THE REPUBLIC OF UGANDA,

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL SUIT NO 309 OF 2008

NANAM AVIATION LIMITED}..... PLAINTIFF

VERSUS

1. **CAPT GEORGE MIKE MUKULA }**
2. **SUN AIR (U) LIMITED}..... DEFENDANTS**

BEFORE HON MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

JUDGMENT

The Plaintiff's suit against the defendants jointly and severally is for US$303,437 or Uganda shillings 576,530,300/= and interest.

The plaintiff alleges in its amended plaint that sometime in May 2008, the plaintiffs while in Uganda were trying to source for two aircraft for hire for their transport business in Southern Sudan when they met the first defendant. The first defendant requested the plaintiff to give the business to his company, the second defendant. The parties signed an aircraft rental agreement. Under the agreement the second defendant was to provide the plaintiff with two aircraft for rent. Pursuant to the agreement the plaintiff paid the second defendant US$207,437 or Uganda shillings 394,130,300. The defendant failed to provide one of the aircraft, while the second aircraft worked for 22 days only and was thereafter withdrawn in breach of contract after the plaintiff had paid two months upfront. Pursuant to the agreement the plaintiff incurred expenses on the accommodation for pilots, salaries, advertisements, operational clearances etc spending a further US$96,000 or Uganda shillings 182,840,000/=. The plaintiffs requested the defendant to refund the money and pay for the expenses incurred as a result of breach by the defendants but the defendants have declined. The plaintiff made some payments to the defendants to the account of Nanam Transpet Company Limited.

The plaintiffs contend that the first defendant is the head and spirit of the second defendant and the second defendant has no known assets and is merely an instrument of the first defendant and the transaction was fraudulent. Secondly, the second defendant breached its contract with the plaintiffs because it had received money from the plaintiffs for supplying aircraft but failed to do so. Consequently the plaintiffs suffered loss and special damages of US$96,000 or the equivalent in Uganda shillings as a result of the defendant's breach of contract. The plaintiffs have been deprived of the money for a long time and are entitled to interest at a commercial rate. The

plaintiffs seek a refund of the money received by the defendants and interest at the rate of 25% per annum and costs of the suit.

The defendants denied the claims of the plaintiffs and counterclaim for specific performance of the contract dated 28th of May 2008 for residue of the contract period. They assert that on the 28th of May 2008 the parties executed an aircraft rental agreement for lease of two planes for two calendar years. The defendants/counterclaimants discharged their obligations under the aircraft rental agreement but by reason of the plaintiffs failure to operate on proper, safe and internationally accepted runways, the planes were damaged while landing on an airstrip in Boma in the Southern Sudan and were returned to South Africa for major repairs. The defendants offered to replace the aircraft with similar specifications but the plaintiffs refused to take up the offer. By reason of the plaintiff's conduct, the counterclaimant has suffered a great loss for which it seeks general damages for breach of contract, an order for specific performance of the contract dated 28th of May 2008 and for costs of the counterclaim.

In defence to the counterclaim, the plaintiffs aver that one of the planes which were availed by the defendants could not be allowed to fly because the defendants breached the contract by delivering a different plane with different registration. It did not fly for more than 5 hours even when it was supposed to fly for 65 hours per month. The plaintiffs further aver that no plane was ever damaged and the defendant never complained about it to the plaintiffs or to the Civil Aviation Authority. The plaintiff denied that the defendants ever provided alternative planes under the contract.

The plaintiff called one witness PW1 Mr. Peter Mukhebi the Operations Director of the plaintiff and closed its case. The defendant on the other hand called two witnesses namely DW1 Captain George Mike Mukula and DW2 Captain Kakooza Joram. Subsequently counsels filed written submissions. The plaintiff was represented by Piwang Paul and Innocent Nyote while the defendant was represented by Kyazze Joseph and Nsubuga Charles.

The agreed issues are:

1. Whether the defendants breached any agreement that was signed between the parties?
2. What are the remedies available to the parties?

Whether the defendants breached any agreement that was signed between the parties?

The written submissions of the plaintiff's counsel are that according to the evidence of all the parties to the suit, there was an aircraft rental agreement between the plaintiff and the second defendant dated 28th of May 2008 which was exhibited. It is not disputed by the parties that the aircraft was to be leased to the plaintiff for two years. According to paragraphs 8, 9 and 10 of the witness statement of PW1, United States dollars 254,005 was paid to the second defendant at the request of the first defendant but the aircraft worked for only 22 days instead of two years. DW 2 Capt Mike Mukula in paragraph 9 of his witness statement says that the aircraft worked for two

months and confirms paragraph 6 of the witness statement of DW 2 Capt Kakooza Joram. There was therefore clear evidence before the court that the second defendant breached the agreement of 28th of May 2008 between itself and the plaintiff when it failed to availed the aircraft for two years as agreed.

Counsel subsequently addressed the sub issue of how the first defendant became a party and therefore liable. He submitted that the evidence of PW1 was that the deal was for the interest and benefit of the first defendant. Any subsequent contract executed between the plaintiff and the second defendant was done at the request of the first defendant. All negotiations where with the first defendant will give the impression that he was the one to supply the aircraft and the negotiations took place in his home. The signing of the agreement was in a room at a Casino and is when the second defendant came into the picture. In the counterclaim, the first defendant is a party. Counsel submitted that the first defendant is liable because consideration moved from the plaintiff to him. He relied on the case of **Curie vs. Misa (1875) LR 10 Exch 153** where it was held that a valuable consideration in the sense of the law, may consist either in some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other. In the circumstances the first defendant had interest and benefit from the award of the contract to the second defendant at his request which was to the detriment of the plaintiff and whether the plaintiff lost the suit money. Moreover the offer was made to the first defendant were accepted the offer but only just to supply the aircraft through the second defendant. Counsel therefore submitted that the first defendant breached the contract as well.

Finally counsel submitted that the case can be determined on the basis of the agreement dated 28th of May 2008 alone. This is because the clear evidence before the court is that the two aircraft were involved and all the three witnesses referred to 2 aircraft yet the agreement talks of only one aircraft. On the balance of probabilities therefore the second aircraft has a lot to do with the first defendant. Counsel prayed that the court finds the defendants jointly and severally in breach of the agreement and therefore liable.

In reply the defendants counsel submitted that the second defendant duly supplied two aircraft according to the specifications required by the plaintiff but only withdrew the same when the plaintiff mishandled the aircrafts causing extensive damage to the aircraft that required immediate repairs. The aircrafts were withdrawn with the intention of keeping the commitment of the defendant to safety contained in the agreement. In the meantime however the second defendant offered alternative aircrafts to the plaintiff to handle the plaintiff's immediate needs pending the repairs which the plaintiff rejected. The defendants consequently counterclaimed against the plaintiff claiming specific performance of the residue of the contract, general damages and costs.

On the first issue of whether the defendants breached any agreement that was signed between the parties? Counsel for the defendant submitted that it is a Cardinal principle of law that the burden

of proof lies on the party asserting a fact. The evidential burden can only shift to the defendant if the plaintiff adduces evidence to raise the presumption that what he asserts is true according to the case of **Coptcot vs. Godfrey Sentongo and another HCCS number 0118 of 2008.** The burden was on the plaintiff to prove that it had executed a valid contract with both defendants which was breached by the defendants. The plaintiff sought to rely on the agreement annexed to the plaint as annexure "A" but no such agreement was exhibited in the course of the trial. Counsel contended that for the agreement to be relied upon in evidence it had to be embossed and there must be evidence of the payment of stamp duty in compliance with the Stamps Act. Section 42 of the stamps act cap 322 provides that an instrument on which a duty is chargeable is not admissible in evidence and is the instrument is duly stamped as an instrument on which the duty chargeable has been paid. Counsel relied on the case of **Proline Soccer Academy versus Lawrence Mulindwa and 4 others.** Because no agreement was exhibited as proof of the contract, the plaintiff cannot rely on annexure "A".

Alternatively and without prejudice, even if the court was inclined to admit and relied on the agreement annexure "A", it was not enforceable by the plaintiff against the first defendant. The agreement relied upon shows that the contract was specifically between the second defendant and the company by the name Nanam Transpet Company Ltd. It may have been for the benefit of the plaintiff but does not make the plaintiff a party to the contract. The agreement does not mention the plaintiff anywhere. Secondly the agreement does not mention the first defendant as a party to the agreement. This fact is acknowledged by the plaintiff in paragraph 3 (d) of the plaint. PW1 conceded in cross examination that the first defendant was not a party the contract and no personal obligations had been imposed upon him under the contract. The fact that the contract was for the benefit of a third party or that a third party benefited from the contract does not by itself make such a party privy to the contract or liable there under. Such a contract cannot be enforced against a non-party merely because such a party may have benefited. Counsel relied on the case of **Kiga Lane Hotel Limited vs. UEDCL HCCS number 557/2004**.

The plaintiff in cross examination conceded that the parties never included the first defendant. PW1 in cross examination stated that the first defendant informed him that he was a director of the second defendant. He conceded that he had no record of any personal request or acknowledgement of any receipt of any money by the first defendant. Secondly he read through the contract before signing it and creating knew he was dealing with the second defendant company and not the first defendant as a person.

The first defendant only executed the contract as a director and not in his personal capacity and so was all other correspondences written. The first defendant conducted negotiations in his capacity as a director of the second defendant. As to where the negotiations took place is immaterial. Had the plaintiff been an uncomfortable with dealing with the second defendant company, it ought to have demanded a personal guarantee from the first defendant.

Counsel further submitted that the question is whether a director can be held personally liable for the debts or obligations of a company. The defendants counsel contends that once the company is registered as a limited liability company, it acquires a legal personality and is capable of being sued and suing. The company is in law in different person from the subscribers. The company is not in law the agent of the subscribers or a trustee for them. See the case of **Lukyamuzi James versus Akright Project Ltd and Anatoli Kamugisha HCCS number 319 of 2002**. The first defendant as a director of the second defendant is not liable for any acts or omissions of the second defendant.

Counsel further submitted that the plaintiff did not plead any facts in the plaint to warrant the lifting of the veil of incorporation. It was not pleaded that the second defendant is a sham or a cloak or was it the case that the company was registered to defraud creditors. DW1 testified that the company had been in business for a long time, with big businesses and had an office in Pan House in Kampala, had assets and was a strong company. PW1 testified that he was approached by the first defendant who requested him to give the business to his company. He further testified that the first defendant requested him to enter into an aircraft rental agreement with the second defendant. Consequently from his own testimony, he was aware that the first defendant was acting in his capacity as a director of the second defendant. Consequently there are no grounds to warrant the lifting of the veil of incorporation so as to make the first defendant liable. Counsel further relied in the case of **Lubega Matovu vs. Mikwano Investments Limited Miscellaneous Application Number 156 of 2012.** In the circumstances the defendants counsel further submitted that the first defendant was a wrong party to the suit and the suit against him ought to be dismissed with costs.

On the question of whether the defendants breached the agreement, the defendants counsel relied on the evidence of PW1 which he submitted was contradictory. The allegation that only one aircraft and not two was supplied, is false. This can be seen from paragraph 10 of the witness statement of PW1. In paragraph 12, he testified that he wrote to the defendants about the withdrawal of aircraft's. Secondly the second defendant acknowledged the withdrawal of the aircraft. In cross examination, he conceded that there were two aircrafts which had been availed. By acknowledgement dated 21st of July 2008, the plaintiffs managing director acknowledged receipt of two aircrafts in good order and shape which the plaintiff used to earn revenue for a period of two months according to exhibit P3. Consequently there is ample evidence that two aircraft were availed.

Secondly the basis of the claim for breach of contract is that the second defendant availed aircraft for only 22 days. The defendants were forced to withdraw the aircrafts for safety as the plaintiff breached the terms of the rental agreement causing extensive damage to the aircraft which required withdrawal of the aircraft to South Africa for repairs. PW1 conceded having received notification of the withdrawal of the aircraft for repairs. According to DW1 after withdrawal of the aircraft, the second defendant offered the plaintiffs alternative aircraft which offer was unjustifiably rejected by the plaintiff. The plaintiff having caused the withdrawal of the aircraft,

further failed to mitigate potential losses by rejecting viable alternatives. The defendants however provided alternative aircraft to the plaintiff to use in the meantime which aircraft were of the same description. The plaintiffs conduct amounted to a fundamental breach of the rental agreement thereby terminating it under clause L1 (e) of the agreement. The allegation that the first defendant breached the contract is legally unfounded. The first defendant is not a party to the contract and it is inconceivable how he can breach or terminate the contract. Counsel relied on the case of **Wakiso Cargo Transporters Company Ltd versus Wakiso District Local Government Council and the Attorney General HCCS numbers 0070 of 2004**.

In rejoinder, the plaintiff's counsel submitted that the aircraft rental agreement and the tenancy agreements are not agreements which are only admissible upon payment of stamp duty. In any case, they are exhibited and the defendant sought to raise an objection to their being tendered in evidence at the time of the trial.

On the issue of US$96,000 paid as rent, it is indicated in paragraph D of the second section of the agreement that the rent was paid. The defendants did not bother to read the agreement and appreciate it.

In reply to the submissions on the counterclaim, the plaintiff's counsel submitted that the defendant's submissions are off the mark. Both defendants are counterclaimants in the suit and according to paragraph 8 of the counterclaim; the main counterclaimant is Capt George Mike Mukula. This clearly points out that he was a party to the deal and counterclaimed on the basis of the aircraft rental agreements. Furthermore none of the counterclaimants prayed to court to award the remedies prayed for in the counterclaim and their evidence is hearsay.

Resolution of Issue 1

I have duly considered the pleadings of the parties, the testimony of the witnesses, the documentary evidence and written submissions of counsel.

The first issue was formulated to try the plaintiff’s suit and is **whether the defendants breached any agreement that was signed between the parties**.

The court will first consider whether it has jurisdiction in this matter. Both defendants are domiciled and resident in Uganda and the High Court has jurisdiction to entertain the suit under section 15 of the Civil Procedure Act though the contract was substantially performed and allegedly breached in Southern Sudan. In those circumstances the High Court can exercise jurisdiction in the matter.

The first issue formulated does not specify which particular agreement was executed between the parties and which formed the issue for trial. Annexure "A" is an agreement dated 28th of May 2008 between Messieurs Sun Air (Uganda) Ltd referred to as the first party and Messieurs Nanam Transpet Company Limited trading as the Messieurs Nanam Aviation Ltd. The first party

who is also the second defendant to the suit is described as a company incorporated under the laws of the Republic of Uganda engaged in the aviation industry and operation of leasing or renting of aircrafts of all kinds, types or sizes.

The defendants counsel in the final submissions objected to the admissibility of the agreement dated 28th of May 2008. There are two grounds of objection to the agreement. The first one is that it was not admitted in evidence and cannot be relied upon. Without much ado, this first ground cannot stand. The testimony of PW1 shows that the document had been admitted as exhibit A (P1). The proceedings of 13 November 2012 are very clear about what transpired about admissibility of documents. Both counsels agreed that the hearing of the suit shall proceed by way of filing witness statements and witnesses would be cross examined and re-examined. It is after the agreement that the court raised the question of any documents that the witnesses intended to rely upon. The defendants counsel did not object to the reference in the witness statements to the documents included in the trial bundle. His problem was that he also wanted to obtain some documents from South Africa that the defendant intended to rely upon. He was requested to avail the documents to his colleague for purposes of admissibility before the trial. Consequently the court directed that the documents in the trial bundle relied on by the witnesses would be attached to the witness statements. At the hearing of the testimony of PW1 the operations director of the plaintiff, the defendants counsel specifically cross examined PW1 on the agreement between the two distinct companies. He established that the first defendant is not a party to the agreement. Secondly the fact that the request of the first defendant to give the business to the second defendant was not specified in the agreement. In other words the defendants counsel cross examined the witness on the agreement dated 28th of May 2008. Notwithstanding any finding that the document was admitted and was relied upon as an exhibit, the defendants were not prejudiced and cross examined the witness of the plaintiff on the document. Furthermore, the other points the defendant raised in defence of the first defendant's case rely on the same agreement.

Questions of admissibility could be raised at the time when the witness adopts his written statement on oath. Subsequently the document was marked as agreed and is exhibit A as attached to the witness statement of PW1 and there was no objection from the defendants counsel. The objection cannot be raised in final submissions after the witness has been cross examined.

That notwithstanding, the agreement dated 28th of May 2008 was admitted in the written statement of defence of the defendants. As far as the joint written statement of the defendants is concerned, paragraph 6 (a) avers that the first defendant did indeed avail and deliver to the plaintiffs the planes as agreed in the agreement between the parties and the plaintiffs used the planes for two months. Secondly in paragraphs 6 (b) the defendant avers that the plaintiffs unilaterally breached the terms of the rental agreement causing damage to the aircraft and therefore requiring the planes to be withdrawn and returned to South Africa for major repairs and overhauling. Last but not least paragraph 9 of the counterclaim of the defendants avers that on

the 28th of May 2008 the parties executed an aircraft rental agreement for lease of two planes for two calendar years.

Under section 57 of the Evidence Act Cap 6 laws of Uganda, facts admitted need not be proved. Section 57 of the Evidence Act provides as follows:

> "57. Facts admitted need not be proved.
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> *No fact need be proved in any proceeding which the parties to the proceeding or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings; except that the court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions."*

The defendants have admitted by the pleadings that an agreement was executed between the relevant parties thereto on the 28th of May 2008. The terms of the agreement are contained in exhibit P2 or annexure “A” to the amended plaint and were admitted by the defendants. Secondly in paragraph 9 of the counterclaim filed by the defendants against the plaintiffs, the agreement forms the basis of the counterclaimants/defendants claim. In those circumstances, the agreement is taken to be proved. Before taking leave of the issue, the defendants counsel raised the question of admissibility of the document on the ground of a bar under the Stamps Act.

Section 40 of the Stamps Act provides as follows:

> 40. Examination and impounding of instruments.
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> (1) Every person having by law or consent of the parties authority to receive evidence, and every person in charge of a public office, except an officer of police, before whom any instrument chargeable, in his or her opinion, with duty, is produced or comes in the performance of his or her functions, shall, if it appears to that person that the instrument is not duly stamped, impound it.
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> (2) For that purpose every such person shall examine every instrument so chargeable and so produced or coming before him or her, in order to ascertain whether it is stamped with a stamp of the value and description required by the law in force in Uganda when the instrument was executed or first executed;
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> but—
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> (a) nothing in this section shall be deemed to require any judge or magistrate of a criminal court to examine or impound, if he or she does not think fit so to do, any instrument coming before him or her in the course of any proceeding;
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> (b) nothing in this section shall be deemed to require any magistrate or justice of the peace to examine or impound any document coming before him or her in the course of

taking an affidavit or exercising or performing any of the other powers or duties of a notary public or commissioner for oaths;

(c) in the case of a judge of the High Court, the duty of examining and impounding any instrument under this section may be delegated to such officer as the court appoints in this behalf.

(3) For the purposes of this section, in case of doubt, the Minister may determine what offices shall be deemed to be public offices, and who shall be deemed to be persons in charge of public offices."

The provision deals with powers to impound an instrument chargeable with stamp duty. It however gives a judge magistrate discretionary powers in any proceedings for the taking of affidavit or notarising an affidavit to impound the instrument chargeable with stamp duty. Particularly gives a judge or magistrate discretionary powers whether to impound the instrument in criminal proceedings. Last but not least, it must appear to the judge or the magistrate that no stamp duty has been paid on the instrument. The defendant raised the question of impounding of the instrument in final submissions. It ought to have been raised at the commencement of the proceedings and particularly during the testimony of PW1 where the document was relied upon to enable the court establish whether stamp duty was paid and for the opposite counsel to be heard on the matter at that stage. Notwithstanding the fact that the defendants counsel did not raise an objection to the instrument during the proceedings when evidence was being adduced, it is contrary to the rules of fair procedure to raise such an issue at the point of submissions. In that scenario, the plaintiff has no opportunity having closed its case, to defend itself as far as the production of the document is concerned. The plaintiff has already relied on the document. However the defendant has also rely on the document in the counterclaim. They cannot therefore raise any objection to the document on the ground that stamp duty has not been paid. It is clear on document. The defendants are barred by the doctrine of estoppels imported under section 114 of the Evidence Act from raising the issue now. The objection of the defendant is accordingly overruled.

The second submission of the defendant is based on a point of law. It is the submission that the first defendant is not privy to the agreement dated 28th of May 2008. Secondly the defendants contend that the plaintiffs pleadings but not contain any averment raising grounds for lifting the veil so as to proceed against the first defendant personally on the basis of the contractual relationship between the plaintiff and the second defendant. The defendants rely on the veil of incorporation. The plaintiff on the other hand primarily relies on paragraph 8 of the counterclaim to assert that the first defendant has counterclaimed against the plaintiff on the basis of the same agreement.

The agreement annexure P2 was indeed executed between the second defendant company and the plaintiffs. It was proved in evidence and it is not in dispute that the first defendant Captain

George Mike Mukula signed the agreement on behalf of the second defendant as a director. The agreement itself shows that Captain George Mike Mukula, the first defendant signed on behalf of the second defendant as an authorised representative. The agreement itself does not mention the first defendant anywhere as a party or having a role to play. The agreement only refers to the parties as the first party and the second party. The first party is described as a private limited liability company incorporated under the laws of the Republic of Uganda. The agreement goes on to provide that the first party shall provide aircraft to the second party together with the appropriate aircrew for the purpose of performing flights stipulated in the agreement for an initial period of two years.

It is a cardinal rule of pleading that the capacity in which a party is sued has to be pleaded. Order 7 rule 9 (2) of the Civil Procedure Rules provides that where the plaintiff sues, or the defendant or any of the defendants is sued, in a representative capacity, the statement shall show in what capacity the plaintiff or defendant sues or is sued. Paragraph 2 of the amended plaint shows that the first defendant is a male adult Ugandan of sound mind while the second defendant is a company registered under the laws of Uganda. The claim is against the defendants jointly and severally.

Paragraph 3 (b) of the amended plaint is to the effect that the first defendant requested the plaintiff to give the business to his company which is the second defendant. In paragraph 3 (c) it is averred that upon the request of the first defendant, the plaintiff gave the business to the second defendant hence the aircraft rental agreement attached as annexure "A". In paragraph 3 (d) it is averred that by that agreement, the second defendant was to provide the plaintiff with two aircrafts for rent.

There is no averment as submitted by the defendants counsel to the effect that the second defendant was a sham or a mere front for the first defendant. The first defendant was sued in his own right as an individual. The second defendant was sued as a company which executed the contract with the plaintiff. As far as the aircraft rental agreement and the terms of that agreement is concerned, the first defendant is not privy. I agree with the defendant's submission which is funded on section 15 of the Companies Act Cap 110. Section 15 (1) of the Companies Act provides that on the registration of the memorandum of the company, the registrar shall certify under his or her hand that the company is incorporated as a limited liability company. Section 15 (2) of the Companies Act provides that from the date of incorporation mentioned in the certificate of incorporation, the subscribers to the memorandum, together with such other persons as may from time to time become members of the company, shall be a body corporate by the name contained in the memorandum, capable of exercising all the functions of an incorporated company, with power to hold land and having perpetual succession and a common seal, but with such liability on the part of the members to contribute to the assets of the company in the event of its been wound up. The company is therefore a legal fiction separate from its members and the contract that it executed with the plaintiff was done in the capacity of the legal entity capable of suing and being sued in its corporate name. In the case of Shiv Construction Co Ltd v Endesha

Enterprises Ltd [1999] 1 EA 329 , the Supreme Court upheld the principle considered by the Court of Appeal that a contract for the benefit of a third-party is not enforceable by the third party but by those who are privy to the contract. The judgement of the Court of Appeal agrees with the holding in the case of **Newborne v Sensolid [1954] 1 QB 45** that though a contract for the benefit of a third party generally does not enable a third party to assert rights arising under it, the contract remains enforceable and binding nevertheless between the promisor and the promise. It is the common law doctrine that only a party to a contract may enforce it. Similarly, the contract can only be enforced against a party to it. In the case of **Scrutons vs. Midland Silicones Ltd [1962] 1 ALL ER 1** Viscount Simonds held at page 6 that it was an elementary principle of the common law that only a party to a contract can sue on it. He said:

> "Learned counsel for the respondents met it, as they had successfully done in the courts below, by asserting a principle which is, I suppose, as well established as any in our law, a "fundamental" principle, ... an "elementary" principle, as it has been called times without number, that only a person who is a party to a contract can sue on it.

The first defendant is not a party to the contract and cannot be held liable for its enforcement or obligations arising out of the contract. The first defendant was not sued in his capacity as a director. The only basis of the suit against the first defendant is the allegation that there was fraud on the part of the defendants to receive money. The testimony of PW1 the managing director of the plaintiff indicates that the plaintiff paid the money the subject matter of the aircraft rental to the second defendant. Payment was made pursuant to the second defendant's invoice dated 25th of July 2008. On 11th of August 2008, the second defendant was paid a further US$11,000. On 2 July 2008 the second defendant received further payment of US$180,000. He asserts in his written statement that the total amount of money paid to the second defendant at the request of the first defendant is US$254,005. Particularly during cross-examination of PW1 he confirmed that the first defendant never received any money from the plaintiff. He only received it through the second defendant.

The only connection to the first defendant is the fact that it is the first defendant who requested the payment to be made. However this is simplistic. The payment by the second defendant is expressly provided for by the contract dated 28th of May 2008 and exhibit D1 which is a memorandum of understanding dated 6th of August 2008.

Particularly the agreement dated 28th of May 2008 and clause "A" paragraph 1 thereof at page 2 of the agreement provides that the service fee for the second party in consideration for renting the said aircraft shall be US$750 per flight hour flown for a maximum of 60 flight hours per month with a guaranteed minimum amount of US$45,000 only. Secondly clause "A" paragraph 4 provides that in the event that the aircraft is operated in excess of the above guaranteed minimum of 60 flight hours, and, then in such event, the service fee for the Second Party in respect of the said aircraft shall be an amount of US$700 only per flight hour flown. Clause "A" paragraph 3 provided that the guaranteed minimum, shall be paid by the Second Party at least one month in

advance. The Second Party is the Plaintiff. As far as exhibit D1 is concerned, it is dated 6th of August 2008 and is made according to section 3 of the lease agreement signed on the 28th of May 2008. Under the memorandum the second defendant was to provide co-pilots to the second party by 7 August 2008 and they were expected to arrive on 8 August 2008. The plaintiff undertook to provide the co-pilots accommodation while in the Juba in the course of their duty for the second party/plaintiff. They were entitled to an allowance of US$1000 each. The plaintiff undertook to provide upfront payment of the pilot's allowances which amounted to a consolidated sum of US$11,000.

It is therefore abundantly clear that the payments made according to the testimony of PW1 were payments made pursuant to the contracts executed between the plaintiff and the second defendant.

In the amended plaint, the plaintiff avers that the defendant's were fraudulent. The particulars of fraud as pleaded were the receipt of US$254,005 from the plaintiff for provision of aircrafts which the defendant failed to do so. The particulars of fraud alleged include withdrawal of the aircrafts after they had been delivered in Southern Sudan; refusal to refund the plaintiffs money upon demand and deceiving the plaintiff while receiving its money that they would supply aircraft which was not done. Particularly in paragraph 6 which contains the particulars of fraud, the plaintiff avers that the first defendant hid under the umbrella of the second defendant to defraud the plaintiff.

The conclusion is that the question of the liability of the first defendant cannot be resolved on the point of law alone. The plaintiff has clearly pleaded that the first defendant hid under the umbrella of the second defendant. The question therefore is whether the plaintiff has proved a case against the defendant. The point of law partially answers the question to the extent that the contractual liabilities of the second defendant cannot be imputed on the first defendant. However the determination of the point of law can be concluded upon an examination of the evidence adduced by the parties. The evidence has established that there was a valid contract between the plaintiff and the second defendant. Secondly the first defendant acted as a director of the second defendant and the company was not a sham. Thirdly, payments made under the agreement dated 28th of May 2008 exhibit "A" and that is dated 6th of August 2008 exhibit D1 were agreements and memorandum of understanding respectively executed between the second defendant and the plaintiff company. In both agreements, the first defendant is not mentioned. The first defendant executed the agreement as a director. It is pleaded and admitted that the second defendant is a private limited liability company incorporated under the laws of Uganda. It is therefore a corporate entity with perpetual succession capable of executing acts as a juridical person can do. The evidence of PW1 establishes that the contractual payments provided for under exhibit "A" and exhibit D1 were made to the second defendant company. There is no evidence of payments made to the first defendant. Last but not least it was established in evidence that two planes were supplied to the plaintiff. The two planes were subsequently withdrawn after a period of say 22 days. Reasons were ascribed by the parties for the withdrawal of the planes. In those

circumstances, the question of whether the reasons absolve the defendant from liability is a contractual question and requires interpretation of the contract and the evidence adduced. The evidence does not prove any fraud against the first defendant.

In the premises, I am satisfied that no case has been established against the first defendant as pleaded. From the evidence, no fraud has been established against the first defendant. Last but not least, the first defendant cannot be in breach of any agreement to which he is not a party. More so, section 91 of the Evidence Act excludes the court from admitting any oral testimony so as to depart from the express provisions of exhibit "A" being an agreement between the plaintiff and the second defendant dated 28th May 2008 and exhibit D1 being an agreement dated 6th of August 2008 also between the plaintiff and the second defendant. Section 91 of the Evidence Act is quoted herein below for ease of reference:

> "*91. Evidence of terms of contracts, grants and other dispositions of property reduced to form of document.*
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> *When the terms of a contract or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence, except as mentioned in section 79, shall be given in proof of the terms of that contract, grant or other disposition of property, or of such matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained."*

The only admissible evidence in the circumstances are the oral testimony about the terms of the agreements referred to above. Secondly no exceptional grounds have been adduced in evidence for the admissibility of oral testimony as contradicts the terms of the documentary evidence/contract referred to above. Since the contracts speak for themselves and there is no mention of the first defendant, no cause of action has been established against the first defendant and the suit against the first defendant is accordingly dismissed.

As far as the second defendant is concerned, it has been established that the plaintiff and the second defendant executed a written agreement dated 28th of May 2008. It has also been established that US$254,005 was paid to the second defendant. There is further strong evidence which is not disputed that the aircraft did not work for two years as contracted but a period of about 22 days or so. The question as to whether the aircraft worked for a period of two months or 22 days does not affect the outcome of the issue and may be relevant on the issue of remedies. It has been established that the aircraft did not work for more than two months. In any case the contract dated 28th of May 2008 provides for flight time or flight hours. The plaintiff's case is not prejudiced because it is based on the assertion that the contract period was two years and evidence has established that the two planes were returned to South Africa by the defendant's pilots.

The gist of the evidence of PW1 was that the defendants were supposed to supply two aircraft but instead supplied one aircraft which worked for only 22 days equivalent to US$46,568. Consequently the sum of US$207,437 remained unaccounted for by the defendants. Secondly that the second defendant breached the contract with the plaintiff for failure to provide the aircraft for two years according to the rental agreement. Furthermore that the second defendant acknowledged in a letter dated 21st of August 2008 that the aircraft had been withdrawn and had promised to avail other aircraft's in the interim period. Because alternative aircraft were not availed, the defendants were requested by the plaintiff to refund the money and have refused to do so. The plaintiff also rented premises for the residence of the pilots in Juba, Southern Sudan.

I have carefully considered the evidence of PW1 whose testimony is the only testimony on behalf of the plaintiff. The first contention concerns the number of planes or aircraft supplied under the lease agreement. Paragraph 10 of the witness statement of PW1, the operations director of the plaintiff is pertinent. In the witness statements PW1 states that the defendants were supposed to supply two aircraft, but instead supplied only one aircraft, which worked for only 22 days equivalent to US$46,568. The plaintiff in support of the assertion concerning the number of aircraft supplied relied on exhibit P7 dated 14th of August 2008 attached to the witness statement. Paragraph 1 of the letter disproves the assertion of the plaintiff's operations director that the second defendant only supplied two aircraft. The letter was signed by PW1 and paragraph 1 thereof provides as follows:

> *"We at Nanam Aviation Ltd have noted with regret your abrupt and unannounced withdrawal of the two aircraft (ZS – OWC and ZS-OUT) recently leased to us by Sun Air Limited. Although you have been aware of these new developments, you have not made any official communication (in the written) as explaining all circumstances that led to such withdrawal. Nanam Aviation, thus, demands that you officially explain what is happening."*

The first paragraph acknowledges two aircraft and gives the registration number of the aircraft. Consequently PW1 lied on oath that one aircraft was supplied. In cross examination he admitted having written exhibit P8. DW1 Dr Captain George Mike Mukula on the other hand adduced in evidence an acknowledgement dated 21st of July 2008 addressed to the Managing Director Crane Bank Ltd acknowledging two Cessna aircraft. The letter was tendered in evidence as exhibit D2. The acknowledgement is addressed to the Managing Director Crane bank Ltd Kampala and is entitled two Cessna 208 Aircrafts. It provides that: "This serves to inform you that we have received the two Cessna Aircrafts ZS – OTU and ZS – OWC". It is signed on behalf of Nanam Transpet Company Limited NTC by the Managing Director. The acknowledgement gives the approximate registration numbers of the two aircraft as contained in the letter of PW1. In those circumstances it is proven that the second defendant supplied two Cessna aircraft and not one as testified by PW1.

Secondly, the second defendant does not dispute having withdrawn the two aircraft. PW1 does not give the reasons why the aircrafts were withdrawn. However, DW1 Captain George Mike Mukula testified that the planes were involved in an accident and that the aircraft were withdrawn from southern Sudan. The facts relied on by defendants is that by the time the plaintiff started operating the aircraft, it was guilty of breach of the terms of the rental agreement concerning the aircrafts. This was by directing the aircraft crew and especially the pilots to land on unutilised unmanned, disused and dangerous runways which subjected the aircraft to collateral damage. The plaintiff was ferrying military hardware and dead bodies in a civilian aircraft. The plaintiff kept pilots under flight operations for over 12 hours contrary to International Aviation Regulations. The aircraft were eventually withdrawn and flown to South Africa for repairs. It is the testimony of DW1 that the second defendant offered alternative aircraft to the plaintiff which the plaintiff rejected. The testimony of PW1 on the other hand agreed under cross examination that the aircraft had been withdrawn due to a bad landing whereupon they were flown to South Africa to get a proper and major maintenance repairs. PW1 testified that the alternative aircraft were not delivered because the plaintiff rejected them. This is because the aircraft were not of the same specifications.

DW1 on the other hand testified that the pilots were made to land at gunpoint in Boma in the Southern Sudan in an aircraft whose minimum landing space is 800 metres. Consequently there was some damage to the aircraft.

I have carefully considered the evidence of the witnesses of plaintiff and defendants. The aircraft was flown to South Africa to carry out some repairs. The evidence of the defendants that the aircraft was flown to carry out repairs is proven. However, DW2 testified that the aircraft had been repaired. He could not explain why the aircraft had not been returned to continue with the provision of services.

DW1 testified that following the withdrawal of the aircraft for repairs in South Africa, the defendants offered alternative aircraft to the plaintiffs who rejected the offer. Instead the plaintiff demanded for refund of monies they had paid to the defendant. DW2 Captain Kakooza Joram, the former flight operations manager of the second defendant company testified that he was in charge of coordinating all flights of the company. Two aircraft had been delivered to the plaintiffs on 12 July 2008 as well as aircrew to operate them. The aircraft stayed with the plaintiff in southern Sudan for a period of over two months. Subsequently the plaintiff started breaching the terms of the rental agreement by coercing the pilots to land in unmanned, disused and dangerous runways subjecting the aircraft to collateral damage. Secondly the plaintiff provided untrained personnel to manage flight operations thereby exposing the aircraft and crew to serious risk. On 8 August 2008, an incident happened in Boma, south Sudan when the aircraft and crew were forced by the officials from the plaintiff company to land the aircraft at an airstrip which had a wet and muddy runway and the pilots took pictures thereof. As a result of the incident and other inconsiderate uses of the aircraft inclusive of overloading by the plaintiffs, the aircraft developed substantial mechanical faults and breakdowns and were withdrawn to South

Africa for overhauling and repairs. DW2 was cross examined on his witness statement and stated that he did not know the manner in which the pilots left under pressure from South Sudan. The pilots had got a ferry permit from South Africa before they flew the planes. The aircrafts were repaired but not returned. DW2 did not know the reason why the aircrafts were not returned.

It is apparent from the testimony of the defendant's witnesses that the contract could not be proceeded with after withdrawal of the aircraft. On the one hand is the reason that the plaintiffs rejected alternative aircraft. On the other hand is the reason given by the defendant's that the conditions under which the aircraft were operating were dangerous conditions. The reason given by the defendants for non return of the aircrafts after their overhauled appears in the testimony of DW1 and is the demand for refund of money by the plaintiff effectively demonstrating termination of the contract under clause L of the aircraft lease agreement. The court also considers the testimony of PW1 that the defendants refused to refund the plaintiffs money over and above the use or hire of the aircraft for the 22 days which testimony proves the use of clause L (2) of the leasing agreement by the plaintiff. This testimony corroborates the testimony of DW1 that the plaintiff after the offer of alternative aircraft, opted to seek or demand for the refund of monies paid to the second defendant.

Before concluding this issue I further reviewed the documentary evidence adduced. In a letter produced by the plaintiff and marked exhibit PE 8 dated 21st of August 2008 the second defendant wrote to PW1 on the subject of withdrawal of aircraft. Paragraph 3 thereof provides that the second defendant had obligations under the contract and was making arrangements to provide the plaintiff with other aircraft to handle the immediate needs of the plaintiff while awaiting the return of other aircraft. In a letter dated 25th of August 2008 admitted in evidence as exhibit D4 the chairman of the board of directors of the second defendant/the chief executive officer flight captain George M Mukula wrote to the chairman board of directors of the plaintiff on the subject of the withdrawal of the two aircraft. He informed the plaintiffs that the aircrafts were relocated to South Africa for major maintenance, as a result of the incident in Boma. Paragraph 4 of the letter reads as follows:

> *"In keeping with our agreement we have identified two (2) Aircrafts C – 208 with similar specifications as the above for relief or emergency operations please confirm your acceptance to place these Aircrafts on your A.O.C to enable us forward the necessary documents to you as soon as possible."*

The memorandum of understanding dated 6th of August 2008 between the second defendant and the plaintiff is the agreement making provision for the availing of pilots and additional aircraft crew for the leased Aircrafts. Under the memorandum of understanding the second defendant was to provide two additional pilots who were expected to be in Juba, South Sudan on 8 August 2008. The plaintiff undertook to provide accommodation for the pilots in the course of their duty to the plaintiff. Thirdly the plaintiff undertook to make an advance payment for the allowances of the pilots amounting to US$11,000 at the beginning of every month. Fourthly the pilots were to

fly for a specified number of hours per day which time was not to exceed a maximum of 12 hours flight hours per pilot according to the Civil Aviation Regulations. Paragraph 8 is pertinent in that it provides that the crew provided by the second defendant shall always be available to the plaintiff or their authorised representatives. However the plaintiff was to at all times allow the pilots to analyse when it was safe to fly in consideration of prevailing weather situations in the different areas of operation. Last but not least the second defendant was required to write to the Aviation at Work (Pty) Ltd in South Africa for approval from the relevant authorities to permit the plaintiff to carry military personnel with their equipment. The conclusion from the evidence is that the second defendant had agreed to operate under unique conditions which included the ferrying of military personnel including their equipment. It also suggested that the situation in South Sudan included armed conflict. Obviously made a person who had to be ferried from where they operate or to where they operate from. To a certain extent which cannot be established, the second defendant could not complain about some of the difficult situations save for those in breach of international aviation regulations.

I also considered exhibit D3 which is an e-mail giving the operational situation on the ground complained about by the second defendant's witnesses. Exhibit D3 is an e-mail written to Captain Mike Mukula dated 9th of August 2008 which reads as follows:

> *"I have had it now. They have now proved in Juba that they don't know what they are doing. We are not carrying on with operations until a responsible person that knows aviation takes over from them. I am not interested in putting my pilots or potential passengers at risk.*
>
> *We also haven't received the outstanding monies or plane tickets for the co-pilots you requested.*
>
> *Regards*
>
> *Frikkie"*

The reasons for the e-mail is contained in another attached e-mail to Frikkie's e-mail from one pilot named Shaun. In the e-mail he described the incidence at Boma where two planes landed at great risk on muddy ground and on a small stretch of runway which was shorter than the recommended minimum runway distance for the leased aircrafts. The pilots landed and the aircraft skidded out of control. Subsequently they managed to take off after physically surveying the water logged runway and at great risk of crashing into the trees and barely made it over treetops. Part of the e-mail tells the story as follows:

> *"We don't want to complain but we are furious about what happened. Doing operations this way is how people get killed. Lying to us about conditions and things being done is unacceptable and we cannot work this way. NO PERSON CAN. We know that there are*

teething problems but is forcing a flight/flights to make money one of them? Now they just lost money and have very unhappy pilots who don't trust a word they say.

We feel really bad to write this letter but we feel you should know as you have a big stake (your aircraft) in this extremely unprofessional operation. We hope that you understand and will help us with this matter. We want to work and fly every day, that's what we are here for, but we want to do it safely.

Thank you for your understanding and cooperation. "

The incident apparently occurred on 8 August 2008. Exhibit D4 is dated 25th of August 2008 and indicates that the two aircraft had been relocated to South Africa for major maintenance as a result of an incident in Boma. What is of special interest is that the plaintiff's operations director wrote a letter to the second defendant dated 14th of August 2008 hardly a week after the "Boma" incident. Furthermore, the second defendant wrote to the plaintiffs director of operations in a letter dated 21st of August 2008 in which they informed the plaintiffs that they had contacted Aviation at Work (Pty) in South Africa and indicated that the aircraft had been taken for repairs due to the bad landing in Boma and were due back upon repair and proper inspection. The second defendant offered alternative aircrafts to handle the immediate needs of the plaintiff before the return of the other aircraft.

My conclusion is that there was an undertaking by the second defendant to have the aircraft maintained and sent back to carry on obligations under the contract between the parties dated 28th of May 2008. This is weighed against the request of the defendant in a letter dated 14th of August 2008 for the second defendant to explain the circumstances that led to the withdrawal of the aircrafts. The plaintiff demanded immediate reinstatement of the contracts status quo and the aircrafts to be returned to Juba without any conditions or delay within seven days from 18 August 2008 or else declare the contract null and void. Particularly it is relevant to consider the letter of the second defendant dated 21st of August 2008 addressed to the operations director of the plaintiff undertaking to provide other aircraft and also informing the plaintiff that the aircrafts had been taken for repair upon bad landing in Boma and were due back upon repair and proper inspection.

The evidence on that issue is contained in paragraph 13 of the testimony of PW1. He testified that in the letter dated 21st of August 2008, the second defendant acknowledged the fact that the aircraft had been withdrawn but promised to provide other aircraft in the interim. The alternative aircraft had not been availed. In paragraph 14 PW1 states that the aircraft which had been withdrawn had not been returned. Subsequently the defendants were requested to refund the money which they did not do. DW1 was the executive director and chairman of the second defendant testified that to the best of his professional knowledge about aviation, the aircrafts had to undergo repairs so as to make them airworthy again. He however remained silent about whether the aircrafts had been repaired and whether they had been returned. Instead his

testimony is that the plaintiff owed the second defendant a lot of money by the time he left, there were still money owing to the defendant. Details of the money owing were not provided. Secondly the plaintiff at a certain point demanded return of its money.

Exhibit "A" attached to the witness statement of PW1 which is the principal aircraft rental agreement executed between the plaintiff and the second defendant. The case of the plaintiff in the witness statement of its operations director paragraph 14 and 15 thereof is that the defendants never returned the withdrawn aircraft. Subsequently the second defendant was requested to refund the money which they received and did not work for in the sum of US$207,437 but refused to do so. As a consequence of the defendant's actions, the plaintiff suffered a lot of losses in projected incomes. Secondly the plaintiff suffered loss of its business or goodwill because it failed to provide any aircraft yet it had advertised the same extensively. The premises procured for the pilots remained vacant in the hope that business would resume after return of the aircraft.

The aircraft rental agreement dated 28th of May 2008 provides for termination of contract. Paragraph L on termination includes among the grounds the right to terminate the contract for breach of fundamental obligations under the agreement such as non-payment or default in payment of any amount. If a notice of five days is given for the party in breach to remedy the default but fails to do so, the agreement may be terminated. Paragraph L (2) provides that termination had the effect of absolving the parties from all obligations and liabilities except that the second party shall pay to the first party all payments due under the presents for provision of aviation services and the first party shall pay to the second party all amounts received if any but not due. There is therefore a very strong inference from the evidence that the plaintiff terminated the contract under clause L of the lease agreement and demanded refund of any monies paid to the second defendant which were not due to it at the time of termination. The failure to pay or refunded the money of the plaintiff, if any, would constitute breach of contract if it is established by evidence that the refund was due under clause L (2) of the contract. The conclusion of the issue therefore depends on the evidence.

In the premises, the court finds that the agreement had come to an end because the aircraft were not returned. Secondly the plaintiff sought refund of its monies under paragraph L (2) of the agreement. There was however no specific evidence about a letter of termination of the contract by the plaintiff adduced in evidence. The contract came to an end and the plaintiff demanded refund of monies paid. It is not the second defendant's case that the contract had come to an end. In fact the defendants seek specific performance of the contract. I will subsequently consider the evidence in light of paragraph L (2) of the aircraft rental agreement dated 28th of May 2008 which is hereby quoted in full and provides as follows:

> "Termination once effected, shall discharge the parties here in from all obligations and liabilities except that the second party to pay to the first party all payments due under these presents for provision of aviation services and the *first party shall repay to the second party all amounts received (if any) but not due*." (Emphasis added).

For the avoidance of doubt the first party under the agreement is Sun Air (Uganda) Ltd (The second defendant) while the second party under the agreement is Messieurs Nanam Transpet Company Limited trading as Messieurs Nanam Aviation Ltd (The Plaintiff). The plaintiff acted on the premises that the contract had been terminated and demanded for refund of monies. The contract no doubt ended and the role of the court is to establish whether there is any money due to either party which has to be refunded under clause L (2).

Remedies available to the parties

The Plaintiffs submissions on the question of damages is that according to exhibit D1 which is the agreement dated 6th of August 2008 and particularly paragraph 5 thereof, it was the duty of the plaintiff to provide accommodation for the co-pilots. The plaintiff proved that it rented premises for their residence in Juba Southern Sudan and paid therefore a sum of US$96,000. Rent was paid in advance for two years according to exhibit P7. The plaintiff incurred damages due to breach of the contract on the part of the defendants.

Secondly the plaintiff claims for money had and received by the defendants from the plaintiff in the sum of US$207,437 or Uganda shillings 394,130,300/= according to the evidence of payment exhibits P2, P3, P4, P5 and P6. Counsel submitted that the money paid to the defendant has not been disputed by the defendant’s witnesses.

Counsel submitted that the aircraft was supposed to work for US$2117 per day and had only worked for 22 days amounting to US$46,568. None of the pilots working with the plaintiff in south Sudan were called as witnesses and the testimony of the defendant's witnesses is hearsay on a question that the aircraft had worked for two months. Consequently counsel contends that it is fair that the defendants refund the plaintiffs money not worked for amounting to US$207,437.

Lastly counsel claimed for interest on the above items at 25% per annum. Award of interest is at the discretion of the court and the commercial rate stands at 25% per annum. Counsel also prayed for costs of the suit.

On the question of the counterclaim, the defendants claimed for an order for specific performance of the contract dated 28th of May 2008 for the residue of the contract period. The submission of the plaintiff’s counsel is that the counterclaim has no merit. First of all no issues or issues were formulated for trial of the counterclaim. No evidence was led to prove that the plaintiff breached any contract with the first defendant or the second defendant. No witnesses made any prayer to the court for remedies sought in the counterclaim. It is apparent that the defendant had abandoned the counterclaim and counsel prayed that the counterclaim is dismissed with costs.

In reply counsel submitted that there was no proof of any payment of the US$63,005. This is based on cheque No. 00006 exhibit P2 which was not proved. Whereas PW1 testified that the payment was made upon request from the first defendant, he failed to produce the alleged

request. The statement of account relied on belonged to Nanam Transpet Company Limited, the drawer of the cheque. Secondly no evidence was adduced for the payment of US$11,000 drawn on account number 030402081949. The evidence of payment was a photocopy of the statement of account exhibit P5. However PW1 was not the author of the photocopied statement and could neither produce nor explain where the original was. It does not bear the signature of a bank official. It does not show that it was issued by any bank official and does not give the relationship between the plaintiff and Nanam Transpet Company Ltd.

PW1 further testified that a sum of US$180,000 was received by the second defendant from the account of Nanam Transpet Company Ltd. Exhibit D5 is a photocopy of the statement allegedly from Crane Bank Ltd. Furthermore no evidence was adduced to the effect that payments had been made through Nanam Transpet Company Ltd. DW1 testified that the only money received by the second defendant was for availing the two aircraft after the delivery. The plaintiff never made any further payments and there is no such evidence. On the question of accountability for the sum of US$207,437, the defendants cannot account for money they never received. The burden was on the plaintiff to prove that it paid such a sum to the defendants. Counsel relied on the case of **Wakiso Cargo Transporters Company Ltd versus Wakiso District Local Government Council and the Attorney General HCCS number 70 of 2004**.

The general rule is that the measure of damages is as far as possible the amount of money which would put the injured party in the same position he or she would have been had he or she not sustained wrong. Damages are measured by the plaintiff's loss, which must be proved. The plaintiff also claimed a sum of US$96,000 on the basis of a tenancy agreement. The original tenancy agreement was never tendered in court. Special damages must be strictly pleaded and proved by credible evidence according to the decision in **Wakiso Cargo Transporters Company Ltd (**supra) furthermore counsel contended that the tenancy agreement was inadmissible by virtue of section 42 of the Stamps Act cap 342 and according to the case of **Proline Soccer Academy versus Lawrence Mulindwa and four others Miscellaneous Application Number 0459 of 2009**.

The tenancy agreement is further not evidence of payment of money. The plaintiff submission that the tenancy agreement indicates that rent was paid for two years cannot stand. The tenancy agreement only indicates that rent was payable for two years in advance and not the rent was indeed paid. PW1 conceded that he had no acknowledgement of payment of rent from the landlord. Counsel concluded that the tenancy agreement is a mere concoction by the plaintiff to justify a false claim.

As far as interest is concerned, counsel contended that there was no proof of payment of the alleged money to the defendants. The plaintiff also claimed general damages for breach of contract. However the plaintiff did not prove any loss it suffered for which it was entitled to compensation by way of an award of either special or general damages.

The plaintiff claims to have suffered a lot of loss in projected incomes but no evidence of such losses was adduced in evidence.

On the question of the counterclaim by the defendants, the case of the defendants through DW1 is that the plaintiff breached the contract or otherwise terminated the contract by its conduct. Consequently the second defendant suffered terrible losses when it took it upon itself, in keeping with the rental agreement to hire alternative planes for the plaintiff to use pending repairs of the initially supplied aircraft which the plaintiff rejected. It was the plaintiffs breach under clauses G and P of the agreement that had caused damage to the aircraft by its conduct in directing the aircraft crew and specifically pilots to land and use unmanned, disused and dangerous runways subjecting the aircraft to collateral damage. Consequently counsel prayed for the award of general damages on the counterclaim with costs.

In rejoinder the plaintiff's counsel reiterated earlier submissions. He submitted that the tenancy agreement relied upon by the plaintiff was not an agreement that were only admissible upon payment of stamp duty. In any case they had been exhibited and the defendants ought to have raised the objection to their being tendered in the plaintiff’s evidence in chief at the time of the trial. Secondly on the question of the US$96,000 payment of rent, it is indicated in paragraph D of the second section of the agreement that rent was paid.

As far as the counterclaim is concerned, none of the counterclaimants prayed to court to award remedies prayed for in the counterclaim and their evidence is mere hearsay.

I have carefully considered the issue on remedies. The first claim of the plaintiff is for special damages in the sum of US$96,000 claimed under paragraph 9 of the amended plaint. The plaintiff avers that it suffered special damages of US$96,000 as a result of the defendant's breach of contract or fraud. This is because it hired two houses for two pilots at the rate of US$2000 per month for each house and paid the rent two years in advance. In support of the claim for US$96,000, the plaintiff relied on exhibit D1 and paragraph 5 thereof. Furthermore the plaintiff relied on exhibit P9 attached to the witness testimony of PW1 and which is a tenancy agreement dated 1st of May 2008.

Paragraph 5 of exhibit D1 provides that the second party undertakes to provide for the co-pilots accommodation whilst in Juba in the course of their duty for the second party. Furthermore paragraph 3 of the memorandum of understanding exhibit D1 and dated 6th of August 2008 provided that the first party (the second defendant) shall provide to co-pilots to the second party on 7 August 2008 and shall be expected to arrive in Juba on 8 August 2008. The accommodation referred to in paragraph 5 of the agreement/memorandum of understanding was to take care of the two pilots mentioned in paragraph 3 of the agreement and not any earlier pilots engaged.

The tenancy agreement exhibit P9 is dated 1st of May 2008. It is a tenancy agreement providing for a tenancy commencing on the first day of June 2008. Under the agreement, advance rent was acknowledged for a period of two years. The accommodation could not have been negotiated

pursuant to the agreement dated 6th of August 2008. This is simply because the memorandum of understanding was reached after the tenancy agreement was executed on the 1st of May 2008. Specifically, the pilots for whom the accommodation was to be provided under exhibit D1 were supposed to have reached Juba on 8 August 2008.

Secondly the consideration in the tenancy agreement was paid to Consumasters Company Ltd two years in advance on the 1st of May 2008. No other evidence of payment was provided except an acknowledgement on the second page of the tenancy agreement in paragraph (d) thereof. It implies that the money was paid on or before the 1st of May 2008. The evidence of PW1 on this point is hard to believe because of the following reasons: firstly, PW1 testified in paragraph 2 of his witness statement that he came to Uganda, Kampala in early May 2008 to try to source for two aircrafts for the plaintiff company to be hired for transport business in southern Sudan. Presumably, the tenancy agreement dated 1st of May 2008 was executed before he came to Uganda. Secondly it is after he came to Uganda in early May 2008 that he conducted the first defendant and informed him about the deal. Thereafter the first defendant requested them to give the business to his company which is the second defendant. Paragraph 5 of the witness statement of PW1 stated that on the 28th of May 2008, the first defendant requested through him that the plaintiff enters an aircraft rental agreement with his company that is the second defendant. From paragraph 7 onwards PW1 statement suggests that the actions of the plaintiff were driven by the aircraft rental agreement. In paragraph 7 of the witness statement he testified that by the said rental agreement the first defendant through the second defendant undertook to provide the plaintiff with aircraft with its appropriate crew for purposes of performing flights for an initial period of two years. So the rent and the payment of rent acknowledged in an agreement dated 1st of May 2008 could not have been in contemplation of the parties to the contract dated 28th of May 2008. Moreover it is pleaded in the amended plaint that the accommodation was procured by the plaintiff to implement agreements between the plaintiff and the second defendant.

Thirdly, the agreement further provided that either party could terminate the tenancy by a notice of one month each. It was incumbent upon the plaintiff to mitigate its losses by terminating the tenancy agreement and getting a refund. All that was required was to give one months notice.

The landlord was not called to prove the payment. The tenancy agreement itself was made before the memorandum of understanding and could not have been contemplated as accommodation for pilots. Moreover the agreement was signed before the first major agreement between the plaintiff and the second defendant which is dated 28th of May 2008. It is highly unlikely that the plaintiff would pay rent in advance in anticipation of an agreement to be executed in future i.e. on the 28th of May 2008 before meeting the first defendant who gave him the idea of giving the business to the second defendant according to the testimony of PW1. In the circumstances, I agree with the defendant's counsel that the tenancy agreement cannot be relied upon as evidence of payment for expenses incurred after the agreement exhibit D1 dated 6th of August 2008 and paragraph 5 thereof which contemplated a future situation. Last but not least special damages claimed has to fall under clause L (2) of the aircraft rental agreement as a refund of money paid

to the 2nd defendant but not utilised or due. In the circumstances, special damages claimed of US$96,000 cannot be allowed and is dismissed.

Furthermore the plaintiff claims US$207,437 as money had and received by the defendants. He relied on the testimony of PW1 particularly the witness statement at paragraphs 8 and 9 thereof. In paragraph 8 (a), PW1 the Operations Director of the plaintiff testified that on 26 July 2008, the second defendant by cheque number 000006 drawn on the account of Nanam Transpet Company Limited was paid US$63,005. The plaintiff relied on the photocopy of a cheque exhibit P2.

I have carefully considered this evidence. The evidence in support of the payment is a tax invoice of the second defendant dated 25th of July 2008 for positioning and de-positioning of two aircraft. The total cost for the two aircraft according to exhibit P3 which is the invoice is US$65,440. Accommodation for Diana Nabukenya of US$2435 was deducted from this sum leaving a total of US$63,005. The truthfulness of the claim is further supported by a letter from the second defendant dated 25th of July 2008 in which there was acknowledgement of invoice for US$2435 mentioned earlier. The payment is consistent with the cheque leaf dated 26th of July 2008 drawn by Nanam Transpet Company Ltd in the names of the second defendant. There is however no evidence that the cheque was ever presented or cashed.

Paragraph E of the agreement dated 28th of May 2008 sub paragraph 1 thereof clearly provides as follows:

> *"The Second Party hereby undertakes to meet all costs relating to the positioning and de-positioning of the said aircraft between the agreed airport facilities in the Republic of South Africa; Uganda and the New (Southern) Sudan plus the cost of fuel therein."*
>
> *2.All costs and expenses related to or connected with positioning and de-positioning, such as, but not limited to fuel costs, landing fees, parking fees, charges for over flight clearances, Hotel accommodation, etc shall be borne by the second party; who undertakes herein to provide the first party with proof of the said payments, by the end of each month."*

The tax invoice relied upon by the plaintiff quotes positioning and de-positioning for two aircraft. It includes flight time to Juba and return of 28 hours; 200 litres; clearances/landing fees. The total amount claimed for one plane is that US$32,720. The expenditure for the second plane is the same less the expenses of Diana Nabukenya amounting to US$2435. In other words it is an expenditure contemplated under paragraph E of the aircraft rental agreement dated 28th of May 2008. It is agreed between the parties and in the testimony that the planes worked for at least a period of time. The expenditure for bringing the plane to Juba etc was to be borne by the plaintiff. In those circumstances, any expenditure and particularly the claim for US$63,005 cannot be claimed as special damages as a loss incurred due to breach or termination of contract for whatever reason under paragraph L (2) of the agreement. It was an expenditure prior to the

falling apart of the parties and was money spent not unutilised according to the terms of paragraph L (2) of the contract. The claim for US$63,005 is accordingly dismissed.

The third claim concerns payment of US$11,000 specifically provided for under exhibit D1 paragraph 6 thereof. Paragraph 6 of the memorandum of understanding between the plaintiff and the second defendant and dated 6th of August 2008 provides as follows:

> *"The Second Party shall cause an upfront payment of the said co-pilots allowances together with the pilot allowances which shall add up to a consolidated sum of US$11,000 to the first party at the beginning of every month.*

The witness statement of PW1 paragraph 8 (b) is that on 11 August 2008, and by a cheque drawn on account number 030402081949, the second defendant was paid a further US$11,000 according to the account statement exhibit P5. The account statement is the account of Nanam Transpet Company Ltd. The statement covers the period 1st June 2008 to 12 September 2008. It shows that on 11 August 2008 by cheque number to account 030402081949, US$11,000 was paid out. It does not indicate to whom it was paid out. Notwithstanding the above observation, exhibit D1 the memorandum of understanding dated 6th of August 2008 and paragraph 6 thereof clearly provides that the payment of the consolidated sum of US$11,000 was to be paid for the pilot allowances. By this time there was a subsisting relationship between the parties. This relationship subsisted according to PW1 for a period of 22 days. According to the defendant's witnesses, it was a period of two months. It is clearly stipulated in the agreement that the payment was for pilot allowances. The pilots were not made a party to the suit. There is no averment that the pilots did not earn their allowances neither was this proved in evidence. Neither is it the plaintiff’s case that the pilots did not fly the requisite routes or the hours set. The sum of US$11,000 constitutes one month consolidated pilot allowances and cannot be claimed as special damages in the circumstances of the plaintiff’s case and is dismissed as a claim falling outside the confines of Paragraph L (2) of the lease agreement.

Under paragraph 8 (c) of the statement of PW1, the operations director of the plaintiff testified that the second defendant received a further payment of US$180,000 from the account of Nanam Transpet Company Ltd from account number 0205031624900 according to the document attached to the statement as exhibit P6. Exhibit P6 is an interim statement of Nanam Transpet company Ltd printed by Crane Bank. It shows that on 2 July 2008 US$180,000 was drawn to the description “Funds/Sun Air”. The narrative in the statement does not give sufficient details about what was meant by that description. The witness statement of PW1 does not elaborate.

Exhibit D2 is an acknowledgement addressed to the Managing Director Crane Bank Ltd dated 21st of July 2008 on the subject of two Cessna 208 aircrafts. It is written by flight captain G.M Mukula/Chairman of the second defendant. It is also signed by Mr MAJOK Wek Akol the managing director of Nanam Transpet Company Ltd. It informs the Managing Director of Crane

Bank Ltd Kampala that they had received the two Cessna aircraft whose registration numbers are written therein. Particularly paragraphs 2 of the acknowledgement they write as follows:

> *"This communication therefore serves to invalidate the guarantee number 2008/200, dated 2nd day of July 2008, indemnified to us by Sun Air Ltd."*

The inference from the evidence is that this was a guarantee, guaranteeing the supply of two aircraft to the plaintiff. In the absence of further details concerning the transaction dated 2nd of July 2008 which corresponds with exhibit P6 attached to the statement of PW1, payment of US$180,000 to the second defendant as alleged is not proven. The statement corresponds with the date of the guarantee. DW1 explained when cross-examined that they negotiated a contract and established a guarantee with Crane Bank who issued a guarantee for delivery of the aircraft in the amount of US$182,000. The second defendant ensured that the aircraft was delivered to the plaintiff. The witness relied on exhibit D5 which has been quoted above. Exhibit D5 shows communication to the effect that the guarantee was discharged upon delivery of the two aircraft. Consequently the entire claim namely concerning US$63,005 plus US$11,000 and the third claim of US$180,000 has not been proven to the satisfaction of the court as special damages or loss occasioned to the plaintiff on account of any breach of contract by the second defendant or the first defendant or money paid but not utilised in terms of clause L (2) of the lease agreement.

The entire claim based on paragraph 8 of the witness statement of the plaintiff PW1 is disallowed.

It follows that interest cannot be claimed on the disallowed particular claims.

The plaintiff's counsel did not make any submissions in support of a claim for general damages, and none was claimed by the plaintiff in the plaint. As far as general damages are concerned paragraph 13 of the amended plaint in subparagraph (a) is a claim for US$96,000 or its equivalent in Uganda shillings. Secondly paragraph 13 (b) is a claim for US$207,437 or the equivalent in Uganda shillings. It is a claim for refund of money and is a liquidated demand. Paragraph 13 (c) is a claim for interest at the rate of 25% per annum on the above sums claimed. Lastly paragraph 13 (d) is a claim for costs of the suit. There is no prayer for alternative reliefs or general damages.

In the circumstances of the case under clause L (2) of the aircraft rental agreement, the task of the court was to establish any amounts that were paid to the defendant but were not due. From the findings above, none has been established.

I will therefore consider whether the defendants are entitled to any reliefs claimed in their counterclaim.

The issue as framed by counsels only deals with the plaintiff's suit. The defendant's counterclaim is for an order for specific performance of the contract dated 28th of May 2008 for the residue of

the contract period. Secondly it is for general damages for breach of contract and costs of the suit. DW1 testified that there were some monies owing to the defendants. However no effort was made to prove the sums owing. Consequently the court cannot establish any loss occasioned to the defendants. Secondly, the evidence is that the plaintiff brought the contract to an end and claimed a refund of monies which were paid but were not due at the time of termination of the contract. The court has gone ahead to establish whether the monies were due. The court cannot turn around and make an order for specific performance of the same contract. Because no loss was established through the testimony of the defendant's witnesses, general damages cannot be established. In those circumstances, the counterclaim of the defendant is dismissed.

In the circumstances the court has no power to award damages to the plaintiff not prayed for in the amended plaint. The plaintiff's suit against the first and second defendants is also dismissed. Each party shall bear its/his own costs of the plaintiff's suit and the defendants counterclaim.

Judgment delivered in open court 13 September 2013

Christopher Madrama Izama

Judge

Judgment delivered in the presence of:

No parties or counsels present.

Counsel Kyaze for the defendants, sent a representative of the first defendant Yiga Stephen Geoffrey

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

13th September 2013