**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 of 2010*)

**JUDGMENT OF MWONDHA JSC**

Background:

The respondent between the months of September 2003 and August 2004 was approached by the appellant to supply the appellant with petroleum products. The respondent supplied him. 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 him only Shs. 18,991,700/= for the products supplied and a balance of Shs. 34,278,845/= was owed to him. 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 his 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:-

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 is 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 Courts below.

The appellant was dissatisfied with the decision hence this appeal in this Court.

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 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 to 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.

The appellant proposed to ask this Court to:

(a) Allow the appeal
(b) The judgment and decision of the Court of Appeal dated 6th November 2016 in Civil Appeal No.38 of 2010 be set aside & HCCS No. 640 of 2005 of the Commercial Division be dismissed with costs.
(c) Costs of the Appeal of this Court and Courts below be granted

**Representation**

Mr. Godfrey Mutaawe represented the appellant and 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, 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 others 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. 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/= it meant that he was indebted to the respondent to the tune of 25,711,720/= 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 admitted and there was nothing more to it.

He submitted further that the respondent did not discharge the burden to provethat the appellant breached the contract and therefore indebted to him. The respondent failed to produce Ms. Rugambwa as a witness who had made the admission. He argued that S. 101 & 102 of the Evidence Act casts the burden on the respondent which he failed to discharge.

On the other hand, counsel for the respondent 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 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 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 P1) which the respondent brought as evidence and had been extracted from EX D1 (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 & Receipt No.516 of 24/07/2004 in the names of Mukisa Mpewo Transport Co. among others.

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 an adverse inference

that failure of Ms. Rugambwa to come and be witness of the respondent amounted to an admission.

He argued that Justices of Appeal addressed their mind on Section 16 of the Evidence Act and concluded that they could not draw an 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:-

**".....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"**

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/=
>
> We had the opportunity to carefully read the proceedings of the trial court and the judgmentof the Court of Appeal. It was clear that the Court of Appeal was alive to its duty as the first appellate court when it was stated in the judgment as follows among others:
>
> **"The duty of this Court is to subject the evidence on record to a fresh review and scrutiny and come to its own conclusion bearing in mind, however, that it did not see or hear the witness testify at trial. See Rule 30 of the Judicature (Court of Appeal Rules) Directions SI.13-10"**
>
> The Court continued in the judgment as follows **"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..."**

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 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**." (Tsekoko JSC)

And also in the case of **Ephraim Orgoru and another Vs Francis Benega Bonge Civil Appeal No. 10 of 1987** it was stated **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)

In my view the re-evaluation the Court of Appeal made 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 1st appellate Court.

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 D1.

It was an agreed fact in the scheduling memorandum that EXD1 was 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.

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 that evidence as Justices were reviewing the evidence before the trial court.

The Court of Appeal aware of the burden of proof required and the law rightly **relied on 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 concur with the learned Justices of Appeal. 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 **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. 17(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 from which this appeal arose HCCS No. 640 of 2005. This was 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 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……." So the respondent cannot be faulted for that. Further to that the amount owed and due to the respondent was proved on a balance of probabilitiesby the respondent's evidence of the Audit report EX P1, which showed that the amount was Shs. 34,278,845/= contrary to what the appellant claimed was due and indebted. But whether the amount due was Shs. 34,278,845/= or Shs. 25,711,720/=, it all comes to one fact that the appellant was in breach of the contract and was indebted to the respondent.

As counsel for the appellant submitted that **S.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."

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.

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. Iam fortified 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 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/= 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.

It was apparent 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…….day of……2017

……

MWONDHA

**JUSTICE OF THE SUPREME COURT**