THE REPUBLIC OF UGANDA,

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL SUIT NO 350 OF 2008

1. **SHEIK MAWANDA ABDU JABBAR IDRIS }**
2. **ASHUR RAKAAN CO (UGANDA) LTD}..... PLAINTIFFS**

VERSUS

KOBIL UGANDA LTD}..... DEFENDANTS

AND

1. **SHEIK MAWANDA ABDU JABBAR IDRIS }**
2. **NABUNYA MARIAM }.... RESPONDENTS TO THE COUNTERCLAIM**

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

JUDGMENT

The brief background to the dispute between the parties has been detailed in the written submissions of Counsel for the Plaintiffs and the second Respondent under the counterclaim and that of the Defendant's Counsels. Counsels opted to file written submissions for and against the claim in the plaint and the counterclaim.

The Plaintiff and the second Respondent to the counterclaim were represented by Counsel Muzamil Kibedi of Messieurs Kibedi and Company Advocates (hereinafter referred to as the Plaintiffs advocates) while the Defendant and the counterclaimant was represented by Enoch Barata of Messieurs Birungyi, Barata and Associates (hereinafter referred to as the Defendant's advocates).

The facts as set out in the written submissions of the Plaintiffs advocates is that the Plaintiffs instituted a suit against the Defendant seeking nullification of the mortgage and the lease agreement dated 24th of July 2003 on grounds of illegality and fraud. The first Plaintiff also

sought to recover damages occasioned by the wrongful termination of the dealership agreements he had with the Defendant. The Defendant denied liability and counterclaimed for recovery of approximately Uganda shillings 230,000,000/= against the first Plaintiff and Mrs Mariam Nabunya (the second Respondent) being an alleged sum owing from them on account of the petroleum products supplied to them on credit by the Defendant/counterclaimant. In response the first Plaintiff and the second Respondent denied being indebted and averred that the money that the Defendant claims against them was advance rent and not on account of credit supplies. The second Respondent also denied the debt and accused the Defendant of unlawfully terminating her dealership contract in a reply to the defence and counterclaim.

The facts in reply to the plaint and in support of the Defendant's counterclaim filed by the Defendant's advocates is that there was a lease agreement which is uncontested and genuine and which was registered on Mawokota block 266 plot 186 of the second Defendant as encumbrance on 26 November 1999 under instrument number KLA 208872. The lease agreement was made on 18 November 1999 for a period of 20 years commencing 1 November 1999. The lease of 8 November 1999 was varied on three occasions namely on 21 February 2000; on 13 August 2001 and on 24 September 2002.

All the variations were read over to the first Plaintiff and the second Respondent and was understood by then before they signed it. A tripartite memorandum of understanding dated 24th of September 2002 was executed between the Defendant and the Plaintiffs. The first Plaintiff agreed to lease Mawokota block 266 plot 198 to the Defendant. Under the memorandum of understanding it was agreed that the second Plaintiff would transfer its land namely plots 198 of the first Plaintiff and both their plots 186 and 198 would be consolidated and leased to the Defendant as one block. The Defendant undertook to transfer and consolidate the two parcels of land and obtain a fresh certificate of title for the consolidated plots. The second Plaintiff handed over to the Defendant duly signed transfer forms for plot 186 together with a duly executed resolution permitting the transfer and consolidation as well as a statutory declaration and the Defendant's lawyers retained full and absolute control of the process and transactions of the transfer and consolidation. The first Plaintiff was paid by the Defendant a sum of Uganda shillings 30,000,000/= on 31 December 2002. The Defendant's advocates further contended that the first Plaintiff has so far received Uganda shillings 153,091,840/= as advance rent under the

terms of the memorandum of understanding dated 24th of September 2002 by way of supplies of fuel. Finally the Defendants Counsels assert that the first Plaintiff also obtained a credit notes dated 13th of August 2003 for Uganda shillings 25,000,000/=; and other credit note dated 27 September 2003 for a sum of Uganda shillings 25,000,000/= and a credit note dated 27 February 2004 for Uganda shillings 40,000,000/= from the Defendant.

In rejoinder to the facts asserted by the Defendant's Counsels, the Plaintiff's Counsels disagree when the inclusion of the "statutory declaration" in the list of documents handed over by the second Plaintiff for the Defendant. They write the documents which the first Plaintiff handed over and the following: (1) a covering letter to the Registrar of Titles; (2) a registered Board Resolution and (3) transfer forms duly executed by the 2nd and 3rd parties. This statutory declaration was eventually admitted in evidence as exhibit P6. It was drawn by Messieurs Shonubi Musoke and Company Advocates who were the Defendant's advocates at that time. As regards the Defendant's submissions on the credit notes, it confirms the truthfulness of the first Plaintiff's complaint regarding the inaccurate posting of entries by the Defendant.

The issues addressed in the written submissions are the following:

1. Whether the contested mortgage dated 24th of July 2003 was lawfully executed?
2. Whether the contested lease agreement dated 24th of July 2003 was lawfully executed?
3. Whether the termination of the dealership of the Plaintiffs/Respondents was unlawful?
4. Whether the Plaintiff/Respondents or the counterclaimant owe any monies claim arising from the relationship as landlord and tenant or the dealership?
5. Remedies.

The first issue is **whether the contested mortgage dated 24th of July 2003 was lawfully executed?**

The Plaintiff's submissions are that the contested mortgage was exhibited in court as exhibit PE 18. The issue arose from paragraph 8 of the amended plaint where the Plaintiff denied ever having signed the mortgage deed which rendered it void for fraud. Particulars of fraud were pleaded under paragraph 9 of the amended plaint. On the other hand the Defendant denied the claims in paragraph 7 and 8 of the amended written statement of defence. Counsel submitted that under section 115 of the Registration of Titles Act Cap 230, only a proprietor of land can create a

mortgage of his land by signing the prescribed mortgage form or documents. In support of the Plaintiff's denial of having executed the mortgage deed exhibit PE 18, the Plaintiff produced a forensic report through a forensic expert (handwriting expert) from Kenya PW2, Chief Inspector Jacob Mugenyi Oduor. The report was exhibited as exhibit P 46. The handwriting expert confirmed to court that the signatures attributed to the Plaintiff were forgeries. PW2 the handwriting expert was not cross examined on the contents of his report by the Defendants Counsel. In the case of **Uganda Revenue Authority versus Stephen Mabosi Supreme Court Civil Appeal Number 26/1995** Karokora JSC as he then was ruled that an omission or neglect to challenge the evidence in chief on a material or essential point by cross-examination would lead to the inference that the evidence is accepted subject to its being assailed as inherently credible or probably true.

The other evidence which confirms that the mortgage was not executed by the first Plaintiff is contained in the detailed oral testimony of PW1 and PW3. Exhibit P6 is a statutory declaration of one of the Defendant's advocates Mr James Kyazze confirms that the purpose for which the second Plaintiff's officials had given the Defendants Counsel the certificates of title to plot 186 Mawokota block 266 in late June or early July 2002 was to transfer the same into the names of the first Plaintiff from the registered proprietor while maintaining the interest of Kobil Uganda Limited/the Defendant. It was not to secure liability of the Plaintiffs. Secondly the Defendants statements which appear as part of the audit report (court Exhibit 1) under the folders for Exhibit 3, Exhibit 4, and Exhibit 52 do not show that on 25 July 2007 the Defendant advanced Uganda shillings 50,000,000/= to the Plaintiffs as claimed in clause 6 of the contested mortgage document. Counsel contended that it defeats simple logic for the mortgage dated 24th of July 2003 to claim in its clause 6 that the mortgagee has on 25 July 2003 advanced Uganda shillings 50,000,000/=. It implied that the mortgage was backdated as set out in paragraph 4 (r) of the amended plaint.

DW 2 Mr Hannington Mpiima, the marketing manager of the Defendant conceded during cross-examination that the statements of account referred to did not indicate that a sum of Uganda shillings 50,000,000/= had been given to the Plaintiffs on 25 July 2003 by the Defendant. Counsel prayed that the court examines the detailed oral testimony of PW1 which proves order particulars of fraud pleaded in paragraph 9 of the amended plaint. On the other hand the

Defendant did not adduce in court any credible and admissible evidence to rebut the Plaintiff's evidence. The Defendants did not bring into court the signatories to the mortgage or the advocates who purported to sign as witnesses to the mortgage to testify about the truthfulness of the same. The Defendant did not produce authors of the handwriting expert's reports to prove the contents of the reports. The two reports were tendered into court by DW 1 Mr Kibaya simply as part of the proceedings of the Disciplinary Committee and were tendered as exhibit D10. This did not absolve the Defendants from proving the contents of each of the two reports. In the case of **Attorney General versus Baranga [1976] HCB 45** the Court of Appeal of East Africa while considering a document (a medical report) tendered in court by consent of the parties, held that the admission in evidence merely dispenses with the need to prove the reports but did not amount to an admission that the contents of the reports were true and correct.

On the other hand the Kenyan forensic expert report which forms part of exhibit D10 made findings of manipulation of the questioned documents through photocopy at page 2 and page 4 of the report. Lastly the only witness of the Defendant who played a role in respect of the contested mortgage was DW1 Kibaya. His rule comes out as he personally witnessed the power of attorney dated 24th of July (exhibit P 28) and the undertaking dated 24th of July 2003 (exhibit P 37) all of which were closely intertwined with the contested mortgage and lease also dated 24th of July 2003. Both the power of attorney and undertaking were found by the handwriting expert (PW2) to have been forged. The Plaintiff's Counsel contends that this is not surprising because by the time Mr Kibaya purported to have witnessed both documents, he had not enrolled as an advocate. This fact was also admitted by Mr Kibaya confirmed during cross-examination that he had enrolled as an advocate in August 2003.

The second issue is **whether the contested lease agreement dated 24th of July 2003 was lawfully executed?**

On this ground the Plaintiff submitted that the disputed lease agreements were tendered in court as exhibit P 16 and as the interior part of exhibit PE 17. These documents are also part of the Kenyan handwriting expert report tendered in court as exhibit P 46. In the handwriting expert report entitled "Forensic Document Examiners Report", the lease agreements are marked "A", "A3", "A6" and "A7". Invalidity of the lease agreements was pleaded in paragraphs 4 (P) and 8 of the amended plaint. Paragraph 10 of the amended plaint sets out the detailed particulars of

fraud relating to the execution and registration of the lease paragraphs 10 (K) (L) and (Q). The particulars are that the lease agreement was not signed by the first Plaintiff. Secondly the lease agreement on which the Defendant's officials signed had a signature attributable to the first Plaintiff in photocopy but the signatures of the Defendants officials on the same page are in original ink. Thirdly no original of the impugned lease agreement was ever registered. Instead, the Defendant registered a photocopy of the lease agreement. Counsel reiterated submissions that the evidence of PW1 the first Plaintiff and PW2 the Kenyan handwriting expert prove that the first Plaintiff did not sign the lease agreements. The signature of PW1 was confirmed by the forensic report to have been forged.

The registration process was testified about by PW3 the Commissioner for land registration. His testimony showed the continuation of fraud to the benefit of the Defendant.

Similar to the contested mortgage, the Defendant did not adduce in court any credible and admissible evidence to rebut the evidence of the Plaintiffs. The Defendants did not bring to court the signatories of the lease agreements which are contested or the advocates who purported to sign as witnesses. The Defendant did not produce the authors of the handwriting expert reports. The Defendant did not produce the authors of the handwriting expert reports that were tendered in court as part of exhibit D10 to prove the contents of these reports. The Defendant's Kenyan report which forms part of exhibit D10 finds that there was manipulation of the questioned the documents through photocopy.

In reply on the issue of **whether the mortgage dated 24th of July 2003 and the lease agreement dated 24th of July 2003 were lawfully executed?** The Defendants Counsel tackled both issues concurrently.

The Defendants Counsel submitted that they were duly and lawfully executed. In support of the submission, contends that the documents were referred to forensic examiners in the Republic of Uganda and the Republic of Kenya. DW1 Mr Andrew Kibaya testified that the documents were first referred to a forensic examiner at the Scientific Aids Laboratory at Uganda Police Headquarters whose conclusion is contained in a report dated 4th of June 2007. They concluded that the questioned signatures appear to have been naturally executed. The first Plaintiff was dissatisfied with the report and made a complaint and the same documents were sent for further

forensic examination to the Kenyan Police Criminal Investigations Department. The Kenyan examiner concluded in his report dated 8 September 2007 that having examined and compared all questioned signatures; they were in his opinion similar and indistinguishable. Both expert reports were exhibited in court by consent of both Counsels as exhibit D10 in the proceedings of the Law Council and particularly a complaint by the first Plaintiff against DW1 and 2 others. The first Plaintiff supplied the documents to the Law Council as evidence of his complaint. Secondly PW2 testified that he had appeared in the Buganda Road Court, with the Kenyan expert to tender in another report which was not his. Counsel relied on the case of **Administrator General versus Bwanika James and others Supreme Court civil appeal number 7 of 2003**, for the holding that agreed facts and documents can be treated as proof, unless those contents intrinsically points to the contrary, and if they are relevant to any issue, their admission disposes of the issue because the need for its proof or disproof would have been disposed of by the fact of admission. The Defendants Counsel submits that unlike the report presented by PW2 and exhibited as exhibit P 46, the two earlier reports were independent reports commissioned and carried out by government organs. The report of PW2 was specifically commissioned in November 2011 after the trial had commenced. Consequently the evidence of PW2 is not only probably untrue; it is inherently incredible and ought to be rejected.

On the other hand the evidence of DW 1 and exhibit D7, D 8 and D9 show that the original signed copies of the documents were duly submitted to and received by investigating officers at the Uganda Police Headquarters. Furthermore it is the evidence of PW1 that all documents relating to the lease of plots 186 and 198 were signed by him and the second Respondents to the counterclaim and left for completion at the offices of Messieurs Shonubi, Musoke and Company Advocates, Lawyers of the Defendant. This was clarified and corroborated by the evidence of DW1 that the first Plaintiff signed all documents including the lease and mortgage documents and left them for completion with the said firm of advocates. This evidence was uncontested and unchallenged and is consistent with the Plaintiffs paragraph 4 (f) of the amended plaint.

The Defendants Counsel Contends That the Plaintiff’s attempt to use the Illiterates Protection Act Cap 48 to deny the contents of the lease and mortgage documents only serves to answer the two issues in the affirmative. Counsel contended that PW1 during his testimony displayed a good command of the English language and did in fact have interactions with the court in fluent

English. Exhibit D3 also proves that the first Plaintiff is fluent and has a good command of the English language. Consequently the contents of paragraph 7 of the amended plaint in fact are an admission of the signature with only the challenge being the literacy of the first Plaintiff. It stops the Plaintiffs from arguing otherwise. The evidence of PW1 and exhibit D3 proves against the pleadings of the Plaintiff that the first Plaintiff is an untruthful witness and ought not to be believed at all. Finally Counsel contended that in all probability the Plaintiff duly signed and executed both the lease and the mortgage documents. The first Plaintiff acting on his behalf and as a shareholder and managing director of the second Plaintiff executed the document while the second Respondent to the counterclaim and PW3 signed as company secretary of the second Plaintiff.

In rejoinder on the first issue the Plaintiff's Counsel submits that the credit notes, confirms the truthfulness of the first Plaintiffs complaint regarding the inaccurate posting of entries by the Defendant by not making credit notes to transfer sums appearing on trading Ledger to the rent account where they rightly belonged. On the question of whether the mortgage dated 24th of July 2003 and the lease agreement dated 24th of July 2003 were lawfully executed? The Plaintiff's Counsel submits that the admission in evidence of the forensic report of Mr Ezati dated fourth of June 2007 and the forensic report of the Kenyan examiner Mr Antipas Nyanjwa PW2 dated 8th of September 2007 as part of exhibit D10 did not amount to an admission of the contents of the two reports. The evidential value of the two reports only comes out when the context under which the tool documents were admitted in evidence is brought out.

First of all the record shows that Andrew Kibaya informed court that he had obtained the contested handwriting expert report from the Law Council and during the criminal trial against him. The Defendants Counsel was requested to bring the report as part of the proceedings of the law Council/criminal proceedings so that the court will have the benefit of having both proceedings on record. As a result of the courts directive, the report of Ezati was tendered in the court for identification as ID 1. The Kenyan handwriting expert report was tendered into court as ID2 to the DW1 Mr Kibaya. Subsequently the two reports were not tendered in evidence and remained for identification only. Lastly the proceedings of the disciplinary committee were admitted and it was assumed that the two documents were part of the proceedings. This was tendered in evidence in a batch as exhibit D10. Consequently the admission of the documents did

not amount to an admission of the contents thereof. It was admitted as evidence that disciplinary proceedings had been commenced against Mr Andrew Kibaya. The record does not support the Defendant's submission that the reports were supplied to the law Council by the first Plaintiff. None of the defence witnesses was present and saw the first Plaintiff lodge his complaint before the law Council. The testimony of the defence witnesses and the matter they never saw by themselves is inadmissible for being hearsay evidence. Admission of the report as proof of the existence of law Council proceedings did not waive the Defendant's obligation to prove the contents of the two reports by putting the authors of the two reports on the witness stand. Furthermore the law Council proceedings do not indicate at all that the said reports had been admitted in evidence before been tendered by their respective authors. In the circumstances the decision in Administrator General versus Bwanika is not applicable.

As far as the submission that the forensic report tendered in court by PW2 as exhibit P 46 was specifically commissioned in November 2011 after trial had commenced, the Defendant has not indicated how the timing and approach affected the credibility of the report. No such credibility was ever brought out during the cross examination of PW2. The fact that the report was commissioned by the Plaintiff's Counsel and not the government was because the Plaintiffs had the burden of proof and had to discharge that burden.

On the submission that the Plaintiff and the second Respondent signed the impugned documents relating to the mortgage and the lease and left it with Messieurs Shonubi Musoke and Company Advocates for completion. The actual documents signed by the Plaintiff appearing in this testimony and are (1) a covering letter to the Registrar of Lands/Titles; (2) Registered Board Resolution and (3) transfer forms duly executed by the 2nd and 3rd parties.

As far as the Illiterates Protection Act Cap 48 is concerned, the point never went past pleadings and was never the subject of any issue during the trial. As such Counsel prayed that the court ignores the Defendant's submission in respect thereof. The second substantive reason for the invalidity of the lease and mortgage documents was that the first Plaintiff did not receive the alleged consideration thereof of Uganda shillings 50,000,000/= as set out in the respective agreements.

Resolution of issues No's 1 and 2

I have duly considered the written submissions of Counsel, the pleadings of the parties, the testimonies and documentary evidence on the first two issues as to whether the mortgage or the lease agreement were duly executed.

The contested mortgage is exhibit PE 18 at page 45 of the Plaintiffs trial bundle. It shows that it was executed on 24 July 2003. However the year 2003 is partially hidden by a stamp. I would therefore not conclude specifically that it was dated 24th of July 2003. It was apparently registered in November 2006. Clause 2 of the mortgage agreement provides that the mortgagor is the registered owner of all the land comprised in Mailo register block 266 plot 198 at Mawokota Kayabwe and that the mortgagor is also a holder of a power of attorney executed on 25 July 2003 by the second Plaintiff Company. The mortgagor is indicated as the first Plaintiff. The power of attorney is in respect of Mailo register block 266 plot 186 at Mawokota Kayabwe. Clause 3 thereof provides that the parties had a memorandum of understanding on 23 September 2002 between the second Plaintiff Company and the Defendant wherein the second Plaintiff Company agreed to transfer it to the first Plaintiff/mortgagor who would consolidate and lease it to the mortgagee stated to be the Defendant. It is further provided that the mortgagee has on the 25th day of July 2003 advanced Uganda shillings 50,000,000/= towards the memorandum of understanding.

The Plaintiff relies on a handwriting expert report produced by PW2 and marked as exhibit P 46 for the submission that the Plaintiff’s signature in the mortgage deed was a forgery.

The first problem with the mortgage deed appears at page 1. At page 1 it is provided as follows: "This Mortgage is made this 24th day of July 2003". Obviously there is an inherent problem with the dates. There cannot be a mortgage executed pursuant to a power of attorney executed in the future date namely on the 25th day of July 2003 by the second Plaintiff company. Clause 2 of the mortgage agreement therefore introduces an anomaly on the dates. It provides that there was a power of attorney executed on the 25th day of July 2003. It was on the basis of the power of attorney that the mortgage deed in respect of Mailo Register block 266 plot 186 land at Mawokota Kayabwe was mortgaged to the Defendant by the mortgagor who is also the first Plaintiff. The signatures of the mortgagor and the witnesses to the mortgagor’s signature are not dated. However, this document was executed by the Defendant on 16 August 2006. On the other

hand the power of attorney exhibit P 28 is actually dated 24th of July 2003. On that ground it can be inferred that the date stated in clause 2 of the mortgage agreement was written in error.

The Defendant relies on the testimony of DW1 Mr Andrew Kibaya who testified that the questioned documents namely the mortgage deed dated 24th of July 2003 and the lease agreement dated 24th of July 2003 were referred to a forensic examiner at the Scientific Aids Laboratory Uganda Police Headquarters who made a report dated 4th of June 2007 showing that the Plaintiffs signatures were consistent with other signatures and were naturally executed. The first Plaintiff was dissatisfied with the report and had the same documents sent for further forensic examination of the Kenyan police criminal investigation Department whereupon one Mr Antipas Nyanjwa made another report dated 8th of September 2007 and reached the same conclusion. The reports are contained in exhibit D10.

I will start by an examination of exhibit D10. Exhibit D10 is the proceedings before the Disciplinary Committee of the Law Council on 16 June 2010 in a complaint filed by the first Plaintiff against advocates from Messieurs Shonubi Musoke and Company Advocates. In the proceedings, reference was made to a commission of a report on the allegations of forgery. The ruling of the law Council at page 10 is pertinent to the first two issues. For ease of reference is quoted as far as is relevant as follows:

> *"Both parties are in agreement that the issue in contention is the alleged forgery by the Respondent and that it has been the subject of protracted investigations by the police which even brought in the involvement of two handwriting experts, one of whom is even beyond jurisdiction.*
>
> *The result of this investigations is a criminal case (number 1092/09) at the Buganda Road Court with Mr Kibaya, the third Respondent as accused. The matter has also resulted into a civil matter (C/S 350/2008) before the Commercial Court where we have learnt that inter alia declarations are being sought on whether the documents in question were forged.*
>
> *We note and advise the parties that issues of forgery are not the preserve of the powers of this Committee, especially the case where criminal and civil proceedings have been*

preferred against a party before us; our powers only go as far as disciplining errant advocates for unprofessional behaviour.

We find that it is prudent we allow the matter in the two courts to proceed and make their pronouncement on the central issue of forgery. And, should there be a finding that any or all of the Respondents authorised or was a party to the forgery in the transaction or the documents in the matter and referred to as take appropriate action against that advocate(s).

We therefore hold that this matter be stayed pending the final judgement in criminal case number 1092/2009 (Uganda versus Kibaya) and C/S 350/2008. Therefore let the matter be reserved for mention within 60 days for parties to report on the progress of both cases."

Attached to the proceedings is a forensic document examiner's report from the Kenyan police Department of criminal investigations which was relied upon by the Defendant. The report which is attached is that of Mr Antipas Nyanjwa. At page 2 he states as follows:

"I have today examined and compared all the questioned signatures indicated with the arrows in red ink on exhibit marked A1 – A 7, with a standard signatures on exhibits marked B1 – B2, and all the non-signatures also indicated with the arrows in red ink on exhibit marked C1 – C3. They are in my opinion similar and indistinguishable. I have also observed all the pages of the questioned documents are initialled except the last page on all the documents excluding the document marked A5. I find this as an indication of possible manipulation. I have also examined and compared all the questioned signatures indicated with the errors in green ink on exhibit marked A5, when a standard signatures on exhibit marked B3, and all the known signatures also indicated with the arrows in green ink on exhibit marked C1 and C3. They are in my opinion similar and indistinguishable.…

At page 4:

"… I have also examined and compared the questioned the document marked exhibit A2 as a true copy of the exhibits marked A 3, A 6 and A 7. In my opinion I could find

evidence of manipulation through a photocopier. The photocopied signatures on the exhibit marked A2 are not true copies of the signatures on exhibits marked A 3, A 6 and A 7."

Unfortunately exhibit D10 does not have the relevant drawings and exhibits which were referred to. The forensic examiner, who made the report, was not called to testify. Consequently, I agree with the Plaintiff's Counsel that the report cannot be accepted as proof even on the balance of probability because the relevant forensic examiner was not called to testify and was not cross examined. What he meant by manipulation through a photocopier cannot be established from the report only.

The only expert, who was called in the civil suit, was called by the Plaintiff and is PW2 Chief Inspector Jacob Oduor from the Kenyan police. He received instructions from the Plaintiff's advocates. PW2 examined exhibits and marked A1 – A7. A1 is a mortgage dated 24th of July 2003 between the first Plaintiff and the Defendant. It is in respect of Mailo register block 266 plot 198. It is also concerning Mailo register block 266 plot 186 in the names of the company namely the second Plaintiff by virtue of powers of attorney. A 2 is a lease agreement dated 24th of July 2003 between the first Plaintiff and the Defendant and it is in respect of Mailo register block 266 plot 198. It is also concerning Mailo register block 266 plot 186 in the names of the company namely the second Plaintiff by virtue of powers of attorney. A 3 is the lease agreement dated 24th of July 2003 but in the first Plaintiff and the Defendant and concerns the same property. A 4 is a mortgage dated 24th of July 2003 and concerns the same property and the same parties. A5 is a board resolution dated 24th of July 2003 of the second Plaintiff Company and the part of attorney dated 24th of July 2003 wherein the second Plaintiff nominates the first Plaintiff as its attorney who played John mortgage Mailo register block 266 plot 186 at Kayabwe. A 6 is yet another lease agreement dated 24th of July 2003 for the same property and between the first Plaintiff and the Defendant. A 7 is yet another lease agreement with the same features.

The handwriting expert compared the signatures in the questioned documents which known signatures B1 and B 2. He concluded at page 2 of the forensic expert report and I quote:

"I can find no agreement between the signatures. They are in my opinion forgeries.

As far as A5 is concerned his conclusion was that there was no agreement between the signatures and in his opinion the questioned signatures were a forgery and written in a different style. He found that exhibit A2 was not a true copy of the exhibits marked A3, A 6 and A 7. The signature in A2 was a photocopy. PW2 has given all the comparisons between the questioned signatures and the specimen signatures. His conclusion is that the questioned signatures were forgeries. He came to the same conclusion on the signature of the wife of the first Plaintiff.

I have duly considered the evidence on the issue by DW1 Andrew Kibaya. His testimony is that he helped in drafting and reviewing agreements namely leases tenancy agreements, distribution agreements, and dealership agreements at the time when he worked on the questioned documents etc. As far as the suit is concerned, as a lawyer practising with Messieurs Shonubi, Musoke and company advocates, they drafted a mortgage, a lease, a power of attorney and resolutions. He identified exhibit P4 which is in a memorandum of understanding between Sheikh Mawanda and Kobil Ltd. Sheikh Mawanda had a plot of land he leased to Kobil in 1999 namely plot 186. He further acquired a piece of land that was adjacent to plot 186 and it was agreed that Sheikh Mawanda would join the two plots so that they would have one title. Plot 186 the subject of the first lease was not in the names of Sheikh Mawanda but that of his company the second Plaintiff. It was agreed that the two plots would be consolidated so that they have one title. Secondly Sheikh Mawanda agreed to transfer the land from his company name into his personal names and issue a lease out of the consolidated plots to the Defendant. Thirdly it was agreed that Sheikh Mawanda would be given Uganda shillings 30,000,000/= as premium. The rent payable would be increased to Uganda shillings 44 per litre of fuel sold at the station. Previously it was Uganda shillings 30 per litre of fuel sold at the station. In the year 2003 a document was drafted but at the time it was drafted, DW1 testified that the two plots had not been consolidated. The lease document was essentially the same except that in the subsequent lease, there was premium payable to Sheikh Mawanda and rent was increased to Uganda shillings 44 per litre of fuel. The lease was to be executed by Sheikh Mawanda as the lessor and not the second Plaintiff Company. The documents were executed by Sheikh Mawanda and witnessed by Counsel Peters Musoke. There was a difference in dates in the contested document because the Kobil execution was in 2006 whereas the document was signed in 2003 but was not acted upon. A space was left in the lease document for inclusion of the new consolidated plot number after it had been ascertained. It was this document after due execution in 2006 which had to be registered for the

Defendant to be able to enforce anything. When the documents were first executed in 2003, they were not completed. It was left for ascertainment of the plot numbers after it had been consolidated. Sheikh Mawanda signed the documents and left them with the firm of advocates. In the year 2006 the accounts of the Defendant with Sheikh Mawanda did not tally and there was an ongoing struggle between them as business partners. The firm of advocates of DW1 had occasion to revisit the file and discovered that the documents had not been duly executed/completed. The documents were sent to Nairobi to a director of the Defendant Company and endorsed. Sheikh Mawanda executed his part on 24 July 2003. DW1 further testified about a mortgage deed signed between Sheikh Mawanda and Kobil (U) Ltd on 24 July 2003. It was also executed by the Defendants in the year 2006. The second Defendant Company issued the power of attorney to Sheikh Mawanda for the mortgage of the company's property at plot 186. The mortgage was for a sum of Uganda shillings 50,000,000/= because Sheikh Mawanda wanted advance rent in respect of these properties. DW1 further testified that this was done before the plots had been consolidated. Plot 186 was in the names of the company while plot 198 was in the names of Sheikh Mawanda. The mortgaging did not wait for the consolidation of the title deeds and plots. There was a resolution exhibit P 29 of the Defendant Company to grant a power of attorney to Sheikh Mawanda to mortgage the company property to the Defendant. DW1 testified that all the documents attached were not forgeries. All the documents were executed by Sheikh Mawanda and his wife. He contended that the Defendant had an ongoing relationship with Sheikh Mawanda and therefore it was not correct to say that the Defendant forged documents to establish an ongoing relationship. The process of transfer of the company land title to the first Plaintiff was also handed over to the firm of DW1. Consequently transfer forms were handed over duly signed on the same day that is 24th of July 2003. However there was nothing happening in between 2003 of 2007.

In the relationship between Sheikh Mawanda and the Defendant, there was a trading account. He was also a dealer and therefore a tenant. The account on the trading account grew up in outstanding sums to over Uganda shillings 200,000,000/=. The Defendant’s advocates wrote a statutory notice on the basis of clause 4 of the mortgage agreement threatening to sell the property that is when the alleged that he had never signed the mortgage document. The matter was then referred to handwriting experts. Furthermore Sheikh Mawanda reported a case of forgery to the police and criminal proceedings were commenced against DW1. The documents

were contested and subjected to handwriting experts. However the same was not tendered in evidence in the current suit. I have already made reference to the report as annexed to the proceedings before the law Council. Another report of Ezati Samuel was tendered for identification as ID1 but he was never called to adduce the document in evidence. The second report from Kenya dated eighth of September 2007 was tendered for identification as ID2. Finally there was a process of getting the title deeds when the title deed for plot 156 got lost and the special title was to be obtained was the end of 2006. The completion of registration was made in 2007. Sometime in February or January 2 titles were consolidated. During cross-examination DW 1 admitted that a lease agreement was envisaged under the memorandum of understanding. DW1 did not witness the mortgage but only the power of attorney and the memorandum of understanding.

As far as the first documents were concerned, the original documents had been submitted to the lands office but got lost or were taken by the police for investigations. During further cross examination DW1 was evasive on whether the documents were actually lodged with the land registry. He testified that the documents were taken by clerks from Messieurs Shonubi, Musoke and Company Advocates. It was in that process that the original documents got lost from the land office and he could not trace them.

I have duly considered the testimony of PW1 Sheikh Mawanda on the question of forgery of documents. His testimony is that he had a trading relationship with the Defendant. The parties executed a memorandum namely the first Plaintiff, the second Plaintiff and the Defendant. Plot 186 was for the second Plaintiff Company. Sheikh Mawanda had plot 198. They agreed that the two plots are consolidated. The memorandum of understanding was executed before Counsel Deepa Verma the lawyer for the Defendant. There was a resolution of the second Plaintiff Company to transfer the title deeds into the names of Sheikh Mawanda. He signed some documents and left them with lawyers of the Defendant. There was supposed to be a transfer of the property from the names of the second Plaintiff to the names of the first Plaintiff. The resolution was also signed by the company to make the necessary transfers. The court then made an order for production of the documents for examination concerning Mawokota block 266 plots 186 and 198 namely transfer forms, application for consent, the lease and the mortgages agreement and covering letter to the registrar of lands from the second Plaintiff Company. PW1

then referred to exhibit P6 which is a statutory declaration. Exhibit P6 is the statutory declaration by Counsel James Kyazze of Messieurs Shonubi Musoke and Company Advocates sworn to on 18 September 2006 to the effect that sometime in June or early July 2002 the title deeds of plots 186 was forwarded for the transfer of the title into the names of Sheikh Mawanda. Under uncertain circumstances the title was missing from the office. All efforts to trace the title deeds were in vain and the title deed was irretrievably misplaced or lost. The relationship between the Plaintiff and the Defendant was that he would be paid in the form of fuel as the landlord and secondly as a dealer and had a trading account with the Defendant. Rent was paid in the form of fuel.

Finally as is relevant the witness and also first Plaintiff Sheikh Mawanda testified that he originally lodged a complaint with the Uganda police on the basis of the mortgage deed which he contends was forged. Subsequently he also discovered that there was a forged lease on the title deed. What happened in the registry appears in the testimony of PW3.

The third testimony is that of PW3 Commissioner Edward Karibwende, formerly the Assistant Commissioner in the Department of land registration Ministry of Land, Housing and Urban Development. His statement to the police was tendered in evidence on the question of irregularities in the registration of instruments on the Plaintiff's property or the suit property. This is exhibit P 47. Exhibit P 47 is the written statement of PW3 which he confirmed on oath. PW3 explained the procedure for the registration of leases. The procedure is that the lease agreement is first registered on the main Mailo title as an encumbrance and then sent to the lease section for offer of the lease title. In the case of the Plaintiff, block 266 plots 198 and 186 the lease agreement was lodged in the Mailo office on 27 February 2007 and a lease title was issued the same day. The lease was in favour of Messieurs Kobil (U) Ltd. It was variously signed on 24 July 2003 by all parties concerned and the director of Kobil (U) Ltd on 16 August 2006. The lease agreement indicated that plots 186 and 198 had been consolidated. The records indicated that consolidation was done on 27 February 2007 under instrument number KLA 326575. The lease was done on the same day that is 27th of February 2007 under instrument number KLA 326574. The request was made by Messieurs Shonubi, Musoke and Company Advocates. The instrument creating the lease number KLA 326574 is before amalgamation of plots 186 and 198 under instrument of amalgamation is KLA 326575 which ought to have come earlier. The

amalgamation was not properly carried out because the two plots still existed separately as plots 186 and 198 while amalgamation presupposes that both plot numbers 186 and 198 ceased to exist and a new plot was created after merging. Furthermore the transaction was not first registered on the Mailo certificate as an encumbrance as is usually the case. The encumbrance was inserted long after the lease title was issued. The certificate of title for plot 186 dated 9th of March 2007 was earlier issued was compared with a substitute white page of the original from the lands office. It shows that the consolidation was an afterthought by the registrar. Both the consolidation and the lease were inserted after issue of the leasehold certificate of title whereas it should have been done before. A special certificate of title seems to have been issued in respect of the Mailo land on 31 January 2007. The office certificate given to the police on 9 March 2007 does not reflect the entry of the said certificate of title. It followed that the entry appearing on the white page was inserted thereon after the date of 9th of March 2007. The application for the special certificate of title was missing from the title but PW3 was shown a certified copy of the application for a special certificate of title dated 18 September 2006 allegedly made by Shonubi, Musoke and Company Advocates. A certified copy was made by the registrar on 14 March 2007. The record shows that there was a mortgage dated 24th of July 2003 between Sheikh Mawanda and Kobil (U) Ltd for payment of Uganda shillings 50,000,000/=. The mortgage was registered in the lands registry on 24 November 2006 though it was made on 24 July 2003. By the time the mortgage was alleged to have been registered that is on 23 November 2006, the duplicate certificate of title was not in existence. It had been reported lost by Messieurs Shonubi, Musoke and Company Advocates on 18 September 2006. The advocates had applied for a special certificate of title and it was advertised in the Gazette on 24 November 2006. How then could the mortgage be registered on 24 November 2006? Was the concern of PW3 when the special certificate of title was issued on 31 January 2007? The mortgage was purportedly registered when the duplicate certificate of title was not in existence and PW3 concluded that this was highly irregular in the practice of conveyance. It should not have been registered until the title is made.

The testimony of PW3 and exhibit P 47 which is the police statement casts a lot of doubt on the entire transaction in terms of its regularity.

I have carefully assessed the evidence on the issue of forgeries. I must first comment that the relationship between the Plaintiffs and the Defendant continued after July 2003 until it fell apart in 2006. The Defendants reason for the relationship falling apart is that the account of the Plaintiffs had accumulated payments to the Defendant in excess of Uganda shillings 200,000,000/=. Whatever the situation, the memorandum of understanding indicates what was supposed to happen between the parties and the relationship between the Plaintiff and the Defendant continued until it fell apart. The falling apart of the relationship is the subject of an issue as to whether the termination of the dealership agreement was lawful. The obvious question is therefore whether a resolution of the question of forgery would lead to any material determination of the rights of the parties whether under a formal lease agreement or under the dealership agreement. As far as a lease agreement is concerned, there is always an implied covenant between the parties. As far as the dealership is concerned, the price of rent per litre of fuel is not in dispute. Apparently the Plaintiffs initial narrowed down complaint concerned the mortgage deed and particularly a sum of Uganda shillings 50,000,000/= and the move of the Defendant to foreclose the Plaintiff's right to redeem the property.

I must make some comments about the attempt to foreclose. Apparently the mortgage was registered in November 2006 on a document which covers plots 186 and 198 which according to PW3 is irregular. PW3 was an assistant Commissioner in the lands registry before he retired. Secondly the mortgage deed exhibit P18 speaks for itself. Its terms were to secure a sum of 50,000,000/= which was said to have been advanced to the first Plaintiff on 25th of July 2003. The first Plaintiff denies having received the money. It is also to secure the memorandum of understanding and the lease agreement. However the lease agreement exhibit P 16 and paragraph 6 thereof provides that an advance rent of Uganda shillings 50,000,000/= shall be paid in two instalments. The first instalment was a payment of Uganda shillings 25,000,000/= upon the signing of the lease agreement (on 24 July 2003). The second instalment was to be paid upon consolidation of the two plots. It further provided that the advance rent was to be amortised from the rent due to the lessee of Uganda shillings 44 shillings per litre of fuel bought from the lessee and sold to the service station on the property. In other words the 50,000,000/= advance mentioned according to the terms of the lease agreement would be recovered from rent charged on the supplies. After the total amount is amortised, then the rent shall revert to being Uganda shillings 44 per litre of fuel bought from the service station. This is the stipulation in paragraph 6

(c) of the lease agreement. The lease agreement also provides that it was executed on 24 July 2003. Upon the falling apart of the parties evidenced by the termination letter, it is apparent that the lease agreement also is deemed to be affected by determination of the dealership. This is because rent was to be recovered from the fuel supplied to the dealer. The dealer also happened to be the landlord. If there was to be another dealer, he or she has to work different terms of the relationship with the Defendant.

The memorandum of understanding exhibit P4 is dated 24 September 2002. It stipulates that a lease in respect of plot 186 had been transferred to the Defendant. The second Plaintiff was willing to transfer the plot to the first Plaintiff (plot 186). It shows that the first Plaintiff had acquired an adjacent plot 198. The first Plaintiff was required to consolidate the two plots and obtain a fresh Mailo certificate of title. He was required to write a covering letter to the registrar of lands to the effect that the second Plaintiff had resolved to transfer the first plot to him. Secondly he was supposed to obtain a registered resolution by the second Plaintiff to the same effect. He was supposed to execute transfer forms duly executed by the company to him. Finally the first Plaintiff Sheikh Mawanda was supposed to hand over to the Defendant company a covering letter to the registrar of titles to the effect that he had acquired both plots and wished to consolidate them and obtain one certificate of title for purposes of leasing it to the Defendant company. Rent was revised with effect from 1 September 2002 to Uganda shillings 44 per litre of fuel. The Defendant was supposed to pay a premium of Uganda shillings 30,000,000/= for the consolidated plots upon execution of the new lease. The intention of the parties in the execution of the memorandum of understanding was apparently not implemented through registration of the requisite instruments. The memo of understanding however remained in force.

According to exhibit P9 the Defendant on 22 April 2006 wrote to the first Plaintiff and basing on the clause of the dealership agreement that it was terminated forthwith and the first Plaintiff was required to vacate the premises as a dealer. Subsequently on 8 August 2006 exhibit P13 the Plaintiff wrote to the Defendant on the question of the sublease of block 266 plot 186 informing them under the clause G of the dealer licence dated 30th of December 1999 and the memorandum of understanding dated 21st of February 2000 that the ground rent was revised to Uganda shillings 80 per litre of premium fuel sold on the premises with effect from the 5th of May 2006 to 4th of May 2011. The letter was received by the Defendants on 8 August 2006. In a

letter dated 15th of August 2006 exhibit P 14 the Defendant replied indicating that the rent payable by the Defendant was Uganda shillings 44 per litre of fuel sold in the service station or Uganda shillings 800,000/= per month and the next revision was supposed to be on 1 November 2009. He relied on the memorandum of understanding executed in the year 2002. In exhibit P 15 the first Plaintiff wrote another letter about a sublease on plot 186. He relied on a memorandum dated 21st of February 2000 and a letter dated 16th of May 2002 about revision of rent. He suggested that the parties clear their misunderstandings and then he would sign (the documents?). I must point out that by this time; the Defendant's director had not yet accepted the questioned instruments by endorsing on behalf of the Defendant Company.

It is therefore apparent that when the Defendant purported to execute an agreement dated 24th of July 2003 in 2006 and proceed to file it with the registry of lands in the manner reflected in the testimony of PW3 coupled with the issuance of a statutory notice by Messieurs Shonubi, Musoke and company advocates in February 2007 threatening to foreclose on the mortgaged property, the Plaintiff contested the entire transaction. It is apparent from the correspondence between the parties that they had not relied on any mortgage instrument or lease agreement executed on 24 July 2003 as late as the letter of the Defendant dated 15th of August 2006 exhibit P 14. The parties depended on the memorandum of understanding dated 24th of September 2002. It is therefore apparent that the registration was done to gain an advantage over the Plaintiff after there was disagreement between the parties which disagreement included a disagreement on the basis of their relationship. Coupled with the findings of the forensic experts about manipulation due to photocopies together with the anomalies in consolidation, issuance of a special certificate and registration of leases in the manner reflected in the testimony of PW3, there is a high probability that the questioned documents namely the lease and mortgage agreements dated 24th of July 2003 were not lawfully executed according to the circumstances. Particular reference is made exhibit P 46 produced by PW2 who come to the conclusion that the signatures and questioned documents were forgeries. It is particularly important to make reference to the Defendant's evidence which was based on the proceedings before the law Council and the document of Mr Antipas Nyanjwa the forensic examiner from Kenya who found that there was evidence of manipulation through a photocopier in the registered documents. Whatever could have transpired from the 24th of July 2003 and the time the questioned documents were registered in early 2007, there was evidence that the documents which were taken for registration

left a lot to be desired and cannot be said to have been duly executed in the circumstances. The documents were lodged in a manner that was highly irregular and suspicious and calculated to take advantage of the Plaintiffs. The registration was made when the parties had fallen apart.

The test to be applied on whether a forgery or alteration goes to the root of a contract was considered by Devlin J in the case of **Chao and Others (Trading as Zung Fu Co) v British Traders and Shippers Ltd (N V Handelsmaatschappij J Smits Import-Export Third Party) [1954] 1 All ER 779** and at page 787 where he held:

> *"There does not seem to be any authority precisely in point, and Counsel for the Plaintiffs relied on broad statements, in Kreditbank Cassel v Schenkers in particular, that a forged document is null and void. In that case Bankes LJ said ([1927] 1 KB 835):*
>
> > *"To mere irregularities the principle of [Mahony v. East Holyford Mining Co.] no doubt applies, but it has never been extended to forgery, a forged instrument being simply null and void."*
>
> *But such general dicta must be related to the circumstances in which they are made. If someone forges the signature to a document, that document is wholly fictitious from beginning to end, and it is, of course, null and void as soon as forgery is proved, but I do not think that that is any authority for the view that any material alteration to a document destroys it and renders it null and void. Deciding the matter in the absence of authority and on principle, I think the true view is that one must examine the nature of the alteration and see whether it goes to the whole or to the essence of the instrument, or not. If it does, and if the forgery corrupts the whole of the instrument or its very heart, then the instrument is destroyed, but if it corrupts merely a limb, then the instrument remains alive, though, no doubt, defective."*

In this case the Defendant approved the document in 2006 and particularly on the 16th of August 2006. By the time the documents were signed by the Defendant's director and registered, there was no consensus ad idem between the parties. Particularly exhibit P14 which is a letter of the Defendant dated 15th August 2006 demonstrates the Defendant represented to the first Plaintiff that their relationship was governed by a memo of understanding dated 21st of February 2000 which was overtaken by a subsequent lease agreement and memorandum of understanding

executed later in 2002. The next day on the 16th of August 2006, the Defendant in exhibits P16, P16 B being lease agreements in respect of plots 186 and 198 respectively and a mortgage on the 2 plots in exhibit P18, purported to sign the said agreements with the Plaintiffs well knowing that the first Plaintiff had offered different terms. There is evidence that the documents executed had alterations using a photocopier according to Nyanjwa and forgeries of signatures according to PW2. In the circumstances there is no need to make a specific finding on whether the handwriting experts report is true about the alleged forgery. The documents in question were not duly executed and on the basis that by the time the Defendants director purported to approve and sign the lease and mortgage instruments there was no consensus ad idem and any consent on the part of the Plaintiffs had been withdrawn. In fact the Plaintiff's dealership had been terminated by the Defendant in April 2006 and the Defendant had re-entered the service station and yet the dealership was an integral part of the questioned lease and mortgage instruments. In the premises issues number 1 and 2 are resolved in favour of the Plaintiffs.

Issue No. 3

Whether the termination of the dealership of the Plaintiffs/Respondents was unlawful?

In support of the above issue, Counsel for the Plaintiffs and second Respondent submits that the issue of termination of the first Plaintiffs dealership in respect of the Kayabwe service station is contained in the amended plaint paragraphs 4 (G) and paragraph 4 (I). On the other hand, the termination of the second Respondent's dealership in respect of Kyazanga service station was raised by the second Respondent in paragraph 8 of the second Respondents reply to the amended counterclaim.

The burden of proving that the termination of the dealership was unlawful is on the part of the Plaintiff and the second Respondent. The dealership in respect of the Kayabwe Service Station was governed by exhibit P3 which is the memorandum of understanding dated 13th of August 2001 and exhibit D1 which is the service station operators agreement dated 14th of August 2001. On the other hand the second Respondent's dealership in respect of Kyazanga service station was governed by exhibit P3 which is the memorandum of understanding dated 13th of August 2001 and exhibit D2 the service station operators agreement made on 13 September 2001. No written agreement was tendered in court by any of the parties to the suit in respect of the Masaka service

station dealership except the first Plaintiffs letter to the retail manager of Kobil Uganda dated 22nd of October 2005 exhibit D3.

The Plaintiff's Counsel submits that in his evidence PW1 testified that the Defendant's letter for the termination of the Kayabwe dealership was dated 22nd of April 2006 but only served on the first Plaintiff on the 5th of May 2006 according to exhibit P9. By the time the Defendant delivered the termination letter, they had already taken over physical possession of the service station on 22 April 2008 and handed the station to their sales representative. They started supplying their products under the changed arrangements with effect from 22nd of April 2006 as confirmed by invoice and the filing advice dated 22nd of April 2006 and tendered in evidence as exhibit PE 8. On the other hand the termination of the Kyazanga dealership was effected by the Defendant in a letter addressed to the second Respondent to the counterclaim dated 29th of April 2006 and delivered to her on the 5th of May 2006 according to exhibit D9.

From the termination letter the Kayabwe dealership exhibit P9, the termination was stated to be based on the dealer's licence agreement dated 30th of December 1999. On the other hand determination of the Kyazanga dealership according to paragraph 2 of exhibit D9 is based on the dealer license agreement dated 28th of December 2000 exhibit P 40.

Counsel submitted that the dealer license agreement upon which the termination was premised was wrong. Clause 3 of the memorandum of understanding dated 13th of August 2001 and exhibit P3 expressly provides that where the Respondents to the counterclaim sign the service station operator's agreement, the same would supersede any other dealer agreements that may have earlier on been signed with the Defendant. Clause 1.2 of the service station operator's agreement executed on 14 August 2001 between the Defendant and Mawanda which is admitted as exhibits D1 expressly provides that it would supersede any previous agreement executed between the parties. Clause 1.2 is repeated in the operator's agreement signed between the second respondent to the counterclaim and the Messieurs Kobil (U) Ltd on 13 September 2001 and tendered in evidence as exhibit D2. It was therefore clear that the termination of both the Kayabwe and Kyazanga dealerships was wrongfully premised and automatically rendered the termination unlawful.

Concerning other aspects of termination, Counsel submitted on the Kayabwe dealership first before dealing with the Kyazanga dealership termination. In paragraph 4 (i) of the amended plaint it is averred that the reasons for termination of the Kayabwe dealership were false and baseless and the first Plaintiff has not been given an opportunity to respond thereto in accordance with the basic tenets of natural justice.

As far as the evidence is concerned, paragraph 1 of exhibit P9 shows that the Defendant accused Sheikh Mawanda inter alia of removing all goods from the service station, abandoning the service station and even communicated to the Defendant that he was not planning to operate the station anymore. They alleged that he purchased and sold at the service station products from another company. All the accusations were denied by the Plaintiff in his letter to the Defendant dated 26th of June 2006 and admitted in evidence as exhibit P12. PW1 challenged the Defendant in that letter to produce documentary evidence of the allegations against him but the Defendant never responded. The first Plaintiff also denied claims in court. Consequently the court should be guided in the evaluation of evidence by the agreement of the parties at the material time namely exhibit D1. This agreement provided both grounds for termination and the procedure to be followed.

Secondly according to the claim in the Kyazanga termination letter exhibit P9, the first Plaintiff had properly communicated to the Defendant that he was planning not to operate the service station anymore. However the Plaintiff's denial is more reliable than the Defendants claim because a credit supply had been specifically requested for in writing by the dealer. Exhibit D3 is clear proof of the request for credit supply. The procedure for getting credit supply is detailed in the testimony of PW1 during examination in chief and was not cross examined on this point. Secondly clauses numbers 1, 3, 7 (e) and 9.1 of the operators agreement exhibit D1 provided that either party could terminate the agreement by giving one month's written notice. Thirdly if the first Plaintiff had verbally communicated with his client to cease operations, why did the Defendant not request him to reduce it in writing in accordance with the operator's agreement? Counsel submitted that Kobil is a multinational subsidiary and in the ordinary course of such a company, it is inconceivable that they would adopt dealing with the alleged termination communication in an informal manner. Lastly if the first Plaintiff had properly communicated his

desire to cease operations, why did not the Defendant wait for a period of one month's notice to expire before opting for an instant termination by them?

Regarding exhibit P9 which is the termination letter dated 22nd of April 2006, the Plaintiff's Counsel submitted that the Defendant does not state the date, the amount and the year when the first Defendant is alleged to have purchased and sold at the Kayabwe service station products from another company. There is no evidence of delivery of petroleum products from another supplier. It is unclear why such a fundamental breach was not brought to the Plaintiff's attention as soon as it was discovered. Secondly it is unclear why the Defendant did not penalise the first Plaintiff when it had a record of imposing penalties on other dealers. Counsel contended that exhibit PE 11 and P10 clearly demonstrated that the Defendant had a history of imposing penalties. The acquisitions of the Defendant were timed in such a way as to coincide with the time when the first Plaintiff was accusing the Defendant, its lawyers of being privy to a scheme of creating fraudulent mortgages and leases to the detriment of the Plaintiff. Finally Counsel contended that the accusations made by the Defendant in its letter exhibit P9 are false.

Consequently the termination of the Kayabwe dealership by the Defendant was unlawful. Concerning the Kyazanga dealership, termination by the Defendant by letter exhibited in evidence as exhibit D9 was unlawful in accordance with the same arguments advanced in respect of exhibit P9. The reply to the letter by exhibit P 41 of the second Respondent to the counterclaim is the truth while the Defendant's termination letter contains lies and distortions.

In a reply the Defendants Counsel submitted that under paragraph 7.1 (F) of the service stations operators agreement exhibit D1, the Defendant had a right to terminate the agreement without notice if the dealer/operator abandons the station or leaves the same unattended or allows or permits the management and operation of the station to become controlled directly or indirectly in whole or in part by any person, firm or company without the previous written consent of the company. Counsel further submitted that the testimony of DW 2 is that the Defendant has a standard code of operation for dealers in all Kobil stations. Once the dealer's falls short of the Kobil (U) Ltd standard, there was no option but to terminate the dealership. Furthermore Counsel submitted that the evidence of DW 2 shows that in a routine check of the station, they established that the first Plaintiff had bought petroleum products from the competitor of the Defendant in the names of Delta Petroleum Ltd.

To the testimony of PW1 that the letter of termination is dated 22nd of April 2006 but served on the first Plaintiff on the 5th of May 2006, by which time the Defendant had already taken physical possession of the service station. The delay in effecting service of the termination letter was caused by the fact that the station had been abandoned, thereby making it difficult to serve the Plaintiffs. Sheik Mawanda consistently refused to meet DW2 at the station. The contract exhibited D1 contains a covenant in paragraph 2.2 (A) to order and purchase products exclusively from the Defendant company or any associated or affiliate companies. It was the same case with the station at Kyazanga that had been abandoned. Evidence of DW 2 was specific, unchallenged and uncontroverted.

Counsel submitted that exhibit P 35 demonstrates that the dealership claim of the Plaintiff's Respondents to the counterclaim was at all material times an afterthought. It was never an issue when the Plaintiff instituted HCCS number 487 of 2007 against the Defendant or in miscellaneous application number 740 of 2007 arising from the suit. He relied on the ruling of honourable justice I.D.E Maitum who dismissed an application for a temporary injunction on grounds that she was not persuaded that the main suit had a likelihood of success. The Plaintiffs failed to demonstrate that they would suffer irreparable damage to warrant granting an injunction contrary to the terms agreed in the mortgage deed.

Counsel submitted that the evidence of DW 5 be rejected as it fell completely short of any professional standard of integrity. It was on the grounds of breach of the standard service operator's agreement that the dealership was terminated and this was not unlawful. Consequently the termination of the dealership was lawful.

There was a rejoinder that need not be repeated.

Resolution of issue No 3

I have carefully considered the third issue of whether the termination of the dealership of the Plaintiffs and the second Respondent to the counterclaim was lawful, the submissions of Counsel and evidence on record.

Exhibit P9 deals with the termination of the dealership for Kayabwe Kobil station and is written by the Defendant on 22 April 2006. It is addressed to the first Plaintiff. It reads as follows:

"Refer to your actions of removing all goods from and abandoning the above said station, combined with your verbal communication to us that you are not planning to operate the station anymore.

Clause B of the dealer allowances agreement dated 30th of December 1999 states that:

> *B: that you shall at all times personally operate and manage the service station on a full-time basis and in default you hereby authorise the company to enter and repossess the station".*

We are also aware that during the continuance of the dealership you violated the dealer licence agreement when you purchased and sold at the said station products from elsewhere in contravention to clause **C – 1**.

Clause C – 1 of the dealer license agreement states that:

"C. That during the exercise of this licence you shall not commit the following:

1. Buy any products from competitors of any other source other than our own.

By your actions above, you failed in this duty of operating the said station and as thus your dealership is terminated forthwith.

If you still have any personal property left on the premises, advise us at the earliest but in any case not later than three days from the date hereof.

You also advised that our actions hearing said did not affect any accrued rights that we may choose to enforce against you or your agents in respect of the manner in which the station has been run audit dealership."

The letter was signed by the General Manager of the Defendant and Mr Hannington Mpiima the Retail Sales Manager. Mr Hannington Mpiima testified as DW2. Before dealing with that testimony, the termination letter of the Defendant dated 22nd of April 2006 was received on the 5th of May 2006 and as is evident from the acknowledgement of receipt on exhibit P9. The termination letter was replied to by the first Plaintiff in a letter dated 26th of June 2006 and received by the Defendant on 28 June 2006.

The first complaint in exhibit P12 which is the letter responding to the termination letter by the first Plaintiff is that it was regrettable that the Defendant did not have the courtesy to take over the station with notice to him. He received the termination letter on the 5th of May 2006 when in fact the Defendant had started operating the station on 22 April 2006. He further indicates that he withdrew his personal property after receiving the letter of termination. Thirdly he asserted that he never communicated to anybody that he intended to relinquish the dealership. And the only communication on the subject was the letter terminating the dealership.

It was after this communication that the first Plaintiff wrote another letter dated 8th of August 2006 and received by the Defendant on the same day in which he wrote that pursuant to clause G of the dealership licence, ground rent was revised to Uganda shillings 80 per litre of premium petrol, diesel and kerosene sold on the premises from the 5th of May 2006 to the 4th of May 2011. This letter was tendered in evidence as exhibit P 13. The reply of the Defendant is exhibit P 14 and is a letter dated 15th of August 2006. In the reply the Defendant disputed the right of the first Plaintiff to increase the rent from Uganda shillings 44 per litre of fuel sold through the service station or Uganda shillings 800,000/= per month. He contended that the rent was only to be revised next on 1 November 2009 and thereafter on 1 November 2014 and only up to a limit of 10% of the previous rent. Subsequent to this reply, there seems to be a lull in communication because the next communication is dated 11th of November 2006 and was admitted in evidence as exhibit P 15. In that communication the first Plaintiff wrote the Gen manager of the Defendant as the landlord of the lease on block 266 plot 186 at Kayabwe. For ease of reference the letter reads as follows:

> *"I thank you for your positive business response, on Kobil Kyazanga and outstanding seven (7 to November 2006). Sir I wait the same on Kayabwe, so we finalise our misunderstandings and I sign.*
>
> *So, I disagree with you by your letter dated 15th of August 2006. Let us (Kobil and landlord) know the same, that the rent account reduced monthly (Kobil Kayabwe) by 3,891,851/= (1,313,500 L /27 times 80) from 5th of May 2006 – 4th of May 2011.*
>
> *So I have attached…*
>
> (1) *How I got that average*

(2) My memorandum dated 21st of February 2000

(3) Letter dated 16th of May 2002."

The letter is signed by the first Plaintiff as the landlord and is copied to the Marketing Operating Manager Kobil Uganda.

The attachments firstly is the breakdown of the rent payable based on the number of litres sold for the period January 2004 to December 2005. Secondly the memo dated 21st of February 2000 is referenced Memorandum of Understanding on Kayabwe Kobil Service Station and is of special mention. In that memo the first Plaintiff and the Defendant agreed that further to a meeting held at the premises of the Defendant concerning the Kayabwe Kobil service station, it was agreed that where the landlord ceases to be a dealer of the station, a meeting between him and Kobil will be convened to discuss how much monthly rental will be payable to him and how it will be paid to him.

From the tone of the correspondence, the first Plaintiff expected upon termination of the dealership agreement, to have a meeting with the Defendants to agree on the rent payable. In the memorandum dated 21st of February 2000, there is no mention of how the termination was to take place. In the letter dated 15th of August 2006, the Defendant did not agree that the memorandum of understanding dated 21st of February 2000 governed the relationship between the Plaintiff and the Defendant on the lease. In that letter of 15th of August 2006, the Defendant wrote that the memorandum of understanding dated 21 February 2000 had been overtaken by the subsequent lease agreement and memorandum of understanding executed later in 2002. To show the further progression in the matter, the Defendant purported to approve the lease and mortgage instruments on 16 August 2006. The approval was purportedly made by a director of the Defendant in Nairobi. In those circumstances the Defendants did not agree to the unilateral increase of rent by the first Plaintiff as the landlord. By this time, the first Plaintiff was not in possession of the premises.

The grounds for termination of the dealership contract is provided for under paragraph 7.0 of the Service Station Operators Agreement and paragraph 7.1 thereof provides that notwithstanding anything contained in the agreement, the company/Defendant shall at all times have the right to forthwith terminate the agreement without notice on the occurrence of events listed under that

paragraph. The submission of the Plaintiff's Counsel is largely premised on the wording of the termination letter and allegation therein firstly that the first Plaintiff abandoned the service station and secondly that the Plaintiff supplied products from another rival company for sale in the station.

According to that analysis, the Plaintiff had not committed any of the matters alleged in exhibit P9 dated 22nd of April 2006 and therefore the termination of the dealership was unlawful. According to Stroud's Judicial Dictionary something may be unlawful in two senses namely:

> *"A thing may be unlawful in two senses, (1) as unenforceable by law, (2) as punishable by law"*

The fact of the matter is that the Defendant company took possession of the premises where the Plaintiffs were operating as a dealer of the Defendant's products. Clause 7.2 explicitly provides that upon termination of the agreement, the dealer shall yield up to the company the station plant and equipment in good working order and condition. The property of the company/Defendant shall revert to the Defendant. Thirdly the Defendant is not liable to the dealer/operator in any way for any loss of trade or profits for inconvenience occasioned to the dealer/operator consequent upon failure of the company to supply products for any reason whatsoever. The dealer was required to remove property from the premises within 15 days from the date of termination. Finally paragraph 7 (e) provides that the agreement shall remain in full force for the period created therein unless otherwise terminated by either party at any time or after the expiry of the period created in clause 1.3 by either party giving to the other not less than one months notice in writing in that regard. Provided that the party giving notice is not in default under any of the provisions provided under the agreement.

The grounds for termination of the Service Station Operators Agreement on behalf of the Defendant are contained in the testimony of Hannington Mpiima. PW2 testified that the first Plaintiff abandoned the station and communicated that he was not planning to operate the station anymore. Secondly that he purchased products from a rival company. Particularly he testified that during a routine dip meter analysis, they realised upon checking the stock at the service station that there was excess fuel. According to DW 2 the station at Kayabwe of the first Plaintiff and that of Kyazanga run by the second Respondent to the counterclaim were both abandoned.

The only established through investigations that the Plaintiffs had bought fuel from Delta Petroleum Ltd. Subsequently the Plaintiff removed all the oils and lubricants. As far as may be material to this issue, DW2 testified that the Defendant had never paid the Plaintiffs rent. What is to happen was that rent was charged on the litres sold. The Plaintiff used to obtain advance rent in the form of petroleum products/fuel. The rent is then offset from the price of fuel and any balance over and above the amount of rent would be payable to be Defendant by the Plaintiffs. During cross examination DW2 testified that the Uganda shillings 50,000,000/= (which was the subject of an alleged mortgage agreement) had already been offset by the time of termination of the dealership agreement.

Upon consideration of the evidence on record, there is no sufficient evidence other than the oral testimony of DW 2 that the Plaintiff committed a breach as alleged by DW2. What is apparent is that the Defendant brought the dealership agreement to end by taking physical possession of the service station. Thereafter the Defendant alleged that the Plaintiff was in arrears as far as his account/trading account with the Defendant is concerned. There were subsequent negotiations between the parties on the question of rent payable and the amounts due on the trading account of the Plaintiffs that was payable to the Defendant. The negotiations are expressly evident in exhibit P 35 which is a letter dated 15th of February 2007 by Nambale, Nerima And Company Advocates and Legal Consultants on the subject of the lease agreement between Kobil (U) Ltd, the second Plaintiff and the first Plaintiff for block 266 plots 186 and 198. Part of the letter reads as follows:

> "Your client attempted to partially settled matters in controversy in a meeting held on 7 to November 2006. See attached copy of draft minutes.
>
> However, our client has reservations concerning minute 3 (a) in as much as it does not specify the rate of amortisation of the sums transferred to the rent account. He demands shillings 3,500,000 per month. Your client insists that the rate is covered under the memorandum of understanding dated 2002. However, our respective view is that the rent under the lease agreement dated 18th of November, 1999 is due for renegotiation and revision. It was agreed in the memorandum of understanding dated 21st February, 2000 (see attached copy) that if the lessor ceased to be the dealer the rent would be renegotiated.

> The 2002 memorandum of understanding was conditional on a new lease agreement being signed after consolidation of the plots. Unfortunately, your client completely failed to implement the agreed steps. The memorandum of understanding is therefore devoid of any contractual force.
>
> We shall be glad to receive your prompt response on the way forward. Otherwise, steps will be taken to recover the certificates of title and terminate the lease."

I am satisfied upon perusal of the attached minutes referred to in exhibit P 35 which is a document of the Plaintiff that there were negotiations on what was outstanding in the service stations where the Plaintiff was the landlord. Secondly the issue was whether the outstanding amounts should be transferred to the rent account so that they could be offset from the rent. Thirdly whether the rent should be Uganda shillings 2,000,000/= for the next 15 years. In other words the negotiations were on how to offset whatever was outstanding from the Plaintiff and due to the Defendant. Secondly, whether the outstanding amount, should be offset on the rent payable. This required negotiations on the rent per month. Before taking leave on the question of termination of the dealership agreement, it was apparently accepted that the dealership had terminated.

Whatever the grounds of the termination, it had to be with notice or without notice. It could be terminated with notice if the party giving the notice was not in default. There is no suggestion anywhere that the Defendant was in default of the rental payments. It to the contrary evident that the Defendant was owed money by the Plaintiff for products supplied at the service stations. In accordance with clause 7 (e) of the standard dealership agreement, the Defendant was entitled to terminate the agreement with notice. Subsequently the Defendant purported to issue a statutory notice to enforce a mortgage to recover any outstanding amounts. Upon the finding of the court on the first and second issues, the mortgages are unenforceable. On the third issue, I am satisfied that the termination of the dealership agreement was not unlawful.

Even if the termination of the dealership agreement was not in strict compliance with the contractual terms referred to above, the Defendant was entitled to terminate with the notice. The Defendant purported to give notice in exhibit P9. However the notice was received on the 5th of May 2006 when the notice purported to have been issued on 22 April 2006. The acts of the

Defendant were not in accordance with the contract clauses. The Defendant took possession of the premises before service of the notice on the Defendant. I adopted the definition of what is unlawful in Stroud's Judicial Dictionary which is that it is either unenforceable by law or punishable by law. The dealership agreement came to an end and all that the Plaintiffs would be entitled to as far as the notice is concerned, is damages in lieu of notice. Secondly any damages for possession of the premises without notice. The Plaintiff had been given three days notice but was never served and the service station was possessed by the Defendants. There is no evidence of what transpired when they took possession.

Issue number 4

Whether the Plaintiff/Respondents or the counterclaimants or any monies claimed arising from their relationship as landlord and tenant or the dealership?

The entire issue is a question of reconciliation of accounts between the parties. Reconciliation of accounts requires precise information based on the audit of the accounts of both parties. During the proceedings, I raised the question of reconciliation of accounts. The Plaintiff instructed Team and Company Certified Public Accountants to carry out an audit. The audit was to audit the quantity of fuel purchased from the Defendant at Kayabwe station for the period January 2003 to the time of termination of the contract on 5 April 2006. Secondly to determine the dealer margin and rental income that accrued from the fuel purchased from Kobil during that period. Thirdly to establish reasonable average monthly sales in litres purchased from both service stations at that time.

On 5 November 2012 the court ruled that under the provisions of section 27 (c) of the Judicature Act, part of the dispute in the suit which concerns the dealership account and the rent account and the actual amount owing under the two accounts would be ascertained and reconciled by an independent auditor in the names of KPMG. The parties to this suit were required to submit the accounts relating to the two accountants KPMG for reconciliation of accounts and to establish what is actually due under the accounts. Costs of the auditors were to be borne by the parties. Secondly the question of loss of profit will be addressed separately on the basis of the merits of the suit. The report was to be submitted to the court and copied to both parties who were given leave to address the court on the implications of the report. The court further held that it was a

trial of questions of fact by an independent referee appointed by the court. An order to that effect was extracted and endorsed by the registrar on 14 November 2012.

Section 27 (c) of the Judicature Act provides as follows:

> *"Where in any cause or matter, other than a criminal proceeding –*
>
> *(c) the question in dispute consists wholly or partly of accounts, the High Court may, at any time, order the whole cause or matter or any question of fact arising in it to be tried before a special referee or arbitrator agreed to by the parties or before an official referee or an officer of the High Court."*

In accordance with the provisions of the law, the auditor's appointed submitted the provisional report on 19 April 2013. Subsequently they submitted a final report on 25 April 2013. At page 7 of the final report, paragraph 1.2 which details the objectives of the engagement of the auditor as provided that the object of the engagement was to independently verify and substantiate the actual amount owing between the concerned parties, that is the first Plaintiff and the Defendant. In order to carry out the duties, the auditors had to take into account and understand the rights and obligations of the parties pertaining to the dealership agreement during the period under review which is 1 January 2000 to 31st of December 2007. They were required to reconcile the transactions undertaken by both parties according to the system data provided to the auditors. Conclude the amounts due according to the terms of the dealership agreement to each of the parties and prepare a report on the findings.

Concerning the Kyazanga account, the net amount under trading business account was Uganda shillings 366, 839,956.21 by 29 April 2006 when the dealership agreement was terminated. On the other hand the rent account which is money owing to the Plaintiffs amounted to Uganda shillings 134,507,500/=. The total amount payable to the Defendant after the deduction of the rent amount is Uganda shillings 230,522,456.21.

As far as the Kayabwe service station is concerned, the Kayabwe trading business account incurred Uganda shillings 293,662,367.54 by 22 April 2006 which was due to the Defendant. On the other hand rent money due to the Plaintiff was Uganda shillings 265,881,800/=. The net

balance after reconciliation of account revealed an amount owing to the Defendants from the Plaintiff of Uganda shillings 27,780,567.54.

As far as the Masaka Service Station is concerned, the first Plaintiff was a dealer and not a landlord. The amounts owing from the Masaka Service Station is Uganda shillings 61,449,448/= that was due by 10 October 2006.

On issue number four and specifically arising from the relationship as landlord and tenant or under the dealership, the Plaintiffs/Respondents to the counterclaim owe monies to the Defendants for the period of the audit. For the moment the court does not have to deal with the question of the period after the termination of the dealership by April 2006.

Remedies

The Plaintiff prays for the remedies detailing paragraphs (a) – (c) of the amended plaint.

The remedies flow from the findings of the court on issues number one and two. It was the finding of the court that the documents challenged in the above two issues were not duly executed in the circumstances of the case. It therefore follows that the following declarations will issue:

(a) A declaration issues that the Defendant's mortgage on Mawokota block 266 plot numbers 186 and 198 was not duly executed and is unenforceable.
(b) A declaration issues that the Defendant's lease on Mawokota block 266 plot numbers 186 and 198 were not duly executed and registered and are therefore not enforceable.
(c) A consequential order issues directing the cancellation of the mortgage dated 24th of July 2003 registered under instrument number as KLA 315236 on 23 November 2006 from Mawokota block 266 plot 186 and 198.
(d) A consequential order issues directing the cancellation of the leases on Mawokota block 266 plot numbers 186 and 198 registered as instrument number 326574 which leases are dated 24th of July 2003.

The Plaintiff claims loss of income related to the pleadings in paragraph 17 of the amended plaint. He relies on exhibit P 48 which is a financial report.

For the dealership margin Kayabwe service station the plaintiffs claim Uganda shillings 495,694,231/=. Secondly station rental income for Kayabwe Uganda shillings 436,210,923/=. Station rental income for Kyazanga Uganda shillings 124,967,947/=.

For losses suffered by the second Respondent to the counterclaim relating to the dealership margin the plaintiffs claim Uganda shillings 274,929,487/=.

The Plaintiff's Counsel further prayed for interest at the rate of 25% per annum on the claimed amount under section 26 (2) of the Civil Procedure Act.

In reply the Defendants Counsel submitted that the dealership was terminated and the Plaintiff cannot claim loss of income. He further submitted that following the termination of the dealership agreement, the Plaintiff was not entitled to any remedies and the question of remedies should be resolved in favour of the Defendants. As far as the counterclaim is concerned, Counsel claim for an award of Uganda shillings 213,147,062/= which was pleaded in the counterclaim and establish to by the independent audit.

As far as general damages are concerned, Counsel prayed for general damages for breach of contract on the basis of the dealership agreement which was terminated.

I have carefully considered the question of remedies. Following the success of the Plaintiffs on the first two issues, consequential remedies have been granted.

The third issue of whether the termination of the dealership of the Plaintiffs was lawful was resolved to the effect that the termination was not in accordance with the contract for want of notice. Because there were grounds for termination, it is the finding of the court that the Plaintiffs were entitled to one month's notice under paragraph 7 (e) of the dealership agreement. According to Halsbury's laws of England volume 12 (1) paragraph 941, the normal function of damages for breach of contract is compensatory. Damages are awarded not as punishment, or to confer a windfall on the innocent party, but compensate the innocent party and repair his actual loss. The question is what loss was occasioned by failure to give notice. The plaintiff is entitled as far as money can do it, to be placed in the same position with respect to damages as if the contract had been performed. In this case, the contract would have been properly performed had the Defendant given the Plaintiffs notice in accordance with clause 7 of the dealership

agreement. Because notice was not given, and the Plaintiff was evicted without notice, he suffered want of notice which in the circumstances was a contractual right because the grounds upon which the dealership was expressed to have been terminated were not proved to the satisfaction of the court. What was proved was that the Plaintiff was in arrears under the trading account. The fact that the Plaintiff was in arrears under the trading account was not mentioned in exhibit P9 which is the termination letter of the dealership. In the circumstances, the Plaintiffs are entitled to damages in lieu of notice.

In the above premises, and due to the fact that the Defendant succeeded in the counterclaim, the Plaintiffs and the second Respondent to the counterclaim are awarded jointly Uganda shillings 7,000,000/= as damages in lieu of notice for termination of the dealership agreement without notice.

For the same reasons, the claim for loss of income cannot be sustained because the Plaintiffs and the second Respondent to the counterclaim were in default under the trading account.

Counsel for the Defendant has not seriously addressed the court on the question of rental income. The Plaintiffs are entitled to claim rent for the period after April 2006 on the basis of the actual rental value of the property. This is based on the consideration that the lease agreement purported to have been duly executed and registered after August 2006 were established not to be duly executed by the Defendant after termination of the dealership agreement. Consequently the Plaintiffs cannot claim under the dealership arrangement. They are entitled to claim loss of rental income on the basis of a lease relationship without reference to the impugned lease agreements dated 24th of July 2003. Notwithstanding the termination of the dealership agreement, the Defendant continued in occupation of the premises. Secondly, a mortgage agreement dated 24th of July 2003 was not lawfully executed after termination of the dealership agreement. In the premises, the Plaintiffs would be entitled to claim the monthly rental value as if the premises had been rented by the Defendants.

The Plaintiffs claim for the period up to the expiry of the dealership agreement in 2019. That claim cannot be sustained. The rental income can only be claimed from May 2006 up to the time of judgement as general damages.

The available evidence shows that after termination of the dealership agreement, the Plaintiff claimed Uganda shillings 3,500,000/= per month. The Defendant rejected the Plaintiff's proposal. In a meeting held between the parties and attached to the letter written and addressed by the Plaintiff's lawyers to Messieurs Shonubi, Musoke and company advocates dated 15th of February 2007 and is exhibit P 35. The lawyers wrote that their client (the Plaintiff) insisted concerning minute 3 (a) which was attached on Uganda shillings 3,500,000/= on one of the stations.

In the minutes it was written that rent would be for a fixed amount of Uganda shillings 2,000,000/= per month for the Kyazanga station. No mention was made of the Kayabwe station. Previously the Defendant had insisted on the rent of Uganda shillings 800,000/= per month or Uganda shillings 44 per litre of fuel sold. It is therefore abundantly clear that there was no agreement on how much rent was payable.

I have carefully considered the evidence and in my opinion rent at the rate of Uganda shillings 2,000,000/= for the Kyazanga station and Uganda shillings 2,000,000/= for the Kayabwe station would be the rent payable per month. Rent is payable for the period May 2006 up to September 2013. This covers the period of seven years and five months or a period of 89 months. 89 months amounts to Uganda shillings 356,000,000/= for both service stations. This is broken down as follows:

For the Kyazanga service station, the Plaintiffs are awarded Uganda shillings 178,000,000/= as rental income lost.

For the Kayabwe service station, the Plaintiff is awarded Uganda shillings 178,000,000/= as rental income lost.

Claims under the counterclaim.

The audit conducted by KPMG established that the Defendant is entitled under the business/trading account to Uganda shillings Uganda shillings 213,147,062/= which is accordingly awarded to the Defendant.

As far as the claim for general damages against the Plaintiffs are concerned, the Plaintiffs lost the dealership. Secondly the Defendant took over the dealership and is deemed to have continued

earning money from it. In the circumstances, the Defendant is not entitled to damages. Instead the Plaintiffs were awarded general damages in lieu of notice as held above.

As far as interest is concerned, section 26 of the Civil Procedure Act permits the court to award reasonable interest. All the amounts of money awarded to both the Plaintiff and the counterclaimant carry interest at the rate of 21% per annum from the date of judgement till payment in full.

Costs follow the event unless exceptional grounds are advanced to order otherwise. In the circumstances, costs of the counterclaim are awarded to the Defendants while costs of the suit as far as has succeeded are awarded to the Plaintiffs.

Judgment delivered in open court the 4th of October 2013.

Christopher Madrama Izama

Judge

Judgment delivered in the presence of:

Diana Sabiti on brief for Enoch Barata for the defendant

Waiswa Salim for the plaintiffs and respondents to counterclaim.

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

4th October 2013