THE REPUBLIC OF UGANDA,

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

HCCS NO 02 OF 2013

MAWENZI INVESTMENTS LTD}.....PLAINTIFF

VS

1. **TOP FINANCE CO. LTD}**
2. **YOU JING SHU}.....DEFENDANTS**

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

JUDGMENT

The Plaintiffs action against the Defendants jointly and severally is for general and special damages for conversion, unlawful impounding of Scania bus valued at **Uganda shillings 395,960,000/=,** interest at 30% on the claim and costs of the suit. The special damages claim is for **Uganda shillings 239,025,000/=.**

The Defendants deny liability and allege that the Plaintiff intends to rob them of borrowed money worth **Uganda shillings 40,000,000/=** secured by two post dated cheques. Secondly the Plaintiff's bus was impounded by the Police due to its poor mechanical condition and was in a 'scrap state' and its value could not have been **Uganda shillings 395,960,000/=** as alleged by the Plaintiff. The Defendants deny converting the vehicle and claimed to have disposed it for **Uganda shillings 10,000,000/=** and admit no liability whatsoever to the Plaintiff as claimed.

The Defendants counterclaimed against the Plaintiff for the recovery of **Uganda shillings 40,000,000/=** based on a "friendly loan facility" advanced to the Plaintiff in the Month of June 2012 against two Bank of Africa post dated cheques and the logbook of motor vehicle registration number UAJ 653U which money was to have been repaid by 13 September 2012. It is further alleged that the Plaintiff acknowledged its indebtedness to the counterclaimants on 20 August 2012 and consented to the sale of the Scania bus to enable the counterclaimant recover part of the loan. The cheques on being presented for payment bounced and were returned to the counterclaimants with the words "refer to drawer". The Defendants seek interest at commercial rate from the date of judgment till payment in full and costs.

In reply to the written statement of defence the Plaintiff asserts that it never borrowed any monies from the Defendants at all. Secondly the directors of the Plaintiff reported a case of forgery of its letterhead and making a document without authority. The bus was unlawfully impounded.

In reply to the counterclaim the Plaintiff's deny having borrowed money from the Defendant. Secondly the evidence relied upon by the Defendant is a forgery. Thirdly the Defendant/counterclaimant has no legal basis for impounding and selling the Plaintiffs vehicle which sale was a clear act of conversion. The counterclaimant admitted having unlawfully converted the bus at a cost of **Uganda shillings 7,500,000/=.** Lastly the cheques of the Plaintiff were presented to the bank long after the unlawful conversion of the bus by the counterclaimant. Consequently the Plaintiff/respondent to the counterclaim prays for dismissal of the counterclaim with costs.

The Plaintiff is represented by Tumwesigye, Baingana and Company Advocates while the Defendants are represented by Messieurs Tareemwa and Company Advocates. The Plaintiff adduced its evidence through three witnesses while the Defendant produced two witnesses whereupon Counsels of the parties addressed the court in written submissions.

I will consider the evidence together with the written submissions and in the judgment when resolving issues arising. The Plaintiff called three witnesses namely; PW1 who is Eric Patrick Ayo and the managing Director of the Plaintiff Company. Secondly the Plaintiff called PW2 who is Carolyn Etap, a sister of PW1 and Co-Director of the Plaintiff Company. Finally the Plaintiff called PW3 Mr. Matanda Robert an estates Manager and Debt Collector being the person who impounded the bus on behalf of the Defendants.

On the other hand the Defendant produced two witnesses. These were DW1 Mr. You Jing Shu who is the second Defendant and Managing Director for the first Defendant Company. Secondly the Defendant produced DW2 Betty Mulego Ingabire the Debt Recovery Officer of the Defendant Company.

Submissions of Counsel

Background

The Plaintiff’s Counsel submitted that the Plaintiffs case is that it is the former owner and proprietor of Scania bus registration number UAJ 653U under the name and style of Mawenzi Bus which had been plying between Kampala and Lira since 2007. While the vehicle was undergoing repairs at IM Engineering Garage, the Defendants jointly and severally on the 21 August 2012 without any authority impounded and subsequently sold it to one Hajj Moses Sebaduka at a cost of **Uganda shillings 10,000,000/=** and a case was reported to Old Kampala Police Station. The Defendants contended that the Plaintiff further borrowed **Uganda shillings 40,000,000/=** in the month of July repayable on 13 September 2012 against Messieurs Bank of Africa post dated cheques together with the logbook of the said bus. Secondly the bus was impounded by the police due to its mechanical condition as such it was in a ‘scrap state’ and the value estimated in the plaint was too high. The Defendants deny that the vehicle was unlawfully converted at a cost of **Uganda shillings 10,000,000/=.** The Defendant counterclaimed for

recovery of **Uganda shillings 40,000,000/=** being the loan allegedly advanced to the Plaintiff in July and payable on 13 September 2012 against the security of the post dated cheques and logbook of the bus.

In reply the Defendant's Counsel submitted on the brief facts from the Defendant's point of view. It is that the Plaintiff company in June 2012 borrowed Uganda shillings 40,000,000/= from the first Defendant at an interest rate of 2% per month against two post dated cheques drawn on Messieurs Bank of Africa together with the log book of the bus registration number written above. The money was meant for the repair of the said bus. After expiry of the agreed time the Plaintiff failed to pay and when the cheques were presented to the Defendant's bankers for payment long after the agreed time, they were dishonoured and returned to the Defendants with the words "refer to drawer". The Plaintiff has deliberately refused to pay according to exhibit D4.

Because of previous transactions PW2 who is a director of the Plaintiff requested for more time within which to retire the loan and DW1 granted the Plaintiff more time within which to repay the loan but up to date it has failed to do so. The evidence of DW1 is that the Plaintiff in an attempt to settle its indebtedness to the Defendant gave the first Defendant authority to sell its bus which had been pledged as security after the bus had been impounded by the police on the grounds of being in a poor mechanical condition. The Plaintiff wrote a letter of authorisation to the Defendants to retire the loan according to exhibited D3. Because the bus was already in a poor mechanical condition according to exhibit D1 it was subsequently sold as scrap for only 8,500,000/= which sum did not satisfy the Plaintiffs debt with the first Defendant. PW2 Carolyn in her testimony admitted that the Plaintiff issued two post dated cheques to the Defendants as security for repayment of the said loan. This testimony was further corroborated by PW1 in cross examination where he admits having placed the logbook of the said bus as security for the loan. The Plaintiff's witnesses did not deny having received the said loan that has remained unpaid to date. No evidence was adduced in court by the Plaintiff to the effect that the loan was retired and as such the Plaintiff ought to be held liable. The bus was lawfully sold with the full authority and knowledge of the Plaintiff as clearly confirmed by PW3 who stated in court that it was Carolyn who directed him to where the bus was before it was disposed of with the consent of the Plaintiff in an effort to discharge the Plaintiff's indebtedness to the Defendants.

The agreed issues are:

1. **Whether the Plaintiff was indebted to the Defendants?**
2. **Whether the sale of the Scania bus by the Defendants was unlawful?**
3. **Remedies available to the parties**

Whether the Plaintiff was indebted to the Defendants?

On behalf of the Plaintiff, it is submitted that the Plaintiff relies on the testimony of PW1 and PW2 who are directors of the Plaintiff and who denied having received any loan from the

Defendant. PW1 is Eric Patrick Ayo the Plaintiff's managing director who testified that Carolyn Etap (PW2) got a loan facility from the first Defendant of **Uganda shillings 10,000,000**/= which she started to repay on 30 June 2012. This testimony stood up in cross-examination. PW2 Carolyn in examination in chief testified that she in her personal capacity applied for a loan of **Uganda shillings 10,000,000/=** and she deposited cheques as security. These cheques were admitted in evidence as exhibit D4. Thereafter she signed a loan agreement for **Uganda shillings 20,000,000/= which** agreement was handed to her without a signature of any of the Defendants. The agreement was admitted as exhibit P6. The testimony of PW2 was not discredited during her cross-examination.

The second Defendant who testified as DW1 insisted that it was the Plaintiff which received **Uganda shillings 40,000,000/=.** When he was cross examined he admitted that the Plaintiff did not submit a resolution to borrow any money. Secondly that he did not reduce the loan transaction in writing. Thirdly that the interest on the loan was 2% per month and the duration of the loan was one month. DW2 Betty Ingabire Mulego testified that the loan was obtained by the Plaintiff through Etap Carolyn. Furthermore in cross-examination she testified that the loan was obtained by Carolyn as a director of the Plaintiff. She informed court that there was a resolution to borrow by the Plaintiff that she was not the one who worked on the loan transaction. The duration of the loan was for one month at the rate of 2% interest per month which rate applies to every borrower.

It is the testimony of the Defendant's witnesses DW1 and DW2 that the first Defendant is a money lending company with a moneylender's certificate. The law governing moneylenders in Uganda is the Money Lenders Act cap 273. PW2 testified that she was given the loan agreement exhibit D6 to sign while DW1 and DW2 denied such an agreement. The Plaintiff's Counsel relies on section 6 of the Money Lenders Act which provides that a contract for repayment by a borrower of money lent to him or her or to his or her agent is not enforceable unless it is in writing. A note or memorandum is required and shall contain all terms of the contract and in particular shall show the date on which the loan is made, the amount of the principal sum of the loan and the interest charged on the loan expressed in terms of the rate per annum.

On the other hand the testimony of PW1 and PW2 is that the Plaintiff never borrowed any money from the Defendant. The Defendants cannot be seen to claim the alleged loan without any note or memorandum in writing as required by the law. Counsel concluded that the Money Lenders Act prohibits oral money lending and any money lending contract must be in writing. From the available evidence on record it is more probable that Carolyn PW2 did receive a loan according to exhibit P6 which is the loan agreement. Denial by DW1 and DW2 that exhibit P5 did not exist is an afterthought. Moreover they agreed that Messieurs Jambo and Company Advocates were their lawyers/advocates. Secondly DW2 informed the court during cross-examination that every borrower is sent to their lawyers to execute a loan agreement. In those

circumstances the evidence of PW2 is more credible with regard to the loan and the defence and Counsel prayed that the court makes a finding to this effect.

The Plaintiff's Counsel further submits that exhibit P6 has some corroborative evidence to prove that it is PW2 who borrowed from the Defendant. Exhibit P6 is dated 22nd of June 2012 and the DW1 and DW2 agree that the loan was disbursed sometime in June 2012. Secondly it was drawn by Messieurs Jambo and Company Advocates the law firm admitted by DW1 and DW2 as the firm which did their legal transactions. PW2 Carolyn is said to be the borrower in exhibit P6. Exhibit P6 is similar to exhibit P4 which is an admitted document.

It would be dishonest of the Defendants to distance themselves from exhibit P6 because according to PW3 it was the very document used to impound the vehicle. It was the document he showed to one Ivan as proof of the loan agreement signed by Carolyn (PW2). In any case the Plaintiff's Counsel submits that both transactions do not meet the mandatory requirements of the Money Lenders Act Cap 273. Furthermore Counsel submits that DW1 who testified through an interpreter was evasive, incoherent and seemed to be hiding valuable information. DW2 was hesitant in answering questions put to her and was also very evasive and deliberately told lies. She testified that DW1 and she had been charged with theft of the bus only and not forgery. This contradicts exhibit P5 which is the charge sheet. DW1 also tried to evade the question as to whether he was charged with forgery too. He became angry when issues of forgery were brought to his attention. Based on an analysis of the evidence on record, DW1 and DW2 did not even know how much money was owed by the alleged borrower.

On the basis of analysis of the evidence the Plaintiff's Counsel concludes that the Plaintiff was not indebted to the Defendant and their evidence was more credible than that of the Defendants. In the premises issue number one ought to be answered in the negative.

In reply the Defendants Counsel relied on the testimony of DW1 that the Plaintiff through its director PW2 obtained a loan worth 40 million Uganda shillings at an interest rate of 2% per month from the first Defendant and against the security of two post-dated cheques. The loan was to be repaid within a period of one month.

Though the Plaintiff is trying to disown the transaction for lack of a company resolution to borrow, it does not deny having received the money from the first Defendant. According to DW1 the failure to first obtain a resolution was prompted by the trust generated by previous transactions between the parties and following prompt payments by the Plaintiff. DW1 agreed during cross-examination that there was no formal agreement between him and the Plaintiff and testified that the Plaintiff secured the sum against two post dated cheques in favour of the first Defendant. The Plaintiff was supposed to pay **Uganda shillings 500,000/=** in the first week from the date of receipt of the principal sum but the Plaintiff has since failure to do so.

DW1 and DW2 testified that it is the Plaintiff who borrowed the money from the first Defendant and the sum of **Uganda shillings 40,000,000/=** remained due and owing. DW1 denied having executed any formal agreement with the Plaintiff and that such exhibit P6 was rejected. DW1 testified that he gave PW3 a letter of authorisation to impound the bus and not exhibit P6 as alleged by the Plaintiff and that PW3 is the one who looked for a buyer and eventually disposed of the bus as scrap. DW1 denied having stolen the bus or forged any document as alleged by the Plaintiff and did not plead guilty to the criminal charges preferred against him that he is still pending before the trial magistrate.

DW 2 confirmed that the Plaintiff obtained the said loan at an interest of 2% per month. She is the debt recovery officer and not a loans officer and further she testified that the first Defendant had several lawyers who would draft loan agreements. Exhibit P6 was a non-existent document because it was not signed, undated and not witnessed and as such should be expunged from the court record. The court should compel the Plaintiff to pay the Defendants debt together with costs.

PW1 admitted having issued two post dated cheques on behalf of the Plaintiff in favour of the first Defendant and as security for a loan of **Uganda shillings 40,000,000/=**. Secondly the signatures on both cheques are his and he is a signatory to the Plaintiff's bank account. There is no evidence to suggest that he signed the cheque under duress or undue influence and no handwriting expert report was produced to show that the signature was forged. There is no evidence to suggest that the loan was retired save for the sum of **Uganda shillings 8,500,000/=** that was realised from the sale of the bus.

From the evidence of PW1 and PW2 they borrowed money as a result of the poor mechanical condition of the bus which had been impounded by the police and required immediate repairs before it could be utilised on the road. The Defendant's Counsel further relies on the testimony of PW2 about whether she knew the effect of issuing a blank cheque. She admitted that the Plaintiff is indebted to the first Defendant and the money was borrowed to repair the bus. She further deposited the logbook of the bus as security for repayment of the loan. Consequently there is overwhelming evidence that the Plaintiff obtained a loan facility worth **Uganda shillings 40,000,000/**= payable within one month from the first Defendant as evidenced by the dishonoured cheques which are in the names of the Plaintiff and not Carolyn (PW2) as alleged. In the premises the Defendant's Counsel submitted that the Plaintiff failed to discharge its burden of proof by showing that the loan was retired and as such judgment should be entered in favour of the first Defendant in the sum owing.

As far as the law is concerned the Defendant relies on the principle that the burden of proof lies on the Plaintiff to prove its case which principle was upheld in **Coptcot EA Limited versus Godfrey Sentongo and Mudu Awulira HCCS 118 of 2008.** In the decision of Honourable Lady Justice Helen Obura it is stipulated that it is a cardinal principle of law that the standard of proof in civil cases is on the balance of probabilities. Secondly the burden is on the Plaintiff to

prove his case on the balance of probabilities according to the case of **Nsubuga versus Kavuma [1978] HCB 307.**

As far as section 6 of the Money Lenders Act is concerned, the Defendant's defence is that the section is inapplicable because there are decisions of this court where it has been held that any writing that entails the borrower's intention amounts to a memorandum or a note. In the case of **Alpha International Investments Ltd versus Senyonga Steven HCCS 111 of 2001** Honourable Lady Justice Stella Arach Amoko held that in the absence of a loan agreement which were declared invalid, the two documents were adequate notes or memoranda for purposes of section 7 of the Money Lenders Act. The notes contained the principal amount and the rest of the terms of the contract and were signed by the Defendant who is the borrower before he took out the loan.

The Plaintiff cannot rely on section 6 of the Money Lenders Act to deny the transaction in the absence of a plausible reason for the issuance of two post dated cheques by the Plaintiff in favour of the first Defendant. The cheques should be interpreted or construed as to be adequate notes or memoranda. The Defendant's Counsel relies on section 72 of the Bills of Exchange Act cap 68 which is to the effect that cheques are bills of exchange drawn on a banker payable on demand. A bill of exchange on the other hand is defined by section 2 as an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand a fixed or determinable sum certain in money to or to the order of a specified person or to a bearer. In **Naris Byarugaba vs. Shivam MKD Ltd (1997) HCB 71** it was held that a bill of exchange constitutes, prima facie evidence of the sum of money printed on it as being due to the person in whose favour the bill is drawn. The debt is only discharged when the bill of exchange is honoured. In the premises the court ought to find that the Plaintiff is indebted to the Defendant in the sum of **Uganda shillings 40,000,000/=**.

In rejoinder, the Plaintiff's Counsel submitted that the Plaintiff through its directors denied any money lending transaction between the Plaintiff and the Defendants. What is clear is that Carolyn in her own capacity borrowed the money. There is no fact on record that the Plaintiff Company ever requested for more time to pay the alleged loan.

Furthermore the Plaintiff's witnesses never admitted receiving any money in favour of the Plaintiff Company. It is PW2 who admitted that she had a loan transaction of **Uganda shillings 10,000,000/=** with the Defendant. There is no evidence to prove that any loan was applied for and granted to the Plaintiff.

The Plaintiff's bus was unlawfully sold and no authority was ever given to the Defendants as earlier submitted. Furthermore in reply to the submission about there being no need for a company resolution to obtain a loan the Defendant admitted that the Plaintiff never resolved to obtain a loan.

The Defendant's Counsel further considered that DW1 agreed during cross-examination that there was no formal agreement between him and the Plaintiff and the Plaintiff reiterates submissions that it never borrowed any money from the Defendants and there was no written transaction as required by the Money Lenders Act Cap 273. The transaction between Carolyn Etap and the first Defendant was not reduced in writing. Counsel further relied on the case of **MTN Uganda Ltd versus Three Ways Shipping Group Ltd HCCS 503 of 2012** for the proposition of law that a contract executed in violation of a statutory provision is void. The Defendant submitted that the first Defendant is a moneylender and cannot be said to seek to enforce a contract or agreement purportedly made between itself and Carolyn when the transaction is void.

The Plaintiff's Counsel agrees that the burden of proof is on the Plaintiff to prove its case on the balance of probabilities but evidential burden shifts from party to party in the course of the trial. The Plaintiff proved that he did not obtain a loan and the burden to disprove or prove that he obtained it shifts to the Defendant who miserably failed to discharge the burden. Furthermore the fact that the claim of **Uganda shillings 40,000,000/=** was not reduced in writing, the fact that the Defendants did not sue on the alleged cheque, shows that there is no basis that the alleged loan to the Plaintiff or anybody was for a period of two months. Illegality of the transaction clearly vitiates the allegation that there was a loan.

On the issue of whether the cheques can be interpreted as a 'note' or 'memorandum' according to the case of **Alpha International Investments Ltd versus Senyonga Steven Civil Suit Number 11 of 2001,** in that case there was indeed a note or memorandum on which Honourable Lady Justice Stella Arach based her decision. These were an application for a loan and a loan application form.

The Plaintiff's Counsel relies on **Black's Law Dictionary 8th edition** pages 1005 and 1085 for the definition of a memorandum. It includes an informal written note on record outlining the terms of the transaction or contract. Secondly the word 'note' is defined as a written promise by one party (the maker) to pay money to another party (the payee) or to bearer. A note is a two-party negotiable instrument. On the basis of the definition to claim that a cheque is a note or memorandum is fallacious.

Whether the sale of Scania bus registration number UAJ 653U by the Defendant was unlawful?

On this issue the Plaintiff's Counsel submitted that DW1 testified that he did not have any court order when he impounded and sold the suit vehicle. PW3 Mr Robert Matanda was instructed by DW1 to sell the vehicle and as an employee of the first Defendant acted on the instructions of the second Defendant DW1. As a debt collector he was instructed by DW1 and also the second Defendant who impounded the vehicle and did not have any court order when he did so. The evidence of PW3 was consistent as the person who executed the illegal mission on behalf of the

Defendants. DW2 corroborated the evidence of PW3 and confirmed that they incurred expenses in moving the vehicle to the eventual buyer. PW3 was paid **Uganda shillings 2,500,000/=** after impounding and sale of the vehicle. Though the written statement of defence denies the Defendant's action, the statement of DW1 to the police exhibit P4 admits selling the vehicle.

In support of the contention of the Defendants that it is the Plaintiff who allowed the vehicle to be sold the Defendant's adduced in evidence exhibit D3. In cross-examination DW 1 did not know who received exhibit D3 on behalf of the Defendant neither did he know who delivered it. DW2 who is a debt recovery officer of the company informed the court during cross-examination that she only saw the letter exhibit D3 at the police. DW2 was uncomfortable during cross-examination when the issue of forgery of exhibit D3 was raised. On the other hand PW3 who is a former employee of the Defendants testified that they had the letterhead of the Plaintiff and DW1 instructed DW2 to forge a letter purporting to be from the Plaintiff Company to indicate that the Plaintiff had authorised them to sell the vehicle. PW3 retained copies of the headed letter. The letter was typed by DW2 and addressed to the Managing Director of Top Finance Company Ltd. The testimony of PW3 was never challenged during cross-examination and remains unshaken.

DW2 testified that the first Defendant Company did not receive any blank letterhead as a precondition for the grant of a loan. This is contradicted by the testimony of PW1 who testified that he was requested for a blank letterhead stamped with the company stamp and the blank letterhead was never returned. Exhibit P14 and exhibit P15 corroborate the testimony that it was the requirement of the first Defendant for borrowers to furnish among other things identification and a company letterhead duly stamped.

Furthermore the testimony of PW1 indicates that the document was a forgery.

The Plaintiff's Counsel submitted that even if there was a valid money-lending transaction, its enforcement has to be through court process under section 10 of the Money Lenders Act. In the case of **Premchand Raichand Ltd and another versus Quarry Services of East Africa Ltd and others [1971] EA 175** the court held that the borrower is entitled to recover security given in respect of a void money-lending contract. The Plaintiff's Counsel maintains that the money-lending contract was void for illegality. In the above case it was held by Sir William Duffus P that because the money lending contract was unenforceable the appointment of the second Defendant as the manager and receiver of the company's property was invalid. The sale of the company's property by the receiver by auction constituted conversion. Every benefit received by the moneylender as a result of any act by the receiver was an illegal benefit. In conclusion the Plaintiff's Counsel submits that the only instance where a chattel held as security is sold without recourse to court is under the Chattels Transfer Act Cap 70.

Counsel maintains that there was conversion of the Plaintiff's property by the Defendants. He relies on the decision of Justice Faith Mwondha, judge of the High Court as she then was in the case of **Mwangi David Gitau and Another versus Attorney General HCCS number 076 of**

2010 for the definition of conversion. Conversion constitutes the wilful interference without lawful justification with any chattel in a manner inconsistent with the right of the owner whereby that other is deprived of the use and possession of it. The elements include dealing with a chattel by a person not entitled to it and secondly an intention and in so doing of denying the person's right or to assert rights which are inconsistent with such a right. Several other authorities are cited and I do not need to go into them. Emphasis is that the Defendants had no legal authority to impound the bus. The ingredients of conversion were completed by the subsequent sale by the Defendants of the suit vehicle. Therefore Counsel prays that the court finds that the action of the Defendants constitute conversion of the Plaintiff's bus.

Exhibit D3 comprises of the cheques deposited with the Defendant. According to the Plaintiff's Counsel the loan was for a period of 30 days from June 2012 when it was received. DW1 and DW2 claim that the cheques were part of the security. The question according to the Plaintiff's Counsel is why the cheques are dated September, 60 days long after the loan is said to have been due in July. The state of affairs makes credible the testimony of PW2 and PW3 that the cheques were filled and dated by DW2 in the absence of the Plaintiff's officials. Again the question is if the Plaintiff had authorised the sale of the vehicle by writing exhibit D3 why then did the Defendants present all cheques for payment? The Plaintiff's Counsel concludes that the only inference to be drawn is that exhibit D3 constituting the cheques are forgeries and the cheques were filled and dated by DW2.

There was a departure from pleadings on the purported loan date. The Plaintiff's Counsel contends that the testimony of PW1 and DW2 during cross-examination was that the loan period was only one month. This was a blatant departure from pleadings both in the defence and counterclaim. Paragraph 6 of the defence is similar to paragraph 11 of the counterclaim. In paragraph 6 of the defence it is written that this suit is intended to defraud the first Defendant of **Uganda shillings 40,000,000/=** borrowed by the Plaintiff during the month of June 2012 against exhibit D3 and the logbook of the suit bus that was to be repaired on 30 September 2012. In the circumstances the Defendant's claim that payment was to be made within one month from June 2012 is a complete departure from pleadings.

In reply the Defendant's Counsel submitted that the Defendant's case is that the bus was pledged as security for the repayment of a loan of **Uganda shillings 40,000,000/=** together with post dated cheques and upon the Plaintiff's inability to retire the loan, it authorised the first Defendant to dispose of the bus in order to realise its debts according to exhibit D3. The Defendant's Counsel reiterated submissions that the Plaintiff failed to repay its debt and authorised the first Defendant to sell the bus. DW1 did not know the whereabouts of the bus whereupon he called PW2 who directed him to where the bus was parked and later impounded it using the services of PW3 and with the consent of the Plaintiff. DW1 denied having received the blank letterhead from the Plaintiff. He testified that it is not one of the requirements to hand over a blank letterhead before one can access a loan from the first Defendant.

It is hearsay evidence for PW1 to allege that his friends handed a blank letterhead to PW1 and as such evidence should be expunged from the record. PW1 did not deny his signature on the questioned letter confirming the reason why the Plaintiff never brought a handwriting expert to prove the alleged forgery. The testimony of PW2 was that the Plaintiff dealt with the Defendant on several occasions but never included the allegation that the Defendant ever demanded a blank letterhead from the Plaintiff.

PW2 admitted in cross examination that the Plaintiff never satisfied its debts owed to the first Defendant and thus informed the second Defendant of the whereabouts of the bus which had been pledged as security. She admitted having received a call from the second Defendant of the intended sale of the borrowers by the first Defendant as a reason of failure or inability to repay the loan. PW3 in cross-examination also submitted that DW1 called Carolyn (PW2) before disposal of the bus and she was the one who accepted that the Defendants should take the bus for the reason of failure to pay. PW3 never faced any resistance when he took the bus because he had a letter authorising him to do so. In the circumstances the vehicle was lawfully sold and the Plaintiff has failed to discharge the burden of proof under section 101 of the Evidence Act.

As far as the law is concerned the Defendant's case is that the Plaintiff authorised the first Defendant to sell the bus and the Plaintiff did not make a formal demand as provided for under section 8 of the Money Lenders Act and as such the Plaintiff cannot invoke section 10 and 11 of the Act to defeat the Defendant's claim. Section 8 applies where there has been a demand by the borrower in writing at any time during the continuance of the contract for a statement signed by the moneylender or his or her agent showing the date on which the loan was made, amount of the principal, amount of any payment already received, the amount of every sum due or outstanding. Section 10 of the Act is inapplicable by reason that no formal demand had been made as envisaged by section 8 of the Money Lenders Act. Secondly section 11 (1) of the Money Lenders Act applies only where there is an allegation of excessive interest having been charged in which case the court would reopen the transaction. The Defendant's Counsel further makes reference to **Bullen and Leak's on precedents at page 778** to the effect that a pledge of goods to secure the repayment of a debt gives power of sale upon the defaulters default and it is also assignable for the creditor to realise money.

The Plaintiff deposited the logbook of the bus and upon failure to pay the loan; the Plaintiff lost its right to immediate possession. The precedents relied upon on conversion are inapplicable since the Defendant relies on the authority given by the Plaintiff for the first Defendant to dispose of the bus. He further contended that a person can only be guilty of conversion when he or she without lawful excuse deprives another by giving some other person a lawful title.

The bus was sold sometime in August 2012 but the Plaintiff reported the matter in November 2012 which shows that the Plaintiff had consented to the sale of the bus. In the circumstances the Plaintiff's claim in conversion is untenable and only intended to defraud the first Defendant of its

monies which remained due and owing. Consequently the Defendant prays that the court should find that the sale of the bus was lawful.

In rejoinder the Plaintiff's Counsel submitted that it is not the testimony of PW1 that the letterhead was handed over to the first Defendant by his friend. The testimony of PW1 is at paragraph 26 of his witness statement. It is to the effect that PW1 got the letterhead (blank) of the Plaintiff when he requested the friends of PW1 to avail it to him at the time they got a loan of Uganda shillings 30,000,000/= and when they used the logbook of the Plaintiff in 2009. The transaction was not between the Plaintiff and the Defendant. The headed letter was clearly obtained before the loan in the instant case and that evidence has not been rebutted.

The testimony of PW3 concerning what transpired in the offices of the first Defendant remains unchallenged and the court should be pleased to rely on that evidence.

Because the Plaintiff never borrowed any money from the Defendants there was no requirement to make a formal demand.

Concerning Carolyn the alleged transaction was void ab initio and as such no formal demand would validate it. Counsel further relied on the decision of the court and reference to several authorities on the point in the case of **MTN Uganda Ltd versus Three Ways Shipping Company Limited (supra)** that the court process cannot be used to enforce an illegal contract. Any contract prohibited by statute either expressly or by implication is illegal and void. In the case of **Kyagulanyi Coffee Ltd versus Francis Senabulya, Civil Appeal Number 041 of 2006**, the Court of Appeal of Uganda held that acting in disregard of a mandatory requirement of law would render the transaction an illegality. Because there was no rendering of the money lending transaction in writing and there was no note or memorandum, the contract was void ab initio.

Remedies available to the parties

Counsel submitted that an award of damages is compensatory in nature and not punitive and intended to place the Plaintiff in as good a position as if the matter complained of had not happened.

Special Damages

The Plaintiff claims special damages on the basis of the value of the bus valued at **Uganda shillings 395,960,000/=**. The Plaintiff's Counsel relies on the testimony of PW1 in chief that he bought the suit vehicle at **US$127,000** according to the tax invoice and delivery note exhibit P3. The value of the vehicle was never challenged.

Secondly PW1 and PW2 admitted that the vehicle was at the time it was taken by the Defendant in the garage and particulars of the prayer are in exhibit D1 which is the motor vehicle inspection report. On 18 July 2012 the vehicle was on the road and en-route to Lira from Kampala according to the evidence exhibit P 18 the receipt book at pages 12 to 15 of the trial bundle. The

vehicle was in a good mechanical condition according to PW3. It was sold to a Burundian who dismantled it according to the unchallenged testimony in chief of PW3. The bus was deliberately dismantled by the person to whom the Defendants sold it. The bus was arbitrary sold without an expert opinion about the value thereof. A new bus would therefore put the Plaintiff in its original position of being a Scania bus owner. The Plaintiff's Counsel relies on the case of **Mubangizi Patrick versus Attorney General Civil Suit Number 045 of 2002** where the Plaintiff prayed for replacement value of the bus which had been written off and the court awarded what was pleaded. In the case of **Mwangi David Gitau** (supra) Honourable Lady Justice Mwondha held that special damages have to be proved specifically but does not need to be supported by documentary evidence in all cases.

On the basis of the authorities and on the balance of probabilities the Plaintiff's Counsel submits that the Plaintiff proved the value of the bus arbitrarily sold to be in the region of **Uganda shillings 395,960,000/=**.

In reply the Defendant's Counsel submitted that as far as the claim for special damages of **Uganda shillings 395,960,000/=** is concerned the Plaintiff failed to furnish the court with evidence of the value of the vehicle. PW1 and PW2 failed to produce receipts in proof of the purchase price. The Plaintiff only produced a copy of the delivery note which does not reflect the alleged sum. The Plaintiff failed to avail the court with copies of Uganda Revenue Authority receipt of invoices in proof of payment of taxes of Uganda Revenue Authority and as such the Plaintiff did not discharge its obligation as envisaged by section 101 of the Evidence Act.

At the time of the sale according to PW1 the bus was in a bad mechanical condition or scrap form according to exhibit D1. PW1 and PW2 admitted the condition of the bus during cross-examination and it was confirmed by PW3 in his testimony. The Plaintiff's exhibit P 10 which is a complaint and charge sheet against the Plaintiff's driver confirms that the bus was in a bad condition and its value have depreciated and as such the Plaintiff did not furnish the court with the valuation report to prove special damages. In the premises the claim for special damages ought to be dismissed with costs. According to **Salmon and Heston on Torts 21st edition at page 116** the general principle is that the value recoverable in an action for conversion is the value of the property at the date of the conversion and not its value at an earlier or later date. See also **Caxton Publishing Company versus Sutherland Publishing Company (1939) AC 178 at pages 192** and 193. Furthermore section 101 of the Evidence Act Cap 6 laws of Uganda provides that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist. Secondly the burden of proof is on the person who asserts the fact. See **Muluta Joseph vs. Katama Sylvano Civil Appeal Number 11 of 1999** where Mulenga JSC held that the burden was on the Plaintiff to prove the claim and that the appellant had failed to discharge the burden of proof when he failed to prove that the Mailo owner's consent to his acquisition had been obtained. In the premises the claim for special damages should be disallowed.

In rejoinder the Plaintiff's Counsel submitted that the Plaintiff's vehicle was arbitrarily impounded and sold. There was no valuation of the bus when the bus was sold and the sale was by private treaty. This sale was never advertised at all. The value of the bus at the time was **Uganda shillings 395,960,000/= or US$117,000.** The argument is that the Plaintiff ought to be put to its original position, that is, a bus to their credit or value. It was the duty of the Defendants to value the bus before selling it and in any case the sale was arbitrary. The evidential burden shifts because the property was sold and dismantled by a Burundian buyer. This sale was without a valuation report. Thirdly the sale was not by public auction to obtain the highest bidder. In the case of **Greenland Bank Ltd (in Liquidation) versus Wasswa Birigwa and Another HCCS 0026 of 2004** before Justice Egonda-Ntende it was held that the Plaintiff acted negligently in so far as it failed to obtain the presale value of the property and yet proceeded to sell the same day by private treaty without the benefit of competition that the public auction provides. The evidence of DW1 is that the Defendants did not carry out any valuation to ascertain the value of the property at the time of its conversion. In the circumstances the Plaintiff's Counsel maintains that the value ascribed by the Plaintiff to the property cannot be challenged at this stage of submissions.

Loss of Earnings

In support of the claim for loss of earnings the Plaintiff's Counsel submitted that the Plaintiff's claim for loss of earnings or financial loss is based on the daily income of **Uganda shillings 1,675,000/=** for 135 days amounting to **Uganda shillings 226,125,000/=**. Secondly payment made to the mechanic of **Uganda shillings 8,000,000/=.** The investigator for the conversion of **Uganda shillings 2,500,000/=.** Finally transport and subsistence costs to the second Plaintiff from Lira to Kampala to pursue the matter and the police on 12 occasions at **Uganda shillings 200,000/=** per trip. According to the testimony of PW1 the bus used to bring a daily income of **Uganda shillings 1,675,000/=.** Consequently the Plaintiff claims loss of earnings and financial loss of **Uganda shillings 239,025,000/=**.

The Plaintiff Counsel submits that the period of deprivation before the filing of the action was 135 days. The Plaintiff relies on the testimony of PW1 for the payment of the mechanic where a deposit of **8,000,000/=** was made and the invoice was for **Uganda shillings 19,828,000/=.** The receipts from IM Engineering exhibit PE 7. A search was conducted and bus seats were found and Counsel prayed that a sum of **Uganda shillings 2,500,000/=** is payable as special damages. The matter was reported to the police according to the testimony of PW2. PW2 testified about her travels to Kampala on several occasions.

In reply to the claim of loss of earnings or financial loss, the Defendant's submission is that the Plaintiffs claim for loss of earnings or financial loss cannot be sustained in the absence of evidence proving the loss. From the testimonies of PW1 and PW2 at the time of sale of the bus it had been impounded and parked by the police for being in a poor mechanical condition. From 18 July 2012 at the time when the bus was disposed of, it was at all material times parked in the

garage and was not operational and there is no reason why the Plaintiff should claim financial loss.

Secondly the Plaintiff's alleged claim for financial loss of **Uganda shillings 239,025,000/=** is not backed by any documentary evidence and no witnesses were produced to confirm the claim and therefore the Plaintiff as submitted above did not discharge the burden of proof under section 101 of the Evidence Act and the claim ought to be disallowed.

In rejoinder the Plaintiff's Counsel reiterates earlier submissions and further that no principles were advanced by the Defendant's Counsel to challenge the claim for financial loss.

Interest

As far as the prayer for interest is concerned the Plaintiff's Counsel prays for interest at the rate of 35% per annum from the date of the cause of action till payment in full.

In reply the Defendant's Counsel submitted that the claim for 35% per interest is a departure from the Plaintiff's plaint. It lacks merit and is not backed by any documentary proof. Secondly 35% interest is not only excessive but is harsh and unconscionable and ought to be denied.

In rejoinder the Plaintiff reiterates earlier submissions and prayers that the court exercises its discretion to grant a commercial rate of interest.

General damages

As far as general damages are concerned the Plaintiff's Counsel submitted that general damages are at the discretion of the trial judge which ought to be exercised judiciously. The Plaintiff's Counsel relies on the case of **Frederick JK Zaabwe versus Orient Bank and Five Others Civil Appeal Number 04 of 2006 at page 96,** In that case the Supreme Court approved the holding of Spry VP in **Obongo versus Kisumu Council [1977] EA 91** that in making a general damages award, the court may take into account factors such as malice or arrogance on the part of the Defendant and the injuries suffered by the Plaintiff in terms of humiliation or distress. Damages enhance an account of such aggravation and are still regarded as being compensatory in nature. In the case of **Mwangi David Gitau** (supra) the court awarded **Uganda shillings 100,000,000/=** as general damages. In the Plaintiff's case the Plaintiff's Counsel submitted that the Defendants violated the laws of Uganda and specifically the Money Lenders Act and the arrogance exhibited required an award of enhanced general damages of **Uganda shillings 250,000,000/=.**

The Plaintiff also seeks interest at court rate from the date of judgment till payment in full on the general damages.

Exemplary damages

The Plaintiff's Counsel contends that before the promulgation of the 1995 constitution of the Republic of Uganda an award of exemplary damages for unconstitutional breaches was only made due to the action of governmental officials. Deprivation of property is in breach of a constitutional right. Money lending has become a very big commercial venture. It should not be conducted arbitrarily and contrary to law. The court should take judicial notice of the notorious conduct of money lenders and the acts of deprivation of property.

In the case of **Kabandize and others versus Kampala Capital City Authority civil appeal number 028 of 2011** (unreported) the Court of Appeal held that service of statutory notice on government, local authority and scheduled Corporation's was no longer a mandatory requirement since under article 20 (1) of the constitution all persons are equal before and under the law and in all spheres of political, economic, social, cultural life and in every other respect and shall enjoy equal protection of the law. In the case of **Osotraco Ltd versus Attorney General HCCS 1380 of 1986** the court accepted that government can be evicted. In the premises the Plaintiff's Counsel prays for an award of exemplary damages of **Uganda shillings 50,000,000/=.**

In reply to the claim for general and exemplary damages the Defendant's Counsel submitted that the Plaintiff has failed to show how it was inconvenienced by the Defendant so as to be entitled to the prayers. The Defendants produced sufficient evidence to prove that the Plaintiff borrowed the sum of **Uganda shillings 40,000,000/=** and pledged its bus as security for repayment of the loan together with two post dated cheques. In the circumstances it is the Defendants who are entitled to general and exemplary damages for the Plaintiff's inability to retire its loan facility within the agreed time. The vehicle was sold with the consent of the Plaintiff and the Plaintiff is not entitled to damages.

The Plaintiff's Counsel submits in rejoinder that the Defendant's Counsel has conceded rightly that the principles are applicable.

Costs

As far as costs are concerned, the Plaintiff's prayer is that costs follow the event under the provisions of section 27 of the Civil Procedure Act. This suit was very complex requiring special interpretation by a Chinese language interpreter because DW1 did not understand English. Counsel prayed for an award of a certificate of complexity for the Plaintiff to claim a higher fee at the percentage of 30% under **Schedule 6 (1) (a) of the Advocates (Remuneration and Taxation of Costs) Regulations**.

In reply the Defendant's Counsel submitted that under section 27 of the Civil Procedure Act costs follow the event. Because the Plaintiff failed to discharge its evidential burden, costs should be awarded to the Defendants. The claim for additional costs is premature and should be dismissed.

Counterclaim

The Plaintiff's Counsel submitted that the claim of **Uganda shillings 40,000,000/=** had not been proved by the Defendant's witnesses. DW1 and DW2 did not know the amount PW2 had so far paid. DW1 and DW2 did not even have the amount due from the Plaintiff. Under section 10 (1) of the Money Lenders Act it is a requirement that the Plaintiff shall produce a statement of his or her account as prescribed in section 8. Sections 6 and 10 of the Money Lenders Act on the form of money lenders contract and the requirement of production of a statement of account is mandatory and non-compliance thereof would result in dismissal of the suit hence the counterclaim cannot stand and ought to be dismissed with costs.

Additionally the Plaintiff's Counsel prays for costs for two Counsels on the counterclaim.

The Defendants Counsel submitted that the Defendants have proved entitlement to the counterclaim which is the sum of money borrowed by the Plaintiff who pledged a bus and issued two post dated cheques which were dishonoured upon deposit. The claim in the counterclaim ought to be allowed with costs.

In rejoinder the Plaintiff's Counsel maintains that the counterclaim was void ab initio and as such it ought to be dismissed with costs. This is on the ground of illegality of the alleged transaction.

Judgment

I have carefully considered the Plaintiff's suit as reflected in the pleadings as well as the written statement of defence, the counterclaim and pleadings associated with it, the scheduling memorandum signed by Counsel, the witness testimonies and documentary evidence as well as the submissions of Counsel and the law. The submissions of Counsel have been set out above.

In the joint scheduling memorandum there are certain brief facts not in accordance with the directions of court because there is no indication as to whether they are agreed facts or not. The joint scheduling memorandum is drawn by Counsel in accordance with Order 12 rule 1 of the Civil Procedure Rules and is meant to reflect points of agreement and disagreement. This is further supposed to be refined to include agreed facts and documents and factual controversies as well as contested documents. From the evidence adduced however there are certain facts that can be set out.

The first fact which is not in controversy is that the Plaintiff is the owner or proprietor of the suit vehicle which is a Scania bus registration number UAJ 653 U which used to operate under the name and style of 'Mawenzi Bus' carrying out passenger service between Kampala and Lira. The vehicle was inspected by the Inspector of Vehicles who recommended a series of repairs and a motor vehicle inspection report was admitted in evidence as exhibit D1. It is also proved that the vehicle had been impounded by the police due to its condition and that the Defendant subsequently while it was undergoing repairs instructed PW3 to impound and sell the vehicle and the vehicle was sold as "scrap". The basis of the instruction is an alleged loan agreement or transaction. Specifically the first issue relates to whether the Plaintiff was indebted to the

Defendant. The issue is somewhat intertwined with the second issue as to whether the sale of the motor vehicle of the Plaintiff was unlawful. The first issue is intertwined with the second issue because the question of whether the Plaintiff is indebted to the Defendants impacts on the counterclaim in terms of whether an order should be made awarding **Uganda shillings 40,000,000/=** to the Defendant in the counterclaim or whether there was no loan transaction in which case the Plaintiff is not liable there being no contractual relationship between the parties. Furthermore it affects the issue of whether if there was ever a loan transaction between the Plaintiff and the first Defendant; it was an illegal transaction under the Money Lenders Act Cap 273 Laws of Uganda. Furthermore the factual controversy includes an admission by the Plaintiff that if there was a loan transaction, it was between Carolyn Etap a director of the Plaintiff Company with the first Defendant. Definitely this constitutes both a question of fact as well as a matter of law on the basis of the submission that there was no company resolution to borrow money from the Defendant.

In conclusion the first issue as to whether the Plaintiff is indebted to the Defendants is a crosscutting issue and I would be obliged to consider all the aspects of the issue even if it affects the second issue which is corollary to the first issue as to whether the sale of the suit vehicle by the Defendant was unlawful.

Whether the Plaintiff is indebted to the Defendants?

The primary basis for the assertion of the Defendants that the Plaintiff is liable is an alleged loan facility extended to the Plaintiff against two post-dated cheques numbers 000269 and 00270 drawn on Messieurs Bank of Africa as well as the logbook of the vehicle which was deposited as security for repayment of the loan. It is alleged that the Plaintiff borrowed **Uganda shillings 40,000,000/=**.

I have carefully reviewed the evidence in respect to the alleged loan transaction. Starting with the evidence of the counterclaimant/first Defendant, DW1 testified that sometime in June 2012 the Plaintiff company obtained a loan facility worth **Uganda shillings 40,000,000/=** payable within one month. The Plaintiff issued two post dated cheques in the amount of **Uganda shillings 40,000,000/=** and also deposited the logbook of the motor vehicle in question. In support of the claim he testified that the Plaintiff wrote to him authorising the first Defendant to sell the Scania bus as part payment in a letter dated 20th of August 2012.

There are two factual controversies on the documentary evidence adduced by DW1 in support of the counterclaim. These are whether the post dated cheques were forgeries and whether the letter authorising the Defendant to sell the suit vehicle dated 20th of August 2012 exhibit D3 is also a forgery. I will start with the issue of whether the post dated cheques are forgeries.

I have carefully reviewed the testimonies of PW1 and PW2. Both witnesses admit that PW2 deposited two blank cheques with the first Defendant Company as security for a loan. In my

humble opinion it does not matter whether the cheque was deposited as security for a loan taken by Carolyn PW2 or taken by the Plaintiff Company. Without having to determine the question as to whether the Plaintiff ever obtained a loan from the first Defendant, what needs to be established is whether the first Defendant is entitled to claim that the Plaintiff is indebted to it on the basis of the post – dated cheques. PW1 testified in paragraph 14 of his witness statement that Etap Carolyn got facilities of a loan from Top Finance Ltd of **Uganda shillings 10,000,000/=** and she started to pay back on 30 June 2012. Upon being cross examined on the issue PW1 admitted that he signed blank cheques and that he is a signatory to the account of the Plaintiff. He testified that Carolyn partly retired the loan. Furthermore he admitted that Carolyn left with the first Defendant two blank cheques and that he had signed the cheques. To the best of his knowledge Carolyn did not retire the loan. She had already paid **Uganda shillings 2,600,000/=** to the Defendant's account in DFCU bank when they stopped paying.

PW2 on the other hand also admitted in cross examination that she had left two blank cheques and the alleged forgery on the cheques relates to the amounts on both cheques. She had not yet finished paying the loan. It is her testimony that it was a personal loan. She further testified at paragraph 7 of her witness statement that as security for the loan the Plaintiff deposited with the Defendant post dated cheques number 00269 and 00270 drawn on Bank of Africa. She also signed an agreement that was made for **Uganda shillings 20,000,000/=**. So it was not correct for the first Defendant to claim that she received **Uganda shillings 40,000,000/=** and therefore the counterclaim lacked merit. In paragraph 14 she testifies that the vehicle had been sold earlier in August 2012 before the loans due date at the date of the post dated cheques. I have duly examined exhibit D4 which is a photocopy of the two cheques. The two cheques appear to be duly signed by PW1 and PW2. The first cheque is dated 13th of September 2012. It has a stamp which shows that the bank of Africa had the signature verified. It is the verification of signature stamp which is signed. It is for the sum of **Uganda shillings 20,000,000/=** and in favour of the first Defendant. It seems to have been deposited with DFCU bank on 14 September 2012 and forwarded to the bank of Africa Uganda Ltd on 14 September 2012 according to the stamps of bank of Africa Inward Clearing. It went to Clearing Head Office on 19 September 2012. Finally it bears the words "refer to drawer". On the face of it the bank was satisfied with the signatories on account since it bears the stamp "Bank of Africa Uganda Limited, Signature Verified." The cheque number is 000270.

The second cheque is also dated 13th of September 2012 and is cheque number 000269 and is also for the sum of **Uganda shillings 20,000,000/=.** It was deposited on 14 September 2012 with DFCU Bank Ltd and apparently forwarded to the Plaintiff's bank that is bank of Africa Uganda Limited on 14th of September 2012. It has the signatures of PW1 and PW2 which signature is verified by a signed stamp reading: "Bank of Africa Uganda Limited, Signature Verified." It is also returned with the words "refer to drawer". On the face of it the bank of Africa was satisfied with the signatories on the cheque. Considering the testimony of PW2, it is only to the effect that

the forgery related to the amount. In other words there is no complaint about the writing of the cheque in the names of the first Defendant.

The Plaintiff cannot be excused merely on the basis that it signed a blank cheque as security. A cheque cannot be security unless it can be cashed. Secondly a cheque is not security but payment of money as the judicial jurisprudence on the question demonstrates. A person giving the blank cheque is entitled to fill it out because it constitutes a promise to pay and is given on the understanding that the payee will fill out the necessary details to make the cheque an effective payment. The Plaintiff through PW1 and PW2 has failed to prove that the cheques were a forgery. PW1 and PW2 have not disputed their signatures on the cheque. Specifically PW2 narrowed down the alleged forgery to a question of the amount filled in the cheque for payment of the first Defendant. No prudent businessman or businesswoman should issue a duly executed blank cheque without understanding the risk of its being presented fully filled up for encashment. In my opinion the issuance of a duly executed blank cheque (meaning without an amount indicated) does not amount to a forgery if it is subsequently filled up with an amount by the intended beneficiary for whose benefit the cheque had been issued. As it is it becomes more difficult to defend where the Plaintiff owes the beneficiary of the cheque some money.

It is therefore my finding that there was no forgery of the Plaintiff's cheque. This is consistent with the overwhelming evidence that the Plaintiff deposited two cheques with the Defendant as ‘security’. It is further evident from the testimony of PW2 Carolyn that she obtained the loan in circumstances where they needed money to repair the bus. This submission that the loan was obtained in her personal capacity does not absolve the Plaintiff from liability on the basis of the cheque. Particularly paragraph 12 of the witness statement is very revealing about the purpose of the loan she had obtained. She states as follows:

> "While I was in Lira, I received a call from my brother telling me that the second Defendant had attached the bus number UAJ 635U, which was removed from a garage, yet I had informed the second Defendant that the payments would delay because the bus was under repair."

This statement should be coupled with paragraphs 6 and 7 of the witness statement to gain a complete understanding of the transaction. In paragraphs 6 and 7 PW2 testifies as follows:

> "6. I am aware that I did apply for a small loan of Uganda shillings 10,000,000/= (also in words) from the first Defendant whose director is the second Defendant.
>
> 7. As security for the loan, the Plaintiff deposited with the Defendant post dated cheques No. 00269 and 00270 drawn on Bank of Africa."

From the facts written above it is clear that the witness PW2 who is also a director of the Plaintiff applied for a loan. Secondly she deposited post dated cheques with the first Defendant as security for the loan. Thirdly the vehicle was attached when she had already informed the

second Defendant that payments would delay because the bus was under repair. The clear inference is that payments were tagged onto the performance of the bus. The bus is owned by the Plaintiff and it is the Plaintiff who issued the blank cheques. There was evidently a connection between the bus and the transaction. That notwithstanding the underlying contract or transaction is not material on the question of the cheque. Judicial precedents establish that a cheque constitutes a separate contract from the underlying transaction. The leading authority on the issue is the Ugandan Court of Appeal case of **Kotecha vs. Mohammed (2002) 1 EA 112** where **Berko J.A** at page 118 held that:

> "The English authorities, particularly James Lamont and Company Limited v Hyland Limited [1950] 1 KB 585; Brown, Shipley and Company Limited v Alicia Hosiery Limited [1966] Rep 668, establish that a Bill of Exchange is normally to be treated as cash. The holder is entitled in the ordinary way to judgment. If he is a seller who has taken bills for payment, he is still entitled to judgment: no matter that the Defendant has a cross claim for damages under the contract of sale or under other contracts. The buyer must raise those in a separate action. There may be exceptions to the rule and the Respondent claim that this case is an exception."

The fact that the underlying contract is considered on its own merit and separately from the bill of exchange was also considered in other cases. The underlying principle is that unless the issuer of the cheque has an equitable claim which amounts to a set-off or a defence, the cheque is enforceable as a separate contract to which there may not be a defence on the basis of law. In the case of **James Lamont & Co Ltd v Hyland Ltd (No 2) [1950] 1 All ER 929** Roxburgh J who delivered the judgment of the Court of Appeal observed at 931 that:

> "... where the matters relied on by the Defendant afford no defence under the Bills of Exchange Act, 1882. In such cases, although it is not easy wholly to reconcile the authorities, a rule more favourable to the Plaintiff has in general prevailed, the court treating the execution of a bill of exchange either as analogous to a payment of cash, or as amounting to an independent contract within the wider contract in pursuance of which it was executed, and not dependent as regards its enforcement on due performance of the latter." "...Courts of equity will not take an account of debts one way and damages the other". A court of law would say you must pay the bill first and then bring an action for the fraud, and, apparently, where a bill of exchange was concerned, equity in this matter followed the law."

As far as the Bills of Exchange Act Cap 68 is concerned section 2 thereof defines a bill of exchange and this includes a cheque. It provides that:

> "2. Bill of exchange defined.

(1) A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person or to bearer.

(2) An instrument which does not comply with these conditions, or which orders any act to be done in addition to the payment of money, is not a bill of exchange.

(3) An order to pay out of a particular fund is not unconditional within the meaning of this section; but an unqualified order to pay, coupled with—

(a) an indication of a particular fund out of which the drawee is to reimburse himself or herself or a particular account to be debited with the amount; or

(b) a statement of the transaction which gives rise to the bill, is unconditional.

(4) A bill is not invalid by reason—

(a) that it is not dated;

(b) that it does not specify the value given or that any value has been given therefor;

(c) that it does not specify the place where it is drawn or the place where it is payable. "

Under subsection 4 (b) a bill is not invalid by reason only that it does not specify the value given. Consequently it is purely a matter of business prudence whether to issue a blank cheque or one which has been carefully filled up with the correct amount. Where a bill is dishonoured, an immediate cause of action accrues against the drawer to the holder in due course. This is stipulated under section 46 of the Bills of Exchange Act which provides as follows:

“46. Dishonour by nonpayment.

(1) A bill is dishonoured by nonpayment—

(a) when it is duly presented for payment and payment is refused or cannot be obtained; or

(b) when presentment is excused and the bill is overdue and unpaid.

(2) Subject to this Act, when a bill is dishonoured by nonpayment, an immediate right of recourse against the drawer and endorsers accrues to the holder.”

In **Bharat’s Dishonour of Cheques (Law and Practice) 1996) by Rajesh at page 33** it is written that**:**

> "The basis of this liability is that the cheque even after dishonouring works as a piece of evidence, wherein the presumption is that the holder of the cheque is the holder in due course and that the cheque was issued for consideration or debt or any other liability as the case may be."

The first Defendant is the holder in due course because the cheques were deposited in the intention of the parties as 'security' for the repayment of a loan. I have already held that it is immaterial whether the loan was issued to PW2 or the first Defendant. Security therefore was issued by the Plaintiff for the benefit of the Defendant in the form of a logbook and post dated cheques. In the case of **Naris Byarugaba vs. Shivam M.K.D Ltd [1997] HCB 71** it was held that a bill of exchange is prima facie evidence of the sum of money printed on it and due to the person in whose favour it is drawn.

Last but not least the burden is on the Plaintiff to rebut the prima facie evidence where a notice of dishonour of the bill has been duly given to the endorser. On the other hand the burden of proof is on the first Defendant as a counterclaimant to prove that a notice of dishonour of the cheque was served on the Plaintiff for it to claim the amount written on the face of the cheque. This is in compliance with 47 of the Bills of Exchange Act which provides as follows:

> "47. Notice of dishonour and effect of non notice.
>
> Subject to this Act, when a bill has been dishonoured by non-acceptance or by nonpayment, notice of dishonour must be given to the drawer and each endorser, and any drawer or endorser to whom the notice is not given is discharged; except that—
>
> (a) where a bill is dishonoured by non-acceptance, and notice of dishonour is not given, the rights of a holder in due course subsequent to the omission shall not be prejudiced by the omission;
>
> (b) where a bill is dishonoured by non-acceptance, and due notice of dishonour is given, it shall not be necessary to give notice of a subsequent dishonour by nonpayment unless the bill shall in the meantime have been accepted."

The provision is explicit that notice of dishonour must be given to the drawer of the cheque (the Plaintiff in this case). The word "must" give a notice of dishonour makes the provision mandatory. In other words it is a mandatory requirement for notice of dishonour to be given to the drawer of the bill of exchange upon its dishonour. Furthermore the rules as to the notice of dishonour are provided for under section 48 of the Bills of Exchange Act. Briefly they include the requirement that for the notice of dishonour to be valid and effectual it must be given in accordance with the rules under the provision. These rules include the fact that the notice may be in writing or by personal communication and may be given in terms which sufficiently identify the bill and intimate that the bill has been dishonoured by non-acceptance or non-payment. Secondly the return of the dishonoured bill to the drawer or endorser is deemed a sufficient

notice of dishonour. Thirdly notice of dishonour has to be given within a reasonable time immediately after the bill is dishonoured. It is further provided that in the absence of special circumstances notice is deemed not to have been given within a reasonable time unless where the person who received the notice resides in the same place the notice is given or sent off in time to reach the drawer on the day after the dishonour of the bill. Or where the person giving the notice resides in a separate place from the drawer or endorser it is to be sent off on the day after the dishonour of the bill. Consequently the phrase "within a reasonable time immediately after the Bill is dishonoured" has to be construed to mean immediately it is practically possible to do so.

As far as the evidence is concerned the witness statement of DW1, the managing director of the first Defendant and also being the second Defendant relates to the issuance of two post dated cheques for **Uganda shillings 40,000,000/=** and the deposit of the logbook as security for a loan of **Uganda shillings 40,000,000/=** obtained in June 2012 by the Plaintiff company. The loan was payable within one month and the Plaintiff defaulted. He does not specifically testify about giving notice of dishonour of the cheque. The evidence in cross-examination was that PW2 was supposed to give the money back within two months. He testified that the cheques were presented on 14 September 2012. Secondly DW2 repeated the testimony of DW1 in her witness statement on the question of the cheques. She does not testify about giving notice of dishonour of the cheque.

That is no evidence of the notice of dishonour in the witness testimonies of DW1 and DW2. I have further examined all the agreed exhibits and there is no correspondence giving notice of dishonour. It is a requirement to give notice of dishonour of the cheque immediately after the dishonour. Where there is no notice of dishonour, the first Defendant cannot rely on the dishonoured cheque leaves unless it is shown to have been served upon the Plaintiff within a reasonable time. Under section 47 of the Bills of Exchange Act, failure to serve a notice of dishonour of the bill of exchange is a defence to the claim founded on the face value of the bill of exchange. In the premises the dishonoured cheques cannot be used as evidence of the Plaintiff’s indebtedness to the first Defendant.

The second arm of submissions relates to the effect of section 6 of the Money Lenders Act Cap 273 laws of Uganda. The Plaintiff's Counsel argued that any money lending contract whether between the Plaintiff and the first Defendant or between Carolyn who testified as PW2 and the first Defendant is void for illegality because there was admittedly no note or memorandum as required by the provisions of section 6 of the Money Lenders Act. The Defendant’s Counsel submitted that even the cheque issued by the Plaintiff amounted to a "note" or memorandum in terms of section 6 of the Money Lenders Act. I have duly considered the arguments of Counsel which have been set out at the beginning of this judgment. Section 6 of the Money Lenders Act has a head note which deals with the form of money lenders’ contracts. Suffice it to reproduce the section for ease of reference.

> "6. Form of money lenders contracts.

(1) No contract for the repayment by a borrower of money lent to him or her or to any agent on his or her behalf by a moneylender or for the payment by him or her of any interest or money so lent, and no security given by the borrower or by any such agent as aforesaid in respect of any such contract shall be enforceable, unless a note or memorandum in writing of the contract is made and signed personally by the borrower, and unless a copy of the note or memorandum is delivered or sent to the borrower within seven days of the making of the contract; and no such contract or security shall be unenforceable if it is proved that the note or memorandum aforesaid was not signed by the borrower before the money was lent or before the security was given, as the case may be.

(2) The note or memorandum aforesaid shall contain all the terms of the contract, and, in particular, shall show the date on which the loan is made, the amount of the principal of the loan, and either the interest charged on the loan as expressed in terms of a rate percent per year, or the rate percent per year represented by the interest charged as calculated in accordance with the provisions of the Schedule to this Act."

The key words as far as is relevant are found under section 6 (1) of the Money Lenders Act and are: "*and no security given by the borrower or by any such agent as aforesaid in respect of any such contract shall be enforceable*". The provision deals with enforceability of a contract for the payment of money by a borrower of money lent to him or her or to an agent on his or her behalf by a moneylender or for the payment by him or her of interest on the money so lent. Secondly it deals with enforceability of the security given by the borrower or by the agent of the borrower in respect of the contract. The evident and clear meaning of the provision is that no contract can, unless there is a note or memorandum in terms of section 6 (1) of the Money Lenders Act cap 273 laws of Uganda for the repayment by a borrower of money lent to him or her or for the payment by him or her of interest for the money lent or for the enforcement of the security, be unenforceable.

There are arguments that there is a contract signed by PW2 Carolyn who is also a director of the Plaintiff Company which alleged contract was disowned by the Defendant's witnesses and in the written submissions of the Defendant's Counsel. The written document was admitted as exhibit P6. It is between the second Defendant Mr. You Jing Shu and Carolyn Etap of Mawenzi Investments Ltd. It is entitled "loan agreement" and is dated 22nd of June 2012. It is only signed by Carolyn and not the lender. Exhibit P6 was used for the argument that the money in question was borrowed by Carolyn and not the Plaintiff. The Defendant does not agree that there was such an agreement. Secondly the document has been used to advance the argument that the loan was for **Uganda shillings 20,000,000/=**. Whatever the case may be it is not important for the court to resolve the question since both parties agreed that the agreement does not apply to the Plaintiff. The question of whether there was a memorandum or note has to be considered from independent evidence.

Starting with the evidence of DW1 who is also the second Defendant and as embodied in his witness statement the Plaintiff in June 2012 borrowed **Uganda shillings 40,000,000/=.** He relied on the two post dated cheques which amount to **Uganda shillings 40,000,000/=** and were exhibited as D4. This was supposed to be the security for the loan. I have duly considered his evidence in the cross-examination that it is Carolyn who applied for the loan on behalf of the Plaintiff. She did so in her capacity as a director of the Plaintiff Company. Because the witness was not very fluent in English a Chinese interpreter was got for him. He testified that the borrowers sometimes have agreements and sometimes they give cheques as security and it depends on the kind of person they are dealing with. Carolyn/PW2 did not make an application in writing and he was not sure because it is the managers who receive such applications. She gave a cheque as security for the loan. Interest was at 2% per month. Under the arrangement the management of the bus were supposed to report the weekly income. Monthly interest was **Uganda shillings 800,000/=**. They did not write to her when there was a default because of the long term friendship between the directors of the Plaintiff and himself. The witness did not know exhibit P6 which is the purported agreement between him and Carolyn. Furthermore DW1 on cross examination testified that there was no resolution from the Plaintiff Company for the bus to be used as security. He admitted signing exhibit P4 which is the police statement.

DW2 Betty Mulego Ingabire also testified that the Plaintiff borrowed **Uganda shillings 40,000,000/=** and deposited two cheques as well as the logbook of the bus admitted in evidence as exhibits D2 and D3 respectively. The Plaintiff despite agreeing to pay the loan within one month defaulted in making the payments. Subsequently on 20 August 2012 the Plaintiff wrote to the managing director of the first Defendant authorising the sale of the bus. In cross examination she testified that she was familiar with the company's processes for granting loans. The documents required deferred from companies and individuals. Normally individuals have a security photo, identification documents and loan agreement if it is a first borrower. They also use several lawyers. The borrowers go to the lawyers premises to execute the agreement. She testified that she did not know whether the Plaintiff signed a loan agreement. In any case she was not aware of any loan agreement that was signed.

For the Plaintiff it was maintained by PW1 and PW2 that there was indeed a loan agreement between Carolyn Etap and the Defendants and that there was no loan agreement between the Plaintiff and the Defendants or any of them.

I have additionally considered all the documentary exhibits. The only two documents which are relevant are exhibit P6 which is between the Defendant and Carolyn Etap. For purposes of the Plaintiff's suit or specifically for purposes of the counterclaim and the issue as to whether the Plaintiff is indebted to the Defendants, it is unnecessary to consider the submission that there was a loan agreement between Carolyn and the Defendant. In any case the Defendant denies exhibit P6 and it is irrelevant for purposes of the counterclaim. The second document is exhibit D4 comprising photocopies of two cheques numbers 000269 and 000270. Other documents include

exhibit P14 which is a loan agreement between different parties' altogether and there is no need to consider it. Exhibit D3 is stated to be a letter written by the Plaintiffs managing director PW1 to the managing director of the first Defendant authorising the sale of the vehicle.

The question therefore is whether there was compliance with section 6 (1) of the Money Lenders Act. It is a requirement that a note or memorandum is to be delivered to the borrower within seven days of the making of the contract. The contract is supposed to be signed before lending the money or before the security is given. The primary intention of section 6 is to ensure that money lenders have on the record a note or memorandum which shall contain all the terms of the contract and in particular under section 6 (2) of the Money Lenders Act the note or memorandum shall contain the following particulars:

- All the terms of the contract and in particular:
  - the date on which the loan is made;
  - the amount of the principal of the loan;
  - Either the interest charged on the loan expressed in terms of a rate percent per year; or
  - The rate percent per year represented by the interest charged as calculated in accordance with the provisions of the Schedule to the Act.

The post dated cheques were presented as security for a loan. I have already held that because there was no notice of dishonour of the cheques, the Defendant cannot rely on it. Secondly and specifically the cheques in question which have been exhibited cannot be used as a memorandum or note because they do not contained the ingredients required under section 6 (2) of the Money Lenders Act which has been set out in the bullets above. The provisions of section 6 (2) (supra) are mandatory because it provides that "*the note or memorandum aforesaid shall contain*…" Thirdly there is no evidence whatsoever of any note or memorandum adduced by the Defendants or admitted by the Plaintiff as between the Plaintiff and the Defendants in terms of section 6 (1) and (2) of the Money Lenders Act. Last but not least the cheque was presented as 'security' or 'payment' and not as a note or memorandum. In any case there is a specific provision for security under section 6 (1) of the Money Lenders Act that is different and separate from the provision dealing with the "note or memorandum".

I agree with the submission that where a statute prohibits a contract or where a contract is drawn in breach of a statutory provision, that contract is not enforceable in a court of law. Specifically section 6 (1) provides that where there is no note or memorandum in terms of the provision, the contract for the payment of money borrowed or security shall not be enforceable. In other words an action cannot be maintained to enforce a money lending contract which does not comply with the terms of section 6 (1) and (2) of the Money Lenders Act. The conclusion is based on the wording of the statutory provision. It is further supported by case law. The case law was considered in the case of **MTN Uganda Limited vs. Three ways Shipping Group Ltd HCCS No 503 of 2012** where the case law is cited. In the case of **Bostel Brothers, Ltd versus Hurlock**

[1948] 2 All ER 312, Somervell L.J held at 312 following earlier precedents that the principle is that:

> "The principle of law relied on... (Is that) "*What is done in contravention of the provisions of an Act of Parliament cannot be made the subject-matter of an action*."

D.J Bakibinga in the textbook: **Law of Contract in Uganda, Fountain Publishers 2001** at page 93 discusses illegal contracts and states that:

> "A contract which is illegal is void. Illegality may manifest itself in four main ways. First, in the formation of the contract e.g. where an unlicensed moneylender makes a loan. Second, in the performance of the contract e.g. a contract to commit a crime. Third, in the consideration for the contract. Finally, illegality may be evident in the purpose for which the contract is made; for instance where a vehicle is hired for the purpose of smuggling items into the country. The contract is illegal if it is (i) contrary to public policy and (ii) forbidden by statute."

In this case the statute forbids enforcement of money lending transactions without a memorandum or note containing the terms of the contract which include the date on which the loan is made, the amount of the principal, and the interest charged in terms of section 6 (2). Any transaction made in contravention of section 6 of the Money Lenders Act is not enforceable on account of being in breach of the statute. In the premises there is no need to consider the provisions of section 8 which deal with obligation to supply information to the borrower or the provisions of section 10 of the Money Lenders Act that deals with the powers of the court. The above holding resolves issue number one.

In the premises therefore the Defendants have not proved entitlement to the counterclaim being a claim for **Uganda shillings 40,000,000/=**. Secondly issue number one as to whether the Plaintiff's are indebted to the Defendants is answered in the negative with judgment being entered for the Plaintiff on the issue.

Whether the sale of the Scania Bus Registration Number UAJ 653U by the Defendants was unlawful?

Issue number two ought to have been answered by issue number one on the finding that any money lending transaction between the Plaintiff and the Defendant is not enforceable because there is no memorandum or note as prescribed by section 6 of the Money Lenders Act.

In the first place section 6 (1) of the Money Lenders Act prohibits the enforcement of the security and any money lending transaction where there is no note or memorandum as prescribed by a court of law. Secondly the evidence is that the logbook of the suit vehicle was deposited as security which evidence is credible and has been proved to the satisfaction of the court. However I do not need to consider the right of the Defendant to dispose of the security without being

produced in court a memorandum or note in terms of section 6 of the Money Lenders Act. In terms of section 10 of the Money Lenders Act an action for the enforcement of any agreement or security made or taken in respect of money lent cannot be enforced without the Plaintiff or counterclaimant producing a statement of his or her account as prescribed in section 8. Of course there can be no statement of account where there is no agreement as prescribed by section 6 of the Money Lenders Act. It is in the interest of money lenders licensed under the Money Lenders Act to comply with the provisions of the Money Lenders Act so that contracts of money lending could be enforced either for the benefit of the borrower or the lender.

Nevertheless what is being advanced is whether the sale of the vehicle was lawful. In other words there is no action for enforcement of the security. The question is whether the enforcement of the security in breach of section 6 of the Money Lenders Act is lawful? The question to be considered is in addition to and despite the finding in issue number one. It is based on exhibit D3 which is a letter dated 20th of August 2012 addressed to the managing director of the first Defendant company and said to have been written by the managing director of the Plaintiff authorising the first Defendant company to sell the bus. The question is considered on the merits and not on the basis of whether there was an enforceable contract between the Plaintiff and the Defendants. This is because an agreement to sell property between two persons cannot be an illegality.

A review of the evidence starts from the testimony of PW1, the alleged author of exhibit D3 and managing director of the Plaintiff Company. His testimony is that it is not true that he gave authority to the second Defendant to sell the vehicle and that the document in question was forged. His reasoning is that all his official letters start with the date, month and end with the year. Secondly the font used in the letters is different from the one used in the forged letter. Thirdly he always signs his letters using the names namely Eric Patrick Ayo. Fourthly he includes his title of being the managing director of the company according to an illustration in a letter dated 5th of May 2011. This is exhibit P 17. Furthermore the stamp in the questioned document exhibit D3 was no longer in use by 16 February 2009 according to the letter dated 16th of February 2009 to illustrate the point at page 48 of the trial bundle. The 'watermark' was also different. By 2009 they used the 'classic' watermark while they are currently using the Royal Executive Bond. Lastly he testified that the second Defendant got a blank headed paper when they requested his friends Mr Adonyo Moses and Akonyo Robert at the time they got a loan of Uganda shillings 30,000,000/= and when they used his logbook. The blank letterhead was never returned. Additionally at the time he was still working in Diamond Trust building on the fourth floor room 414 and the letterhead had the particulars thereof. On 15 June 2011 they moved to suit 415 of the seventh floor and the letterhead was changed to include the particulars of the office. In November 2011 they shifted to Diamond Trust building on the second floor Suite 205 but the letter dated August 20, 2012 and reads Suite 414. In July 2012 the company shifted to Amber House. PW1 was extensively cross examined on the issue of forgery. He testified that he did not sign exhibit P3 dated 20th of August 2012. He reported the matter to the police. Cross-

examination did not cast any doubt about the conviction of PW1 that exhibit D3 was forged. He however did not deny that the Defendant had been given a blank letterhead which was no longer in use by the Plaintiff Company.

The testimony of PW2 as is relevant to the issue is that she got a call from her brother (PW1) informing her that the second Defendant had attached the bus which had been removed from a garage yet she had informed the second Defendant that the payments would delay because the bus was under repair. She expressed surprise at the development and tried to call the officials of the first Defendant. A search was carried out to recover the bus but only seats were recovered. The matter was reported to the police. PW2 was cross examined about whether the vehicle had been impounded by the police and why.

PW3 Mr Matanda Robert gave direct testimony on the issue. He testified that he was called by the director of the first Defendant who informed him about the person who had defaulted to service his loan of one month interest. He traced the vehicle through PW2 who gave him the information about the whereabouts of the bus after he requested her for the information. Upon taking photos of the bus, the mechanics wanted to know why he was doing so. Secondly he was given photocopies of the inspector of vehicles report and other forms indicating that the vehicle was impounded by the police due to mechanical defects. Furthermore he obtained copies of invoices and receipts showing that the vehicle was being repaired. The mechanics resisted his action to impound the vehicle. On the 21st of August 2012 he went back to the mechanic who goes by the names Ivan who requested for money for keeping the bus in his garage at a sum of **Uganda shillings 700,000/=**. The second Defendant gave him the money which he gave to Ivan whereupon on 21 August 2012 he went to the garage and collected the bus on the instructions of the second Defendant for parking in the second Defendant's parking yard. He did not have a court order or consent letter and only came to learn that the Defendant sold the vehicle as scrap. On 12 November 2012 the second Defendant was served by the Plaintiff's lawyers with a notice of intention to sue. He called PW3 and DW 2 whereupon he produced blank headed letters of the Plaintiff together with two blank cheques of bank of Africa. He instructed the Betty (DW2) to write a letter from the Plaintiff indicating that it had authorised the Defendant to sell the bus. Secondly the second Defendant gave him a yellow empty letterhead of the Plaintiff to photocopy whereupon he made six photocopies and retained one. DW2 Mrs Betty went and typed a letter addressed to the managing director of the first Defendant which paper had a signature and stamp of PW1. Upon being cross - examined on the issue he testified that he did not report to the police because he participated in the forgery. He was given the blank letterhead to photocopy. Secondly the cheques were blank and signed by the directors of the Plaintiff. He also saw the logbook which was in the file with the second Defendant and was the security for the loan. The director of the Plaintiff was indebted. Lastly he testified that it was the business practice of the second Defendant to get blank cheques and blank letterheads from customers.

DW1 who is also the second Defendant for his part testified that the Plaintiff wrote to him authorising the first Defendant to sell the Scania bus. On cross examination he testified that he did not forge the document. He remembers that it was a document which the Plaintiff Company wrote. Furthermore he testified that the letter could have been received at the reception perhaps. He did not know who delivered the letter exhibit D3.

DW2 testified that the Plaintiff on 20 August 2012 wrote to the managing director of the first Defendant authorising the sale of the Scania bus. Upon being cross examined on exhibit D3 she stated that she had ever seen the document before. She had seen it for the first time at Old Kampala Police Station. Initially she denied having been charged with forgery. She did not see the document in her office and that it was the second Defendant who took it to the said police station. She denied having participated in any forgery of the letter.

I have carefully considered the evidence and the submissions under section 101 of the Evidence Act that the burden is on the person asserting a fact to prove it. Section 101 (1) provides that:

> "(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist."
>
> (2) Where a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."

It is true that the Plaintiff asserts that exhibit D3 authorising the Defendant company to sell the bus is a forgery. Secondly under section 102 of the Evidence Act the burden of proof in the suit or proceeding lies on that person who would fail if no evidence at all were given on either side. Thirdly under section 103 of the Evidence Act, the burden of proof as to any particular fact lies on the person who wishes the court to belief in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.

The Plaintiff is likely to lose the argument that the sale of the bus by the Defendants is unlawful or unauthorised if it had given consent to the sale. However the question of whether exhibit D3 is a forgery is two-faced. The Defendant is also likely to lose if it is proven that exhibit D3 is a forgery. In other words it is a defence to the assertion that the motor vehicle was sold without justification for the Defendant to prove that exhibit D3 was duly executed and reflected the Plaintiff's consent. The Defendant's officials do not deny having sold the Plaintiff's bus. The Defendants did not deny the title of the Plaintiff to the bus. The Defendant's Counsel submitted that the Defendant had the right to sell the bus on the basis of the deposit of the logbook for the loan which the Plaintiff took and had defaulted in repaying according to the terms of the loan agreement. In resolving issue number one however it is clear that the security was not enforceable to recover any loan advanced to the Plaintiff because the contract was not enforceable under section 6 (1) of the Money Lenders Act cap 273 laws of Uganda. This is

because there was no evidence of any note or memorandum executed as prescribed under the above statute. Consequently the only basis upon which the Defendant can be excused is the assertion (subject to proof) that the Plaintiff consented to the sale of the motor vehicle.

The case of the Plaintiff as pleaded in the plaint paragraph 4 (e) and (f) thereof is that on 21 August 2012, without any right or authority the Defendants caused the removal of the bus from the garage and forcefully took it under their custody. Secondly without the consent of the Plaintiff or their authority the Defendants in an act of conversion commissioned one Moses Sebadduka to unlawfully dismantle the bus and sell it as scrap at a cost of **Uganda shillings 10,000,000/=**.

In the written statement of defence the Defendant denied the assertions and averred under paragraph 8 thereof that the bus was impounded by the police because of its poor mechanical condition and as such it was in a 'scrap state' and its value could not have been **Uganda shillings 395,960,000/=** as alleged by the Plaintiff. Secondly the Defendants deny having converted the vehicle into scrap and disposing of it at a sum of **Uganda shillings 10,000,000/=** unlawfully. Strangely annexure D3 which is the questioned documents is attached to the Defendant's counterclaim as annexure "A". In paragraph 12 of the counterclaim, the counterclaimant/Defendant averred that the Plaintiff acknowledged its indebtedness to the counterclaimants when on 20 August 2012 it authorised the sale of the Scania bus to enable the counterclaimant recover part of the loan.

It is therefore the counterclaimant who asserted that there was consent of the Plaintiff. In the defence to the Plaintiff's assertion of unlawfully disposing of the vehicle, there is a mere denial. In summary the burden is on the Plaintiff to prove that exhibit D3 is a forgery. A review of the evidence has been made above. The Defendant in the counterclaim clearly asserted that the Plaintiff gave consent to sell the vehicle and attached annexure "A" which was later admitted in evidence as exhibit D3. The only evidence on the matter is that of PW1. In my assessment of the evidence I have come to the conclusion that it is more probable that the Defendant had a blanket security in which he was given blank cheques for a loan by the Plaintiff. Secondly it was given a blank letterhead of the Plaintiff.

The evidence is however more complex. PW1 was able to point out significant differences in the letterhead which he alleged had been given in an earlier transaction. He invited the court to compare exhibit D3 with exhibit PE 17. I have carefully considered the two exhibits. Exhibit P17 is a letter dated 5th of May 2011 written by PW1. PW1 wrote his names as Eric Patrick Ayo. Secondly under the names is the title managing director in capital letters. Other documents include a letter dated 16th of February 2009 at page 48 of the trial bundle as well as a letter dated 16th of August 2012 at page 49 of the trial bundle in which the same pattern of signatures and writing of names is repeated. On the other hand exhibit D3 has the names Eric Ayo. The name Patrick is missing from the middle as compared to the other three letters. Secondly the words "managing director" are not written below the names. Another significant difference is in the

stamp. The first major difference is it has a place in the middle for the date which is always written in exhibit P17, the letter dated 16th of August 2012 and another letter dated first of December 2011.

In exhibit D3 there is a small stamp which does not have space for the date included in the stamp. The previous 4 letters on various dates even have a star sign on both sides of the date in the middle of the stamp. There are different office numbers for all the letters and as appears in the testimony of PW1 that they shifted offices. In the circumstances I am inclined to believe PW1's testimony that the headed letter exhibit D3 was a previous headed letter of the Plaintiff which was in use in 2009. In the letter dated 16th of February 2009 the stamp in question is evident. It shares the same stamp as exhibit D3. The rest of the letters have different stamps and were written variously on the 5th of May 2011, 16th of August 2012 and 1 December 2011.

It is highly improbable that the Plaintiff would use a discarded letterhead together with an office number which they have since vacated by 2011. All the subsequent letters of the Plaintiff from the year 2011 onwards demonstrate that the Plaintiff was using a different letterhead and a different stamp as well as a different office number in its letterhead. As a limited liability company the Defendant is obliged to notify the Registrar of Companies of any change of address. The office number on 5 February 2011 is Suite 415. In exhibit D3 it is Suite 414. This is the same as the letter dated 16th of February 2009 at page 48 of the trial bundle. In the letter of 16th of August 2012 the Plaintiff's letterhead has the address of Amber House. This was before the letter of 20th of August 2012 exhibit D3. Yet exhibit D3 shows that the Plaintiff was in the Diamond Trust Building.

I have additionally considered exhibit D4 which is the statement of DW1 to the police. In this statement he states inter alia that on 20 August 2012 one of the directors Mr Erick Patrick gave a letter authorising them to sell the bus which was in a poor mechanical condition. However the evidence is very clear that the bus was impounded while it was still in service by the police. I do not believe the testimony of DW1 that the vehicle was in a scrap state. The motor vehicle inspection report exhibit D1 is very revealing about the condition of the vehicle. It makes a list of several things as follows:

1. The indicator lights were defective.
2. Windscreen wiper system was defective.
3. Rear side shock absorbers were defective.
4. Offside rear inner tyre was worn smooth.
5. The body was shabby and dusty.
6. One of side window glass was broken.
7. Front guard was loose and shabby.
8. Front shock absorbers were defective.

The remarks were that the vehicle was in a dangerous mechanical condition and should be deregistered pending repair. The testimony of PW1 and PW2 confirms that the vehicle was impounded and released for repairs. Secondly evidence of vouchers and receipts were admitted on the question of the repairs. Exhibit P7 is the quotation for carrying out repairs consistent with the inspection report. The quotation is for **Uganda shillings 19,828,000/=** by I.M Engineering Lubaga and is dated 19th of July 2012. If the Plaintiff needed any money it was for the repair of the motor vehicle. Furthermore most of the items costs are for repairs on the body parts of the bus. Exhibit PE 8 is the receipt from I.M Engineering Lubaga dated 23rd of July 2012 wherein the engineering firm acknowledges **Uganda shillings 8,000,000/=** from the Plaintiff leaving a balance of **Uganda shillings 11,820,000/=**. The conclusion is that the vehicle was for repair in order to put it back on the road. Secondly PW2 testified and I believe the testimony that she was called from Lira when the vehicle had been impounded and she called the Defendants and informed them that the vehicle was still under repair so the bus was not working. I also believe the testimony that the vehicle was capable of generating income to pay the Defendants. The vehicle was not checked for any engine trouble and the assumption is that the engine was okay. The list of items listed by the Inspector of Vehicles had something to do with roadworthiness and safety. The vehicle was not scrap and the Inspector of Motor Vehicles recommended repairs. Moreover there are inconsistencies in the testimony of DW1 and DW2 on the question of duration of the loan. Was the loan for one month or two Months? The evidence was made to coincide with the date on the cheque. It was in those circumstances highly improbable for PW1 to write to the Defendant to sell the vehicle when efforts were made to put in back on the road where it would earn more money. In the premises exhibit D3 was not duly executed. Coupled with the fact and the finding of the court that there was no evidence of any note or memorandum in terms of section 6 (1) of the Money Lenders Act and therefore the Defendants were not entitled to enforce any security to realise the loan, issue number two on whether the sale of the bus was unlawful is answered in the affirmative. The sale of the bus by the Defendant was unlawful and judgment is entered for the Plaintiff on issue number two.

Remedies

Claim for special damages.

The Plaintiff claims the sum of **Uganda shillings 395,960,000/=** being the costs of the suit vehicle equivalent to **US$127,000** according to the tax invoice and delivery note exhibit P3. Counsel submitted that this value was never challenged. Secondly as far as the evidence is concerned there is uncontroverted evidence that the vehicle was sold as "scrap". Neither party valued the vehicle at the time of its sale.

The Defendants Counsel submitted based on several precedents referred to in the submissions which have been reproduced above that it is a general principle that the value recoverable in an action for conversion is the value of the property at the date of conversion and not its value at an earlier or later date according to the case of **Caxton Publishing Company versus Sutherland**

Publishing Company (1939) AC 178 at 192 and 193. On the other hand the Plaintiff's Counsel in rejoinder submitted that the duty was upon the Defendant to value the vehicle before sale.

I agree with the law that the value of the vehicle should be at the time of its conversion. Consequently the claim for repairs cannot be recovered but can only be a factor in the valuation of the suit vehicle at the time of its sale. The Plaintiff did not prove the value of the property at the time of its conversion by the Defendant. The court does not have the benefit of expert evidence on the valuation of the bus neither does it have evidence of the market rates. Special damages do not only have to be specifically pleaded they are also strictly proved. According to **Halsbury's Laws of England, 4th ED Vol. 12(1) at paragraph 812,** special damages is those damages which are capable of calculation in financial terms and must be proved. In the case of **Kyambadde v. Mpigi District Administration [1983] HCB 44**, it was held that special damages must be specially pleaded and strictly proved, but does not have to be supported by documentary evidence in all cases. Special damages, on the other hand, are such as the law will not infer from the nature of the act. They do not follow in the ordinary course. They are exceptional in their character, and, therefore, they must be claimed specially and proven strictly. (See also the cases of **Musoke vs. Departed Asian Custodian Board [1998 1994] E.A 219; Uganda TELECOM vs. Tanzanite Corporation [2005] E.A 351; Asumani Mutekanga vs. Equator Growers Uganda Limited [1995 – 1998] 2 EA 219; Uganda Breweries Ltd vs. Uganda Railways Corporation (SCCA NO. 6 OF 2001) and Uganda Commercial Bank vs. Deo Kigozi [2002] 1 EA 293)**.

Where special damages relating to the value of the vehicle have not been proved and in the absence of a claim for the equivalent value of the converted item through its replacement, the Plaintiff can only recover general damages.

Loss of Earnings

The Plaintiff claims loss of earnings for failure to use the vehicle at the rate of **Uganda shillings 1,675,000/=** for 135 days amounting to **Uganda shillings 226,125,000/=.** The Plaintiff further seeks recovery of **Uganda shillings 8,000,000/=** being the deposit on the repair of the bus. The Plaintiff further seeks transport & subsistence costs for PW2 who travelled from Lira to Kampala to pursue the matter with the police on 12 occasions at **Uganda shillings 200,000/=** per trip amounting to **Uganda shillings 2,400,000/=.** In total the Plaintiff seeks payment of **Uganda shillings 239,025,000/=**. The Defendant opposed the claim on the ground of lack of evidence. The vehicle was at all material times packed in the garage and was not operational and the Plaintiff could not claim financial loss.

I agree with the Defendant's submission. The Plaintiff can only claim loss that is proved. Secondly the vehicle was parked and subsequently sold. Any other damages which could be a natural consequence of the conversion of the bus can only be claimed as general damages if not

specifically proved. In the premises the Plaintiff has proved loss of **Uganda shillings 10,400,000/=** which is hereby awarded as special damages.

General damages

The Plaintiff claims general damages of **Uganda shillings 250,000,000/=.** Assessment for general damages is based on the principle of *restitutio in integrum* according to East African Court of Appeal in the case of **Dharamshi vs. Karsan [1974] 1 EA 41.** The principle means that the Plaintiff has to be restored as nearly as possible to a position he or she would have been in had the injury complained of not occurred. According to **Halsbury's laws of England fourth edition (reissue) volume 12 (1) and paragraph 802** thereof damages are defined as the pecuniary recompense given by the process of law to a person for the actionable wrong that another has done him or her. Damages may, on occasion, be awarded to a Plaintiff who has suffered no ascertainable damage and damage may be presumed. General damages are those damages which will be presumed to be the natural or probable consequence of the wrong complained of; with the result that the Plaintiff is required only to assert that such damage has been suffered.

The Plaintiff has proved that the bus was for repairs and would have been put back on the road if the repairs were completed. The Plaintiff was earning income from the bus. There is no evidence as to how long the Plaintiff would have continued to earn income from the bus. The Plaintiff seeks the replacement value of the vehicle but did not carry out any valuation of the vehicle in the circumstances of the case. Taking into account the apparent economic loss sustained by the Plaintiff for the loss of the vehicle, the evidence is that the vehicle was purchased some time in 2007. It was subsequently impounded July 2012 about six years later. The bus had depreciated during the 6 years of service. It had been impounded for being in a dangerous mechanical condition though the plaintiff spent some money for its repair. Taking into account depreciation at a reasonable rate in the resale value of the asset per annum, the Plaintiff would be awarded 35% of the cost price of the bus together with damages for inconvenience of **Uganda shillings 20,000,000/=**.

In the premises the Plaintiff is awarded a total of **Uganda shillings 158,586,000/=** as general damages.

Exemplary damages

Exemplary damages are defined by **Osborn's Concise Law Dictionary** as damages awarded in relation to certain tortious acts (such as defamation, intimidation and trespass) but not for breach of contract. The grounds for award of exemplary damages were considered by the Court of Appeal of East Africa sitting at Nairobi in the case of **Obongo and another v Municipal Council of Kisumu [1971] 1 EA 91** per Spry VP at page 94 giving with approval a summary of the principles in **Rookes vs. Barnard [1964] A.C. 1129**:

> "In the first place, it was held that exemplary damages for tort may only be awarded in two classes of case (apart from any case where it is authorized by statute): these are, first, where there is oppressive, arbitrary or unconstitutional action by the servants of the government and, secondly, where the Defendant's conduct was calculated to procure him some benefit, not necessarily financial, at the expense of the Plaintiff. As regards the actual award, the Plaintiff must have suffered as a result of the punishable behaviour; the punishment imposed must not exceed what would be likely to have been imposed in criminal proceedings if the conduct were criminal; and the means of the parties and everything which aggravates or mitigates the Defendant's conduct is to be taken into account. It will be seen that the House took the firm view that exemplary damages are penal, not consolatory as had sometimes been suggested".

The Defendants are already facing criminal prosecution and I would not make any comments about the merits of the case. However the Defendant was operating in violation of section 6 of the Money Lenders Act. Secondly Defendant used a letterhead of the Plaintiff falsely to absolve itself. Thirdly the vehicle was sold as scrap when it was undergoing repairs and partial payment had been made for the repairs. It was sold for an incredibly low sum of money and dismantled to the extent that only the seats were recovered. It was sold for the sum of **Uganda shillings 10,000,000/=** only and part of the money went to recover costs. The Defendant acted without regard to the interest of the Plaintiff or the market value that could be obtained in a public auction. If a sale was to be conducted, notice ought to have been given to the Plaintiff to redeem the property. Secondly it ought to be advertised in order to attract the fairest price. The sale was conducted in secrecy. In the premises the first Defendant was operating outside the law and as a person licensed to carry on a money lending business, exemplary damages would be awarded for the manner in which the Plaintiff was treated by the Defendant. The Plaintiff is awarded exemplary damages of **Uganda shillings 10,000,000/=.**

Interest

Section **26 (2) of the Civil Procedure Act** give courts discretion to award reasonable interest in a decree for the payment of money. It provides that:

> "Where and insofar as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or such other earlier date as the court thinks fit."

In the premises reasonable interest will be awarded at a commercial rate of 21% per annum on the sums awarded above from the date of judgment till payment in full.

As far as the counterclaim is concerned, upon issue number one having been decided in favour of the Plaintiff, the counterclaim stands dismissed with costs.

The suit of the Plaintiff succeeds with costs.

Judgment delivered in Open Court the 26th day of August 2014

Christopher Madrama Izama

Judge

Judgment delivered in the presence of Counsel John Paul Baigana and John Mary Muwaya for the plaintiff and Erick Patrick Ayo Director of plaintiff also present.

Counsels Innocent Tareemwa and Baluku Ronald for the Defendant present

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

26/08/2014