THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL SUIT NO 180 OF 2009

SAAHIB ENTERPRISES LTD} ……PLAINTIFF

VERSUS

OLAM UGANDA LIMITED} ……DEFENDANT

BEFORE HONOURABLE MR. JUSTICE CHRISTOPHER MADRAMA

JUDGMENT

The plaintiffs claim in the plaint is for refund of US$ 41,650.00 and or specific performance of the contract, general damages and costs of the suit. The plaintiff avers that on the 15th of February 2007, the defendant agreed to supply the plaintiff 1000 metric tons of Brazilian Brown Sugar at US$ 583,000.00 and the plaintiff made a part payment of US$274,500.00. The plaintiff further alleges that the defendant supplied the plaintiff with sugar worth 232,850.00 before stopping the supply and leaving a short delivery of sugar worth US$ 41,650 out of the amount paid. The plaint avers that the defendant failed to supply the sugar paid for and therefore seeks refund of US$ 41,650.00 from the defendant or alternatively delivery of 71.4 metric tons of sugar, general damages and special damages, interests on the special damages, general damages and costs of the suit.

For its part the defendant in its written statement of defence disputed the plaintiffs claim for a refund of the sum claimed in the plaint. The defendant admits executing a contract for the purchase by the plaintiff of 1000 metric tons of sugar and receiving the deposit but avers that:

1. It was the duty of the plaintiff to take delivery of the sugar fully paid for after paying the requisite taxes, duties and transfer of ownership fees to the Uganda Revenue Authority.
2. That at all material times there were sufficient stocks of sugar with the defendant for the plaintiff to take delivery of upon full payment for each of such quantities of sugar as the plaintiff wished to take at any particular time;
3. That the plaintiff took delivery of quantities of sugar on four different occasions namely 20 February 2007, 26 February 2007, 7th March 2007 and 16th March 2007 totaling 408.30 metric tons but thereafter failed, neglected and/or refused to take delivery of the remaining tons contracted for which at all times the defendant was ready and available for collection as stated above.

4. The defendant denied having difficulties in delivering the sugar. The defendant further denied that it failed to refund the claimed sum and averred that the entire amount was offset wholly by warehouse rental fees incurred by the breach and failure of the plaintiff to take delivery of the remaining contracted sugar and by loss suffered by the defendant in eventually having to sell of the said remaining contracted sugar at a loss due to the said breach and failure of the plaintiff.

In the joint scheduling memorandum of the parties the agreed facts are:

1. The plaintiff is a limited liability company incorporated and carrying out business in Uganda.
2. The defendant is a limited liability company incorporated and carrying out business in Uganda.
3. By agreement dated 15th of February 2007 the plaintiff contracted with the defendant for the plaintiff to purchase from the defendant 1000 metric tons of Brazilian Brown sugar for a total consideration of United States dollars 583,000 at United states dollars 583 per metric ton.

The scheduling memorandum of the parties further provides for facts asserted by the plaintiff but denied by the defendant as follows:

a. The plaintiff contends that the defendant failed to deliver more sugar to it and has failed to refund the sum of United States dollars 41,650 being the difference between the amounts deposited and the amount representing the price of the sugar which the plaintiff took delivery of.
b. The plaintiff's efforts to collect the paid for stocks of sugar were futile as the defendant failed to deliver it and became hostile; which prompted that the plaintiff to write a demand for a refund of the balance due.
c. The plaintiff's demands a refund of that sum or in the alternative delivery of 71.44 metric tons of sugar.

Defendant’s contentions but denied by the plaintiff were as follows:

a. The defendant contends that it was the duty of the plaintiff to take delivery from the defendant’s bonded warehouse of sugar that was fully paid for and after the plaintiff had paid the requisite taxes, duties and transfer of ownership fees to the Uganda Revenue Authority.
b. The defendant further contends that at all material times there were sufficient stocks of sugar with the defendant for the plaintiff to take full delivery upon making full payment for each of such quantities as the plaintiff wished to take at any particular time.
c. The defendant contends further that the plaintiff failed and/or refused within a reasonable time or at all to pay for and take delivery of the remaining tons of

sugar contracted for which was at all material times ready and available for collection upon payment.

d. The defendant finally contends that it suffered warehousing losses by the plaintiff's failure to pay for and take delivery of the remaining tons of sugar contracted for as well as losses in eventually selling off the same at lower prices.

Agreed issues:

1. Whether the plaintiff's efforts to collect the contracted sugar were frustrated by the defendant.
2. Whether it was the duty of the plaintiff to take delivery from the defendant's bonded warehouse of sugar that was fully paid before and after the plaintiff had paid the requisite taxes, duties and transfer of ownership fees to the Uganda Revenue Authority.
3. Whether there was at all material times sufficient stocks of sugar with the defendant for the plaintiff to the full delivery upon making full payment for each of such quantities as the plaintiff wished to take at any particular time;
4. Whether the plaintiff failed and/or refused within a reasonable time or at all to pay for and take delivery of the remaining tons of sugar contracted for;
5. Whether the defendant suffered warehousing losses by the plaintiff's failure to pay for and take delivery of the remaining tons of sugar contracted for as well as losses eventually selling of the same at lower prices;
6. Whether the plaintiff is entitled to the remedies prayed for.

At the hearing the plaintiff was represented by Counsel Kamugisha Vincent of Messrs Kamugisha and Company Advocates, while the defendant was represented by Counsel Didas Nkurunziza of Messrs Didas Nkurunziza and Company Advocates. The plaintiff called one witness and the defendant called one witness. Both parties filed written submissions.

The plaintiff's submissions:

The plaintiffs brief facts were that the plaintiffs MD (PW1) One Yusuf Yahaya testified that out of United States dollars 274,500 paid to the defendant as part payment, only sugar worth United States dollars 232,850 was delivered. The plaintiffs demand for delivery of the remaining sugar and/or the balance of the money were ignored.

The plaintiff argued issues 1, 2, 3, and 4 together which he submitted was due to their interconnectedness. Plaintiff submissions are that PW1 gave the procedure the plaintiff would go through before taking delivery of the sugar paid for in exhibit P3 dated 10th of February 2007. The plaintiff would place an order/request through its clearing agent for a specific quantity of sugar, which request would in turn trigger of the following steps.

Because the sugar was technically owned by the defendant, it would on receipt of the plaintiffs order, write to Uganda Revenue Authority asking it to transfer ownership of the quantity required by the plaintiff (see exhibits D4 and D5). In the meantime the defendant and the plaintiff would execute a mini contract indicating how much has been ordered for and what its costs are for purposes of accounts reconciliation and transfer fees payment. Dates for the request to transfer ownership and local sales contract for each delivery are similar, indicating that they would be executed on the same day, before sending the request for transfer to Uganda Revenue Authority.

Uganda Revenue Authority on receipt of the defendant's request for transfer of ownership would in turn instruct the plaintiff to pay transfer fees as indicated by the hand written instructions on exhibit D4.

The plaintiff’s counsel contended that it is not true as DW1 testified that payment of transfer fees by the plaintiff would precede the defendant’s instructions to Uganda Revenue Authority to transfer ownership. Using exhibits D4 as an example, one can clearly see that its date is the same as exhibit D5 while the hand written instructions on exhibit D4 by Uganda Revenue Authority officials bear subsequent dates. This therefore, conclusively puts to rest any doubts that payment of transfer fees would precede the defendant's request to Uganda Revenue Authority to effect to a transfer.

In other words Uganda Revenue Authority would have no basis of assessing and collection of fees if not informed by the hitherto owner of goods (defendant) that a certain quantity is available at a specific cost for transfer to the plaintiff.

Therefore DW1's testimony that the plaintiff failed to pay taxes and take delivery of the sugar falls flat on its face in the absence of exhibits D4, D5 for the alleged non-lifted sugar. Such an agreement would be believable if documents were produced to the effect that Uganda Revenue Authority was asked to transfer the sugar but the plaintiff failed to pay the taxes. No such evidence was produced by the defendant. Interestingly the defendant which claimed to have had sugar all the time failed to deliver it even on receipt of exhibit P1 dated 5/11/2007; which was a demand by the plaintiff.

In view of the above the plaintiffs submitted that even though it was the plaintiff's duty to take delivery of the sugar it had paid for from the defendant’s bonded warehouse, its attempts were frustrated by the defendant who either didn't have it or deliberately refused to release it on demand.

Issue 5

DW1 testified that the defendant had specifically imported sugar to satisfy the plaintiff’s contract. That when it failed to lift it within the time given by the Uganda Revenue Authority to dispose it off, run out, it wrote and obtained permission revoking the bond but unfortunately the prices have gone down and it had to sell it at a loss.

In cross examination he stated that Uganda Revenue Authority always waits for 3 months before intervening in cases where the buyer fails to pick its consignments. But when he was reminded that it took six months between delivery of the first and last consignments in February and July 2007 respectively which was more than three months he backtracked that the defendant in this case obtained an extension after the expiry of the initial three months. He however failed to produce the copy of the said extension by Uganda Revenue Authority.

It is the plaintiff's contention that DW1 stunned court that because of the plaintiffs' alleged failure to lift the sugar this led the defendant to incur losses by selling it cheaply. DW1 relied on exhibits D41, D43, D45, D47, D49 and D51 which were summaries of sales for different months. He sought to justify the defendant's non-delivery on the argument that if the plaintiff had taken the sugar there would have been no need to sell it to others at give away prices. However counsel submitted that this is rendered hollow by exhibit P1 and the question is why would the defendant choose to sell its sugar at a giveaway price when there was a ready buyer (plaintiff) offering a better price.

The plaintiff's counsel submitted that the defendant suffered no losses as alleged by DW1 and that this was simply a case of unjust enrichment, and DW1 testimony was a pack of lies and court should find him as an untruthful witness.

Issue 6

It is the plaintiff's further submission on issue 6 that the plaintiff proved on a balance of probabilities that the defendant failed to fulfill the contract and/or reimburse its money since October 2007 to date. PW1 in this testimony stated that the plaintiff had won a contract to supply the SPLA of southern Sudan and because of the defendant's breach, it lost the contract. It is not known for how long the contract would have run but had the plaintiff performed, it would have raised its track record and qualified it to supply for a longer time. The plaintiff therefore lost potential business that would have stretched for a number of years. He contended that in the circumstances general damages of Uganda shillings 100 million would fairly and adequately compensate the plaintiff for the loss suffered. He prayed for interest from the time the plaintiff was deprived of use of its money and for costs of the suit.

Submissions of the defendant

The defendants counsel contended that the facts of this suit were relatively clear and simple.

The defendant is a wholesale importer and dealer in commodities one of which is sugar. By contract dated 15 February 2007 the plaintiff agreed to purchase from the defendant 1000 metric tons of Brazilian brown sugar at the rate of United States dollars 583 per metric ton. The agreed consideration was, therefore United States dollars 583,000. It was an express term of the contract that;

1. The said consideration was "ex bond" i.e. the defendants bonded warehouse in Kampala, and therefore prior to payment of taxes or other dues to the Uganda Revenue Authority before bonded goods can be released into the open market or be exported;
2. Deliveries of that sugar were to begin at the end of February 2007;
3. Payment of 50% was to be made upon signing of the contract and the balance to be paid in advance before lifting of the goods or transfer of ownership into the plaintiffs names (See exhibit P2),

Upon signing the contract the plaintiff made a down payment of United States dollars 274,500 on 16 February 2007 (less than the 50% agreed upon).

Be that as it may, counsel submitted that the plaintiff commenced taking deliveries of the sugar on 20th February 2007 from the defendant's bonded warehouse in Kampala. As the contract price was "ex-bond" ownership of the sugar would only be transferred, and the sugar taken out of the bond, upon clearing with the Uganda Revenue Authority and paying their dues, if any. He contended that exhibits D4 to D8 give a clear example of how the plaintiff would access the sugar that it had fully paid for. Upon the plaintiff indicating the quantity of sugar that he wished to lift and take the defendant would write to Uganda Revenue Authority requesting that ownership of such quantity be transferred to the plaintiff. Uganda Revenue Authority would indicate what had to be paid and the plaintiff, after getting a local sales contract from the defendant for such quantity to be transferred, would then effect payment of the sums due to URA and take delivery of the said quantity of sugar set out in the local sale contract from the said bonded warehouse.

This same procedure was applied on February 26, 2007 – see exhibits D9 to D13; on March 7, 2007 see exhibits D14 – D19 and on March 16th 2007 exhibits D21 to D24. In fact exhibits D16 and D22 show the plaintiff certifying acceptance of the particular goods being cleared into its ownership and possession and undertaking "to pay all duties, rents and charges due and accruing…" on the goods.

Defendants counsel submits that the above exhibits show and proof that it was up to the plaintiff to decide how much quantity of sugar, out of the entire 1000 metric tons, it wished to lift at any particular time. The only conditions were that the price/consideration for the sugar being lifted was to be paid for in full to the defendant by the time of lifting and the duties and charges etc… due to the Uganda Revenue Authority were to have been paid for by the plaintiff.

Counsel further submitted that exhibits D25 to D28 show delivery notes/release orders for quantities of sugar that the plaintiff was lifting from the defendant's bonded warehouse on diverse dates. As the defendant had received almost 47% of the agreed 50% down payment it obviously had no problem with the plaintiff lifting sugar it had purchased (property having passed under section 19 (a) of the Sale of Goods Act cap 82 laws of Uganda) as and when it

wished so long as the plaintiff paid the URA the money due to it since it was the obligation of the plaintiff under the main contract to cater for anything over and above the ex bond price.

Counsel submitted that all the other defence exhibits prove that the defendant was fully stocked with quantities of sugar to sell and/or trade with (see the item on "sugar re-export" at exhibits D57 to D66 which were not contested by the plaintiff and prove that the defendant was stocked with huge quantities of sugar).

He submitted that it is of great significance that exhibits D39, D41, D43, D45, D47, D49, D51, and D55 show that the price of sugar per metric ton in the market from March 2007 to December 2007 was, with the exception of one or two days at the time, consistently going down and certainly well below the price at which the plaintiff had contracted to purchase from the defendant.

Defence counsel contended that the irresistible inference to be drawn from the above exhibits is that when the plaintiff realized that the market price was going down well below the price at which it had contracted to purchase the sugar from the defendant, the plaintiff suspended taking deliveries. That is why, with the exception of one delivery on 28 July 2007, the plaintiff did not take any deliveries after mid April 2007. It had nowhere to sell the sugar at those low market prices. Exhibit P1 shows that the plaintiff took delivery of sugar on 17th April 2007. The next, and the last, delivery it took was two and a half months later on 28th of July 2007. Why did it not take more frequent deliveries if it had a vibrant market in Southern Sudan as PW1 claims?

PW1 testified that at the end of October 2007 he went to the defendant to protest why sugar was not being delivered to him and that he was manhandled and thrown out. In cross examination he admitted that he did not report the matter to the police nor did he write to the defendant protesting such behaviour. However, in view of the fact that exhibit D51 shows that the market price of sugar was down to United States dollars 530 per metric ton as at 26th of October 2007, his testimony cannot make sense. Why would the defendant with a contract to supply the plaintiff with sugar at United States dollars 583 per metric ton harass and throw out its best priced customer and elect to sell to others at United States dollars 53 less? On the contrary the defendant would have welcomed PW1 with open arms!

Counsels contention is that the obvious truth is that the plaintiff had grown cold feet without continuing with the transaction because the market price had collapsed around it. That is why there is no demand or protest from the plaintiff between April and November 2007. Even exhibit P1 does not contain any complaint or protest about any breach of contract by the defendant or harassment as claimed by PW1. Exhibit P1 is only asking for the money back. It however overlooks the fact that there was a binding contract for it to purchase 1000 metric tons of sugar at United States dollars 583 per metric ton. By virtue of exhibit P2, the agreement, the plaintiff was under legal and contractual obligation to pay for and take delivery of 1000 metric tons of sugar at that price. It did not have an option to say, "I no longer want your sugar, I'm backing out of the

agreement, give me back my balance". There was no such clause in the agreement. It was not an option sale or sale on approval contract. The defendant contracted to supply and duly took the necessary commercial and financial steps to comply with its obligations under the agreement which it did. There was no evidence whatsoever from the plaintiff that the defendant was ever asked to deliver and failed. On the contrary it is the plaintiff who breached its obligations under the agreement and thereby caused the defendant to suffer loss.

The agreement, exhibit P2 required and requested the plaintiff to start taking deliveries at the end of February 2007 provided that it would have paid in full for the deliveries it wished to take. Had it paid the full sum it would have been entitled to take delivery of the full quantity. At all times the defendant was ready and willing to deliver such of the goods as would have been paid for by the plaintiff. Counsel referred to section 37 of the Sale of Goods Act (cap 82). It provides:

"When the seller is ready and willing to deliver the goods and requests the buyer to take delivery, and the buyer does not within a reasonable time after the request take delivery of the goods, he or she is liable to the seller for any loss occasioned by his or her neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods except that nothing in this section shall affect the rights of the seller where the neglect or refusal of the buyer to take delivery amounts to a repudiation of the contract."

The plaintiff's failure to take delivery of the contract goods and to pay for those quantities not yet paid for had the necessary consequence of causing loss to the defendant by way of further warehousing costs and subsequent sale into the market of the goods at a far lower price than had been contracted for with the plaintiff. DW1 testified on this and, though not among the scheduled documents, computed the defendant's losses in a document attached to a letter from its lawyers to the plaintiff's lawyers dated 3rd of February 2007 and a copied to this honourable court. That document totals the defendant's losses, as allowed by section 37 of the Sales of Goods Act, in the sum of United States Dollars 39,019.30 which it offsets from this sum claimed by the plaintiff in accordance with Order 8 Rule 2 of the Civil Procedure Rules.

From the foregoing it is humbly submitted that the answers to the agreed issues are as follows;

Issue No.1 Counsel prayed that I answer this issue in the negative; the Plaintiff's efforts to collect the contracted sugar were not frustrated by the defendant.

Issue No 2 – Counsel prayed that I answer in the affirmative; it was the duty of the plaintiff to take delivery from the defendant's bonded warehouse of sugar that was fully paid for and after the plaintiff had paid the requisites taxes, duties and transfer of ownership fees to the Uganda Revenue Authority.

Issue No. 3 – Defendants counsel prayed that I answer the issue in the affirmative; that there was at all material time sufficient stocks of sugar with the defendant for the plaintiff to take full

delivery upon making full payment for each of such quantities as the plaintiff wished to take at any particular time.

Issue No. 4 – in the affirmative; the plaintiff failed and/or refused within a reasonable time to pay for and take delivery of the remaining tons of sugar contracted for.

Issue No. 5 – That I answer the this issue in the affirmative; Because the defendant suffered warehousing losses by the plaintiff's failure to pay for and take delivery of the remaining tons of sugar contracted for as well as losses when eventually selling off the same at lower prices.

Issue No. 6 – Defendant's counsel prayed that I answer the 6th issue in the negative; In that he contended that the plaintiff is not entitled to the remedies prayed for. Finally he prayed that I dismiss the plaintiff's suit with costs.

Plaintiff's submissions in rejoinder

In rejoinder the plaintiff's counsel agreed with the defendant's position that taxes to Uganda Revenue Authority would be paid after indication to the plaintiff of the quantity to be lifted in a local sale contract.

He disputed the defendant's submission that property in the goods passed to the plaintiff on execution of exhibit P2 dated 15th of February 2007 as envisaged by section 18 (1) and (2) of the Sale of Goods Act.

Had that been the case the plaintiff would have automatically accessed the sugar every time it wanted. According to PW1's unassailable testimony release of sugar to the plaintiff was always at the whim of the defendant. For instance it declined to release any sugar to the plaintiff between 16th of April to 27th July 2007 despite persistent requests and visits by the plaintiff's clearing agent.

Even when PW1 decided to personally go and demand for the sugar he was manhandled and thrown out. Exhibit P1 was equally treated contemptuously, deserving no reply or explanation. Surely this is inconsistent with both sections 19 (a) and 37 "whereby the seller is ready and willing to deliver the goods and requests the buyer to take delivery but the buyer does not…" In this instance it is the buyer who was ready and willing to receive the goods but the seller refused to deliver.

He submitted that the contract fell under section 18 (i) and (ii) of the Sale of Goods Act because despite exhibit P1, the plaintiff would access the sugar only if the defendant signed the local sale contract and only then would the plaintiff pay taxes and access the sugar. Consequently property in the goods would pass at each signing of the local sale contract and not before. Counsel reiterated his earlier prayers that the suit be allowed and judgment is entered for the plaintiff.

Judgment

I have had the benefit of reading the pleadings and written submissions of the parties. I have also had opportunity to read through the scheduling notes and documents exhibited in evidence which documents are not in dispute. The dispute of the parties revolves around the interpretation of the main contract, the subsidiary contracts for each quantity of sugar lifted and the procedure the parties adopted in the implementation of the contract or the conduct of the parties.

The major contention of the plaintiff is that it is entitled to refund of United States dollars 41,650 or in the alternative to delivery of 71.4 metric tons of Brazilian brown sugar. This is because and it is not in dispute that the plaintiff paid for sugar worth United States dollars 274,500 and was only supplied sugar worth United States dollars 232,850. The plaintiff contends that the defendant refused to supply the balance of the sugar paid for. That several demands were made but to no avail and on one occasion the plaintiff's managing director was physically manhandled. The plaintiff further maintains that it could only receive sugar after the defendant has written a letter transferring the sugar to it.

The defendant on the other hand maintains that that the plaintiff refused to take delivery of the sugar worth the amount of money which remained after it had paid US$274,500. The defendant agrees that the plaintiff took delivery of the stated United States dollars 232,850 worth of sugar. It however contends that the balance of the money was offset against demurrage costs and having to sell the sugar at a lower market price when the plaintiff failed to take delivery of the same in time. For the above reason the defendant claims a set off against the plaintiff.

The main contract of the parties is dated 15th February 2007 and is exhibited by the plaintiff and defendant as exhibits P2 and D2 respectively. In the contract, the plaintiff is the buyer while the defendant is the seller. The contract stipulates that the seller would supply Brazilian brown sugar of about 1000 Metric Tonnes equivalent to about 20,000 bags of 50 kilograms each to the plaintiff. The total value of 1000 metric tonnes is USD 583,000. Deliveries of sugar were to start at the end of February 2007. The payment terms were that the first payment of 50% was to be made at the time of signing the contract. The contract further stipulates that failure to make payment within 3 working days of signing the contract would make the contract void. Specifically on payment terms the contract provided that "*balance payment to be made in advance before lifting of the goods/transfer of ownership*".

It is an agreed fact that the first instalment was paid. This is exhibit P3 which is also exhibit D3, being a paying in slip showing that payment was made to an account of the defendant in Crane Bank Ltd. It shows that the defendant received USD 274,500 by cash deposit. This payment was made on the 16th of February 2007.

As noted above, the express terms of the contract stipulates that balance payment was to be made in advance before lifting of the goods/transfer of ownership. Evidence shows that the request would be made for tons of sugar and upon payment a transfer of the sugar ownership would be made. This is difficult to understand at a glance because advance payment had been made for at

least some tons of sugar. The sum of the United States dollars 274,500 covered some tonnage of sugar. Despite this, the stipulation in the payment terms is that the first payment of 50% was to be made at the time of signing of the contract within three working days, the payment terms go ahead to provide that balance payment was to be made in advance before lifting of the goods/transfer of ownership. The express terms of the contract provided for further payment before the lifting of the goods. Does this imply that the 50% paid was half payment of any tons that may be lifted? Moreover each quantity of sugar is covered by a subsidiary contract indicating the quantity and payment terms being 100% in advance. I will attempt to deal with the agreed issues in a logical order but not in the order in which they have been presented. I agree with the plaintiff's counsel that all the issues are intertwined. The facts for resolution of the first two issues are intertwined and its resolution would substantially deal with the remainder of the issues as well. The first two issues are:

1. **Whether the plaintiff's efforts to collect the contracted sugar were frustrated by the defendant.**
2. **Whether it was the duty of the plaintiff to take delivery from the defendant's bonded warehouse of sugar that was fully paid before and after the plaintiff had paid the requisite taxes, duties and transfer of ownership fees to the Uganda Revenue Authority.**

This issue when determined resolves the central question in this controversy as to whether there was failure to deliver by the defendant or failure to take delivery by the plaintiff of sugar worth the balance of USD 274,500 paid to the defendant less sugar worth USD 232,850 delivered and had by the plaintiff. It resolves the question as to whether the defendant frustrated the delivery of sugar worth USD 41,650 being the balance of the money deposited by the plaintiff under the subsisting contract between the parties for delivery of sugar.

The issue of whether the plaintiff's efforts to collect the contracted sugar were frustrated by the defendant is a question of fact as well as a question of law. As much as it is a question of fact, it flows from the interpretation of the contract of the parties and how they implemented the contract and therefore engages legal doctrine as to the rights and obligations of the parties under the relevant contract.

PW1 Yahaya Yusuf the Managing Director of the plaintiff testified on behalf of the plaintiff as the sole witness. His testimony is that the plaintiff was interested in buying sugar for export to Sudan and they approached the defendant whereupon they signed a contract for the supply of 1000 tons of Brazilian Brown sugar. The sugar was in possession of the Defendant ("in the hands of Olam (U) Ltd") He testified that each time the plaintiff needed sugar, it was the defendant who decided how much sugar the plaintiff would take. PW1 further testified that the plaintiff would request for say 100 tons and the defendant would deliver only 45 tons. All together PW1 testified that the defendant delivered to the plaintiff and transferred 399.4 tons of Brazilian Brown sugar which was a quantity less than what the plaintiff had deposited. He testified that there was a

balance of US $ 41,650 worth of sugar paid to the defendant which had not been supplied. The last delivery of sugar to the plaintiff was made in July 2007. He further testified that the plaintiff used to send its clearing agent to the defendant's offices but after going there several times no sugar was delivered to him. PW1's testimony is that when he went there himself he was manhandled and thrown out of the defendant's offices. After being manhandled by a manager of Indian descent whose name he did not know he wrote a letter dated 5th November 2007 exhibit P1 which was received by the same manager and since then the plaintiffs did not receive any communication from the defendant whatsoever.

PW1 further testified that the sugar was in bonded warehouse meant for export and they wanted to export the same to the Sudan. For this to be possible the defendant had to transfer ownership to the plaintiff. The plaintiff would request the defendant to transfer ownership and the defendant would write to Uganda Revenue Authority for the transfer to be effected to the plaintiff an illustration of which is the letter exhibit D9. PW1 further testified that the plaintiff was interested in all the sugar and was willing to pay for the balance after the initial deposit. The witness was referred to page D41 entitled "Brazilian Brown Sugar Sales April 2007 and denied knowledge of the document. PW1 further testified that there was a balance of 41,651 US$ though he did not calculate what this amount represented in terms of its worth in the quantity of sugar. In November 2007 the plaintiff wrote to the defendant and demand for a refund of the balance of money namely the USD 41,650 stated above but the defendant did not respond to the correspondence.

Upon being cross examined by Counsel Didas Nkurunziza, PW1 agreed that the contract price of sugar was as stipulated in the contract dated 15th February 2007 plus the tonnage to be supplied. He agreed that the price was ex bond Kampala. He did not agree that additional costs above the US 583 per ton was supposed to be incurred by the plaintiff. According to him ex bond meant that the plaintiff bought sugar from the defendant's bond. The plaintiff paid for the sugar transferred. The witness was referred to several exhibits and agreed with exhibit D4 at page 4 of the joint trial bundle, exhibit D5, a local sale contract in respect of the 80 MT as stated in exhibit D4 exactly. He agreed that it is after payments that the plaintiff took possession of the goods.

PW1 was referred to exhibit D16 and the certificate of acceptance which stated: "hereby certify that as from this date I am the owner of the above mentioned goods and I undertake to pay all duties, rents and charges due and accruing thereon" duly signed by the plaintiffs and agreed that all dues indicated therein were to be paid by the plaintiff and this was the procedure for all sugar the plaintiff took delivery of. He agreed that the agent of the plaintiff did not have any trouble obtaining delivery prior to July 2007 but only got problems after July 2007. The plaintiff did not write for delivery of balance of sugar but communicated verbally. He further testified that after the agent failed to obtain further quantities of sugar he went there himself and talked to a manager of the plaintiff he had not met before, which manager told him that there was no sugar and threw him out using the company security personnel. Thereafter the plaintiff forgot about the sugar and sought a refund of the money. He did not complain to the police on being manhandled

by the defendant's security personnel. In pursuit of the demand for refund the plaintiff wrote to the defendant the letter exhibit P1. This letter is dated 5th November 2007 and is addressed to the defendant. Receipt stamp shows that it was received by the defendant on the 5th of November 2007. It reads as follows:

"We write in regards to Sugar Contract No. 07/S/150201/SU between OLAM (UGANDA) LTD and SAAHIB ENTERPRISES LTD on 15/02/2007 and the subsequent cash slip dated 16/02/2007 amounting to US the 274,500. We purchased sugar as below;

204/2/07	45 tons
26/2/07	50 tons
	24 tons
09/3/07	50 tons
09/3/07	35.7 tons
13/3/07	24 tons
15/3/07	45 tons
01/4/07	45 tons
02/4/07	45 tons
17/4/07	10.7 tons
28/7/07	25 tons
	399.4 tons x USD 583.00 = USD 232,850

Amount paid on 16th of February 2007 USD 274,502

Less purchases USD 232,850

Balance to be refunded USD 41,650

We therefore request you to refund as United States dollars 41,650 only by cheque immediately

Regards…"

PW1 admitted that he wrote to the defendant demanding payment but not about breach of contract or failure to deliver sugar.

On re-examination PW1 maintained that the plaintiff was required to pay fees to URA after the letter of transfer of sugar to the plaintiff by the defendant. That the plaintiff never wrote

demanding for delivery because each time the plaintiff wanted sugar it's clearing agent would go and collect a letter of transfer and present the same to URA. The defendant would then write a letter to URA transferring ownership to the plaintiff. Payment of any taxes would be after the letter of transfer of ownership. That the demand for payment Exhibit P1 was a consequence of the defendants breach.

For the Defendants part DW1 Mr. Zaid Bin Salahuddin testified that he was employed by the defendant as a Sales Manager and he was responsible for the holding cargo of the defendant. He testified that the company kept records of all transactions and the company had been in operation in Uganda for over 10 years. It is an affiliate of a company stationed in Singapore. DW1 agreed that the defendant had a contract with the plaintiff in the year 2007. This was for the supply of 1000 metric tons of Brazilian brown sugar at a price of 583 US$ per ton. The witness agreed with the contract terms exhibit D2 referred to above. He emphasized that in the contract the term ex bond Kampala meant that the plaintiff was to pick the goods from the defendant's bonded warehouse in Kampala. As far as procedure is concerned DW1 testified that once funds for the sugar are received the defendant writes a transfer of ownership letter to URA. From there he would receive permission from URA to load the sugar from the bonded warehouse. Without such permission loading was impossible.

DW1 testified that the defendant was to transfer whatever quantities the plaintiff required. The plaintiff would present payment slips and the defendants request for transfer. Whereupon the plaintiff would pay the charges to URA. He agreed that the plaintiff did not take delivery of all the sugar in the bonded warehouse in fact they did not take delivery of all the sugar they had paid for.

DW1 further testified that the plaintiff did not take delivery of all the sugar. The defendant applied to URA to supply a total of 408 tons but the plaintiff did not take delivery thereof whereupon they requested URA to revoke or cancel the quantity on the ground that it could not be taken. The quantity was kept lying for some time and when the time expired, the defendant sold the sugar. It is only in November 2007 that the plaintiff asked for a refund of the balance of its money.

DW1 further testified that the plaintiff purchase price was 583 US$ per metric ton but exhibit D41 which is a summary of the defendants sales between April 17th and April 30th shows that the market sale price of sugar was lower than that agreed to with the plaintiff. He noted that prices keep fluctuating but sugar was always there with the defendant.

DW1 had no knowledge of what happened when PW1 came to the defendant in July because he was not there. He testified that the defendant suffered looses because it was bonded to move the cargo out of the country within a specified period and had to sell the sugar. The defendant incurred some storage costs.

On cross examination the DW1 admitted that he was the defendant's Sales manager since October 2007 when he came to Uganda from Germany. He only acquainted himself with the previous transactions of the defendant. He had the documents and he read the file. That the previous company official handed over the matter to him and took him through the transactions after he came into the picture around October 2007. DW1 confessed that he did not understand the transaction at first until much later when he started appearing in court around the year 2010.

He further stated in cross examination that for the quantities requested by the plaintiff the defendant's officials received payment slips and thereafter payments are made and then the processing would be done. He would write to URA to release the sugar for the particular quantity requested. Further that payment of taxes would come at a later stage. As far as the bond period was concerned he testified that Uganda Revenue Authority would give three months and if the defendant needed an extension, it had to request for it. He however had not seen any application by the defendant for such extension. He agreed that for payment terms, the plaintiff had to pay in full before delivery of the goods. As far as exhibit P1 is concerned, he agreed that the defendant did not respond to the letter.

As far as documentary exhibits are concerned, the hard evidence of the practice the parties adopted is proven by exhibit D4 which is a letter from the Defendant dated 20th of February 2007. The letter is a request for transfer of ownership for sugar described "1M07 numbers."It reads: "*We request that the following IM 7 of Brazilian brown sugar be transferred to the plaintiff*". In the letter the defendant requested for transfer of 80 metric tons or 1600 bags. The handwritten notes on exhibit D4 minute number 2 writes "*collect transfer of ownership fees*". Minute number 3 writes "*please process transfer of ownership*". Exhibit D5 is a local sales contract dated 20th of February 2007, between the plaintiff and the defendant. It is a supplementary contract for a quantity of 80 metric tons. As far as the contract price is concerned it provides and I quote: "*United States dollars 583 per metric ton ex-bonded warehouse Kampala (All taxes to the account of buyer"*). It further provides on payment terms *"100% advance"*. The subsidiary contract is signed on behalf of the plaintiff and on behalf of the defendant by the authorised signatories.

Exhibit D9 is a letter from the Defendant dated 26 February 2007 and is a request for transfer of 88.3 metric tons of Brazilian brown sugar. Handwritten notes on the exhibit show notes that read as follows: *"facilitate transfer of ownership as requested"*. The handwritten minute on the letter is dated 27th of February 2007. Again there is a separate contract exhibit D10 dated 26 February 2007, between the plaintiff and the defendant. The quantity is about 88.3 metric tons which is 1766 bags of 50 kg each. The prices are United States dollars 583 per metric ton ex-bonded warehouse Kampala (all taxes to the account of buyer). The payment terms are "100% advance".

Exhibit D14 is a letter from the defendant dated 7 March 2007 addressed to the in – charge warehousing section Customs and Excise department Uganda Revenue Authority Kampala. It requests for transfer of 120 metric tons of Brazilian brown sugar. Again it is preceded by a local

sales contract between the plaintiff and the defendant dated 7th of March 2007 and provides for 120 metric tons (2400 bags of 50 kg each) of Brazilian brown sugar at United States dollars 583 per metric ton ex-bonded warehouse Kampala (all taxes to the account of buyer). The payment terms are "100% advance".

Last but not least on the documentation showing practice of the parties is exhibit D16 being a customs forms C 21 which is a request to transfer ownership of warehouse goods under regulation 71. It is a request to transfer 2400 bags or 120 metric tons of Brazilian brown sugar to the plaintiff. It is dated 7th March 2007 and signed by the defendant and on whose behalf the goods are warehoused and also signed by the plaintiff as transferee. The request for transfer is addressed to the Commissioner URA. Handwritten notes addressed to the supervisor CBC are that they collect US$ 30 as transfer fees. Exhibit D17 shows a payment details to URA Nakawa Pilot CBC account of shillings 52,965 and bank charges of 2000. The narrative is 00 with Olam being the name of the defendant.

The documentation establishes the following facts:

The parties executed a main contract for the plaintiff to buy and the defendant to supply 1000 metric tons of Brazilian brown sugar, equivalent to 20,000 bags of 50 kilograms each. The price per metric ton agreed was US$ 583. Deliveries were to commence at the end of February 2007. The first payment of 50% of the total contracted amount was to be paid within 3 working days of execution of the contract. Payment terms are that the payment to be made in advance before the plaintiff took delivery of the goods. This contract is dated 15th of February 2007 contract NO. 07/S/150201/SU executed by both parties to the suit and exhibited by both parties as exhibits P2 and D2 respectively.

As far as payment of 50% under the contract dated 15th February 2007 by the plaintiff within three days is concerned, payment by the plaintiff to the defendant as aforesaid is proved by exhibit P3 and also exhibit D3. It shows that the plaintiff paid USD 274,500 by cash deposit to Messrs Olam Uganda Limited on account 0245020047800 on the 16th of February 2007 one day after execution of the main contract dated 15th of February 2007. 50% of 583,000 USD is USD 291,500, though not dwelt on by the defendants counsel, he pointed out that it was less than the 50% agreed upon. It is a point of fact that **USD 274,500** is less by **17,000 USD** for it to reach exactly 50% of the contract price. The defendant accepted the payment on these terms and delivered quantities of sugar based on it and must be taken to have waived the right to object to receive the full 50% before delivery as stipulated in the contract.

Notwithstanding the stipulation for 50% payment in the main contract dated 15th February 2007, the parties executed subsidiary contracts for each separate tonnage of sugar that was supposed to be transferred to the plaintiff. The subsidiary contract terms were always the same except for the tonnage of sugar to be lifted namely: That payment was to be made in advance; that the price of 583 US $ for Brazilian brown sugar was the amount paid per metric ton; all taxes are supposed to

be on account of the buyer (the plaintiff). The subsidiary contracts are signed by both parties. It proves that both parties had to execute separate contracts for the tons of sugar that the plaintiff was supposed to lift from the bonded warehouse. These subsidiary contracts resolve the question of full payment before delivery and the tonnage of sugar that the plaintiff was supposed to take delivery of. They show that letter of transfer of ownership of the sugar came after the contract and the letter of transfer of ownership was for a specific amount of sugar less than what is stipulated in the main contract to be lifted at any particular time. The subsidiary contracts also show that taxes are to be paid by the plaintiff. It proves that any taxes for the exportation of the Brazilian brown sugar to Sudan or any other country from the "ex bonded warehouse Kampala" were to be met by the buyer. It further disproves the testimony of PW1 that the plaintiff would request for more tonnage of sugar but the defendant would supply less. PW1 did not produce any evidence of such a request for sugar and for evidential purposes his testimony is overridden by the written subsidiary contracts the parties signed before transfer of sugar showing 100% payment for specified quantities. No written contract was adduced for which the defendant transferred less sugar. Each quantity supplied was consistent with each subsidiary contract. In any case the testimony of PW1 as seeks to vary the practice of the parties to sign subsidiary contracts and the contents of any such contract orally is excluded by section 91 of the Evidence Act cap 6 laws of Uganda.

The goods were stored in a warehouse of the defendant and payment was ex bond (that is before payment of taxes to Uganda Revenue Authority). The subsidiary contracts have been exhibited in evidence as exhibits D5 executed on the 20th of February 2007 for 80 metric tons of Brazilian sugar; exhibit D10 executed on the 26th of February 2007 for 88.3 metric tons of Brazilian brown sugar; exhibit D15 dated 7th March 2007 for 120 metric tons of Brazilian brown sugar;

The defendant would write letters to the in- charge of the Warehousing section Customs and Excise Department Uganda Revenue Authority requesting that the quantity of sugar indicated in the subsidiary contract be transferred to the plaintiff. These letters were exhibited in evidence as exhibits D4 dated 20th of February 2007 and is on the same date and having the same tonnage of sugar as the subsidiary contract exhibit D5; exhibit D9 dated 26th February 2007 having the same date and tonnage as the subsidiary contract exhibit D10; exhibit D14 dated 7th March 2007 having the same date and tonnage of sugar as the subsidiary contract exhibit D15 exhibit D21 dated 16th of March 2007 with no subsidiary contract exhibited but for 120 metric tons of sugar. The request for transfer exhibit D21 for 2,400 bags of Brazilian brown sugar is covered by 3 customs form C21 of which are dated 16th March 2007 being for warehouse entry 6858 for 800 bags; warehouse entry 6849 for 800 bags and warehouse entry 3842 for 800 bags.

Miscellaneous payment forms for payment to URA for transfer fees payable to URA were exhibited as exhibits D8 and D19. Further bank slips showing evidence of payment of transfer fees were exhibited D6; D7; D11; D12; D15; D17 and D18. Documents further show that the plaintiff undertook to pay all taxes of the tonnage of sugar agreed to be lifted under the subsidiary contracts. This is evidenced by form C21 entitled "Request to transfer ownership of

warehoused goods." It is crucial to critically examine this document to reflect some of the procedures the parties adopted in execution of the subsidiary contracts. It is signed by three parties, namely the plaintiff, the defendant and the Commissioner Uganda Revenue Authority. First of all Form C21 is addressed to the Commissioner Uganda Revenue Authority. The first part shows that the defendant seeks permission to transfer goods deposited in warehouse W0073 to the plaintiff. This first part is signed by the defendant. The second part of form C21 describes the goods to be transferred. It shows the warehouse details of the goods. Form C21, exhibit D16 shows the entry number of the goods namely as S.5610, S5612 and S5614. What is further material and important is that it demonstrates when the goods were warehoused. It reads: "Date warehoused: February, 2007" and the owner as Olam (U) Ltd. It also gives the marks and numbers of the packages. This section or second part of Form C21 is signed by the Commissioner of Uganda Revenue Authority. Lastly form C21 exhibit D16 is entitled at the bottom being the third part and last section as "Certificate of Acceptance" and is signed by the transferee for the warehoused goods. This is the plaintiff. The plaintiff signed exhibit D16 and the certificate of acceptance reads: "*I Ismail Suleman of SAAHIB Ent. Ltd hereby certify that as from this date I am the owner of the above mentioned goods and I undertake to pay all duties, rents and charges accruing thereon...*"

PW1 testified that the plaintiff requested for goods pursuant to the agreed deposit already made but the defendant refused to deliver after the last delivery was made around July 2007. In cross examination he admitted that the plaintiff's agent had no problem until July 2007 in requesting for delivery of sugar. Unfortunately the plaintiff did not indicate how they came to sign the subsidiary contracts. Apparently requests for delivery of any goods were verbal. No single correspondence has been produced showing such a request for payment after the July 2007 experience. What was produced in evidence are subsidiary contracts signed by the parties. By July 2007 DW1 was not in Uganda and cannot verify whether PW1 was manhandled or whether requests were made for delivery of sugar. It is only the oral testimony of PW1 which is on record. The defendants contention in rebuttal is that the plaintiff failed to take delivery of sugar and that the plaintiff was obliged to pay dues for this to happen which they failed to do. The facts that the plaintiff was liable to pay taxes for the ex bonded sugar Kampala has been proven by the documentary evidence exhibited above but as to whether this prevented the plaintiff to take delivery of goods is a matter of inference by the defendant. On the one hand the defendant demonstrates through exhibit D41 which PW1 professed no knowledge of that it had sufficient stocks of sugar during the material times.

D41 is the sales of sugar by the defendant and their prices. It shows that sales in April 2007. Out of 19 sales, 13 sales were at a price of 265 USD per metric ton. 3 sales were at USD 280 per metric ton and 3 sales at 590 metric tons. In total 16 sales out of 19 were at a price below 583 per metric ton as stipulated in the main and subsidiary contracts of the parties exhibited in evidence. The defendant prays that the court infers that it could not sell the sugar at a lesser price when there was a buyer (namely the plaintiff) who was offering 583 USD per metric ton which was

higher than the prevailing market prices in April. It is necessary at this point to examine the deliveries made as admitted by the plaintiff in exhibit P1. According to the plaintiffs document, exhibit P1 two deliveries were made in February 2007 namely on the 20th and 26th of February 2007. In March 4 deliveries were made. These were 2 deliveries on the 9th, one delivery on the 13th and 15th of March 2007. In April 2007 deliveries are admitted for the periods 1st April, 2nd April and 17th April 2007. Exhibit P1 shows that a total of 399.4 tons of sugar were delivered or supplied to the plaintiff. The plaintiff paid USD 274,500 which represents 470.840 tons. For the amount paid and according to the exhibit of the plaintiff there was less delivery by 71.4 tons of sugar representing 1,428 bags of 50 Kilograms each. The defendant further produced delivery notes exhibits D25 to D38. The show the following tonnage of Brazilian brown sugar was delivered to the plaintiff and signed for namely:

- 24th February 2007 900 bags
- 28th February 2007 1000 bags
- 2nd March 2007 280 bags
- 2nd March 2007 200 bags
- 7th March 2007 714 bags
- 10th March 2007 1000 bags
- 12th March 2007 480 bags
- 16th March 2007 774 bags
- 16th March 2007 126 bags
- 27th March 2007 900 bags
- 27th March 2007 500 bags
- 28th March 2007 714 bags
- 2nd April 2007 186 bags
- 16th April 2007 214 bags
- Total 7,988 bags

Exhibit P1 shows that the plaintiff took delivery of more tonnage of sugar from the defendant. According to exhibit P1 between 17th of April 2007 and 28th of July 2007 the plaintiff did not take any deliveries of sugar. This is a period of more than three months. On the 28th of July 2007 the plaintiff took delivery of 25 tons of sugar as per the admitted evidence exhibit P1. PW1 admitted that until July 2007 the plaintiff had no problem with the defendant as far as delivery of sugar was concerned. The plaintiff's agent started getting problems after July 2007. On the other hand it is the defendant's case that it could not wait for 3 months without delivery as it could not keep sugar in the bond without sale. Documentary proof of the plaintiff shows that the plaintiff did not take delivery of sugar for about three months and 10 days. Problems occurred after the 28th of July 2007.

Exhibit D41 shows that the fall in the price of sugar occurred between the 17th April to 30th April 2007. This was also the time when the plaintiff did not take delivery of sugar inclusive of the

period up to the 28th of July 2007 when it took only 25 tons of sugar. I believe the testimony of PW1 that after July 2007 the defendant refused to deliver the balance of 71.4 tons of Brazilian brown sugar to the plaintiff representing 41,626.2 USD. The testimony that PW1 was manhandled by the defendant's manager is not rebutted by any evidence from the defendant and has been proved on the balance of probabilities. However the facts that the defendant prevented the plaintiff from taking further supplies between the period 17th April 2007 and 28th of July 2007 is not proven even on the balance of probabilities. The plaintiff by admission of PW1 had no problem with the defendant until after July 2007. Yet the plaintiff between the above dates of over 3 months and about 11 days did not take delivery of sugar. Thereafter the plaintiff asked for refund of its money on the 5th of November 2007. There is however no documentary evidence to support the testimony of PW1 that the plaintiff sought to obtain sugar after July 2007. In my view the material period in the controversy is the period before the 28th of July 2007 and this is the assertion of the defendant in its written statement of defence. Thereafter the defendant sold the sugar at prices mostly less than 583 USD per metric ton the price agreed with the plaintiff. This price is higher than the market prices at which the defendant sold the sugar. The lower prices are evidenced by exhibits D43 for May 2007, Exhibit D45 for June 2007, exhibit D47 for July 2007. After July 2007, the material period of the plaintiffs complaint about the defendants conduct, the defendant exhibited exhibit D49 being sales for August 2007. In August 2007 prices were fluctuating between USD 460 – 565 with there being only one sale with USD 580 per metric ton. Exhibit D51 shows that there are sales for September, October and November 2007 at prices ranging between USD 490 – 548 per metric ton. This is less than the price agreed with the plaintiff of 583 per metric ton.

The issue here is that the plaintiff had already deposited the money and if the defendant delivered, it would be at a higher market price. As far as logic is concerned, if the defendant did not deliver the goods and sold to someone else, it could afford to do so because it already had money for 71.4 tons from the plaintiff and it could resell the goods and therefore as far as 71.4 tons are concerned get double payment. Issues numbers 1 and 4 cannot be answered without first resolving issue No. 5 as well. For that reason I will from the above evidence resolve issues 2, 3 and 4 of the issues before resolving issues 1 and 5 of the agreed issues:

As far as issues no. 2 is concerned, the evidence shows that the goods had to be transferred to the plaintiff after signing of a subsidiary contract and it was the duty of the plaintiff to take delivery of the sugar after the transfer and pay all the dues such as taxes to Uganda Revenue Authority. The issue does not resolve the actual matter in controversy as to who is liable because possession of goods is based on transfer pursuant to a subsidiary contract and practice adopted. It was the duty of the defendant to write the written transfer pursuant to a written subsidiary contract showing 100% payment in advance had been made and not 50% advance payment as stipulated in the main contract dated 15th February 2007. These contractual obligations are determined by subsequent subsidiary contracts executed by the parties. Under section 1 (d) of the Sale of Goods Act, "delivery" means "voluntary transfer of possession from one person to another;" The

voluntary transfer took place when the defendant transferred title to the goods using customs transfer form C21 addressed to the Commissioner Uganda Revenue Authority and the plaintiff undertook in the same document to pay all taxes due. The defendant also wrote letters requesting for transfer to the plaintiff. In practical terms thereafter, the plaintiff would then take physical possession after payment of any dues to Uganda Revenue Authority as clearly undertaken in custom form C21 signed by three parties namely the defendant, the Uganda Revenue Authority and the plaintiff respectively.

As far as issue No. 3 is concerned, the question of whether there were at all material times sufficient stocks of sugar should be answered in two stages. In the first stage, the question is what is meant by "sufficient." Sufficient under this issue meant sufficient to meet the amount paid for which as we noted was 71.4 metric tons being the balance of sugar not delivered after payment by the plaintiff in February 2007. What is sufficient is clouded by the procedure of the parties to sign subsidiary contracts for each quantity of sugar to be transferred to the plaintiff. The second stage is answered by looking at the onus of proof and the evidence on record. It was upon the plaintiff to prove that the defendant did not have sufficient stocks of sugar. However the plaintiff did not lead any evidence on whether the defendant had sugar or not. Evidence only shows that the plaintiff paid and the defendant after July 2007 refused to deliver 71.4 metric tons of sugar paid for as has further pleaded it as a set-off against its losses or costs. The plaintiff has not discharged the onus of proof under this subheading.

However the defendant has proved by exhibits of sales for the period 17th April 2007 - November 2007 that it had sufficient stocks of sugar at any one given time to satisfy the plaintiffs 71.4 metric tons of sugar. I refer to exhibits D 41 showing that in April it sold 505 metric tons. Exhibit D43 for May 2007 showing that the defendant sold 1015.5 metric tons. The plaintiff took nothing in this month. Exhibit D45 for June 2007 showing that the defendant sold 1203.5 metric tons of sugar. The plaintiff did not take any that month. Exhibit D47 showing that the defendant sold 795 metric tons of sugar though it does not show whether the 25 tons the plaintiff took on the 28th of July as over exhibit P1 is included. Exhibit D49 for August shows sales of 501.50 metric tons at less the price agreed with the plaintiff. Exhibit D51 shows sales of September 2007 at 296.5 metric tons of sugar, October 2007 at 215.50 metric tons of sugar and November 2007 at 244 metric tons of sugar. This evidence was not rebutted and the conclusion is that the defendant had sufficient stocks of sugar which it was selling at less the price it had agreed with the plaintiff to other buyers. Issue number 3 is resolved in favour of the defendant.

Issue No. 4 deals with whether the plaintiff failed to take delivery or pay for the goods within a reasonable time. The question of payment within time does not arise in the subsidiary contracts and has not been made an issue in the main contract. There is agreement that out of the amount paid by the plaintiff to the defendant, there remained 71.4 tons Brazilian brown sugar not supplied to the plaintiff. Secondly as far as the main contract is concerned, the plaintiff paid 274,500 USD out of 583,000 USD contracted for the supply of 1000 metric tons of sugar. The plaintiff did not pay the whole amount stipulated in the main contract which provides for "full

payment" before delivery. The contract dated 15th of February 2007 states in the second last paragraph clearly as follows: "Balance payment to be made in advance before lifting of the goods/transfer of ownership". As far as the main contract is concerned, no further full payment has ever made from the evidence on record. Instead subsidiary contracts were made covering fewer tons of sugar showing 100 % advance payment for amounts of sugar to be delivered which presumably is founded on the initial deposit made by the plaintiff. The terms "payment within a reasonable period" in issue number 4 cannot be settled with any sufficient clarity as far as the wording of the main contract is concerned. As far as the subsidiary contract is concerned, payments were made prior to lifting of sugar and no document has been exhibited where delivery was not made within time. From the evidence adduced after signing of subsidiary contracts for specific tons of sugar letters requesting for transfers of ownership of sugar to the plaintiff by the defendant were written immediately and the form C21 transferring ownership for specific tons of sugar were also filled and signed by the relevant parties effecting transfer of title to warehoused goods immediately. As far as the main contract is concerned payment was made in advance on the 16th of February 2007 but no full payment was made as stipulated therein.

The question of whether the plaintiff refused to take delivery within a reasonable time is also problematic. In the first place the main contract dated 15th February 2007 makes it a precondition to taking delivery for the plaintiff to make full payment. Under this contract the plaintiff paid towards the stipulated 50% which payment was less by about 17,000 USD to make the full 50%. Secondly this contract is read in conjunction with subsidiary contracts which deal with specific tons of sugar paid for 100% in advance. In other words there has to be a specified tonnage of sugar for there to be full payment of 100% and taking delivery thereof.

Furthermore the question of delivery deals with taking delivery of 71.4 tons of sugar specifically. This is the main question in controversy and is also intertwines with issues 5 and 1 of the agreed issues. Nonetheless the question of fact to be noted at this stage is that between 20th February 2007 and 17th April 2007 the plaintiff had taken delivery of 374.4 tons of sugar. In terms of months, in February 2007 the plaintiff took delivery of 119 tons of sugar according to plaintiffs exhibit P1. In March 2007 the plaintiff took delivery of 157.7 tons. In April 2007 the plaintiff took delivery of 100.7 tons. From these trends the plaintiff was taking a minimum of 100 tons per month. Thereafter the plaintiff took delivery of 25 tons on the 28th of July 2007 leaving a balance of 71.4 tons. However, it must be noted that there was a delay of 3 months and about 11 days before the last delivery. A delay of 3 months would be unreasonable because the goods were kept in a bonded warehouse and attracted demurrage charges. The contract of the parties is silent about demurrage charges. It is sufficient at this stage to refer to The East African Community Customs Management Act 2004 and regulations made there under.

Section 2 (1) of the East African Community Customs Management Act 2004 defines a "bonded warehouse" to mean "*any warehouse or other place licensed by the Commissioner for the deposit of dutiable goods on which import duty has not been paid and which have been entered to be warehoused."* It should be noted that form C21 used by the defendant to transfer ownership

of the sugar agreed in subsidiary contracts to the plaintiff in this matter is issued under regulation 71 of the East African Community Customs Management Regulations 2006. It provides as follows:

> 71. Subject to the provisions of section 51 of the Act, where the owner of any goods deposited in a warehouse desires to transfer them to another person, he or she and the person to whom it is desired to transfer the goods, shall each complete and sign in the appropriate places a form of transfer in Form. C. 21.

Goods may be warehoused for export as in this case before payment of taxes. The law is that where goods arrive in Uganda using any vehicle the goods may be classified under section 34 of the East African Community Customs Management Act for export, or transhipment, warehousing or transit and this enables the Revenue authority to apply the appropriate tax including zero tax to the category of goods. In the defendants case the contract shows that the goods were warehoused and the contract was ex bond Kampala (before payment of taxes).

Section **47** of the EAC customs and Management Act provides that goods may be warehoused without payment of import duty but as soon as possible the proper revenue officer shall take an account of such goods and classify them for purposes of tax. Goods warehoused in a bonded warehouse cannot be moved without the consent of the appropriate revenue officer. (See section 65 of the EACCMA)

Under section 60 (2) of the EACCMA where goods entered for export shall be removed from the warehouse or bonded factory and exported within thirty days or within such further period, not exceeding thirty days, as the Commissioner may, in any particular case, allow or else be sold or forfeited. Keeping goods meant for domestic consumption and not export for three months without payment of taxes and without extension of time for re-warehousing by the Commissioner would still be unreasonable under section 57 of the EACCMA. Last but not least all warehoused goods are subject to the lien of the warehouse owner who charges fees for the same. Extended periods of time would accumulate demurrage charges. It would be immaterial that the goods could be warehoused in the warehouse of the defendant. The defendant would be entitled to use the space to warehouse goods for profit. PW1 testified that these goods were meant for export to the Sudan and therefore the period they were to be kept warehoused is one month unless otherwise extended by the Commissioner.

This brings us to issue number 5 which is whether warehouse rental has been incurred by the defendant.

I have already found that there was delay in taking delivery of the goods by the plaintiff and that the defendant must have suffered demurrage charges on account of the same. Goods in a warehouse are subject to the lien of the warehouse keeper or owner.

The defendant relied on section 37 of the Sale of Goods Act for the assertion that the buyer is liable for neglecting or refusing to take delivery of the goods. I have found it difficult on a point of fact to apply the above provision to the facts of this case because it provides that the buyer shall be liable to the seller for any loss occasioned by the buyer's failure to take delivery. What we have on record is claim for a set off but no amount for the set off was properly established in evidence by DW1. The defendant's submissions rely on a letter filed on court record dated 3rd February 2011 and attaching an email of DW1 to the defendants counsel. In the document DW1 computes the storage costs at 19,219.2 and interest incurred at 9% per annum for 3 months for USD 308,500 not paid at 6,941.25 USD. The defendants computed the total at USD 39,019.3. Setoffs are governed by Order 8 rule 2 of the Civil Procedure Rules which provides:

> 2. Setoff and counterclaim.
>
> (1) A defendant in an action may set off, or set up by way of counterclaim against the claims of the plaintiff, any right or claim, whether the setoff or counterclaim sounds in damages or not, and the setoff or counterclaim shall have the same effect as a cross-action, so as to enable the court to pronounce a final judgment in the same action, both on the original and on the cross-claim. But the court may on the application of the plaintiff before trial, if in the opinion of the court the setoff or counterclaim cannot be conveniently disposed of in the pending action, or ought not to be allowed, refuse permission to the defendant to avail himself or herself of it.
>
> (2) Where a defendant includes a counterclaim in the defence, the defendant shall accompany it with a brief summary of evidence to be adduced, a list of witnesses, a list of documents and a list of authorities to be relied on."
>
> Order 8 rule 16
>
> "16. Defence or setoff founded on separate grounds.
>
> Where the defendant relies upon several distinct grounds of defence or setoff founded upon separate and distinct facts, they shall be stated, as far as may be, separately and distinctly."

The rules provide that the setoff is pleaded and facts averred in the written statement of defence. The defendant pleaded a setoff in paragraph 6 where it is averred that the amount claimed in the plaint was setoff by the warehouse rental incurred due to the alleged neglect and failure of the plaintiff to take delivery of the goods and losses suffered by the defendant. The amount claimed in the plaint is about 41,650 US$ plus damages. DW1 in his testimony did not indicate how much warehouse rental was and there is no evidence on record as to the duration of rental. He merely testified that the defendant suffered losses as well but did not indicate what those losses amounted to. Secondly the WSD of the defendant pleads that the period of failure to take delivery is the period after March 2007. This can be found at paragraph 4 (c) of the defendant

Written Statement of Defence which avers: "*The plaintiff took delivery of quantities of sugar at four different dates, to wit; 20th February 2007, 26th February 2007, 7th March 2007 and 16th March 2007 totalling 408 metric tons but thereafter failed, neglected and/or refused to take delivery of the remaining sugar contracted for which at all times were ready and available for collection as stated above...*" It must further be pointed out that according to the list of deliveries in exhibit P1 after the 17th of April 2007, the plaintiff again took delivery of 25 tons in July 2007. There are no materials properly on record showing what these warehousing rental or loss occasioned by sale at a lesser amount than that of the plaintiff amount to. I will revert to this issue later on in this judgment after conclusion of issue number 1.

To conclude issue number 1 the plaintiff's efforts to collect the contracted sugar were not frustrated by the defendant because PW1 stated that there was no refusal or problem to deliver sugar until after July 2007. Prior to 28th of July according to exhibit P1 the plaintiff had delayed by over 3 months to take delivery of the warehoused goods. The plaintiff has also not paid for all 1000 metric tons of sugar contracted for in the main contract dated 15th February 2007.

Nevertheless in the absence of specific proof by way of special damages as a setoff to the plaintiffs claim, the general rule is that the plaintiff would be entitled to money had by the defendant for which goods have not been supplied. Alternatively the plaintiff would be entitled to delivery of sugar worth the money not yet supplied by an order for specific performance. However in assessing how much the plaintiff would be entitled to, I have taken cognisance of the fact that statutory provisions on warehousing give the warehouse man a lien on the goods warehoused. The goods were warehoused under a contract to supply 1000 metric tons. It is a scientifically provable fact that 71,400 kilograms of sugar amount to 1,428 bags of 50 kilograms and each bag thereof would occupy some space in a warehouse. A set-off by its nature assumes that the plaintiff has a valid claim which should be offset by the defendants claim against the plaintiff.

It is a fact stated in the contract that the goods were warehoused in a bonded warehouse. However there is no indication as to when the goods were sold and whether they were not sold above the import price and at a profit by the defendant. What is material is that the defendant in any case warehoused the goods and warehousing rental has been incurred. Secondly, there is evidence that the goods were not taken for a period of about 3 months. Prior to this the practice was that goods were been taken several times a month. The bulk of the sugar for the amount paid for in advance had been delivered or supplied between February 20th 2007 and March 2007. DW1 testified that the goods were sold after the plaintiff failed to take delivery thereof. The evidence of PW1 is that after July 2007 the defendant refused to deliver the goods. For the above reasons I find that demurrage charges amounting to 3 months being 12 weeks could in equity be offset against the plaintiffs claim in the plaint. As far as the main contract is concerned, the claim for non payment by the defendant pursuant to the main contract dated 15 February 2007 ought to have been claimed as a counterclaim for breach of contract. In the absence of a counterclaim, I

cannot grant the prayers of the defendant to off-set an indeterminate amount based on breach of contract.

According Mulla on the Code of Civil Procedure 16th edition page 1975 in its original and strict sense, a setoff is a plea in defence pure and simple, which by adjustment would wipe off or reduce the plaintiffs claim. At page 1978: the expression ascertained sum is used in contradistinction to un liquidated damages. There can also be an equitable setoff in respect of an ascertained sum of money the essence of such a claim is that there must be some connection between the plaintiffs claim for a debt and the defendants claim to set-off which would make it inequitable to drive the defendant to a separate suit. The learned author notes that as far as common law is concerned a set off has to be of an ascertainable amount. However the rule interpreted provides that the set-off has to be of an "ascertained sum". On the other hand courts of equity used damages or un ascertained sums as a defence to a claim in the plaint. An equitable set-off must arise from the same transaction. The general rule is that a legal set-off has to be of an ascertainable sum. The strict application of this rule on legal set-off has been criticised. In the case of **Axel Johnson Petroleum AB v MG Mineral Group AG The Jo Lind [1992] 2 All ER 163** STAUGHTON LJ notes at 169 that the development of the law of set-off was less than satisfactory and this led to the use of the equitable setoff:

> Its historical development has led to results which appear to lack logic and sense. Legal set-off is available if both claims are for liquidated sums. Thus if a plaintiff has a claim for unliquidated damages, the defendant cannot at law seek to set off a liquidated claim. I can see no sense in that today. This rule was mitigated by the Court of Chancery through the doctrine of equitable set-off which is available in broad terms if there is a sufficient degree of connection between the two transactions, whether or not either or both claims are unliquidated. But, as Leggatt LJ has pointed out, it is questionable whether the remedy is wholly effective as a cure for the disease.
>
> Thirdly there are cases, such as Mondel v Steel (1841) 8 M & W 858, [1835–42] All ER Rep 511, where a claim for unliquidated damages can be used to diminish the price agreed to be paid.
>
> In addition to those three rules there are particular cases where special rules have evolved, such as a claim for freight under a contract for the carriage of goods by sea and a claim by the holder of a bill of exchange.
>
> It can be said that there is a case for reform of the law, which has to be discovered in a number of diverse rules based on no coherent line of reasoning. But in practice masters and judges, for whom the problem is of almost daily occurrence, manage to solve it without any great difficulty. Since the landmark case of Hanak v Green [1958] 2 All ER 141, [1958] 2 QB 9 a broad interpretation of the doctrine of equitable estoppel, or the grant of a stay of execution pending the trial of a counterclaim, has generally been

> sufficient to safeguard the defendant's cash flow when justice required that result, and not if the defendant did not deserve indulgence. It is rare indeed in my experience that legal set-off is mentioned, and even rarer for there to be such an elaborate and skilful argument as we have had in this case. So perhaps we can continue to tolerate the law as it stands.

According to Denning MR in the case of **Federal Commerce and Navigation Ltd v Molena Alpha Inc and others The Nanfri, The Benfri, The Lorfri [1978] 3 All ER 1066** between pages 1077 – 1078 equity should be applied on a case by case basis:

> During that time the streams of common law and equity have flown together and combined so as to be indistinguishable the one from the other. We have no longer to ask ourselves: what would the courts of common law or the courts of equity have done before the Supreme Court of Judicature Act 1873? We have to ask ourselves: what should we do now so as to ensure fair dealing between the parties? (see United Scientific Holdings Ltd v Burnley Borough Council ([1977] 2 All ER 62 at 68, [1977] 2 WLR 806 at 811–812) per Lord Diplock). This question must be asked in each case as it arises for decision; and then, from case to case, we shall build up a series of precedents to guide those who come after us. But one thing is quite clear: it is not every cross-claim which can be deducted. It is only cross-claims that arise out of the same transaction or are closely connected with it. And it is only cross-claims which go directly to impeach the plaintiff's demand that is, so closely connected with his demands that it would be manifestly unjust to allow him to enforce payment without taking into account the cross-claim. ..."

From the above persuasive English authorities, there is ground for saying that the plaintiff cannot claim the whole amount without taking into account the warehouse rental incurred by the defendant for storage of the goods between March 2007 and July 2007 and losses and costs of the defendant pursuant to failure to take delivery. This can only arise in equity and is not a legal set-off. The warehouse rental arises directly from the same transaction which is a contract to supply 1000 metric tons of sugar ex bound Kampala. The defendant claims to have incurred loses but has not assisted the court much to arrive at a quantifiable amount as to what these loses amount to. He pleads warehouse rental as a complete defence without specific proof. For the above reasons and taking into account any damages that the defendant may have incurred I would set-off a sum of US$ 20,000 against the plaintiffs claim for a refund of 41,500 US$. On the other hand the plaintiff is awarded 21,500 USD with interest at 10 per cent per annum from 1st of August 2007 till judgment. Further interest is awarded at 10 % per annum from the date of judgment till payment in full. The rest of the plaintiffs claims for damages are disallowed on grounds of equity. The plaintiff is awarded half of the costs of the suit.

Judgment delivered this 27th day of July 2011

Hon. Mr. Justice Christopher Madrama

Judgment delivered in the presence of:

Didas Nkurunziza for defendant,

Takwana Fred holding brief for counsel Kamugisha for the plaintiff.

Ojambo Makoha Court clerk.

Hon. Mr. Justice Christopher Madrama