**THE REPUBLIC OF UGANDA**

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

**(Coram:** Kisaakye, Mwangusya, Opio Aweri, Mwondha, Ekirikubinza JJSC)

**CIVIL APPPEAL NO. 04 OF 2016**

**BETWEEN**

 GODFREY SSEBANAKITA , APPELLANT

**AND**

 FUELEX (U) LTD RESPONDENT

*(Appeal against the decision of the Court of Appeal at Kampala before Nshimye,
Kasule, Buteera JJA delivered on the 6th day of November 2015 in Civil Appeal
No.38 of2010)*

**JUDGMENT OF MWONDHA JSC**

Background:

The appellant between the months of September 2003 and August 2004
approached the respondent to supply him with petroleum products. The
respondent supplied accordingly. The value of the supplies was Ug. Shs.53,270,545 (Fifty Three Million Two Hundred and Seventy Thousand Five
Hundred Forty Five shillings). The respondent claimed that the appellant had
paid it only Shs. 18,991,700/= for the products supplied and a balance of Shs.
34,278,845/= was owed to it. The respondent instituted a suit in the High
Court (Commercial Division) HCCS No. 640 of 2005 claiming the amount due.

The High Court found in its favour. The appellant was dissatisfied with the
decision and he appealed to the Court of Appeal. He appealed on 5 grounds as
contained in the Memorandum of Appeal but at the hearing the appellant opted

to argue all the 5 grounds together which the respondent never objected to. All

the five grounds were reduced into one single issue as follows:-

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Whether on the evidence as presented during the trial the learned trial Judge
was justified to find and hold that the appellant breached the contract and was
indebted to the respondent to the tune of Ug. Shs. 34,278,845/=.

The Court of Appeal dismissed the appeal with costs of the Court and the Court
below.

The appellant was dissatisfied with the decision hence this appeal.

In the memorandum of Appeal, the appellant raised eight grounds of appeal as
follows:-

1.) The learned Justices of Appeal as the first appellate Court erred in law
and fact when they did not re-evaluate and analyze all the materials and
evidence on record before reaching their decision

2.) Alternatively, the learned Justices of Appeal erred in fact and law when
they ignored the bulk of the appellant's evidence on record

3.} The learned Justices of Appeal erred in law and fact when they failed to
appreciate the weight and importance of admissions of Ms. Jane
Rugambwa

4.) By finding and holding that the refusal to call Ms. Jane Rugambwa as a
witness did not amount to an admission by conduct, the learned Justices
of the Court of Appeal erred

5.) The learned Justices erred in law and fact by holding that the Court of Appeal could not draw an adverse inference on the part of the
respondent on the failure to call Ms. Jane Rugambwa as a witness

6.} The learned Justices of Court of Appeal erred in law and fact in
upholding the findings and conclusions of the High Court without
scrutinizing them

7.) The learned Justices of the Court of Appeal erred in law and fact by
failing to appreciate that the burden of proof was static during the trial in
the High Court

8.) The learned Justices of the Court of Appeal erred in law and fact by
misconstruing the provisions of the Evidence Act Cap 6.

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The appellant prayed Court to:

(a) Allow the appeal

(b) Set aside the judgment and decision of the Court of Appeal dated 6th
November 2016 in Civil Appeal No.38 of 2010 and HCCS No. 640 of 2005
of the Commercial Division.

(c) Grant costs of the Appeal of this Court and Courts below.

**Representation**

Mr. Godfrey Mutaawe represented the appellant while Mr. Innocent Taremwa
and Mr. Hannington Mutebi represented the respondent.

**Submissions**

At the hearing of the appeal, counsel for the appellant argued grounds 1, 2 & 6
together, then grounds 3, 4& 5 together and lastly grounds 7 & 8 together

The main complaint in grounds 1,2,3,4,5,6,7 and 8 was for all purposes and
intents that the 1st appellate Court erred in law and fact when it failed to re-
evaluate all evidence and material before the trial Court by not subjecting it to
fresh scrutiny.

Counsel for the appellant contended among other things that the evidence was

the original sales book EXD1; the receipts formerly tendered in court as EXD2
(i) - D2 (xi); EX D4 (i) & (ii) showing the payments by the appellant; the case
scheduling memorandum filed jointly in Court on 24/08/2006 containing

among others the admission by the respondent MD Ms. Rugambwa having

received Shs. 28,954,600/=in cash from the appellant; and Receipt No. 477
dated 8/06/04 in the sum of Shs. 8,300,000/=. He submitted that by Ms.
Rugambwa the then MD of the respondent admitting receiving 28,954,600/=
meant that he was indebted to the respondent to the tune of 25,711,720/= and
not Shs 34,278,845/=. Counsel concluded that since there was no rejoinder to
the statement of defence, by the rules of Civil Procedure the said statement was
deemed to have been admitted.

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Counsel submitted further that the respondent did not discharge the burden to
prove that the appellant breached the contract and therefore indebted to him.

Counsel contended that the respondent failed to produce Ms. Rugambwa as a
witness who had made the admission. He concluded that S. 101 & 102 of the
Evidence Act casts the burden on the respondent which he failed to discharge.

Counsel for the respondent on the other hand supported the findings and
decision of the Court of Appeal. He submitted that the learned Justices of the
Court of Appeal thoroughly re-evaluated the evidence and materials before the
trial Court as the law required of the 1st appellate court. He argued that the
receipts the respondents relied upon had been disputed by the respondent
during the scheduling conference as per the scheduling memorandum and so
they could not be taken as agreed facts. He argued that it was as a result of the
learned Justices of Appeal having re-evaluated the evidence and found that the
receipts relied on were full of discrepancies as they had been made in the
names of different entities which had separate accounts with the respondent.

He argued further that it was after that re-evaluation that the Court of Appeal
found that the Auditor's report (EX PI) which the respondent brought as
evidence and had been extracted from exhibit EXD 1 (Sales Record Book) Which
proved the case of the respondent.

He submitted that the Accountant DW2's evidence brought out the
inconsistencies in the appellant's case when he stated that he didn't know why
the receipts were issued in the names of different entities. He also stated that
he didn't know the specific outstanding figure. The receipts exhibited were
No.711 issued on 24/03/2004 in the names of Sebana & MMTC; Receipt No.
434 made on 6/04/04 and Receipt No.516 of 24/07/2004 in the names of
Mukisa Mpewo Transport Co.

He contended that the Court of Appeal had no legal duty to rely on contents of
a withdrawn summary suit HCCS No.117 of 2005 to draw any adverse
inference that failure of Ms. Rugambwa to come and be witness of the
respondent amounted to an admission.

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He .argued that Justices of Appeal addressed their mind on Section 16 of the
Evidence Act and concluded that they could not draw any adverse inference.
He relied on the case of **Uganda Breweries Limited Vs Uganda Railways
Corporation Civil Appeal No.6 of 2001.**

He submitted that DW2 clearly stated that he carried out a reconciliation based
on receipts and sales book and found two figures representing over payment by
the appellant but the inconsistencies were not reconciled by the appellant. He
contended that the burden of proof was on the appellant to show that he had
not breached the contract. He concluded that by the respondent producing the
auditor's report which they considered and re-evaluated, the learned Justices
had properly exercised their duty as a first appellate Court and found that the
respondent had discharged its duty.

**Consideration of the appeal**

This is a second appeal and the duty of the second appellate Court was long
settled in a host of cases among which is **Kifamunte Henry Vs Uganda
Criminal Appeal No. 10 of** 1997 as hereunder stated:-

**" ..... the first appellate court has a duty to review the evidence of the case
and to re-consider the materials before the trial judge. The appellate
Court must then make up its own mind not disregarding the judgment**

 **appealed from but carefully weighing and considering it on a second**

**appeal, it is sufficient to decide whether the first appellate court on
approaching its task, applied or failed to apply such principles ... this court
will no doubt consider the facts of the appeal to the extent of considering
the relevant point of law or mixed law and fact raised in any appeal. If we
re-evaluate the facts of the case wholesale we will assume the duty of the
first appellate court and create unnecessary uncertainty. We can interfere
with the conclusions of the Court of Appeal if it appears that in its
consideration of the appeal as the first appellate court, misapplied or
failed to apply the principles set out in such decisions. See also Pandya Vs
R [1957] EA 336"**

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The appellant raised eight grounds of appeal which were submitted in clusters
of grounds 1, 2, 6 together, 3, 4 and 5 together and then 7 & 8 together.

It was very clear to me that much as these grounds were submitted upon in
clusters they came to one issue being:

**Whether the Court of Appeal properly re-evaluated the evidence of the
trial court to confirm the findings of the trial court that the appellant
breached the contract and so was indebted to the respondent to the
sum of Shs. 34,278,845/=**

I have had the opportunity to carefully reading the proceedings of the trial
court and the judgment of the Court of Appeal. It was clear that the Court of
Appeal was alive to its duty as the first appellate court. While citing rule 30
of the Judicature (Court of Appeal) Rules, the Court of Appeal had this to
say to the issue:

**"Upon reviewing the evidence on record, it's clear that the appellant
and the respondent entered into a contract whereby the respondent
agreed to supply the appellant with petroleum products on both cash
and credit basis. The respondent supplied petroleum products** worth~
**Ug. Shs. 53,270,545/= of which the appellant only paid** 18,991.700/~
**leaving an outstanding balance of Ug. Shs 34,278,845/=. The
respondents brought evidence of an audit report and also called the
auditor who conducted the audit and testified that the appellant owed
the respondent money to the above mentioned tune ... "**

In my view, the above re-evaluation by the Court of Appeal was sufficient in
subjecting the lower Court evidence and material to fresh scrutiny. For it
depends on the circumstances of each case and style of the 1 st appellate
Court.

According to cases I have perused, there seems to be no parameters as to
how far the 1st appellate Court can go in re-appraising & re-evaluating for

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Instance the case of **Uganda Breweries Limited Vs Uganda Railways
Corporation (supra).** It was observed as follows:

**"There is no set format to which a re-evaluation of evidence by a first
appellate court should conform. The extent and manner in which re-
evaluation may be done depends on the circumstances of each case
and the style by the first appellate court." (Oder JSC) RIP.**

The case of **Francis Sembatya Vs Alport Services Ltd SCCA No.6 of 1999**

 it was held among others "" A **first appellate court is expected to**

**scrutinize and make an assessment of the evidence but this does not
mean that the Court of Appeal should write a judgment similar to that
of the trial."** (Tsekooko JSC)

And also in the case of **Ephraim Orgoru and another Vs Francis Benega
Bonge Civil Appeal No. 10 of 1987** it was stated that **while the length of
the analysis may be indicative of a comprehensive evaluation of
evidence, nevertheless the test of adequacy remains a question of
substance.** (Odoki JSC)

It was not disputed that the respondent's case was premised on the
Auditor's report EXP1 which had been extracted from the Record Sales Book

Ex Dl.

It was an agreed fact in the scheduling memorandum that EXD1 was the
book where the respondent's servants were entering delivery of the
products.

The appellant adduced evidence from DW2 an Accountant who testified in
Court that he carried out a reconciliation based on receipts and sales books
from which he found two different figures being Shs. 869,880/= and Shs.
1,123.055/= being figures showing over payment by the appellant. He also
stated that the inconsistencies were not reconciled by the appellant.

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The appellant relied on the receipts whose contents were disputed by the
respondent according to paragraph 7 of the scheduling memorandum.

The Court of Appeal brought out clearly the above evidence while reviewing
the evidence before the trial court.

The Court of Appeal was aware of the burden of proof required as stated in
**section 102 of the Evidence Act Cap 6 Laws of Uganda** which provides
**"The burden of proof in a suit or proceeding lies on the person who
would fail if no evidence at all were given on either side."**

I agree with the learned Justices of Appeal when they held that the
respondent considering the evidence from both parties, the burden of proof
was upon the respondent and the respondent discharged its burden on a
balance of probabilities. The burden of proof shifted to the appellant to
prove that he had not breached the contract and was not indebted to the
respondent. In addition, the appellant insisted on receipts which were in
dispute and were full of discrepancies in that they were made in names of
different entities other than the appellant.

I agree with the Court of Appeal finding that failure by the respondent to call
Ms. Rugambwa cannot cause this court either to make an adverse inference
that it was an admission by conduct. I concur with the authority cited by
learned counsel for the respondent, **Uganda Breweries Limited Vs Uganda
Railways Corporation (supra).** The issue" **whether an adverse inference
should be drawn from the fact that a particular witness has not been
called is a matter which must depend upon the circumstances of each**

 **case in view of the opinion on the facts which I have expressed**

**above this question is now hardly relevant and I will content myself in
the observation that I doubt very much whether in the circumstances
an adverse inference of any materiality was justified."**

It is trite law that a litigant is not compelled to rely on a given number of
witnesses. **See section 133 of the Evidence Act.** But most importantly

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**'section 17(1) of the Evidence** Act provides **"statements made by a party
to the proceedings or by any agent of any such party, whom the Court
regards, in the circumstances of the case, as expressly or impliedly
authorized by him or her to make them are admissions."**

Even without considering the provisions of S. I 7 (3)(a)(b) it is clear that the
appellant's counsel misconceived all these provisions.

The suit in which Ms. Rugambwa swore an affidavit had been withdrawn
before institution of the instant suit. This was HCCS No.117 of 2005 as
opposed to the instant suit HCCS No. 640 of 2005 from which this appeal
arose. This was a later suit, with different amount of money due and owed

to the respondent. Besides, **Order XXV Rule (1) (1) of the Civil Procedure
Rules** gives a discretion to the plaintiff at any time before the delivery of the
defendant's defense or after receipt of that defence before taking any other
proceeding in the suit (except an application in chambers) by notice in
writing to wholly discontinue his or her suit against all or any of the
defendants or withdraw any part or parts of his or her alleged cause of
complaint and thereupon he or she shall pay the defendant's costs
occasioned by the matter so withdrawn. In the premises, the respondent
cannot be faulted in the circumstances. Above all, the amount owed and
due to the respondent was proved on a balance of probabilities. The
respondent's evidence of the Audit report EX PI, which showed that the
amount was Shs. 34,278,845/= contrary to what the appellant claimed was

due and owing.

As counsel for the appellant submitted, **8.102 of the Evidence Act**provides:

"The burden of proof in a suit or proceeding lies on that person who would
fail if no evidence at all were given on either side."

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The appellant was at liberty to call Ms. Rugambwa as his witness, as he was
the one who wanted to rely on the proceedings of the withdrawn suit in light
of section 102 of the Evidence Act

**C.D Fields Law of Evidence 10th Edn Vol II at page 1354** was relied on at
length by counsel for the appellant among others. He quoted **"suits may
come and go withdrawn with or without liberty to sue afresh, dismissed
or decreed, no matter which but statements made therein, no matter
where, in pleadings, petitions, affidavits or evidence remain forever
and for all purposes too, allowed by law such as to be proceeded with as
admissions, where they are found to be such, so long as they are not**

**rebutted It is well settled that admissions of a party adverse to its**

**own interests as to the fact in issue or a relevant fact irrespective of
the occasion it was made is one of the best or simplest pieces of
evidence against it."**

I hasten to add that this is in reference to a party to the suit. Definitely, Ms.
Jane Rugambwa was not a party to the suit which was withdrawn and she

was neither a party in the instant case.

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But whether she was a party or not the learned author points to an

exception, and that exception is in the rebuttal. Needless to say that it's not
anywhere on the record of the case, that Ms. Rugambwa made an admission
and therefore the submission by counsel that there was an admission was
superfluous.

However, even if we were constrained to take it that there was an admission,
it was rebutted by the submissions of counsel for the respondent before the
trial court (High Court Proceedings) which were not responded to by counsel
for the appellant. Counsel for the respondent stated as follows:

"It is important to note that civil suit No. 117 of 2005 was filed before the
Auditor's report was made. The affidavit of Jane Rugambwa counsel for the
defendant makes reference to having stated the debt as at 28,954,600/=

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'was accordingly made in that belief. However, upon receipt of the Auditor's
report with a new figure the said case was withdrawn .... and this suit was
accordingly filed."

Since that submission was not challenged and or responded to the inference
is that the purported admission, was made before the truth about the
money due was unearthed. And that means that the admission was
rebutted and could not stand. It confirmed that the respondent had proved
its case to the required standard so it discharged its burden.

In conclusion, I find that the Court of Appeal exercised its duty properly as
the first appellate Court and came to the right decision that the appellant
entered into contract with the respondent and he breached it. The appellant
failed to pay the outstanding balance as already stated in this judgment.

There is no justification for interfering with the Court of Appeal decision.

The judgment, decision and orders of the Court of Appeal are upheld. The

appeal is dismissed with costs of this court and the courts below.

 Dated this 06th day *of.August 2017*

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MWONDHA

**JUSTICE OF THE SUPREME COURT**

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**THE REPUBLIC OF UGANDA**

**IN THE SUPREME COURT OF UGANDA AT KAMPALA
CIVIL APPEAL NO.04 OF 2016.**

***[CORAM: KISAAKYE, MWANGUSYA, OPIO-AWERI, MWONDHA,*** *-*

 *10* ***TIBATEMWA EKIRIKUBINZA, JJSC.]***

**BETWEEN**

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**GODFREY SEBANAKITTA :::::::::::::::::::::::::: APPELLANT
AND**

***MIS* FUELEX (U) LTD :::::::::::::::::::::::::::::::: RESPONDENT**

*[Appeal from the decision of the Court of Appeal at Kampala
before (Hon. Nshimye, Kasule and Buteera, JJA)) Civil
Appeal No.* 38 *of* 2010 *dated 6th November)* 2015.]

**Representation**

Mutaawe Geoffrey appeared for the appellant while Innocent
 Taremwa together with Hannington Mutebi appeared for the
respondent.

**JUDGMENT OF TIBATEMWA-EKIRIKUBINZA.**

I have had the benefit of reading in advance the draft judgment
prepared by my learned sister, Mwondha, JSC. I agree with her that

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 5 the appeal be dismissed. I also agree with the award of costs proposed
in her judgment.

I however wish to lay a little more emphasis on what constitutes an
admission and also discuss the applicability of the law on burden of
proof in this matter.

10 **Background**

The brief background of this appeal is that in the months of
September 2003 and August 2004 the respondent supplied fuel on
credit to the appellant, who was employed as a transport officer in
Mukisa Mpewo Transport Company (MMTC). It was an agreed fact

15 that the total value of the supplies was Ug shs. 53, 270,545/=.

The appellant used to pay some money to offset the credit. On 10th
February 2005, the respondent filed a summary suit in the High
Court vide HCCS No.117 of 2005 claiming an unpaid sum of
24,315,945/=. To support the claim, the respondent adduced

 20 affidavit evidence of Ms. Rugambwa who was the Managing Director
of the respondent at the time. In the said affidavit, Ms. Rugambwa
averred that the appellant had paid off Ugshs 28, 954, 600/= of the
total value of supplies and was left with a balance of 24,315,945/=.
However, before the suit could be heard, the matter was withdrawn.

 25 The withdrawal of the suit was as a result of the company having
engaged an auditor in March 2005 who came up with a report
indicating that the appellant had only paid Ug shs. 18,991,700/=
and not 28,954,600/= and that the balance owed was Ug shs. 34,

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 5 278,845/= and not 24,315,945/=. Thereafter, the respondent filed
Civil Suit No. 640 of 2005 in the Commercial Division of the High
Court, to recover the balance of 34, 278,845/=. The appellant
disputed the claim and contended that he had paid all money due to
the respondent and contended in his submissions that he had in fact

 10 overpaid the respondent. He tendered in evidence receipts which he
claimed had been issued by the respondent company.

However, the High Court Judge found that the appellant had
breached his part of the contract and that he was indebted to the
respondent in the sum of Ug shs.34, 278,845/=.

 15 Aggrieved with the decision, the appellant appealed to the Court of
Appeal on a central ground that: *the learned trial judge erred in law
and fact when he did not evaluate the receipts tendered by the
appellant in evidence and resolved the inconsistencies in the receipts
in favour of the respondent and thereby came to the wrong conclusion.*

 20 The Court of Appeal Justices found the appellant in breach of
contract for failure to pay the outstanding balance of Ugshs.34,
278,845/=.

Dissatisfied with the above decision, the appellant appealed to this
Court on 8 grounds. However, in his submissions, he reduced the
grounds to one issue:

**Whether the Court of Appeal as the first appellate court while
handling Civil Appeal No.3S of 2010 lived up to it’s statutory**

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 5 **duties and obligations as interpreted in decided cases before
arriving at its conclusions.**

**Appellant's Submissions**

The appellant argued that although in its judgment, the Court of
Appeal had correctly stated its duty as a first appellate court, it failed

 10 to adequately scrutinize, re-evaluate and weigh all the evidence
before reaching its own conclusion on the dispute. That had the
learned Justices of Appeal done so, they would not have upheld the
findings and conclusions of the trial judge.

The appellant further argued that since there was no reply to his

 15 written statement of defence in the summary suit, the figure stated
in the affidavit of Ms. Rugambwa was binding on the respondent
because it was an admission. In support of this argument, the
appellant relied on Section 17 (1) and 17 (3) of the Evidence Act. The
Section provides in part as follows:

 o **(1) Statements made by a party to the proceeding or**

**by an agent of any such party, whom the court regards,
in the circumstances of the case, as expressly or
impliedly authorized by him or her to make them, are
admissions.**

 25 In addition, the appellant faulted the Court of Appeal's finding
that the evidence of the receipts relied upon by the appellant to
support his case were not credible and that they were marred
with discrepancies in that they bore different names. The said

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 5 receipts were those claimed by the appellant to have been
issued by the respondent each time he settled his debt.

The appellant therefore argued that had the Court of Appeal re-
evaluated all the materials relating to the receipts, they would have
found Ugshs. 34,278,845 an incorrect figure of the balance owed.

 10 The appellant also submitted that the Court of Appeal erred in failing
to analyze the contents of Exhibit D I (this was the respondent's sales
book indicating the paid and unpaid amounts in regard to the
contract of fuel supply between the appellant and the respondent. It
was marked as D I by the High Court). That the Court of Appeal like

 15 the High Court based their findings on Exhibit PI (which was the
respondent's auditor's report) indicating that the unpaid balance was
34,278,845/=. The appellant argued that there was no way Exhibit
P I which was extracted from Exhibit D I could be more reliable and
credible than the source from which it was extracted.

 20 The appellant further faulted the Court of Appeal's failure to
appreciate the burden of proof of each party. That the learned
Justices cited Section 102 of the Evidence Act and came to the
conclusion that the respondent discharged its burden while the
appellant had not. The appellant submitted that the respondent

 25 had the onus and burden to disprove Rugamba's admission
regarding the payments.

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 5 The appellant concluded the submissions by praying that this
Court allows the appeal to succeed and set aside the judgments
of the lower courts.

**Respondent's submissions**

The respondent argued that the Court of Appeal carried out its

10 duty as a first appellate court and came to the right conclusion.

That the Justices properly re-evaluated the receipts adduced by
the appellant and noted that while some of the receipts were in
the names of the appellant, some were in the company name.
That consequently the court came to the conclusion that the

 15 receipts were marred with inconsistencies and could not be
relied upon. Furthermore, the respondent pointed to the fact
that the Court of Appeal noted that DW 2, appellant's
accountant, testified that he did not know why the receipts were
issued in names of two different entities and further that he did

 20 not know the specific outstanding figures. That on this basis
the Court of Appeal was right to hold that the appellant's
evidence led by his accountant had many inconsistencies that
were never reconciled.

In regard to the alleged admission by Ms. Rugambwa, the
25 respondent argued that the statement was made before a proper
audit could be made. That when the audit was made and the

right sum was discovered, the suit with an incorrect sum was
withdrawn under Order 25, Rule 1 of the Civil Procedure Rules
which *inter alia* allows a party to discontinue a suit. The

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 5 respondent thus argued that the burden lay on the appellant to
bring Ms. Rugambwa to court to support his case. In addition,
the respondent submitted that the failure to call Ms. Rugambwa
on its part did not amount to an admission by conduct on its
part. That Section 1 7 of the Evidence Act was misapplied by the

 10 appellant to qualify the affidavit of Ms. Rugambwa as
admissions in law.

**Analysis**

**What constitutes an admission?**

The appellant submitted that the affidavit of Ms. Rugwambwa
15 stating that the balance due as Ushs.28, 954,600/= amounted
to an admission of the debt due.

**Section 16 of the Evidence Act** defines an admission as:

**A statement, oral or documentary, which suggests any
inference as to any fact in issue or relevant fact, and
which is made by any of the persons, and in the
circumstances, hereinafter mentioned. (My emphasis)**

The circumstances referred to in Section 16 above are
elaborated in Section 1 7 of the Evidence Act to include
statements made out of court by a party to the proceedings or

 25 by a person who is their representative, predecessor in title, .
associate, agent or referee of a party.

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 5 I note that the affidavit of Ms. Rugambwa was made at the time
when she held the position of Managing Director in the
respondent company. Therefore, in line with Section 16 and 17
(supra), her statement would qualify as an admission by the
respondent company.

 10 I note that an admitted fact need not be proved (Section 22 of
the Evidence Act). The essence of the appellant's argument was
therefore that the respondent could not ask the appellant for
more than the sum averred to by Ms. Rugambwa.

However, as earlier pointed out in this judgment, the suit in
15 which Rugambwa's affidavit was adduced as evidence was
withdrawn. The question which follows IS: *whether the
respondent company is still bound by the said admission.*

**Section 28** of the **Evidence Act** provides:

**Admissions not conclusive proof, but may estop.**

 20 **Admissions are not conclusive proof of the matters
admitted, but they may operate as estoppels under the**

**provisions hereafter contained.**

Section 17 of the Indian Evidence Act is in *pari materia* with
Section 16 of Uganda's Evidence Act and Section 18 of the
Indian Evidence Act is in *pari materia* with Uganda's Section 17

supra.

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 5 In the Indian persuasive authority of **Nagubai Ammal and
others vs. B. Shama Road and others AIR 1956 se 593,** the
Supreme Court in addressing the effect of statements
[admissions] made in a previous suit held:

**An admission is not conclusive as to the truth of the**

 10 **matters stated therein. It is only a piece of evidence,
the weight to be attached to which must depend on the
circumstances under which it is made. It can be shown**

**to be erroneous or untrue, so long as the person to
whom it was made has not acted upon it to his**

 15 **detriment, when it might become conclusive by way of
estoppel.**

And in another persuasive authority of **Panchedo Narain
Srivastar vs. Jyoti Sahay and another (1984) see 594,** the
Indian Supreme Court emphasized that admissions can be

20 withdrawn or explained away.

From Section 28 (supra) and the above persuasive authorities,
as, it is clear that an admission is not conclusive. In the present
matter, it was the explanation of the respondent that the debt
sum in Ms. Rugambwa's affidavit was not correct. That the sum

 25 was arrived at before the audit was made and it was for this
reason that the suit in which Ms. Rugwamba's affidavit had
been tendered was subsequently withdrawn. I therefore
conclude that what would have been an admission can no
longer be binding as it had been explained away. An averment

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5 in a withdrawn suit cannot be said to be an admission more

especially when both the High court and the Court of Appeal
relied on the evidence of the Audit report which determined the
exact debt.

**Burden of proof**

 10 I will first discuss the question of who has the burden to prove
the debt sum and then who has the burden to prove the
authenticity of the receipts.

It was the appellant's submission that the respondent had the
burden to prove that he had breached the contract and also

 15 disprove the appellant's evidence. That the respondent did not
produce evidence whatsoever to explain the disparity in the debt
sum. Further that, the burden to disprove the receipts lay on
the respondent.

On the other hand, the respondent submitted that since the
20 appellant relied on the affidavit of a withdrawn suit, the burden
was upon him to call the said Ms. Rugambwa to support his
defence.

**Section 102 of the Evidence Act** provides:

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 5 **On whom burden of proof lies.**

**The burden of proof in a suit or proceeding lies on that
person who would fail if no evidence at all were given
on either side.**

**Section 103 of the Evidence Act** provides:

 10 **Burden of proof as to particular fact.**

**The burden of proof as to any particular fact lies on
that person who wishes the court to believe in its
existence, unless it is provided by any law that the
proof of that fact** shall lie **on any particular person.**

15 **Section 106 of the Evidence Act** provides:

**Burden of proving, in civil proceedings, fact especially
within knowledge.**

**In civil proceedings, when any fact is especially within
the knowledge of any person, the burden of proving**

 20 **that fact is upon that person.**

In the present case, the respondent company adduced evidence
of a sales record book and an audit report to prove the fact that
the appellant was indebted to it in the sum of Ugshs.
34,278,845/=.

 25 On the other hand, the appellant adduced evidence of receipts
which he alleged had been issued to him by the respondent

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 5 when he paid for the fuel supplies. In addition he also relied on
the affidavit evidence of Ms. Rugambwa which as I have found
above is no longer binding and cannot be used to support the
appellant's case.

In response to the receipts adduced by the appellant, the

10 respondent company argued that the receipts were fabricated.

It was further argued that the lower courts had found them to
be marred with inconsistencies and issued in names different
from that of the appellant; whereas some receipts bore 'Sebana
MMTC', others bore 'Mukisa Mpewo' and Nsubuga. In reply to

 15 the respondent company's assertion above, the appellant stated
that the receipts bearing the name Nsubuga was for comparison
purposes with those written in his names, to show that they all
originated from the respondent company.

I note that the receipts relied on by the appellant indicated that
20 the respondent issued receipts to Ssebana Z (MMTC) and
sometimes Mukisa Mpewo as acknowledgment of payment of
fuel debts.

On record is the fact that the sales and record book (exhibit
D 1) adduced by the respondent bore the title: "SEBANA/

 25 MMTC". Indeed the auditors also relied on this book to come
up with a report. I note that in crediting the appellant's
payments to the respondent, the auditors credited the receipts
that exclusively bore the appellant's name (SEBANA) as well as
receipts bearing both the appellant's name and the business

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 5 name of MMTC (SEBANA/MMTC). This shows that Sebana
and MMTC were considered one and the same person
although in law a company and an individual are considered
as different persons. On this point, since the evidence of the
sales and record book adduced by the respondent showed that

 10 Sebana and MMTC were considered one person, I fault the
Court of Appeal and the trial court's reasoning that the
receipts of the appellant could not be relied on because the
names on the receipt were inconsistent.

Be that as it may, I must still discuss the question: on whom
15 did the burden lay to prove that the receipts the appellant
adduced in evidence were not fabricated?

**Section 106 of the Evidence Act (supra)** is to the effect that a
person who has knowledge of a fact has the duty to prove that
fact.

 20 The appellant adduced receipts which he claimed were issued
to him by the respondent whenever he paid off his debt.
However, the respondent disputed the receipts. To support this
argument, PW2 (Managing Director of the respondent company)
stated that the colours on the receipts presented by the

25 appellant were different from the colours of the company logo.

PW 2 pointed out that whereas some receipts had blue and red
colours, others had green and red colours. In addition, PW 2
also pointed out the fact that whereas some receipts were
worded FUELEX (U) LTD, others were worded FUELEX

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 5 (UGANDA) LIMITED. That these disparities showed the
appellant had forged the receipts.

The appellant did not give any explanation for these
discrepancies. I therefore find that he failed to prove that the
receipts in issue originated from the respondent company.

 10 Consequently, I would uphold the decision of the Court of
Appeal, that the respondent proved that the appellant owed the
respondent the sum of Ug shs. 34,278,845/=.

**Conclusion**

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Arising from the above, I would dismiss the appeal.

 Dated at Kampala this 6th day of Ocober 2017.

**......•.......................................**

**PROF. LILLIAN TIBATEMW A-EKIRIKUBINZA
JUSTICE OF THE SUPREME COURT**

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

*[CORAM: KISAAKYE; MWANGUSYA; OPIO-AWERI; MWONDHA;* & *TIBATEMWA-
EKIRIKUBINZA; JJ.S. c.}*

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CIVIL APPEAL NO 05 OF 2016

BETWEEN

GODFREY SSEBANAKITA APPELLANT

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AND

F

UELEX (U) LTD ,.,., RESPONDENT

 . . .

*[Appeal from the Judgment of the Court of Appeal (Nshimye, Kasule,* & *Buteera, JJA)
dated 6th November 2015* in *Civil Appeal No.* 04 *of 201 OJ*

JUDGMENT OF DR, KISAAKYE, JSC

 15 I have had the benefit of reading in draft the Judgment of my learned
sister Mwondha, JSC. I agree with her that this Appeal should be
dismissed with costs. I also agree with the orders she has proposed.

As the rest of the members on the Coram agree, this Appeal is hereby
dismissed on the terms and orders proposed by the learned Justice of
20 the Supreme Court.

 *06th*

 Dated at Kampala this day of October 2017 .

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JUSTICE DR. ESTHER KISAAKYE
JUSTICE OF THE SUPREME COURT

**THE REPUBLIC OF UGANDA**

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

(Coram: Kisaakye, Mwangusya, Opio Aweri, Mwondha and Tibatemwa-
Ekirikubinza JJSC)

**CIVIL APPPEAL NO. 04 OF 2016**

**BETWEEN**

 GODFREY SSEBANAKITA APPELLANT

**AND**

 FUELEX (U) LTD RESPONDENT

*(Appeal against the decision of the Court of Appeal before A.S Nshimye, Remmy
Kasule. Richard Buteera JJA delivered on the 6th day of November 2015 in Civil
Appeal No.38 of2010)*

**JUDGMENT OF MWANGUSYA, JSC**

I have had the opportunity of reading in draft the judgment of
Mwondha, JSC.

I agree with her that there is no justification for interfering with
the Court of Appeal decision and that this appeal should be
dismissed with costs in this Court and Courts below.

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 Dated this 06 day of *.. October 2017*

 Mwangusya

**JU TICE OF THE SUPREME COURT**

**THE REPUBLIC OF UGANDA**

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

(Coram: Kisaakye; Mwangusya; Opio-Aweri; Mwondha; Tibatemwa-
Ekirikubinza; JJ.S.C).

**CIVIL APPEAL NO. 04 OF 2016**

**BETWEEN**

**GODFREY SSEBANAKITA::::::::: :::::::::::::::::::::::::::::::** : APPELLANT

**AND**

FUELEX **(U) LTD :::::::::::::::::::::::::::::::::::::::::::::** RESPONDENT

*(Appeal against the decision of the Court of Appeal* at *Kampala before Hon.*

*Justice: Nshimye, Kasule, Buteera JJA, Civil Appeal No.* 38 *of 2010, dated 06TH
day of November, 2015)*

**JUDGMENT OF OPIO-AWERI, JSC**

I have had the benefit of reading in draft the judgment of my learned
sister, Hon. Justice Faith Mwondha, JSC. I agree with her that this
appeal should be dismissed. I also agree with the Orders she has
proposed.

 *06th*

 Dated at Kampala this October 2017.

**OPIO-AWERI,**

**JUSTICE OF THE SUPREME COURT.**