THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL COURT DIVISION)

CIVIL SUIT NO. 144 OF 2008

AISHA TUMUSIIME::PLAINTIFF

VERSUS

MARINE SERVICES COMPANY LIMITED::::::::::DEFENDANT

BEFORE HON. LADY JUSTICE HELLEN OBURA

JUDGMENT

Aisha Tumusiime, the plaintiff is a registered business enterprise that imports goods to Uganda and in this respect it used to utilize the ferry of Marine Services Company Limited, the defendant known as MV Umoja to ferry its wagons from Mwanza Port in Tanzania to Port Bell in Uganda. The plaintiff claims that in 2006, it contracted with the defendant to transport 69 wagons for which it paid USD 60,720, but only 68 wagons were delivered and wagon No. C523095 was allegedly retained by the defendant. It sued the defendant for non delivery of the said wagon.

The defendant on its part claims that it was never under a contract to transport the said wagon as it was not paid for, and counterclaims that the plaintiff actually contracted with it to transport 72 wagons which it did but three remained unpaid for.

The plaintiff also claims that wagons were delivered to it from the defendant between October 2006 and December 2007, but this is contested by the defendant who claims that wagon delivery to the plaintiff after the cut off date was from August 2006 to December 2007.

Issues

The parties agreed on four issues, namely;

1. Whether the defendant retained the wagon No.C523095, containing the plaintiff's consignments, and if so, whether such retention was unlawful.
2. Whether the defendant is liable in damages for the loss occasioned to the plaintiff.
3. Whether the plaintiff is liable to the defendant for any freight charges for the consignments in wagon Nos.C523025, C523039, and C521146 (counterclaim).
4. Remedies and costs.

Issue 1: Whether the defendant retained the wagon No. C523095 containing the plaintiff's consignments and if so whether such retention was lawful?

It was submitted for the plaintiff that according to a correspondence by the defendant to the Resident Representative of Rift Valley Railways (RVR) dated 7th November 2007 that was listed as No. 4 on the plaintiff's list of documents, it was expressly stated that the plaintiff; "*...had to pay for the two wagons so that we can release the wagon remaining at Mwanza South Port*."

Counsel for the plaintiff relied on section 94 of the Evidence Act for the principle that when a language used in a document is plain in itself and when it applies accurately to existing facts, evidence may not be given to show that it was not meant to apply to those facts. He submitted that the wagon in dispute was recorded on the defendant's manifest of outward cargo dated 25th October 2006 but the evidence of DW1 and DW2 were both consistent that it was never transported by the defendant for apparent non payment for one or two wagons that had allegedly crossed to the destination at Port Bell.

Counsel contended that the defendant was precluded from denying retention of the wagon and invited court to find that the retention was unlawful since there was evidence to show that the plaintiff had directly paid the defendant for this particular wagon which was part of the 69 wagons.

Conversely, it was submitted for the defendant that retention is defined in ***Black's Law Dictionary; Eighth Edition at page 1342*** as a possessor's right to keep a movable until the possessor's claim against the movable or its owner is satisfied.

Counsel thus contended that from this definition it was the duty of the plaintiff to prove that the defendant ever got into possession of and retained the wagon.

Counsel stated that the basis of the plaintiff's claim of the alleged retention is a letter dated 7th November 2007 (not exhibited) allegedly from Mr. B.S. Temba, the Marketing and Commercial Manager of the defendant, where the word ***"release"*** of wagon No.C523095 was used.

Counsel contended that as the letter was not tendered into evidence, it should not be the basis for the plaintiff to found a claim against the defendant. If it was that important a letter, the plaintiff should have tendered it. It could have done this easily by cross examining Mr. Cyril Mukwase (DW5) about it, since he was the addressee, as Resident Representative of RVR. According to counsel for the defendant therefore, the evidential value of this letter is very questionable given the fact that when Mr. Wilbard Kilenzi (DW1), the Company Secretary of the defendant**,** was cross examined on this letter, he continuously used the word 'purportedly', clearly showing that its authenticity was never admitted by the defence.

In addition to this, counsel submitted that the purported author of this photocopied letter, B.S.Temba, was never called as a witness to tender in the document, and hence its origins are highly questionable. He invited court not to hold the defendant liable on the basis of a photocopied and untendered letter.

Counsel stated that assuming court holds that this letter was validly relied upon by the plaintiff, it was his submission that the plaintiff is simply choosing to interprete it in a way that favours its case and in a way that will make the defendant look like they retained the consignment. He stated that the letter has to be read in context and in its entirety so as to get the meaning the alleged author intended to convey.

He referred to paragraph 3 of the letter which states that *"...one has already crossed and another one retained at Mwanza Port awaiting payments."*This statement according to counsel, confirms that the wagon in contention was in the control of the port authorities. He argued that if indeed the defendant had retained the consignment, it would have been at its own premises and not at the Mwanza Port which is under the control of the Tanzania Ports Authority and hence any

issue regarding the retention of the consignment had to be in regard to issues of non clearance with customs.

Counsel for the defendant submitted without prejudice, that the statement that ***"the customer has to pay for the two wagons so that we can release the wagon remaining at Mwanza South Port"*** simply means that the remaining wagon would only be transported by the defendant upon payment of the freight charges, which the plaintiff failed to do. He therefore submitted that the defendant did not retain the wagon as alleged since it was not yet even in possession of it and hence did not even qualify to be a possessor.

Counsel referred to the evidence of PW2 during re-examination that once goods are loaded and entered on the manifest, there is no other reason for failure to ship except clearance with customs. He pointed out that this followed the statements of PW2 in cross examination that the disputed wagon was cleared through customs and the documents handed over to the defendant. He argued that no evidence of this clearance through customs was properly availed to this court in proof of this.

Counsel also alluded to the evidence of DW3, Mr. Nassor Kupaza, a Customs Officer at Tanzania Ports Authority who testified that on conducting investigations in the records, he found that no documents were handed over to the customs authorities for clearance of the disputed wagon No. C523095. He referred to the witness statement where DW2 stated that that wagon was not cleared by Tanzania Revenue Authority (TRA).

Exhibit D6 was also tendered in by this witness, which is the East African Community Customs Union (Management Regulations) 2006, and specific reference to regulation 104(7) which requires that clearance at customs be made before wagons can be allowed to be shipped. Emphasis was made on the testimony of DW3 that this responsibility lies with the consignee or his agent, who in this case was the RVR and if they omit to do this, then it means that the goods cannot be released to the shipper, who in this case was the defendant.

Counsel also relied on the evidence of DW5, Mr. Cyril Mukwase who testified that wagon No.C523095 was never cleared through customs. He invited court to believe the evidence of DW3 and DW5 on this point instead of PW2 who was based in Kampala and may not have known the facts on ground in Mwanza. He

also invited court to hold that the power to retain the wagon was with the port authorities pending clearance through customs and the defendant could not have retained wagon No. 523095 in the circumstances.

Counsel submitted based on the authority of ***Agrovalue Processors Impex (U) Ltd v. URC; HCCS No. 025 of 2005*** that the defendant will only be liable when the goods are in his possession.

Counsel furthermore submitted that as much as the wagon No. C523095 appeared on the outward cargo manifests and loading lists (Exhibit D3 (IV)) on 25th October 2006, that should not in any way create the assumption that this wagon was on that particular occasion carrying the rice consignment in dispute, and that it was paid for.

He referred to the evidence of DW1 who in re-examination explained that that particular wagon was used several times by various clients including the plaintiff and it was always on a round trip to and from different ports, without being restricted to one customer. Hence its appearance on the outward cargo manifests did not mean that it was appearing in relation to the goods in dispute but for other unrelated carriage rounds which were paid for, since loading memos and manifests would in most cases be made by the plaintiff's agent after payment for freight was completed, as stated by DW5.

Counsel for the defendant noted that looking critically at Exhibit D3 (IV)**,** as much as it shows that wagon No. C523095 was on the outward cargo manifest for Aisha Tumusiime, the consignment note number as per the manifest is 372605, and the year is 2006. He argued that if it is to be compared with the actual consignment note (Exhibit P17) adduced as evidence for the wagon containing the rice, it is clear that this exhibit has a consignment note number of 381455, and the year is 2007.

He raised a question as to whether a consignment note can be for the year 2007 and yet the outward cargo manifest is for 2006 in relation to the same cargo and answered it in the negative. He argued that a consignment note is always made before an outward cargo manifest, and hence if the consignment note in relation to the disputed cargo is for 2007, then the outward cargo manifest should have also

been made in 2007 for that consignment, and looking at the outward cargo manifest for 2007, the wagon C523095 does not appear.

He concluded that this proves the point that the manifest in Exhibit D3 (IV), being a manifest for 2006, cannot be relied upon as proof of an arrangement to transport the cargo in dispute since it was meant to be transported in 2007.

I have considered the arguments of both counsel on this issue and looked at all the documents referred to. As regards the plaintiff's reliance on a letter that was never exhibited, I have reviewed the evidence and found that despite the letter appearing on the plaintiff's list of documents and the witnesses being cross examined on it, counsel for the plaintiff omitted to tender it in evidence as an exhibit. Other letters as well as e-mail correspondences that were responding to that letter were agreed upon by the defendant and admitted as exhibit. It is my considered view that, since the other correspondences that refer to that letter are not disputed and in view of the fact that evidence was led on this letter and the defendant's counsel had an opportunity to cross examine the witness on it as well as put it to his own witness, no prejudice would be occasioned to the defendant by this court considering it for whatever its worth is. I will therefore rely on that letter in this judgment.

I do agree with the view of counsel for the defendant that the letter has to be read in context and in its entirety so as to get the meaning the alleged author intended to convey. I therefore adopt that approach in dealing with that letter as I do here below by quoting its entire content.

The Reference Number of that letter which is on the defendant's letterhead is MAR/HQ/V/3 and it is dated 7th November 2007. It states:

> "*The PR-RVR,*
>
> ***MWANZA***
>
> ***RE: UNPAID WAGONS BY AISHA TUMUSIIME***
>
> *The above subject refers.*
>
> *After going through our records, it has been noted that M/s. Aisha Tumusiime of Kampala has not paid for two wagons as per workings attached.*

Out of the two wagons; one has already crossed and ***another one retained at Mwanza Port waiting payments****.*

Therefore the ***customer has to pay for the two wagons so that we can release the wagon remaining at Mwanza South Port.***

Regards,

B.S. Temba

MARKETING & COMMERCIAL MANAGER." (Emphasis added).

To my mind, the highlighted part of this letter clearly shows that the sole reason for detaining the wagon was the alleged non-payment by the plaintiff. Who then is the beneficiary of that payment? Is it not the defendant who clearly stated in the last paragraph of the letter that the customer has to pay for the two wagons so that "***we can release"*** the wagon remaining at Mwanza South Port. I am quite sure the pronoun ***"we"*** referred to the defendant who authored that letter and perhaps some other person. It could not have only meant Mwanza Port Authority which in my view was simply mentioned because the wagon happened to be located there. It was at least not responsible for its presence there because the payment referred to in the letter was not for its benefit.

I have considered the definition of the word "retention" as per ***Black's Law Dictionary*** (supra) referred to by counsel for the defendant and his elaborate arguments that the goods had not yet gone through customs clearance and so it was not in possession of the defendant as this was only possible after clearance.

First of all, I find the evidence of DW5 on this point quite useful. In paragraphs 5, 6 and 7 of his witness statement, DW 5 explained the procedure followed when goods en route to Port Bell arrive in Mwanza. He then stated in paragraph 8 that when he presented to defendant a list of wagons destined for Port Bell and their respective consignees, they identified three customers whose wagons were not paid for among whom was a wagon No. 523095 consigned to the plaintiff. He further stated that he contacted the plaintiff who insisted that payment for the wagon had been made but the defendant insisted on proof of payment before transporting the wagon. According to DW5, the parties were advised to carry out a joint verification/reconciliation of payments to resolve the dispute but they did not do it

so the wagon in dispute could not be presented to TRA-customs for verification and thus clearance for loading was not possible.

In cross examination DW5 again elaborated the procedure as follows:

> ***"When documents arrive in Mwanza en route to Port Bell we have to present the documents to Marine Services to ensure that the requirements of payments are met and Tanzania Railways Corporation (TRC) to ensure that theirs have also been met. It normally goes through that procedure before we prepare the loading lists to guide the parties".***

In specific reference to the wagon in dispute, DW5 stated in cross examination that:

> "*What I recall is that when this particular wagon arrived in Mwanza* ***Marine Services (read defendant) was supposed to transit it to Kampala but they declined to do so on the ground that it was not paid for****. We were working together under the same roof. We would make loading lists after we had satisfied ourselves that all the parties involved had been cleared*."(Emphasis added).

DW5 then stated in re-examination that:

> *"To the best of my knowledge I do not think we submitted the wagon in dispute on the loading list up to customs.* ***I do not think it even reached that stage because Marine Services insisted that it had not been paid for"***. (Emphasis added).

The above evidence in my view shows that the process of clearing the wagons through customs in readiness for transit to Port Bell was halted by the defendant who declined to transport it on allegation of non payment. Whichever way you look at it the defendant as the carrier had a major role to play in retaining the wagon at Mwanza South Port.

Secondly, I have looked at the meaning of the word *"possession"* as per ***Black's Law Dictionary*** (supra). It is defined as; *"The fact of having or holding property in one's power, the exercise of dominion over property*".

Possession can be actual or constructive. Constructive possession is defined in ***Black's Law Dictionary*** (supra) as; *"Control or dominion over a property without actual possession or custody."*

Going by the above definition of constructive possession, it is the considered opinion of this court that the defendant had constructive possession of the wagon in dispute. This is because the defendant had control over its stay there as it had power to either transport it or refuse to transport it as it did. I do appreciate the critical analysis of counsel for the defendant of the number on the consignment note and the year on Exhibit P17 which shows a disparity with the consignment note and year in Exhibit D3 (iv).

However, I hold the view that entry of the wagon in the manifest is not necessary to prove the alleged retention of the wagon by the defendant. To my mind, the most important question is who had control over transportation of that wagon and actually prevented it from being transported? Never mind at this point whether the retention was justified because it is the 2nd leg of this issue. In my view this question is already answered by the defendant's letter dated 7th November 2007 and the evidence of D5 quoted above together with Exhibit PEX 9 which shows that the defendant later exercised its power and released the wagon for onward loading to Kampala but upon subjecting it to verification the rice was found to be rotten.

The conclusion of this court on the first leg of this issue based on the above analysis is therefore that the defendant retained wagon No. C523095 containing the plaintiff's consignment. This now brings me to the second leg of the issue as to whether such retention was lawful. If at all the wagon was not paid for this question would be answered in the affirmative.

I have considered the evidence and arguments for the plaintiff that the wagon was paid for and carefully looked at the documents relied upon as proof of payments. I have also taken into account the defendant's arguments that part of the payments made directly to the defendant after the cut-off period was used to offset the plaintiff's indebtedness to the defendant on account of wagons that had earlier been transported when they were not paid for. I must express my disappointment that counsel for the plaintiff merely glossed over this contention of the defendant

and did not properly address court on it. I therefore had to go through the entire evidence myself to sort out the ones that relate to this matter.

The plaintiff adduced evidence to show that before the cut-off period it was dealing directly with Uganda Railways Corporation (URC) to whom it was paying the freight charges and did not know the defendant company or the relationship between it and URC. PW1 who is the proprietor of the plaintiff specifically testified in cross examination that in 2005 the plaintiff paid to URC a total of USD 24,500 being freight charges for 25 wagons as per receipt Nos. 04199 & 04200 dated 29th September 2005 and No. 04103 dated 30th July 2005 all marked "N".

In re-examination, PW1 stated that the 25 wagons the plaintiff paid for in September 2005 delayed to be delivered because of the ship that capsized. He also stated that the wagon numbers were not indicated on the receipts as payments were made in advance before the wagons are allocated.

It was also the plaintiff's unchallenged evidence that in 2006 it paid a total of USD 60,720 for 69 wagons directly to the defendant and only 68 wagons were transported in bits leaving a balance of one which is the subject matter of this suit. Exhibits P2–P9 being receipts issued by the defendant were relied on as proof of payments. Furthermore, PW1 singled out wagon Nos. 73050 (as per Exhibits P13 & P14) and C521432 (as per Exhibits P15 & P16) and stated that they were paid for to URC.

It is the defendant's case that part of the payment made directly to it was used to clear the plaintiff's indebtedness to the defendant in respect of wagon Nos. C531036 and C521257 that were shipped in August 2005 and 11th September 2005 as per the evidence of DW2. It is also contended by the defendant that the plaintiff did not pay for other two wagons Nos. C521505 and C521423 which were shipped in 2005. It was therefore argued by counsel for the defendant that the defendant used part of the USD 60,720 to cover the unpaid wagons of 2006 hence leaving the last three wagons delivered in 2007, namely; Wagon Nos. C523025, C523039 and C521146 unpaid for which is the basis of the counterclaim.

The evidence led by both parties show that before 1st July 2006 there was a tripartite arrangement between TRC, URC and the defendant whereby the parties would collect payments due to the other. For example as between URC and the

defendant, URC collected freight charges and shared it with the defendant on an agreed percentage. DW2 explained the percentage in his evidence.

It was also testified by PW1 that before September 2006 the plaintiff did not know about the defendant because it was only dealing with URC. That evidence is supported by the one of PW1 who was the Commercial Manager of RVR that took over from URC. He testified that the confusion about the wagon in dispute came about because of the transition from URC to RVR in 2006 because the plaintiff had paid for many wagons (69). He explained that the transition was at first from URC to an interim administration of 3 months from 1st July 2006 to 31st October 2006 and on 1st November 2006 the interim administration handed over to RVR.

He further explained that it was from 18th July 2006 that the defendant was entitled to receive money directly from the owners of goods but this was not implemented immediately because the defendant did not have a representative in Kampala. He alluded to a meeting that was held on 18th July 2006 where TRC, URC and the defendant signed an MOU authorising the defendant to collect its money directly from customers.

I have no reason to doubt the evidence of PW2 whom I found to be credible. His evidence is supported by minutes of the verification meeting held from 21st -25th May 2007 (Exhibit D 5) which showed that URC continued to collect payments on behalf of the defendant even after the cut off period.

Since the cut off period was 1st July 2006, I would believe the evidence of the plaintiff that payments for the wagons that were transported in 2005 and part of 2006 were already made to URC. At that time the plaintiff was dealing with URC much as the defendant's ship could have been used. This view is supported by Exhibits D1 dated 1st August 2006 and D7 (ii) dated 30th November 2006 which are loading lists prepared by URC for the defendant to load wagons that included the plaintiff's. Two of the wagons that are alleged to have been transported without payment appear in Exhibit D1. URC could have only prepared the loading lists after satisfying itself that it had received payments. This lends credit to the plaintiff's claim that those wagons were paid for in advance to URC.

If any party should claim payment for those wagons it should be URC and not the defendant. No wonder that URC did not lay any claim because it is on record that

the plaintiff had already paid for those wagons in 2005 but according to PW1 their transportation was delayed by the sinking of the ship. It is therefore my finding that the defendant cannot claim that it used the money paid to it by the plaintiff in 2006 to offset the outstanding debts by the plaintiff incurred in 2005 because there was no such debt owing from the plaintiff. If at all URC did not pass on that money to the defendant that is another matter for which the plaintiff cannot be held liable.

There is also evidence on record as per PW1, PW2 and Exhibit D5 to show that even after the cut-off period URC still continued to collect money on behalf of the defendant. I would therefore be inclined to believe the evidence of the plaintiff that payments were made to URC in respect of some of the plaintiff's wagons transported by the defendant up to September 2006. The mere fact that the plaintiff's name does not appear on Exhibit D4 does not in my view negate the fact of payment to URC as the plaintiff was not part of that meeting.

It is also the view of this court that if indeed the plaintiff had an outstanding debt with the defendant, it would have been prudent for the defendant to notify the plaintiff accordingly at the time it was paying for the 69 wagons so as to make it aware other than quietly offsetting the money and creating the scenario that gave rise to this suit.

For the above reasons, this court is satisfied that the plaintiff has proved its case on a balance of probabilities that it had paid for the wagon in dispute. The defendant was therefore not justified in retaining that wagon at Mwanza South Port for alleged non payment instead of transporting it to Port Bell. Accordingly, I find that the retention was unlawful thereby answering the 2nd leg of issue one in the affirmative.

Issue 2: Whether the defendant is liable in damages.

It was submitted for the plaintiff that the defendant as a common carrier is liable for the loss of the consignment in wagon No. C523095 and associated damages. The definition of the word common carrier by ***Black's Law Dictionary*** (supra) was cited, and the case of ***Sebagala & Sons Electric Centre v. Kenya National Shipping Lines Ltd [1997-2000] UCLR 388*** as well as ***Halsbury's Laws of England, 4th Edition, Volume 28 at paragraph 536*** were relied upon by counsel to support the principle that a common carrier is under a duty to carry goods and

deliver them safely to the place they were directed to and is entitled to a particular legal lien on the goods until the carriage is paid for.

It was argued for the plaintiff that the defendant retained the plaintiff's perishable expensive goods in the wagon in dispute without completing its duty of transporting it and as such the defendant had no legal right whatsoever to retain the wagon. It was therefore concluded that the defendant's failure to transport the plaintiff's consignment in the wagon in dispute led to the condemnation of the rice as rotten and unfit for human consumption and animal feeds. This court was invited to find the defendant liable in damages for the loss occasioned to the plaintiff's consignment in wagon No.C523095.

On the other hand, it was submitted for the defendant that wagon No.C523095 was never brought into the hands of the defendant, and so there is no contract of carriage between the parties to the suit in relation to that wagon, the plaintiff is entitled to none of the remedies sought, and its claim should be dismissed with costs.

In the alternative, but without prejudice to the foregoing, it was submitted that should court hold that the defendant retained wagon No. C523095, which is denied, the plaintiff was under a duty to mitigate its losses by seeking alternative carriers or salvaging any good bags of rice and selling them.

Counsel referred to the case of ***Umusiime Fidelis v. AG HCCS No.88 of 2003,*** *in which* ***Kasule*****, J** (as he then was) while relying on ***Denmark Productions Ltd v. Boscobel Production Ltd [1968]3 ALLER 513,*** held that a party to a contract that suffers by reason of breach committed by another party must take reasonable steps to mitigate the loss, and should not sit back and make no attempt to repair it. If he fails to do so, he cannot hold the defendant responsible for more than the loss which he would have suffered if he had done his best to mitigate it.

Court was invited to take note of the fact that even up to today, the bags of rice are still at Mwanza Port under the control of TRA and the plaintiff has taken no steps to try and see if there are any bags of rice in good condition that can be recovered, which is testament of the plaintiff's negligence towards its duty to mitigate its losses.

It was submitted that the plaintiff's claim against the defendant ought to fail, and this court was invited to find in favour of the defendant and dismiss the plaintiff's claims with costs.

In rejoinder, counsel for the plaintiff submitted based on the evidence of PW2 that at the time in issue the only ship operating on the Mwanza to Port Bell route was the defendant's as all other ship had capsized. He argued that mitigation was therefore impossible as there was no alternative available to the plaintiff.

I have considered the submissions of both counsel on this issue more especially the alternative argument that the plaintiff should have mitigated its loss. I do agree with the principle relied upon by counsel for the defendant although I think the circumstances of each case must be taken into account. There were communications between the plaintiff and the defendant as per the correspondences on record. In all those letters the parties were arguing over the issue of payment and finally the defendant agreed to release the wagon whose content was inspected and found to be rotten.

In the meantime, there was also an effort by a representative of RVR to have the parties sort out their dispute as per Exhibit D2. Indeed PW2 testified that at that time the only ship available was the defendant's. I would therefore agree with the plaintiff that in terms of finding an alternative transport it was impossible as road transport would not have been worth it due to excessive costs.

On the argument that the rice should have been sold off, since this only came up in the submission of counsel for the defendant I do not know whether the plaintiff tried that option. Be that as it may, the goods were intended for the Ugandan market so I would give the plaintiff the benefit of the doubt and hold that it did not have to sell the rice in Mwanza due to the difficulty that would be encountered with TRA and Ports Authority.

I would only consider the correspondences and the absence of other alternative transport and hold that the plaintiff did what it could do to mitigate the loss but the defendant was adamant and only relented when it was too late to save the goods.

On the whole, I find that the defendant having unlawfully retained the plaintiff's wagon No. C532095 and only released it after the goods were rotten is squarely

responsible and is liable in damages. Whether the damages are proved to the satisfaction of this court is another matter that will be considered under issue four.

Issue 3: Whether the plaintiff is liable to the defendant for freight charges.

The finding on the 2nd leg of issue one that the retention of the wagon in dispute by the defendant for non payment was unlawful because it was paid for has a direct bearing on this issue. Evidence was led by the plaintiff to prove that up to September 2006 the plaintiff had paid for all the wagons that crossed over to Port Bell to URC. That evidence has already been analysed and evaluated under issue one so I will not go over it again. It suffices to say that this court is satisfied that the payments that were made by the plaintiff to the defendant for 69 wagons fully covered the three wagons that are subject of the counterclaim. For that reason, it is the finding of this court that the plaintiff is not liable to the defendant for freight charges.

Issue 4: Remedies

The plaintiff claims for special damages, interest at the rate of 29% per annum on special damages, general damages and costs.

(a) Special damages

Under special damages, the plaintiff in its amended plaint claims a total of Ushs. 72,000,000/= with the following particulars:-

(i) Value of consignment of forty metric tonnes of rice in wagon No. C523095 amounting to US $ 10,560 (Ten thousand five hundred sixty US dollars);

(ii) Payment of port and clearing charges to the Tanzania Ports Authority amounting to US $800 (Eight hundred US dollars);

(iii) Transport costs from Dar es salaam to Kampala amounting to US $ 3,203 (Three thousand two hundred three US dollars);

(iv) Inspection fees for the Government Chemist to inspect the consignment US $300 (Three hundred US dollars);

(v) Transport and accommodation costs incurred by the plaintiff's Managing Director, amounting to US $700 (seven hundred US dollars).

Counsel for the plaintiff in his submission merely reproduced the above items as pleaded and did not bother to convince this court why it should be awarded. It was only when counsel for the defendant submitted that the plaintiff had failed to prove special damages by producing documentary evidence that counsel for the plaintiff in the rejoinder submitted that PW1 testified as to the price of a kilogram of rice at the time. He relied on the authority of ***Kampala City Council v. Nakaye (1972) E.A. 446*** which was cited in ***AKPM Lutaaya v. Attorney General Civil Appeal No. 2 of 2005*** for the proposition that special damages can be proved by oral evidence.

Counsel for the defendant argued that special damages must be proved by documentary evidence and not by verbal assertions. He contended that it appears in this case there was no proof of the value of the consignment as the plaintiff did not disclose to court how much each bag cost or the profit margin.

I have considered the above submissions and the principle that special damages must be specifically pleaded and strictly proved. I have studied the record of proceedings and found that when PW1 first testified before another judge counsel for the defendant objected to his evidence on the particulars of special damages on the ground that it was not pleaded. All he was able to state was that a ton of rice in Pakistan where he imported the goods in dispute from was USD264. No document was produced to support that allegation and no reason was given as to why the import documents were not tendered in court. Similarly, PW1 stated verbally that the market price of a kilogram of rice at the time was Ushs. 2500/=. I do not know why the plaintiff as a dealer in rice could not produce duplicate/carbon copies of receipts to show the exact price and even calculate the profit margin by deducting the costs of importing the goods from the sale price. An amount of Ushs. 42,436,000/= was merely pleaded without showing how that figure was arrived at.

I wish to observe generally that this court is not at all satisfied with the way the plaintiff's evidence was led in this case. Less emphasis was put on the most important aspect of the plaintiff's case. More specifically, the court was not

assisted by materials upon which special damages could be awarded to the plaintiff.

Be that as it may, it is not in dispute that wagon No. C523095 contained 800 bags of rice which was converted by the plaintiff's counsel into 40 tonnes. PW1 testified that each ton costs USD 264 making a total of the US $ 10,560 claimed. I would allow that amount.

As regards the claim for port and clearing charges and costs of transportation, since it is not in dispute that this wagon went through transit from Dar es salaam it follows that some charges were paid as testified by PW1 and in view of the finding of this court that the wagon was already paid for, I would allow the claim of USD 800 being port and clearing charges and USD 3,203 being transportation costs.

On inspection fees, Exhibit PEX9 indicates that USD300 was paid and an invoice was alleged to have been attached but the copy on court record does not have that attachment. I would find that the plaintiff has proved that claim and allow it because it is not in dispute that the inspection was done and the defendant's representative was in attendance.

As regards the claim for transport and accommodation of the plaintiff's Managing Director, no evidence was led to that effect and no documentary proof of travel and receipt for accommodation was adduced in court. I would therefore have no basis for awarding the same and it is accordingly denied.

On the claim for lost profit, it was pleaded in paragraph 4 (a) of the amended plaint that the plaintiff is a whole sale trader dealing in the importation and sale of mixed supplies in Uganda, inclusive of rice. PW1 testified that the market price of rice at the time was Ushs. 2500/= per kilogram. He did not state whether this was the whole sale price at which he was selling or the retail price at which his customers were selling. There was even no explanation as to how the amount of Ushs. 42,436,000/= claimed as lost profit was arrived at.

Since it was the duty of the plaintiff to specifically prove its lost profit to the satisfaction of this court, I do not find the evidence on record satisfactory to justify the lost profit claimed. I would therefore decline to award it.

All in all, the amounts allowed under special damages are US $ 10,560 being the costs of the 40 tonnes of rice, USD 800 being port and clearing charges, USD 3,203 being the costs of transportation and USD 300 being the fees for inspection. The total claim allowed under special damages is therefore USD14,863 for which judgment is entered for the plaintiff.

(b) Interests

Interest at the rate of 10% per annum is awarded on the special damages from the date of filing the suit until payment in full.

(c) General damages

I have considered the plaintiff's arguments justifying an award of general damages and the principle that governs it. I would award Shs. 20,000,000/= as general damages for the inconveniences and losses suffered by the plaintiff as a result of the defendant's failure to transport its consignment and it is so awarded.

(d) Costs

Costs of the suit are awarded to the plaintiff as the successful party.

I so order.

Dated this 5th day of June 2013.

Hellen Obura

JUDGE

Judgment delivered in chambers at 3.00 pm in the presence of Mr. Patrick Kabagambe who was holding brief for Mr. Enock Barata for the plaintiff and Ms. Jamila Apio who was holding brief for Mr. Peters Musoke for the defendant.

JUDGE

05/06/13