THE REPUBLIC OF UGANDA,

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL SUIT NO 41 OF 2012

TOM BRIGHT AMOOTI}

T/a WATER FRONT BEACH}.....PLAINTIFF

VS

SWIFT FREIGHT INTERNATIONAL LTD}.....DEFENDANT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

JUDGMENT

The Plaintiffs suit is for special damages of US$22,400 being the purchase price for one unit used Toyota Land Cruiser, Uganda shillings 4,292,000/= and Uganda shillings 2,190,000/= as freight charges for the said vehicle from Dubai to Mombasa and from Mombasa to Kampala respectively. The Plaintiff further claims general damages for breach of contract of carriage and for inconvenience suffered by the Plaintiff for late delivery of one of the Plaintiff's vehicles and non-delivery of other vehicles.

In the amended written statement of defence, the Defendant denies liability. The Defendant avers that delay in delivery was caused by circumstances beyond the Defendant’s reasonable control and was due to frustration when vehicles were stolen on transit. The Kenyan police recovered two vehicles pending an ongoing criminal case in Kenya.

Agreed issues

1. Whether the Defendant informed the Plaintiff to insure the vehicles while in transit?

2. If so, whether failure to insure the goods in transit was a fundamental breach of contract?
3. What are the remedies available to the parties?

The Plaintiff called two witnesses and the Defendant also called two witnesses. Plaintiff was represented by Counsel Kawenja Livingstone of KAL Advocates while the Defendants were represented by Counsel Mohammed Ali Kajubi of Kawanga and Kasule Advocates and at the end of the respective cases of the parties; Counsels addressed the court in written submissions.

The facts are sufficiently contained in the written submissions of Counsel. The Plaintiff's case is that by July 2011, he bought from Dubai three vehicles described in the agreed facts. He left the payment receipts for the vehicles with his colleague PW2 one Hamidu Sewanyana who collected the vehicles from the supplier and used US$700 to service the Toyota land cruiser. On 7 August 2011, PW2 handed over the vehicles to the shipper Swift Freight International LLC and was issued with shipping instructions for the vehicles exhibit P1. On 7 September 2011, after the vehicles had reached Mombasa port in Kenya, PW2 travelled from Dubai to Kampala and approached the Defendant paid the shipping charges and picked the shipping documents and during the process contracted the Defendant to clear and deliver the vehicles from Mombasa to Uganda. PW2 was issued with the quotation for clearance and delivery to Mombasa/Kampala of US$3450 exhibit P2 accompanied by exhibit P3 which is the invoice.

On 8 September 2011, PW2 paid to the Defendant Uganda shillings 27,726,200/= which is equal to US$9278 for shipping charges and for clearance and delivery of the vehicles. The Defendant issued exhibit P4 the receipt thereof. Specifically US$1150 equivalent to Uganda shillings 4,272,000/= was for clearance and delivery of the land cruiser in issue from Mombasa to Kampala and US$1180 equivalent to Uganda shillings 3,190,000/= was for its shipment. The Defendant delivered two of the vehicles but the land cruiser was never delivered.

Whether the conditions for carriage of goods (if any) were brought to the attention of the Plaintiff?

The Plaintiff's Counsel's submission is that the broad issues stated above has a sub issue as to whether there were any terms and conditions set by the Defendant for

the carriage of the Plaintiffs goods. Exhibit P2 issued by the Defendant required the Plaintiff to note that the rates quoted excluded transit cargo insurance cover and that all business handled was subject to the Defendant's terms and conditions. Exhibit D1 was admitted as the terms and conditions referred to. However during cross-examination, the Plaintiff's witnesses denied ever having been shown exhibit D1. Under clause 32 thereof the alleged conditions were governed by United Arab Emirates law and any dispute arising out of any act or contract to which the conditions apply was subject to the exclusive jurisdiction of the United Arab Emirate Courts.

From the foregoing provisions the Defendant had no locus to apply the conditions contained in exhibit D1 to any contract it executes with any party and as such the conditions did not apply to its contract with the Plaintiff.

The Defendant's case according to the Plaintiff's Counsel is that it is only a delivery agent of a disclosed principal. In paragraph 2 of the amended plaint it is averred that the Defendant is an incorporated company carrying on business in Uganda and the Defendant admitted this paragraph in its entirety. It cannot rely on trading conditions of the sister company in Dubai to operate in Uganda. Exhibit P2 clearly shows on its heading that it is generated by the Defendant in its own right and not as an agent of any other company. The Defendant contracted with the Plaintiff as the principal and does not have any standard trading conditions of its own i.e. exhibit D1. The Plaintiff's Counsel further contended that it is illegal for the Defendant to apply the terms and conditions of contract for the Dubai sister company. Those terms are only enforceable in the United Arab Emirates by United Arab Emirate Courts.

Alternatively the Plaintiff's Counsel contends that exhibit D1 if found to be applicable, were never brought to the attention of the Plaintiff and were therefore not binding as held in **HCCS number 161 of 2010 Dian International Ltd versus DAMCO Logistics Uganda Limited and Transtrac Ltd**. Where a seller wants to rely on the standard terms of contract, the seller must obtain the buyers unqualified confirmation. The Defendant did not adduce any evidence to prove that exhibit D1 was ever handed over to the Plaintiff in any form or that the Plaintiff accepted them on knew about them.

In reply the Defendants Counsel submitted that exhibited D1 provides for the Defendant's standard trading conditions and in the preamble thereof the customer's attention is drawn to the clauses which exclude or limit the company's liability and which require the customer to indemnify the company in certain circumstances. The Defendant was delegated as an agent by Messieurs Swift International LLC to receive and handle the Plaintiff's vehicles from Mombasa to Kampala. The Defendant is free to adopt the sister companies terms and the Plaintiff has not quoted any laws barring the same. The Defendants Counsel further submits that the case of Swaibu Katongole vs Spear Tourism Cargo (U) Ltd HCCS No. 225 of 2006 which had been cited by the Plaintiff's Counsel was distinguishable on the ground that the Defendant is an agent of Swift International LLC which the Plaintiff contracted while in Dubai, United Arab Emirates to ship his vehicle to Kampala Uganda. Counsel further distinguished the case of Dian International Ltd (Supra) where the matter involved a seller and buyer agreement distinguishable from the instant case which is subject to the Defendants trading terms and conditions and which was available on request but the Plaintiff did not request for them. During cross examination the Plaintiff admitted getting the Defendants quotation but he did not request for the trading terms or insurance. Counsel for the defence submits that the Plaintiff is estopped from claiming that he had no notice of the contractual terms which were available on request according to exhibit D1 and exhibit PE 1 and also exhibit P 2.

In the premises Counsel for the defence submits that the Plaintiff had ample notice of the terms and conditions which were binding and indicate the extent of the Defendant's liability. If the Plaintiff was a prudent shipper, he would have requested for the trading terms and conditions but never did so. In those circumstances the Defendants Counsel prayed that issue number one on whether the conditions for the carriage of goods were brought to the attention of the Plaintiff should be answered in the affirmative.

In rejoinder the Plaintiff's Counsel submitted that exhibit P1 which are the shipping instructions is very clear in that it is a contract between the Plaintiff and Swift Freight International LLC. The contracted company was supposed to ship the Plaintiff's vehicles from Dubai and the destination was Mombasa on transit to Kampala. The consignee was the Plaintiffs trading name Waterfront Beach. The

freight charges quoted were those to be paid for shipment from Dubai to Mombasa, payment for shipment charges was to be made in Kampala. There is no indication anywhere that the Defendant was involved or referred to as the agent of Swift Freight International for purposes of clearance and delivery of the Plaintiff's vehicles from Mombasa to Kampala. If the Defendant was an agent, it would not have the capacity to delegate its duty to another company in Mombasa as this would contravene the old legal adage that a delegate cannot delegate. Secondly exhibit P2 which is the quotation for clearance and delivery of the vehicles from Mombasa to Kampala and issued by the Defendant is done in its own right and under different terms from the one in exhibit P1. This position is confirmed by the defence witness's paragraph 4 and 5 of the witness statement of DW1 and paragraph 5 of the witness statement of DW 2. Consequently it is a separate contract and has nothing to do with exhibit P1. Counsel invited the court to find that the Plaintiff entered into two separate contracts namely one for shipment of vehicles from Dubai to Mombasa between the Plaintiff and Swift Freight International LLC, and another contract for clearance and delivery of the vehicles to Kampala from Mombasa with the Defendant. In execution of these contracts, there was no principal agent relationship exhibited or proved by the Defendant. In the absence of such proof, the court should not be required by Counsel for the defence to assume that such a relationship existed between the Defendant and Swift Freight International LLC.

Issue two

Whether the Plaintiff in failing to insure the vehicles was in breach of the contract of carriage?

The Plaintiff's Counsel submits that the Plaintiff's witnesses testified on cross-examination that they have been dealing with the Defendant for a long time and at no time were they required by the Defendant to insure their goods prior to shipment and delivery. DW1 Otim Fred and DW2 Abbas Wazir testified that they always advised their customers to insure their goods. Consequently the requirement to insure is not contractual under the Defendant's terms and conditions of service if any. If there was any requirement to insure the goods, it does not stop the Defendant from clearance and delivery of a client's goods.

The only terms applicable to the Plaintiffs contract with the Defendant are contained in exhibit P2 (quotation) and there is no specific requirements therein for insurance of the goods before the Defendant could deliver them. Failure to insure the vehicles was not in breach of any known terms and conditions of trade of the Defendant binding on the Plaintiff. Exhibit P2 contains the only term to the effect that "rates and conditions for service are valid for 30 days from the date of offer. All business is handled subject to our trading terms and conditions". However no terms and conditions of service were attached. Exhibit D1 as submitted earlier is not the standard terms and conditions of the Defendant. In those circumstances the Plaintiff cannot be in breach of a non-existent term or condition.

In reply, the Defendant's case is that under exhibit D2 all businesses are subject to the Plaintiff's trading terms and conditions. The Plaintiff agreed that under exhibit D2 all businesses were under the Plaintiff's trading terms and conditions. If the Plaintiff had insured his Land Cruiser, he would have been in a position to get a replacement from the insurance company. Counsel relied on the case of **Inter Freight Forwarders (U) Ltd vs. East African Development Bank SCCA number 33 of 1992** where the respondents vehicle was damaged while on transit to Kampala and the appellant contended that he was not liable for the damage because he tied it with ropes but it was the respondent's duty to insure the vehicle and his appeal was allowed. In the same vein the Plaintiff ought to have insured his vehicle from Mombasa to Kampala to cover the foreseeable risk of theft or loss. Failure to insure the car breached the contract of delivery of the car to the Plaintiff and he cannot hold the Defendant liable for the loss.

In rejoinder on issue two as to whether the Plaintiff was in breach of contract for failure to insure the vehicles, the Plaintiff's Counsel reiterated earlier submissions.

Issue number three

What Remedies are available to the parties?

The Plaintiff claimed a total of US$25,030 being costs of the land cruiser, shipping charges and clearance and delivery charges.

Additionally the Plaintiff claims for general damages for inconvenience suffered because of the Defendant's breach of contract. The undisputed testimony of PW2

was that he spent US$700 to service the Toyota land cruiser. Secondly he had to hire alternative transport for himself at the cost of Uganda shillings 100,000/= per day with effect from 15th of October 2012 and the Plaintiff continuous to do the same up to date. The Plaintiffs spent approximately Uganda shillings 36,500,000/= and continues to spend. The Plaintiff claims interest on special damages at the rate of 20% per annum with effect from the date of filing this suit until payment in full and costs of the suit as well.

The Plaintiff's Counsel submitted that the undisputed evidence is that the Plaintiff bought the vehicle at US$22,400 from Dubai. Secondly the Plaintiff paid to the Defendant shipping clearance and delivery charges amounting to Uganda shillings 7,627,000/= or the equivalent of US$2580 at that time. The payments were proved in evidence by exhibit P1, P2, P3, P4 and PID1. Counsel prayed that the document for identification is admitted as an exhibit under the discretionary powers of the court. The Defendant does not dispute that the vehicle was paid for or that payment was made in Dubai. In **HCCS number 95 of 2005 Sylvan K Tumwesigyire versus Trans Sahara International General Trading LLC** honourable Justice Kiryabwire in a similar case where the Plaintiff contracted the Defendant to transport five vehicles from Dubai via Mombasa Kenya and Uganda, and four of the vehicles were delivered instead of five, held that there was a contract of bailment. The Plaintiff's Counsel further relied on the statement of law in the case of **Dian GF international Ltd** (supra) on exclusion clauses. Exclusion clauses cannot be relied upon unless it is proven that it was brought to the notice or attention of the bailor. Secondly where it is proved that a written contract has been executed that effect. Thirdly that the bailor consented to the assignment of the contract of carriage to a third party and lastly that the bailee took appropriate precautions to ensure that the goods are safely delivered according to the terms of the contract.

The bailee remains bound by the common law principle of contract of bailment to hold goods and ultimately deliver them to the bailor or in accordance with his directions. Failure to do so is a fundamental breach of the contract and makes the bailee liable for the loss. The Plaintiff's Counsel further submitted that the Defendant failed to lead evidence proving any standard trading terms of its own. Secondly the Defendant did not rebut the Plaintiff's evidence that no standard

trading terms had ever been brought to the attention of the Plaintiff. Thirdly the Defendant never executed a written contract in which any trading terms and conditions are spelt out as a precondition for carriage of goods. The evidence of DW 2 is that they got instructions from the Defendant for clearance and delivery of the Plaintiff's vehicles from Mombasa to Kampala. The Defendant did not lead evidence to prove that the vehicles were delivered safely with the necessary care, judgement and skill.

There was assignment of the Plaintiff's contract to Swift Kenya without the Plaintiffs consent or approval. The assignment was given to drivers of Swift Kenya without any escort or direct supervision. The vehicles were stored in the place where the Defendant had no control or arrangement because of loss of vehicles. There was alleged loss/theft of the vehicles from the storage place according to DW 2. According to the Plaintiff, the vehicles would not have been stolen if precautions had been taken. Report of theft of the vehicles was made by a driver one Rashid Hassan who was not called to testify and the rest of the evidence was therefore hearsay. The Defendant relied on the report allegedly from the Kenyan police about the theft of vehicles but the same was not proved as required by law under section 77 (i) (d) of the Evidence Act which provides for proof of official documents from a foreign country.

On the question of general damages, Counsel submitted that according to McGregor on damages 15th edition page 681 and paragraph 1101, the normal measure of damages for non-delivery is the market value of the goods at the time and place at which they should have been delivered less the amount it would have cost to get it to the place of delivery. The Plaintiff further claims general damages for loss and inconvenience and relied on the case of **Robbialac Paint (Uganda) Ltd versus KB Construction [1976] HCB 45**. It was held in that case that substantial physical inconvenience or even inconvenience that is not strictly physical and discomfort caused by breach of contract will entitle the Plaintiff to damages. The testimony of the Plaintiff is that it suffered inconvenience of not having a personal vehicle and having to hire alternative transport. The testimony of the Plaintiff is that he flew to Dubai to purchase the vehicle in issue among other goods. PW2 was given US$700 to service the land cruiser at the Plaintiff's expense and flew to Uganda at the Plaintiff's expense and paid for clearing the vehicles.

The Plaintiff hired the vehicle at Uganda shillings 100,000/= per day since 15 October 2012 amounting to Uganda shillings 36,500,000/=. The Plaintiff further claims interest on special and general damages at the rate of 20% per annum from the date of filing the suit till payment in full. The Plaintiff is a businessman whose money was held up while at the same time he incurred accrued expenses by hiring a vehicle and interest at the rate of 20% per annum is reasonable.

In reply the Defendants Counsel submitted that on the question of the claim of special damages of US$22,400 and Uganda shillings 7,482,000/= the Plaintiff adduced no evidence to back up the claims. There was no evidence of service of the land cruiser and no evidence of car hire costs submitted. Furthermore service and hire were not pleaded in the plaint.

As far as the claim for general damages is concerned, it was a foreseeable event that is why the insurance in transit is a necessity. The Plaintiff opted not to insure the vehicle. Furthermore the Defendants Counsel submits that interest at 20% per annum is also unfounded.

The defence case is that the Plaintiff has failed to show any wilful misconduct or gross negligence on the part of the Defendant who carrying out the instructions with the necessary skill and care. The police abstract report exhibited in court proved that the Defendant used diligence and judgement to have the culprits who stole the vehicle prosecuted. The documents from the Kenyan police are original documents and public documents prepared by a public officer from a Commonwealth country and were admissible. It was presumed genuine under section 77 of the Evidence Act. The Defendant with the aid of the Kenyan police recovered two of the vehicles which had been stolen. Under clause 27 the Defendant is relieved from liability for any loss caused as a consequence of a cause which the company was unable to prevent by exercise of reasonable due diligence.

The Defendants Counsel maintains that in the circumstances of the case, the theft of the Toyota Land cruiser cannot lead to the liability of the Defendant coupled with the fact that the Plaintiff did not insure the vehicle. On the question of the difference between Swift International LLC and the Defendant, the Plaintiff testified that he dealt with Swift International LLC. DW 1 and DW 2 testified that Swift Freight International LLC is their headquarters. Counsel relied on the

authority of **Copy Line Limited vs. Rapid Shipping and Freight HCCS number 314 of 2008** in which the court relied on the case of **Phenehas Agaba vs. Swift Freight International LTD** (Supra) where Justice Stella Arach established that the air waybill was issued by a Swift Freight International LLC of Dubai, United Arab Emirates. There was no reference at all to the Defendant on the air waybill. She held that Swift Freight International LTD and Swift Freight International LLC were different legal entities. The air waybill was prima facie evidence of the conclusion of the contract of carriage between the Plaintiff and Swift Freight International LLC Dubai. She established that the evidence on record disclosed that the Defendant was an agent of a disclosed principal and the general rule being that an agent makes a contract on behalf of his principal. Prima facie the only person to be sued for the contract is the principal. In the circumstances of the Defendant's Counsel maintains that the Plaintiff ought to have filed the suit in Dubai and no cause of action is disclosed against the Defendant in the circumstances.

In rejoinder the Plaintiff's Counsel submitted that the Defendant does not dispute the fact that the land cruiser was lost in transit after they had been brought from Dubai or that it was brought for an amount of US$22,400 as pleaded. Though the original receipt was not produced in court, the court should use its discretion to allow the value of the vehicle as pleaded and as appearing on the photocopy of the receipt PID 1. The case of Copy line Limited versus Rapid Shipping and Freight Ltd HCCS number 314 of 2008 is based on different facts and therefore inapplicable to the Plaintiff's case. In this case the Plaintiff executed two separate contracts with two independent companies for the shipment and delivery of his vehicles.

Judgment

I have duly considered the evidence on record together with the written submissions of Counsels and authorities cited.

In a joint scheduling memorandum dated 15th of February 2013 Counsels of both parties agreed to certain basic facts namely as follows:

1. The Plaintiff contracted the Defendant to deliver the Plaintiffs vehicles to wit used Toyota Hiace Ch. LH113087250, a used Mitsubishi Rosa Ch. No.

BE 438F40494 and a used Toyota Land Cruiser CH Number HDJ 1010012150, from Mombasa Kenya to Kampala Uganda.

2. Uganda Shillings 27,776,200/= for Defendant's invoice of US$6278 and US$3300 for CDC was received from the Plaintiff for freight from Dubai to Mombasa and from Mombasa to Kampala respectively.
3. The Defendant delivered two of the vehicles and the said Land Cruiser was never delivered.

The first issue is **whether the conditions for the carriage of goods (if any) were brought to the attention of the Plaintiff**.

In arguing this issue, Counsels also disputed the question of whether the Defendant was the party contracted to deliver the Plaintiffs vehicles to the Plaintiff in Uganda. This is curious in view of agreed fact number one. It is clearly indicated therein that the Plaintiff contracted the Defendant to deliver vehicles for Mombasa Kenya to Kampala, Uganda. The bone of contention arises from exhibit D1 which are terms and conditions. The bone of contention is whether the terms and conditions under exhibit D1 are applicable to the transaction. Exhibit P1 was pleaded in paragraph 8 of the Defendants amended written statement of defence. In paragraph 8 it is averred as follows:

> "The Plaintiff was advised to insure his vehicles before the contract was concluded which he failed to do. The Defendant will rely on the Plaintiff's annexure TB3 in proof of the same and the Defendant's terms and conditions of service. The photocopy of the Defendants said terms is attached hereto and marked as annexure "A".

It is an elementary rule of pleading contained in Order 6 rule 7 of the Civil Procedure Rules that no pleading shall contain any allegation of fact inconsistent with the previous pleadings of the party pleading that pleading. By extension of the rationale of the rule, Order 6 rule 1 (1) provides that every pleading shall contain a brief statement of the material facts on which the party pleading relies for a claim or defence as the case may be. In other words a party can only prove what is pleaded and cannot rely on a case which is not pleaded. Consequently the controversy is whether exhibit D1 is the Defendants terms and conditions of service. Against this background the Defendants Counsel submitted that the

Defendant was an agent of Swift International LLC. Exhibit D1 is clearly the terms and conditions of Swift Freight International LLC a company duly registered and incorporated under the company law of Dubai, United Arab Emirates. In other words the only way in which the Defendant can rely on exhibit D1 is to prove that it is an agent of Swift Freight International LLC. The submission that the Defendant is an agent is at variance with paragraph 1 of the agreed fact asserting that the Plaintiff contracted the Defendant. The Defendant is Swift Freight International (Uganda) Ltd. I have duly noted that paragraph 4 of the amended written statement of defence avers that the Defendant was only a delivery agent of a disclosed principal and all payments it had received from the Plaintiff for the freight charges for the vehicles were received in that capacity. Delay in the delivery of the Plaintiff's vehicles was caused by circumstances beyond the Defendant's reasonable control which was that the motor vehicles were stolen in transit. In ordinary circumstances under section 57 of the Evidence Act facts which are admitted need not be proved. Section 57 provides as follows:

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

The admitted fact is that the Plaintiff contracted the Defendant to deliver the Plaintiffs vehicles for Mombasa Kenya to Kampala, Uganda. The question of whether the Defendant is the proper party to the transaction ought to have been tried preliminarily. However the matter is put beyond argument by the witness statement of Abbas Wazir, the branch manager of Swift Global Logistics Ltd a Kenyan sister company of the Defendant. Paragraph 5 of his witness statement signed on 16 April 2013 reads as follows:

> "That we got instructions from the Defendant for clearance and delivery of the Plaintiff's vehicles from Mombasa to Kampala.

The second statement is that of Otim Fred DW1 the operations supervisor of the Defendant. Paragraph 4 of his witness statements indicates that the Plaintiff placed an order with Swift Freight International LLC, Dubai to ship his Toyota land cruiser and other vehicles to Mombasa. Paragraphs 5 and 6 of his witness statement is very pertinent and reads as follows:

> "5. That on 7 September 2011, I wrote (see Plaintiffs exhibit P1) to the Plaintiff quoting our rates for clearance and delivery of his vehicles Mombasa/Kampala."
>
> 6. That my total quotation was US$3450 for the three vehicles and of this fee excluded among other things in transit cargo insurance cover which need I informed him orally."

On cross examination the witness testified that the delivery of the vehicles is by Swift Freight International (Uganda) Ltd. The quotation excluded insurance cover. Nowhere is there any mention that the Defendant acted as a delivery agent of Swift Freight International LLC of Dubai. In fact paragraph 7 of the witness statement of DW1 presented exhibit D1 as the trading terms and conditions of the Defendant. He stated as follows: "our letter also informed him that all business is handled subject to our trading terms and conditions which were available on request which he did not request for." The letter of DW1 exhibit P1. Exhibit P1 are shipping instructions for vehicles by Barloworld Logistics. Paragraph 4 of the trading terms and conditions provides that goods and instructions are accepted and dealt with subject to the trading conditions (copy available on request). Paragraph 5 thereof provides that insurance can be arranged upon request. It is possible that the witness intended to rely on exhibit P2 which is dated 7th September 2011. Exhibit P2 is addressed to the trading name of the Plaintiff namely Waterfront Beach. It gives quotation for delivery of three motor vehicles amounting to US$3450. The document speaks for itself and does not refer to any trading terms and conditions. It does not purport to attach any other document. In small letters at the bottom of exhibit P2 is written the words:

> "All transactions are subject to company's standard trading conditions (copies available on request)"

In the premises I agree with the Plaintiff's submissions that the Defendant cannot rely on exhibit D1 which it relates to the terms and conditions of Swift Freight International LLC based in Dubai. Issue number one is therefore answered in favour of the Plaintiff to the effect that the facts and circumstances show that the conditions for the carriage of goods were not brought to the attention of the Plaintiff. No conditions of service were proved in evidence. Exhibit D1 relates to a separate company and is not proof of such conditions of service. Additionally the letter of the Defendant's written by DW1 is a unilateral document.

Issue two

Whether the Plaintiff in failing to insure the vehicles was in breach of the contract of carriage?

On the basis of the above judgment exhibit P2 which is the primary document relied upon by the Defendant imposing a duty to insure does not impose any duty to insure the goods and cannot even purport to indicate for whose benefit the insurance would be. Exhibit P1 only provides that insurance can be arranged upon request. In other words even if exhibit P1 is to be taken as the stipulation for insurance of goods, it is an optional stipulation and gives the party to either request for insurance to be arranged for or not. In those circumstances failure to arrange for insurance cannot amount to breach of contract. Last but not least the general statement of law is that insurance is for the benefit of the person who has the prudence to take out an insurance policy for any insurable risk. Secondly the Defendant who is liable for negligence cannot exclude liability for negligence on the ground that the Plaintiff had the prudence to take out an insurance policy. With regard to a discussion of the law, I refer to the decision of Lord Denning in the case of **Parry v Cleaver [1967] 2 All ER 1168** in the Court of Appeal and his conclusion thereto at page 1171:

> "I would adopt as the reason for Bradburn's case that given by Viscount Haldane LC:
>
> > "The reason of the decision was that it was not the accident, but a contract wholly independent of the relation between the Plaintiff and the Defendant which gave the Plaintiff this advantage."

The issue was whether insurance benefits the Plaintiff may have received for the insurable risk may be taken into account in assessing damages against the Defendant. When the matter went to the House of Lords in the case of **Parry v Cleaver [1969] 1 All ER 555** Lord Morris of BORTH-Y-GEST at page 573 agreed with the principle that insurance benefits of the Plaintiff should not concern the Defendant. He said:

> "It is not for a Defendant to inquire what use a Plaintiff has in the past made of his own money. If a Defendant who is sued asks the Plaintiff whether or not he had had a gift from a friend or whether or not he had saved money and invested it and whether his investments had prospered and if so to what extent or whether or not he had taken out any insurance policies the reply, firm though courteous, could well be that the Defendant should only concern himself with his own affairs."

Lord Pearce at pages 575 – 576 reviews the authorities and rationales for not taking into account insurance monies of the Plaintiff to assess damages against the Defendant:

1. In Bradburn v Great Western Ry Co it was held that the reason of the decision was that it was not the accident, but a contract wholly independent of the relation between the Plaintiff and the Defendant which gave the Plaintiff his advantage.
2. In the case of Admiralty Commissioners versus Steamship Amerika (Owners), The Amerika ([1917] AC 38 at page 61; [1916–17] All ER Rep 177 at page 190 it was held that: "damages recoverable by an injured man cannot be reduced by the fact that he has effected and recovered upon an accident policy."
3. In the case of Shearman v Folland ([1950] 1 All ER at page 978; [1950] 2 KB at page 46, Asquith LJ held: "If the wrongdoer were entitled to set-off what the Plaintiff was entitled to recoup or had recouped under his policy, he would, in effect, be depriving the Plaintiff of all benefit from the premiums paid by the latter and appropriating that benefit to himself."

Finally Mc**Gregor on Damages 15th Edition (Sweet and Maxwell) Paragraph** 1482 page 928, writes that it was decided in the case of **Bradburn v. G.W. RY.**

(1874) L.R. 10 Ex. 1 that, where a Plaintiff had taken out accident insurance, the moneys received by him under the insurance policy were not to be taken into account in assessing the damages for the injury in respect of which he had been paid the insurance moneys.

Finally the rational for not taking into account the insurance moneys includes the fact that insurance contracts are independent. If the Plaintiff takes out insurance cover for loss of vehicle risk, the contract would most probably be between him and the insurance company. The benefit should be paid to him on the basis of whether the insured risk occurred. It is therefore inconceivable and untenable in law to suggest that failure to insure the vehicle against possible loss would be breach of the contract of carriage. It may be imprudent not to have an insurance policy. However the insurance policy should be for the benefit of the person who has the prudence to insure any risks involved in the business.

Finally issue number two on whether the Plaintiff in failing to insure the vehicles was in breach of the contract of carriage does not resolve the actual dispute between the parties. The dispute ought to have been resolved on the basis of whether the Defendant could be liable for the loss of vehicle in the circumstances of the case before dealing with remedies. In the premises issue number two is resolved in favour of the Plaintiff.

Issue number three

What remedies are available to the parties?

Before considering the remedies available, it is sufficient for the Plaintiff to have established that is handed over the vehicles to the Defendant and is entitled to delivery of the vehicles by the Defendant. The grounds of defence of the Defendant contained in the amended written statement of defence are generally contained in paragraphs 5, paragraph 7 and paragraph 8 of the written statement of defence. In paragraph 5 it is averred that the delay in delivery was caused by circumstances beyond the Defendant’s reasonable control but frustration when the motor vehicles were stolen in transit. Secondly it is averred in paragraph 7 that damages if any suffered by the Plaintiff did not arise from the Defendant's failure to perform and the Plaintiff shall be put to strict proof. Thirdly in paragraph 8 it is averred that the Plaintiff was advised to insure his vehicles before the contract was

concluded and he failed to do so. As far as the third ground of defence is concerned, the court has already determined that insurance is for the benefit of the person who takes out the policy for the benefit of himself or herself. Paragraph 7 of the WSD only provides that damages did not arise from failure to perform. This is an assertion which can only be proved or disproved by the fact of whether failure to perform led to any damages. The question cannot be determined without conclusion of the defence in paragraph 5 of the amended written statement of defence which is that the vehicle was stolen not due to the fault of the Defendant. In my opinion this is the only ground worthy of consideration as the Plaintiff has proved that it delivered the vehicles after contracting the Defendant to clear the vehicles from Mombasa and to deliver it to Kampala. The fact that the Plaintiff contracted the Defendant has been admitted both by the witnesses of the defence and in the joint scheduling memorandum admitted fact number 1 thereof filed on the court record on 15 February 2013.

The Defendant did not adduce sufficient evidence to prove that it is not liable for loss of the vehicle because it never led evidence as to what measures it had in place to ensure that the vehicle was not stolen. The vehicle got lost while parked at another facility not of the Defendant. The driver responsible for conveying the vehicle was never called to explain what measures were in place for security and how different vehicles were accounted for according to ownership and control. Who kept the keys for instance? There is no evidence about the security arrangements at the facility in which the vehicle was parked so as to give the inference that the necessary precautions were in place against theft or any other kind of loss. The onus is on the Defendant to prove that the vehicle did not get lost on account of its own negligence or fault. The fact that the vehicle could have been stolen does not rule out that it was negligently kept. It is not disputed that the vehicle was in the custody of the Defendant. The onus is on the Defendant to prove why the goods did not reach their destination. In the case of **Houghland vs. Low (Luxury Coaches) Ltd (1962) 2 ALL ER 159** where the managers of a coach for old peoples outing lost the Plaintiff's luggage it was held on appeal by Wilmer LJ at page 162:

> "I do not think that it makes any difference whether the case is put in detinue, or whether it is treated as an action on the case for negligence.

> Whichever be the correct approach, it has been admitted in argument that the Plaintiff, by proving the delivery of the suitcase at Southampton and its non-return on the arrival of the coach at Hoylake, made out a prima facie case. That prima facie case stands unless and until it is rebutted. The burden was on the Defendants to adduce evidence in rebuttal."

The only evidence on the matter is that of Mr. Abbas Wazir, the branch manager of Swift Global Logistics Ltd Kenya. According to his testimony, the Defendant is a sister company. They got instructions from the Defendant for clearance and delivery of the Plaintiff's vehicles from Mombasa to Kampala. They paid the clearing and applicable fees of the Kenya Ports Authority and moved the vehicles out of the port. Paragraph 7, 8 and 9 of his witness statement is as follows:

> "7. On 13th of October 2011 the drivers as usual had to take the cars for the minor service before departure for Kampala to avoid cars breaking down on the road if not properly checked and serviced which is applicable for all used vehicles.
>
> 8. That the servicing of vehicle was delayed and finished in the evening, and due to security reasons the drivers did not want to travel at night. They kept the cars at a secure Kizingo petrol station (Gapco) after fuelling for the night as has been the practice.
>
> 9. That on 14th of October, 2011 I was informed by the company driver Mr Rashid Hassan that the Toyota land cruiser and Toyota Hiace were missing and the Mitsubishi Rosa had been broken into and its ignition system vandalised."

The witness goes on to testify that certain suspects were charged in the Chief Magistrates Court of Mombasa. In cross examination he testified that he learnt in the morning that the vehicles had been stolen. His drivers only found out when they went to collect the vehicles. There is however no evidence as to how the vehicles were parked and whether there was any security arrangement. There is no evidence of what the arrangement was other than packing at a petrol station. The only evidence is that it was usual to pack vehicles there and that several other vehicles had been stolen as well. In my opinion the Defendant has not discharged the burden of proving the circumstances in which the vehicle got stolen and that it

was no-fault of the Defendant. Was there any arrangement with the petrol station to provide security? How did several vehicles get stolen from one petrol station? The only evidence is that the vehicles went missing and some persons have been charged. The case is yet to be heard. In those circumstances alleged theft of the vehicle is not evidence that the requisite measures had been put in place to ensure that the vehicles would be safe, in other words that reasonable diligence had been exercised by the Defendant. The Defendant is therefore liable for the loss of the vehicle in the circumstances of the case.

The Plaintiff claims particulars of special damages in paragraph 6 of the plaint. The cost of the vehicle is Uganda shillings US$22,400. Shipping charges of Uganda shillings 4,292,000/= then equivalent to US$1480. Clearance and delivery charges and Uganda shillings 3,190,000/= equivalent to US$1100. The Plaintiff claims the total of US$25,030.

The Plaintiff's testimony is that he travelled to Dubai to buy the vehicles in July 2011. He paid US$22,400 for the Toyota Land Cruiser. He left US$1200 to service the three vehicles. He claims that his friend flew from Dubai to Kampala to pay for clearance of the vehicle when he was out of the country. The Toyota Land Cruiser was never delivered. As a consequence he has been hiring a vehicle for his own transportation at Uganda shillings 100,000/= per day. PW2 Mr Hamidu Sewanyana, a resident of Dubai testified on behalf of the Plaintiff. He came to Kampala and paid the Defendant for clearance and freight from Mombasa to Kampala. The quotation of the Defendant is exhibit P2. The Plaintiff quoted US$3450 for all the three vehicles. DW1 agreed that they handed over to vehicles to the Plaintiff and one vehicle was stolen while in Mombasa.

I have carefully considered the Plaintiffs evidence. Exhibit P4 shows that the Defendant received from the Plaintiff US$9578. Clearing charges for each vehicle was US$1150. The total amount for the three vehicles was US$3450 according to exhibit P3. This is consistent with exhibit P2 which is the letter dated 7th of September 2011 quoting the clearance and delivery charges from Mombasa to Kampala.

I have carefully considered the principles to be applied. The Plaintiff is entitled to the cost of the vehicle at the place of delivery. The Plaintiff is entitled to the

replacement value of the Toyota land cruiser. The principle to be applied is that of restitutio in integrum as held in the Court of Appeal case of **Dharamshi versus Karsan [1974] 1 EA 41** that the Plaintiff has to be restored as nearly as possible to a position he or she would have been had the injury complained of not occurred. According to McGregor on damages 15th edition at page 681 the normal measure of damages for non-delivery is the market value of the goods at the time and place at which it ought to have been delivered less the amount it would have cost to get them to the place of delivery. Flying to Dubai etc were costs anticipated in obtaining the vehicle and having it in Kampala. In other words the Plaintiff cannot claim freight, clearance and delivery charges if he claims the replacement value of the vehicle at Kampala. No evidence was produced by way of receipts. However the testimony of PW1 to the effect that he purchased the vehicle at US$22,400 has not been disproved. The Plaintiff is entitled to the value of the vehicle at Kampala as imported for personal use. The claim for the value of the vehicle cannot be claimed as special damages but as general damages. The Plaintiff has proved that he lost the vehicle which he had entrusted to the Defendant. The Plaintiff has proved that he has suffered loss due to non-delivery of his Toyota land cruiser. The value of the vehicle at Kampala includes freight charges and other expenses the Plaintiff had to incur in order to have the vehicle delivered to him in Kampala. The Plaintiff has proved that he cleared all the charges of the shipper and the Defendant. Those charges are reasonable charges to be added on the costs of the vehicle in order to obtain the value of the vehicle at Kampala. In the circumstances the Plaintiff is awarded US$22,400, US$1,150 for clearance and delivery to Kampala, and US$1,180 for the shipping charges. This gives a total of US$24,730 which is awarded to the Plaintiff as the replacement value of the vehicle at Kampala. The claim for service of the vehicle is not foreseeable and in any case the vehicle could have been serviced in Mombasa or Uganda.

I have carefully considered the claim for hire of the vehicle. Hiring a vehicle is not the natural consequence of failure to deliver a vehicle in the circumstances. The Defendant delivered two of the vehicles. The Plaintiff ought to have mitigated his losses by using alternative vehicles of his business. In the premises it is reasonable that the Plaintiff is only awarded **Uganda shillings 2,500,000/=** for loss of use of his vehicle. Furthermore it is sufficient for the Defendant to be awarded interest on

the amount for the replacement value of the vehicle from the date of filing this suit after the date of judgement as compensatory for the loss of use.

As far as interest is concerned, the Plaintiff is awarded interest at 18% per annum from the date of filing the suit till the date of judgement on the sum of US$24,730 and interest at 14% per annum from the date of judgement on the aggregate award till payment in full.

Costs follow the event and the Plaintiff is awarded costs of the suit.

Judgment delivered in open court the 6th of December 2013

Christopher Madrama Izama

Judge

Ruling/Judgment delivered in the presence of:

Mohammad Ali Kajubi for the Defendant

Livingstone Kawenja for the Plaintiff

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

6th December 2013