonoured and the debit on that account grew to Shs. 40,831,849/=. But, because some of the old cheques could not be recovered, the debit balance on the account showed a sum of Shs. 30,631,849/=.

Mr. A.M. Jha, DW4 the Executive Director of the respondent company, returned from India and learnt that the deceased had misappropriated a sum of Shs. 47,731,000/= from the company. He demanded from the appellant payment of the amount. He reported the matter to police and the appellant was in September 1997 charged with the offence of issuing false cheques contrary to section 364(1)(5) of the Penal Code Act. She

was released on police bond but kept on reporting to the police subsequent to her release.

In October 1997, the appellant received a letter from the respondents' lawyers, M/S Mulenga & Karemera Advocates, informing her that goods purchased by her company from the respondent had not been paid for as a result of fraudulent concealment of her company's indebtedness. The advocates' letter warned the plaintiff that unless within 7 days she paid the debt together with their legal fees, she would be reported to police for having issued a bouncing cheque and for conspiracy to defraud and or theft/obtaining goods by false pretence. The letter stated as follows:-

> Mrs. Restae Twinomugisha
> Tyresland (U) Ltd
> C/o Mr. Z Bishangenda
> NW&SC
>
> Dear Madam,
> Re: Bounced Cheque
> We act for M/s Uganda Aluminum Ltd of P.O. BOX 12133 K'la which has instructed us to write to you as follows:
> In or about July 1997 our client discovered that goods purchased by your company from our client had not been paid for as a result of the fraudulent concealment of your company's indebtedness by your late husband Mr. Tony Twinomugisha who was also our clients Chief Accountant. Our client further discovered a series of cheques issued by your company in purported settlement of your dues, which had been receipted but were never banked and instead were kept aside by your

late husband. When our client discovered and presented them for payment they were all dishonoured. According to our instructions you were the signatory to all the cheques.

Upon full investigation our client found that your company was indebted in the sum of U.Shs. 40,631,849/= and demanded repayment of the same. On 18/8/97 the administrator of the Estate of your late husband paid to our client U. Shs. 10,000,000/=. To date, however, the outstanding balance of Shs. 30,631,849/= remains unpaid despite several reminders and demands by our client.

The purpose of this letter therefore is, as instructed to warn that if you do not pay to us the sum of 30,631,849 together with legal fees so far incurred of Shs. 1,500,000/= within 7 days from the date hereof our client will be left with no alternative but to lodge a formal complaint with the Criminal Investigation Department (CID) for your issuing of bounced cheques and conspiracy to defraud and or theft/obtaining goods by false pretences.

Yours faithfully
Mulenga & Karemera Advocates
c.c. Bishegenda
c.c. The Executive Director.

Upon receipt of the above letter she filed an action in the High Court complaining of harassment and intimidation which were calculated to

extort from her the amount of indebtedness. She further complained that she had been defamed as a result of a false and malicious report made against her to police. She stated that her constitutional rights were violated.

In his defence the respondent denied liability and at the same time counter claimed from the appellant for Shs. 30,631,846/= as the balance outstanding on the goods supplied.

The learned Principal Judge found that the appellant had suffered harassment, defamation and mental and physical anguish at the hands of respondent and awarded her combined general and exemplary damages of shs. 15,000,000/= as fair compensation for her harassment defamation and mental as well as physical anguish with interest and costs of the suit. The learned Principal Judge dismissed the counterclaim The respondent appealed to the Court of Appeal which allowed the appeal in part and dismissed the suit and the counterclaim and order that each party must bear its costs in the Court of Appeal and in the High Court, hence this appeal.

There are six grounds in the memorandum of appeal framed as follows:

1. The learned Justices of the Court of Appeal erred in law and fact in the view they took of the pleadings and the issues as framed and in coming to the conclusion that:

> "It is therefore, necessary for this court to re-appraise all the evidence, including the pleadings and submissions, and to come to its own conclusion as to whether the decision of the trial court can be supported"

2. The learned Justices of Appeal erred in law in not dealing individually with each ground of appeal in the mistaken assumption that such procedure would lead them.

> "to deal with a lot of irrelevant materials that were not ..... Necessary for the determination of the (appeal)".

3. The learned Justices of Appeal erred in law and caused grave injustice to the appellant in this appeal when they proceeded to decide the appeal after submissions had been concluded and without reference to counsel by focussing as. Twinomujuni JA put it,

> "On two broad issues, namely
>
> (a) Whether the evidence adduced by the plaintiff/respondent disclosed and proved a cause of action against the deponent/appellant.
>
> (b) Whether the counterclaim was proved to the required standard."

4. The learned Justices of Appeal erred in law and in fact in their evaluation of the evidence on record without the advantage of having seen the demeanour of the witnesses to answer to the above issues they had set for themselves.

5. The learned Justices of Appeal erred in law in allowing the appeal in part and dismissing the counterclaim with the further order that each party bears its own costs here and in the High Court.

6. The learned Justices of Appeal erred in law and in fact in not upholding the judgment and decree of the Principal Judge.

I shall discuss grounds 1 and 2 separately, ground 3, 4 and 6 together, then ground 5 separately.

Ground 1 complained of the view the Court of Appeal took of the pleadings and the issues as framed and in coming to the conclusion that:-

> *"It is therefore necessary for this court to re-appraise all the evidence including the pleadings and submissions and to come to its own conclusion."*

This statement is a reflection of the provisions of Rule 29(1) of the Rules of the Court of Appeal. Therefore, I cannot fault the Court of Appeal as a first appellate court in its above statement. If further authority is required, this can be found in the decision of *Pandya VR (1957) EA 336, Sella 7 Anor v Associated Motor Boat 1968 EA 123* and *Peters v Sunday Posts (1958) EA 478*. I therefore do not find any justification for the criticism of the Court of Appeal by Dr. Byamugisha Counsel for the appellant. Therefore ground one has no merit and must fail.

Ground 2 complained that the Court of Appeal was in error when it failed to deal with each ground of appeal on the ground that such procedure would lead the court into dealing with irrelevant material. In the lead judgment, Twinomujuni, JA, gave two reasons why there was considerable difficulty in dealing with the grounds of appeal. The first was that the plaint contained mostly generalities without specifics. For instance, it stated that the appellant had been harassed and defamed as a result of the false and malicious report made against her to police, and

that her constitutional rights were violated but the pleadings never stated which of those rights were and whether she was seeking constitutional remedy under Article 50 of the Constitution. Further, looking at the plaint, it never disclosed facts constituting the cause of action and particulars of those facts. Even the written statement of defence never challenged the averments in the plaint as a result of it never became an issue at the trial whether the plaint disclosed a cause of action. The second reason for the difficulty was that the issues which were framed were either wrongly framed or none issues. As a result, he stated that the trial Judge dealt with all of them in his judgment, resulting in the counsel for appellant mounting a lot of irrelevant attacks in the judgment. For those reasons he said he would not be follow the traditional method of dealing individually with each ground since this was likely to lead him to deal with a lot of irrelevant material that he did not consider necessary for determining the appeal.

Although normally each ground of appeal should be examined and determined on its merits, in some appeals where grounds of appeal are confusing and at times overlapping or repetitive or offend the rules of this court, they need not be considered individually. In the instant case the learned Justices of Appeal gave reasons for deviating from the traditional methods of dealing individually with each ground of appeal and properly dealt with those which were necessary and relevant to the appeal. As in my view no injustice was caused, would not fault the Court of Appeal. In the result ground 2 must fail.

I now turn to grounds 3, 4 and 6. Ground 3, like ground 2 is complaining against the Court of Appeal for having decided the appeal without reference to counsel's submission but on merely basing its decision on the two broad issues, framed by Twinomujuni, JA. The

learned Justice framed those issues in which the other two justices concurred, as follows:-

(a) whether the evidence adduced by the plaintiff disclosed and proved a cause of action against the defendant.

(b) Whether the counterclaim was proved to the required standard.

In my considered view, the reasons which the Court of Appeal gave and which I have already discussed while discussing ground 2 of this appeal equally apply here. I would in the circumstances not repeat them here. Suffice it to say that what was paramount before the Court of Appeal was whether the claim by the plaintiff and the counterclaim by the defendant had been proved before the High Court.

In determining whether the evidence adduced by the plaintiff disclosed a cause of action against the respondent it is necessary to discuss the four grounds of appeal and determine the issue of credibility of witnesses. It must be noted that the issue of credibility and reliability of witnesses as they testified before the court did not come in issue. The learned Principal Judge never doubted their credibility and reliability. He merely formed his opinion by inference from the evidence as a whole and held that the plaintiff had been defamed. The Court of Appeal, on the other hand, formed the opposite view by the same method.

Dr. Byamugisha, Counsel for appellant supported the decision of the learned Principal Judge in which he held that the facts complained of in the plaint had proved that the appellant had suffered harassment, defamation, mental and physical anguish. On the other hand Mr. Musisi, Counsel for the respondent, submitted that the Court of Appeal re-evaluated the relevant material and determined whether the claim and the counterclaim had been proved.

Twinomujuni, JA who wrote the lead judgment stated:-

> *"It should be noted that she (appellant) did not make any effort to give particulars of the alleged arrest, defamation or any other loss or damage nor does she indicate which of her constitutional rights were curtailed or interfered with.'*

Kikonyogo, DCJ concurred with Twinomujuni, JA when she held:

> *"As far as I am concerned the words used in the advocate's letter were not in their natural meaning defamatory. She had to prove her allegations ..... I am unable to find evidence to support the trial Judge's finding that the advocates' letter did harass and intimidate the plaintiff ....."*

Kitumba, JA also concurred when she stated:

> *..... the respondent failed to plead those violations and to adduce evidence to prove the same".*

Considering all the evidence on the record I am not persuaded by Dr. Byamugisha's arguments.

Firstly, there was no evidence led by the appellant to show how either reporting the appellant to police for fraud or theft or the writing of a letter to her by M/S Mulenga & Karemera Advocates, demanding that if she did not pay the debt within 7 days she would be reported to police for possible prosecution, defamed and caused her mental and physical anguish.

Secondly, there is no evidence that the police ever learnt of the contents of the letter or acted on those contents to the detriment of the appellant or at all.

Thirdly, there was no evidence that the appellant never signed those cheques and that goods were not supplied by the respondents against those cheques.

Lastly, we were not shown how in view of the above facts, reporting the appellant to police for investigation for either fraud or theft or obtaining goods by false pretences infringed her constitutional rights. Equally I fail to see how the letter from the advocates threatening to report her to police for possible prosecution if she did not pay the debt within 7 days infringed on her constitutional rights.

Mr. Musisi, for respondent, while rightly supported the decision of the Court of Appeal. He cited the case of Benmax v Austin motor Co. Ltd (1955) AC 370 at page 375 in which Lord Reid cited Thomas v Thomas (1947) 1 ALLER 582 to support the decision of the court. In that case Lord Thankerton had held:-

> *"(1) Where a question of fact has been tried by a Judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion;*
>
> *(2) The appellate court may take the view that, without having seen or heard the witnesses, it is not in a*

position to come to any satisfactory conclusion on the printed evidence.

(3) The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the issue and importance of having seen and heard the witnesses will vary according to the class of cases and it may be the individual cases in question."

Lord Reid continued :

"Where there is no question of credibility or reliability of any witness, and in cases where the point in dispute is the proper inference to be drawn from the proved facts, an appeal court is generally in as good a position to evaluate the evidence as the trial Judge, and ought not to shrink from that task, though it ought, of course, to give weight to his opinion."

I respectfully agree with the above dictum. In the instant case there was no dispute about any credibility or reliability of the witnesses. The only issue was on the proper inference to be drawn from the proved fact. The Court of Appeal was in as good a position to evaluate the evidence as the trial Judge and form an independent opinion though it had to attach importance to the judgment of the learned Principal Judge.

Clearly, there was no evidence to prove that either the report the Executive Director of the respondent company made to the police regarding the loss of their money through forged cheques was false or the

letter M/s Mulenga & Kalemera Advocates wrote to the appellant about the bounced cheques was false. A letter from Mr. Z. Bishagenda, the Administrator of the Estate of late Twinomugisha acknowledged the indebtedness of the deceased husband of the appellant. In the letter, there was payment of Shs. 10,231,849/= outstanding on account of Tyresland. There was an undertaking that they would continue paying the amount owed till the whole debt was cleared. In that same letter, the administrator of deceased's estate appealed to the respondent to let the appellant either remain in the house where her late husband used to live with the appellant or be allowed to take goods on credit from the respondent company, so that she could sell, realise profit and repay the debt.

In my view, as the respondent supplied goods in reliance on the cheques which bore the appellant's signatures, the respondent was perfectly right to report her to police for investigation and for appropriate action. In my view, any course taken by the respondent could not be a foundation for the appellant to file an action against the respondent in tort for defamation.

In the result grounds 3 fail.

Ground 4 complained that the Justices of Appeal erred in law and fact in their evaluation of the evidence on record without the advantage of having seen the demeanour of the witnesses to answer to the above issues they had set for themselves. In my view, my discussion of ground 3 has substantially disposed of ground 4. I would therefore be repeating myself to discuss this ground. In the result ground 4 must fail.

Ground 6 complained that the court of Appeal erred in law and fact in not upholding the judgment or decree of the learned Principal Judge.

With due respect to the Counsel for appellant, when he addressed us, he never pointed out to us where the Court of Appeal erred in law and fact and I do not see where the learned Justices erred. In the result, this ground has no merit and must fail.

Ground 5 deals with counterclaim. That issue had been dismissed by the learned Principal Judge. In the Court of Appeal there was no specific objection against the decision of the Principal Judge on the counterclaim. However, its objection was implicit in ground 2 where there was objection that the Principal Judge had erred in law and fact in finding that the appellant was not legally responsible to make good the dishonoured cheque No. 075339, which she had signed. The appellant admitted having signed it in blank and having handed it to her husband.

After her husband's death some blank cheques signed by the appellant were found in deceased's office. Tiko DW3 filled the amount of money, the payee and the date on instructions of DW4. When the cheque in question was presented for payment, it was dishonoured.

The learned Principal Judge dismissed the counterclaim without considering and determining whether the goods had been supplied to Tyresland shop in respect of the cheque. He dismissed it merely because the plaintiff had not written the names of the defendant or to the order of the defendant and also because she had not written the amount of money which the defendant would withdraw.

On appeal to the Court of Appeal, the counterclaim was dismissed, because Tyresland or Tyresland Ltd. never existed and therefore the appellant could not conceivably own such a company and that there was no way a non-existent company could order or receive goods from the respondent. Although the ~~respondent~~ appellant signed blank cheques on a bank

account jointly owned by her and her late husband, she did not know what the husband used it for. Moreover the cheques were not signed in contemplation of payment for any goods supplied by the appellant or anyone else.

In conclusion, Twinomujuni, JA who wrote the leading judgment with which the other 2 justices concurred held that:-

> *"..... It is not possible for me to hold that a person who signs an otherwise completely blank cheque can be said to have issued it to anyone within the meaning of the definition of that word in section "2" of the Bills of Exchange Act. The word issue:*
>
> *'means the first delivery of a bill or note, complete in form to a person who takes it as a holder".*
> *"delivery" means transfer of possession, actual or constructive from one person to another*
> *and "holder" means:-*
> *"the payee or endorsee of a bill or note, who is in possession of it,*
> *or the bearer thereof"'.*
>
> *The appellant could not be said to be a "holder" since it was not a payee or endorsee known to the appellant. It is common knowledge that many of the cheques were filled by employees or agents of the appellants without reference to or knowledge of the respondent and many of them were filled after the death of her husband. By signing blank cheques, some of them many months before they were "issued" to the appellant by its own*

agents, the respondent did not bind herself to the liable to any person to whom such a cheque could be fraudulently issued. I find no merit in the counterclaim."

The complaint before the Supreme Court was that the Court of Appeal erred in law in allowing the appeal in part and dismissing the counterclaim with further order that each party bears its own costs here and in the High Court.

The counterclaim had been based on the dishonoured cheque No. 075339 for Shs. 4,000,000/=. The appellant had admitted before the High Court that she signed the blank cheque and handed it to her late husband. It was argued on her behalf that she could not be liable for what her husband did with the cheque.

The Court of Appeal never considered the cheque in question on which the counterclaim was based. It merely decided the issue of counterclaim on existence or non-existence of Tyresland Ltd or Tyresland and held that there was no way a non-existent company could order or receive goods from the appellant or any one else.

With due respect to the Justice of Appeal, goods were delivered by the respondent to Tyresland shop along Ben Kiwanuka Street and the cheque in question was not a company's cheque but an individual's cheque. The respondent who was in possession of it, filled up the amount due to it, the payee and the date and, it thus became a complete bill.

It must be noted that the issue of a person in possession of a signed blank cheque is well settled in law. The Hulsbury's Laws of England volume 4, 4th Edition paragraph 350 states as follows:-

'Where a person is in possession of an instrument wanting in any material particular he has prima facie authority to fill the bill in any way he think fit"

The above principle was applied in the case of *Gerald Mcdonald & Co. V Nash & Co. 1924 AC* 625

"The applicant had implied authority to fill in their names as payee as they did over the name of the respondents and that when so filled up the bill became retrospectively due."

Further, our Bills of Exchange Act (Cap 76) provides in section 20(1) that

"..... and in like manner when a bill is wanting in any material particular the person in possession of it has a prima facie authority to fill up the omission in any way he thinks."

In my opinion, the respondent having supplied goods which were delivered by the appellant's driver, Musika Brown, in vehicle Reg. No. UXK 848 belonging to the appellant, the respondent who was in possession of the blank cheque signed by the appellant had prima facie authority to fill up the name of the payee, the amount of money for the goods they had supplied and the date. In the instant case, the appellant was not disputing that the goods indicated on the delivery note were not supplied or if supplied, the amount for the goods received was worth less than the amount on the cheque. In the result, the counterclaim for Shs. 4,000,000/= should have been allowed by the Court of Appeal. However, because there was no cross-appeal to this court, I shall make no order in

respect of the claim by the respondent grounded on cheque No. 0753339 for Shs. 4,000,000/=. In the result, ground 5 must fail.

Consequently, as grounds 1, 2, 3, 4, 5, and 6 have failed this appeal must fail. Accordingly the appeal is dismissed with costs here and in the lower courts.

Dated at Mengo this ...24th..... day of April....., 2002

.....
A.N. Karokora,
Justice of the Supreme Court