

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**(COMMERCIAL COURT DIVISION)**  
**HCT - 00 - CC - CS - 182 - 2007**

**KUEHNE & NAGEL LTD ::: PLAINTIFF**

**VERSUS**

**FORWARD INTERNATIONAL LTD ::: DEFENDANT**

**BEFORE: THE HON. JUSTICE GEOFFREY KIRYABWIRE.**

Civil law and procedure – contract – breach of contract  
Contract – detinue – right to a lien

**JUDGMENT:**

The plaintiff M/S Kuehne & Nagel Ltd, a limited liability company incorporated in Uganda brought this suit against the defendant, Forward International Ltd, for the recovery of US \$ 43,842.04 being special damages arising of the defendant’s breach of contract, general damages, interest and the costs of the suit.

The plaintiff’s case is that, the defendant imported cargo from Japan which arrived at Mombasa port on 9<sup>th</sup> April 2005 on a charges collect basis. The cargo constituted two Isuzu trucks and car parts in 2 feet containers. On 7<sup>th</sup> September 2005, the defendant through its Managing Director hired the plaintiff to clear and transport the cargo from Mombasa to Kampala. At the time the time of the hire the defendant’s cargo had spent more than 4 months at the Mombasa port and had accrued various port charges. The plaintiff averred that among the accrued charges, there were storage charges which the defendant sought to be waived by the Kenyan Port Authority (herein after referred to as KPA) but the waiver was rejected. On 2<sup>nd</sup> November 2005, the defendant requested the plaintiff to appeal to KPA’s decision. An appeal to waive taxes was made on 5<sup>th</sup> November 2005 and this appeal was also rejected by KPA on 29<sup>th</sup> November 2005. The plaintiff further averred that subsequent to the rejection of the defendant’s appeal, the defendant instructed the plaintiff to clear its cargo on the understanding that the defendant will settle all expenses incurred by the plaintiff and the plaintiff’s charges. The plaintiff averred that it paid a total sum of US \$ 64,192.04 on the Defendant’s account but, the defendant only reimbursed US \$ 20,350 leaving a balance of US \$ 43,842.04 which is still outstanding to date. The plaintiff averred that the defendant requested the plaintiff to release the cargo and offered as security for payment for settlement of the

defendant's fees and expenses arising out of the payments made by the plaintiff, registration books of five Isuzu trucks and 1 (one) motor vehicle. Efforts by the plaintiff to have the balance settled have to-date been fruitless. It is the plaintiff's case therefore that the defendant's conduct amounted to a breach of contract subsequent to which the plaintiff has suffered loss.

The defendant denied any liability and averred that its Managing Director Mr. Swi Tim Tal who negotiated with M/s Delmas (K) Ltd and got 100% waiver of the demurrage charges on the understanding that the defendant clears the outstanding freight charges. The defendant contends that it contracted M/S Seven Seas Forwarding & Clearing Agents to clear and transport the containers from Mombasa to Kampala, but the said Seven Seas Forwarding & Clearing Agents could not fulfill its obligations as the import documents had been illegally detained by the plaintiff whereupon the defendant was constrained to reluctantly allow the plaintiff to clear the goods in question. The defendant avers that it had cleared all relevant port charges which had accrued and had obtained a waiver by the Kenya Port Authority. It is the defendant's case that the alleged charges claimed in this suit were occasioned by the plaintiff's delay to transport the said containers to Kampala. The defendant contends that it was agreed with the plaintiff that the defendant reimburses the plaintiff's bonafide expenditures upon the plaintiff's production of documentary proof thereof which the plaintiff failed to do. The defendant further contends that it duly paid a total sum of US \$ 20,350 to the plaintiff and thereby discharging its obligations to the plaintiff. The defendant therefore prayed that the plaintiff's suit be dismissed with costs.

The defendant brought a counter claim against the plaintiff for an order that the plaintiff delivers up to the defendant the security documents given to the plaintiff namely, 8 registration cards and one unit of a motor vehicle, Isuzu Fargo Minibus, General Damage for breach of contract, conversion and detinue and costs of the counterclaim.

The following issues were raised;

1. Whether the defendant owes the plaintiff a sum of US \$ 43,842.04 for services rendered by the plaintiff to the defendant?
2. Whether the plaintiff is liable in detinue for not having released to the defendant the registration cards deposited to secure the defendant's debt?
3. Whether the plaintiff is liable for breach of contract as pleaded in the counterclaim?
4. What remedies are the parties entitled to if any?

Mr. Isaac Walukaga appeared for the plaintiff while Mr. John Mary Mugisha appeared for defendant. The plaintiff called Kassim Ngude (PW1) the operations manager for Kuehne & Nagel Uganda whereas the defendant called Mr. Swi Tim Tal (DW1) the Managing director of the defendant company.

Before I deal with issues as framed I need to recall that during the proceedings the defendant with leave of Court took out Third Party proceedings for indemnification against M/s Delmas For US \$ 8,0156.00 in respect of demurrage charges. M/s Delmas did not respond to service of process and default Judgment was accordingly entered against them on the 31st March 2009.

**Issue No. 1: Whether the defendant owes the plaintiff a sum of US \$ 43,842.04 for services rendered by the plaintiff to the defendant?**

Counsel for the plaintiff submitted that Mr. Kassim Ngude (PW1) testified that the plaintiff transported the defendant's cargo and cleared the Mombasa port and all related charges on behalf of the defendant. Kassim Ngude further testified that the plaintiff and the defendant entered into an agreement wherein it was agreed that the plaintiff transports the defendant's cargo from Mombasa to Kampala and that the plaintiff pays all charges levied by the Kenya Ports Authority (KPA), Customs Warehouse Rent, Shipping line charges, demurrage and that all these expenses would be reimbursed by the defendant once the cargo gets to Kampala. It was the testimony of Kassim Ngude that between the 7<sup>th</sup> and 10<sup>th</sup> of September 2005, the plaintiff received instructions from the defendant to clear and forward its cargo from Mombasa to Kampala. It was subsequently discovered by the plaintiff that the defendant's cargo had arrived at Mombasa Port on the 10<sup>th</sup> of April 2005 and that by the time the plaintiff got instructions to clear the said cargo, it had attracted KPA charges, Customs Warehouse Rent, demurrage and other attendant charges. Kassim Ngude testified that the plaintiff safely transported the defendant's cargo to Kampala. However, that the defendant did not fully meet its obligations to the plaintiff.

Counsel for the defendant however submitted that the plaintiff has no claim against the defendant and has failed to discharge its burden of proof as provided for under Section 101 of the Evidence (Act Cap 6). Counsel for the defendant further submitted that the plaintiff has not supported its assertions with evidence and that the documents tendered in by the plaintiff were insufficient/ lacking to convince the court to conclude that they were genuine expenses incurred on behalf of the defendant. With regard to the transportation charges from Mombasa to Kampala, the defendant conceded to the said expenditures but contended that it paid the said sums of money to the plaintiff and therefore the plaintiff is estopped from

claiming the same from the defendant. Counsel for the defendant further submitted that the letters dated 9<sup>th</sup> September 2005 and 10<sup>th</sup> September 2005 [Exhibits P3 (i) and (ii)] are not denied in so far as Mr. Swi Tim Tal (DW1) testified that he had requested for a waiver but it was rejected. The defendant however denied the KPA invoice and the Account statement of the plaintiff [marked Exhibit P.5 (i) and (ii)] as the said exhibits showed money transfers by the plaintiff through Citibank but the same did not create a nexus with the defendant. Counsel for the defendant further submitted that the payment details [Exhibit P.5 (iii)] which bears the defendant's name was the plaintiff's own document whose authenticity is questionable. It was the defendant's submission that the monies transferred under Exhibits P.5 (i) and (iii) were not for the defendant and that there was no sufficient evidence to show that the payments were for benefit and or on behalf of the defendant. With regard to the demurrage charges of US\$ 8,016, counsel for the defendant submitted that they were paid by the plaintiff without the authorization from the defendant and that at the time of payment of the demurrage charges by the plaintiff there was no valid subsisting contract with the defendant and the defendant did not ratify any such actions by the plaintiff. Counsel for the defendant therefore submitted that the plaintiff has failed to execute its duties as per the contract and that the court should therefore reject their claim.

I have addressed myself to the submissions of Counsel for the plaintiff and the evidence before court on this matter. This issue raises a claim in special damages for reimbursement of monies spent by the plaintiff in providing clearing and forwarding services to the defendant.

To my mind based on the evidence before me it is simply a question of what was the actual cost of the service provided by the plaintiff to the defendant. The two parties do not agree on this point as the defendant takes the position that the money it paid the plaintiff clears the cost of the service provided by the plaintiff.

Mr. Kassim Ngude (PW1) testified that the plaintiff and the defendant entered into an agreement wherein it was agreed that the plaintiff transports the defendant's cargo from Mombasa to Kampala and that the plaintiff pays all charges in levied by the Kenya Ports Authority (KPA), Customs Warehouse Rent, Shipping line charges, demurrage and that all these expenses would be reimbursed by the defendant once the cargo gets to Kampala. Further, there is documentary evidence (Marked Exhibit P.5 –P.18) before court showing various payments for KPA storage charges, Kenya Revenue Authority Customs Warehouse Rent and the shipping line demurrage paid by the plaintiff on behalf of the defendant. Some of these

documents namely KPA invoices marked exhibit P.5, P.6 (ii) and P.12, indicate the defendant's name and the Release order No.584152. However Exhibit P.6 (i), P.7 (ii), P.9 (i), P.9 (ii) do not indicate the defendant's name but indicate the release order number. Mr. Kassim testified every shipment that comes in port is given one release order and that all invoices generated by KPA shall bear that number. This number according to Mr. Kassim can be used to identify the owner of the shipment. Exhibit P.11, P.13, P.14, P.15 and P.16 are payments slips for customs wear house rent which were paid by the plaintiff on behalf of the defendant, however the name of the defendant is not indicated on the document. Exhibit P.18 is an invoice for transportation of the cargo from Mombasa to Kampala. The sum total of the above is that the services provided and paid for by the plaintiff on behalf of the defendant is \$ 64,192.04 of which the defendant paid \$ 20,350 leaving a balance of \$ 43,842.04

Counsel for the Defendant in reply submits that the plaintiff has failed to prove on the balance of probabilities that the defendant owes it the said US \$ 43,842.04 for the services purportedly rendered to it. The defendant contests the evidence adduced by the plaintiff and asserts that it had paid all the monies owed to the plaintiff and that the documents tendered in by the plaintiff were insufficient to convince the court to conclude that they were genuine expenses incurred on behalf of the defendant. With regard to the demurrage charges Mr. Swi Tim Tal however testified that the defendant had received 100% waiver from M/s Delmas after paying a total sum of US\$ 10,660.00 for freight charges as agreed to in a letter dated 12/8/05 and E-mail dated 12/8/05 [Exhibit D2 (i-ii)]. During Cross examination however, Mr. Swi Tim Tal testified that he was never given any document showing that the 100% waiver had actually been given to him but he was given a delivery order which he gave to the plaintiff company.

I find the defence evidence and submissions of Counsel for the defendant to be legally technical without specifically addressing the issue of what it actually cost the plaintiff to deliver the goods/cargo of the defendant from Mombasa to Kampala. What is clear in my mind is that the parties agreed that plaintiff would provide some sort of credit to the defendant in that it would clear and forward the defendant's goods/cargo and invoice for them later or need be. There is also no doubt that the defendant's goods/cargo had over stayed at the port attracting all sorts of penalties and demurrage. The evidence also shows that the defendant tried its best efforts to get these penalties and demurrage waived without much success which compounded the clearing process.

Apart from the receipts adduced in evidence by the defendant marked exhibit D1 (i-viii) showing the payment of a total sum of US \$ 20,350 to the plaintiff there is no further evidence of payment. This figure tallies with the evidence of the plaintiff. Furthermore the evidence of Mr. Ngude for the plaintiff was clear and straight forward as to how remaining balance of US \$ 43,842.04 comes about and looking at the facts on the whole; it is true and I so find that the defendant owes and never paid to the plaintiff the remaining balance of US \$ 43,842.04.

**Issue No. 2: Whether the plaintiff is liable in detinue for not having released to the defendant the registration cards deposited to secure the defendant's debt?**

It is an agreed fact that the defendant deposited with the plaintiff 8 registration books as security from the settlement of its debts to the plaintiff. It is the case for the defendant that it is not indebted to the plaintiff as it paid them all their dues and the registration books deposited as security ought to have been released to it. Having failed to release the said books, the defendant contends that the plaintiff is liable in detinue. Counsel for the defendant referred the court to the case of **Christine Bitarabeho .Vs. Edward Kakonge S.C.C.A No.4 of 2000** where court held that a cause of action in detinue arises from the defendant's refusal to return the goods on demand. The essence of detinue is that the plaintiff maintains and asserts his property in the goods up to the date of judgment.

It was counsel for the defendant submission that the plaintiff is liable in detinue in so far as it detained and is still detaining the defendant's goods without any lawful excuse. Counsel for the defendant further submitted that whereas the detention of the defendant's goods, logbooks was initially lawful, it became unlawful the time the 1<sup>st</sup> defendant paid the sum of US\$ 20,350 to the plaintiff and demanded for the release of the logbooks and vehicle. Counsel for the defendant therefore prayed that the plaintiff be found liable in detinue.

Counsel for the plaintiff on the other hand referred court to the text in **Salmond & Heuston on the Law of Torts 20<sup>th</sup> edition, 1992 at page 116** where the learned authors defined detinue as follows;

*“The common law was that a claim in detinue lay at the suit of a person who had an immediate right to the possession of the goods against another who is in actual possession of them, and who, upon proper demand failed and or refused to deliver them up without lawful excuse.”*

Counsel for the plaintiff cited the case of **Trucks & Spares Ltd .V. Maritime Agencies (Southampton) Ltd [1951] 2 ALLER 982 at page 983** Denning L.J held that,

*“If there was an agreement for a lien on general account then, of course, then the purchasers from Hamilton (original owner) would not be in a better position than Hamilton himself and could only take subject to the lien.”*

Counsel for the plaintiff submitted that under common law, one is liable in detinue only if there is failure to deliver up goods without lawful excuse. It was counsel for the plaintiff’s submission that the plaintiff is not liable in detinue because, firstly, no formal demand has ever been made for the registration books and the motor vehicle and secondly, that the plaintiff has a lawful excuse for keeping the registration books and motor vehicle as they are security for payment of monies owed to it. Counsel for the plaintiff therefore submitted that the only reason why the defendant has never made a demand for the registration books and motor vehicle is because he was at all times aware of its indebtedness to the plaintiff.

I have perused the submissions of both counsels for the plaintiff and the defendant and I reviewed the evidence in relation to whether the plaintiff is liable in detinue for not having released to the defendant the registration cards deposited to secure the defendant’s debt.

I believe that both Counsels have expounded correctly on the law relating to detinue and I shall not review the authorities on it further.

In the instant case, it is an agreed fact that the defendant deposited with the plaintiff 8 registration books and a motor vehicle as security from the settlement of its debts to the plaintiff. There is evidence on record that is a letter dated 6<sup>th</sup> July 2006 (Exhibit P.20) showing that 5 registration books were deposited with the plaintiff as security for payment of debts owed to the plaintiff by the defendant. A close look at the copy of registration books No.277928, 285181 and 277792 there is a note stating that;

*“Original received by Kassim Ngude of Kuehne and Nagel as further security of the money owed to Kuehne and Nagel by Forward International.”* This note was signed and dated the 9<sup>th</sup> of May 2006.

I have already found under issue No.1 that the defendant still owes the plaintiff a sum of US \$ 43,842.04 for services rendered by the plaintiff. One cannot therefore say that there is no lawful excuse why the log books and vehicle are still being held. These items are being held by agreement of the parties themselves to secure payment for services rendered by the plaintiff which payments I have found to still be outstanding. Furthermore a look at the FIATA model rules for freight Forwarding services (under which this contract was carrier out) Para 15 allows the freight forwarder to hold a general lien on the goods and any documents related thereto until it is paid; which is the case here. On those grounds, I find that plaintiff is not liable in detinue for not having released to the defendant the registration cards deposited to secure the defendant’s debt

**Issue No. 3:                    Whether the plaintiff is liable for breach of contract as pleaded in the counterclaim?**

It is the case for the defendant that the plaintiffs are in breach because they failed to deliver the said goods to Kampala from Mombasa to enable the defendant transact his business and in particular 7 days as pleaded in the Para 30 of the counter claim.

On the other hand it was counsel for the plaintiff’s submission that the defendant did not hire the plaintiff to transport its cargo within 7 days. He referred court to the evidence adduced by Mr. Kassim Ngude who testified that the defendant and the plaintiff did not agree to have the cargo transported within 7 days as this was not practical for a number of reasons including expired entries since the defendant’s cargo had been at the port for sometime, applications for waivers on KPA charges and the Customs Ware House Rent. Counsel for the plaintiff therefore submitted that there was no breach by the plaintiff in this regard.

In light of the evidence I have reviewed above I find Mr. Ngude’s testimony on this issue to be credible. Mr. Swi Tim Tal had testified that it was agreed that the plaintiff was to transport its cargo and delivered it to the defendant within 7 days. There is no independent evidence to support this 7 day assertion and in any event I do not see how this was possible given the problems caused by the goods having overstayed at the port of Mombasa without clearance.



I therefore answer this issue in the negative.

**Issue No. 4: What remedies are the parties entitled to if any?**

The plaintiff prayed for the recovery of US \$ 43,842.04 being special damages arising of the defendant's breach of contract, general damages, interest at a rate of 24% and the costs of the suit

Given my finding in issue no.1 that the defendant still owes the plaintiff a sum of US \$ 43,842.04 for services rendered by the plaintiff. I hereby award US \$ 43,842.04 to the plaintiff as special damages arising of the defendant's breach of contract.

I now turn to the issue of general damages. Lord Nicholls restated the general position in the case of **Attorney General v Blake, [1998] 1All E R 376 at page 309** thus,

*'As with breaches of contract, so with tort, the general principle regarding assessment of damages is that they are compensatory for loss or injury. The general rule is that, in the oft-quoted words of Lord Blackburn, the measure of damages is to be, as far as possible, that amount of money which will put the injured party in the same position he would have been in had he not sustained the wrong'*

Counsel for the plaintiff did not address Court as to the quantum to be applied in this situation. I accordingly award 5,000,000/= (five million Uganda shillings) as general damages to the plaintiff.

The plaintiff also prays for interest on the amount at a rate of 24% from the date of filing this suit till payment in full.

I however award interest of 21% per annum (which is more in line with current commercial interest rates today) on the US \$ 43,842.04 prayed for by the plaintiff for breach of contract from the date of filing the suit until payment in full and 8% per annum on the general damages from the date of this judgment until payment in full.

I also award the plaintiff the costs of the main suit.

As regards the counterclaim, I hereby dismiss it with costs. I further order that the plaintiff may enforce its lien on the vehicle it has of the defendant which is still in their possession by way of execution using the normal court process; to clear its debt. The cards of the other vehicles not in possession of the plaintiff should be returned to the defendant

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**Geoffrey Kiryabwire**  
**JUDGE**

**Date: 13-01-11**