

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA  
(COMMERCIAL DIVISION)**

**HCCS NO. 334 OF 2002**

**CHRISTOPHER KISEMBO:..... PLAINTIFF**

**VERSUS**

**GLOBAL DISTRIBUTORS LTD:..... DEFENDANT**

**BEFORE: THE HON. LADY JUSTICE M.S. ARACH - AMOKO**

**JUDGMENT:**

The Plaintiff is a business man based in Ishaka, Bushenyi. The Defendant is a limited liability company located in Ntinda Industrial Area, Kampala. It deals in the distribution of products manufactured by the “House of Dauda”, including sweets and biscuits. The Plaintiff was its agent in Ishaka for many years. They had a credit arrangement which reached Shs.50m by 2001. The Plaintiff made several efforts to pay in vain. In April 2001, the Defendant requested for and Plaintiff’s driver delivered the Plaintiff’s Fuso Lorry Reg. No. UCS 214 to the Defendant’s premises at Ntinda Industrial Area.

The Plaintiff alleged in this case that his driver delivered the said lorry on the understanding that the Defendant had agreed to hire the said lorry at a rate of Shs1.5m per week. When the lorry was delivered to the Defendant’s premises on the 20/4/2001 to start work, the Defendant’s Manager impounded the lorry instead because of the outstanding debt. The Defendant refused to release the lorry to him despite numerous requests, until the said lorry was attached by the Court in Civil Suit No. 272 of 2002. The Plaintiff then filed this suit and prayed for:

- a. Shs.1.5m per week w.e.f 20/4/2001 till payment in full.
- b. Interest at bank rate on (a) from 20/4/2001 till payment in full.

c. Costs.

d. Any other relief.

In its written statement of defence, the Defendant denied impounding the said lorry or the contract of hire. It contended instead that the Plaintiff and his wife owed it a debt of Shs.54,850,000/, and the Plaintiff had as a consequence not only pledged the said lorry as security, but had invited the Defendant to repair and then hire it as well. The Defendant however avers that it did not hire the lorry as it was not in a road worthy condition.

Without prejudice to the foregoing, the Defendant also contended that the Plaintiff has no cause of action against it, and the suit is resjudicata since the issues raised by the Plaintiff were considered and resolved in C.S. No. 272/01 whereby the Plaintiff and his wife conceded that the said lorry was pledged as security with other plots, and undertook to pay Shs.54, 850,000/= within six weeks from the date of Judgment.

In view of the foregoing, the Defendant denied the remedies claimed and prayed that the suit be dismissed with costs.

The following were common grounds at the commencement of the hearing:

1. That the Plaintiff and his wife owed the Defendant Shs.54, 850,000/= prior to handing over the lorry to the Defendant.
2. That they had problems in paying the money.
3. They had pledged the title to plot No. 1016 Block 39 Igara, Bushenyi Road.
4. That the amount was not paid.

The following issues were agreed upon for determination by this Court:

1. Whether the Plaintiff hired the lorry to the Defendant or not as alleged. 2.
- Whether the Defendant impounded the Plaintiff's lorry or not.
3. Whether the Plaintiff is entitled to the remedies sought.

Apart from his own testimony, the Plaintiff called his wife, Mrs. Provia Kitembo (PW3) and his driver, one Ahmed Kaggwa (PW1) to support his case. The Defendant called the following witnesses:

1. Mr. Vinay Dawda - the Managing Director (DW1).
2. Mr. Ambrose Onoria - the Transport Manager/Assistant (DW2).
3. Mr. Francis Kavuma Kiwanuka (DW3).

I have dealt with the first two issues together, that is,

Whether the Plaintiff hired the lorry in question to the Defendant or not and whether or not the Defendant impounded the Plaintiff's lorry. Regarding the 1<sup>st</sup> issue, the Plaintiff insisted in his oral testimony that he did hire the said lorry to the Defendant. The Defendant on the other hand maintained that he didn't. It is not in dispute that there was no written agreement for the hire of the lorry. The decision on this issue therefore depends entirely on the oral testimony of the witnesses.

I will start with the Plaintiff's side. The relevant testimony came from the Plaintiff himself as PW2 and his wife (PW3). The Plaintiff stated in his evidence in chief that:

*"In April 2001 on if I met Mr. V/nay at his office in Ntinda. We discussed business of transport. He asked me to provide him transport of my 25 tonne lorry - UCS 214 Fuso. We agreed that I should bring the lorry in his factory. We agreed on the payment at Shs. 1. 5m per week after expenses had been knocked off. I told him that the lorry is up country and I left it proceeding to Rwanda taking salt. When it is back I would send it to Vinay"*

And then:

*“The lorry was delivered to Vinay by my wife and Ambrose Onorio... my driver Ahmed with my Manager Edmund Asingwire... I went there after one week at Britania and I wanted to know why the agreement of the business was not signed. We had arranged that an agreement of hire would be signed. I found the lorry parked there. I didn't find Vinay... I rang him and he told me that he still had a problem with my lorry and the company management... He didn't pay me the weekly money and he didn't release the lorry to me. He told me I had some outstanding debt with the company which I had to clear first. I had his debt of Shs.42m. That is the reason why he didn't want to pay me or to release the forty.”*

Mrs. Kisembo (PW3) on her part testified that on the 17/4/2001 she was at home in Ishaka when Mr. Vinay rang them (Mrs. Kisembo and her husband) and told them that he had a lot of work. On the 18/4/2001, the following day, she travelled to Mr. Vinay's office. He told her that he had a lot of work of transporting biscuits to some places. She stated that:

*“He wanted our forty UCS 214-25 ton Fuso Lorry. He told me that we are going to hire the forty at Shs. 1.5m per week. We had a debt to the company. He said we would pay 1/2 and remain with 1/2 to clear the debt. We agreed on the arrangement. He told me to go and bring the lorry because they wanted it urgently... By that time it was 20/4/2001 next day, and it was Friday. The Managing Director told Ambrose in my presence that you tell the driver where to park the vehicle then we shall make the agreement on Monday... The driver parked the lorry... On Monday, I went back to his office and he told me that he had impounded the forty. I asked him the reason and he kept quiet.”*

During cross examination Mrs. Kisembo first of all denied swearing the affidavit in HCCS No. 272/2001. When she was shown the affidavit (Exhibit D1) she changed her position and agreed she signed it. She however became angry and rude when he was put to task to explain why she had sworn in her affidavit in CS No. 272/2001 that they had entered into a verbal agreement that the Defendant should use the said lorry w.e.f 20/4/2001 at a rate of Shs.600,000 per day to settle the outstanding debt of Shs.42,645,000/; and not Shs.1.5m per week as she alleged in her testimony. When she was questioned further, she stated that it was a

mistake. I must say, I found Mrs. Kisémbó's testimony riddled with falsehoods and inconsistencies. She was also rude and evasive and I have disregarded most of her testimony.

Mr. Vinay (DW1) on the other hand gave a detailed history of how the said lorry came to be delivered to the Defendant's premises. I found his testimony consistent and I believe him. He stated that the Plaintiff had a good business relationship with the Defendant Company as an agent in Ishaka. They started a small credit arrangement which later on grew. Mr. Kisémbó gave security of a piece of land at first and then a house in Ishaka on which the company registered an interest. Mr. Kisémbó prospered in business and even bought a petrol station and a lock up shop. However, the business subsequently hit a snag and Mr. Kisémbó failed to pay the credit which had by then reached over Shs.50m for goods supplied to him by the Defendant. The Defendant started asking for payment and he was polite at first and would promise to pay. He didn't pay and the Defendant sent a demand Form that day. Mr. Kisémbó disappeared from the scene and put his wife (PW3) forward until 3 months ago when he resurfaced. The wife then deposited Shs.3m towards the debt. She also offered their Pajero which was used to off set about Shs.7m from the debt. They still failed to clear the debt. The company did not sell the house because of sympathy.

Mr. Vinay said:

*"Mrs. Kisémbó came to our office and said she would be ready to bring that lorry to our office in Kampala and then see how we can off set the debt using the lorry, or see how we can use it In reducing the debt. We said we would decide after we had looked at the lorry.... Finally the lorry came. I looked at the lorry. According to our assessment it was not in a proper condition. We decided not to use it or to have a good enough value to be able to offset the debt....We carried out a valuation and found that we would need about Shs.12 - 15m to put it in order. When we saw that the lorry was not worth the security we had in our mind, we did not consider it worthy to put money on the lorry. It didn't make business sense because I was trying to recover a debt. It was like throwing good money over bad money... Their own driver drove the lorry to our offices. I never agreed to hire the said lorry at Shs.1. 5m per week. I transport goods throughout Uganda. If you take Shs. 1. 5m per week, that would be*

*Shs.6m a month you could buy another vehicle in six months. In other words we could have bought a better vehicle than that of Kisémbó that time. We could add a few shillings and get a better lorry than Kisémbó '5. If he could fetch that kind of money, he could have hired it out in the open market and paid my money.”*

Mr. Vinay also denied that he met Mr. Kisémbó on 15/4/2001 because it was a Sunday and they do not work on Sundays. Further Mr. Vinay stated that he was out of the country on that day, he had left for Kenya on 12/4/2001 and he returned on 17/4/2001. Mr. Kisémbó had stopped coming to see him in 2001. It was his wife who used to come to him. He tendered a page of his passport as Exh. D4. He denied into any agreement for hire with Mr. Kisémbó totally.

From the evidence on record, it is clear that Mr. Kisémbó lied when he said that he met Mr. Vinay on 15/4/2001 and agreed on the hire of the lorry. Mr. Vinay passport Exh. D4 clearly shows that he was out of the country and in Kenya from 12/4/2001 to 17/4/2001.

Secondly, Mr. Vinay has stated and I believe him that Mrs. Kisémbó now came into the forefront when the husband failed to pay the debt. That explains why she is the one who went to Mr. Vinay's office on the 18/4/2001 to discuss the issue of the lorry and offered and indeed delivered the lorry to the Defendants premises on 20/4/2001 instead of her husband.

Thirdly, Mrs. Kisémbó is the one who made frantic efforts to save the situation when she delivered the Shs.3m and the Pajero.

Fourthly Mr. Vinay has stated and it can be gathered from the testimony of all the key witnesses that the lorry was delivered to the Defendant's premises in an effort to settle the outstanding debt. Mr. Vinay thought he could use it to transport their products but discovered that it was in such poor mechanical condition that it could not be repaired and hired. Therefore the Defendant declined to use it and instead he impounded it to recover their

outstanding debt.

On the basis of this, I find as a fact that there was no contract of hire between the parties. I find as a fact that although the vehicle was delivered to be hired, the Defendant changed its mind due to its poor mechanical condition, and decided to impound it instead. The answer on the first issue is accordingly in the negative and the second issue is answered in the affirmative.

The third issue is whether the Plaintiff is entitled to the remedies sought. Having held as I have on the two issues, the Plaintiff is therefore not entitled to the remedies sought, namely the Shs.1.5m per week for the hire of the lorry. This is simply because the Plaintiff's claim is based on the alleged contract of hire which I have not found to exist. In the result this suit is hereby dismissed with costs to the Defendant.

M.S. Arach - Amoko

**JUDGE**

31/5/2004