THE REPUBLIC OF UGANDA,

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

HCCS NO 0432 OF 2006

NASOLO KALEMA FARIDA TA CONTOUR BUS COACH}.....PLAINTIFF

VS

DFCU LEASING CO LTD}.....DEFENDANT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

JUDGMENT

The Plaintiff filed this action for recovery of special and general damages for breach of contract and conversion. The Plaintiffs claim is that the Defendant leased a bus registration number 432 UDU to the Plaintiff under a written understanding that upon successful completion of payment of rental fees, the bus will become the property of the Plaintiff. That by 17 January 2001, the Plaintiff had paid all the monthly rental fees with extra pay of Uganda shillings 4,338,317/=. On 17 January 2001 for no justifiable cause the Defendant's agents in the course of their employment impounded the bus on the pretext that the Plaintiff had defaulted on payment of rentals. The Defendants have since converted the bus to their own use with the intention of permanently depriving the Plaintiff of ownership thereof. It is averred that as a result the Plaintiff suffered both special and general damages for which the Defendant is vicariously liable. The Plaintiff claims special damages of Uganda shillings 485,438,317/=, general damages, exemplary damages, costs of the suit and interest at 30% per annum from the date of filing the action till the date of judgement and from the date of judgement till payment in full.

The Defendant denied the claim and contended that on 14 January 1998 the Defendant leased the Plaintiff the vehicle in question at a capital cost of Uganda shillings 76,775,278/= upon which the Plaintiff was required to pay rentals of Uganda shillings 2,971,203/= exclusive of VAT monthly. Subsequently the Plaintiff consistently defaulted on the rental payment obligations and by 14th of December 2000 when the lease agreement was terminated the Plaintiff had accumulated arrears to the tune of Uganda shillings 29,337,430.47 and a demand for payment of the same was made. Upon inspection of the bus it was established by the Defendant's servants that the bus had been run down and its major engine components were missing. Furthermore that the Plaintiff had illegally and unlawfully tampered with the chassis and engine numbers of the vehicles and it became the subject of police investigation. The Plaintiff had illegally used license and third-party stickers for the bus on another bus which was involved in an accident. The

Defendant lawfully terminated the lease on the grounds averred in the written statement of defence.

The hearing of this case originally proceeded before Honourable Justice Lameck Mukasa up to the time when the Plaintiff closed its case and the matter was for defence. The Plaintiff called two witnesses namely the Plaintiff herself as PW2 and the financial manager of the Plaintiff Mr Atabua Ali as PW1. The Defendant called two witnesses while the court examined a third witness who was part of the team of auditors appointed by the parties for reconciliation of accounts. Counsel Ruth Sebatindira of Ligomarc Advocates represented the Defendant while Counsel Moses Tugume of Messrs Tugume – Byensi and Co Advocates represented the Plaintiff.

On 13 December 2012 when the suit was mentioned before me I directed that an auditor be appointed by the parties for purposes of reconciliation of accounts namely the lease account of the Plaintiff with the Defendant concerning the lease on the question of what money was owing, if at all, under the lease agreement. The parties appointed joint auditors. The Plaintiff appointed Team and Company Certified Public Accountants and the Defendant appointed BMR Associates. The terms of the appointment of the auditors were as follows:

1. The audit will be completed within 30 days.
2. The audit period is the date of commencement of the lease until termination of the lease.
3. The auditors will establish whether there was an outstanding amount at the time of termination of the lease and how much?
4. The auditors were to note any dispute as to instruments such as deposit slips etc and make it part of the report.
5. The audit report was to be jointly authored.
6. The report was required to be presented to the court with a copy to both parties.
7. Each party was to pay its own auditor.

A big component of the Plaintiffs claim is a dispute about what transpired in the lease account for Motor Vehicle Bus UDU 442 with the Defendant and it requires reconciliation of accounts because the Plaintiff claims inter alia that the leased asset had been unlawfully repossessed because she did not owe money to the Defendant. Consequently the first primary question of fact is what the state of accounts of the Plaintiff with the Defendant Company was at the time of termination of the lease? The audit report partially deals with the first issue which is whether the Plaintiff was indebted to the Defendant and if so to what extent by 14th of December 2000?

1. Whether the Plaintiff was indebted to the Defendant and if so, to what extent by 14 December 2000?

Submissions of the Plaintiffs Counsel on issue no 1.

In the written submissions of the Plaintiff's Counsel, the Plaintiff relies on the audit report as well as the testimony of PW1 and PW2. He submitted that PW1 the finance manager of the

Plaintiff was able to prove that the Plaintiff paid all the lease rentals according to the agreement and even overpaid by Uganda shillings 4,338,317/=. PW1 testified under the first issue that the Plaintiff was entitled to refund due to the overpayment. The contention of the Plaintiff that the Plaintiff had overpaid the Defendant as far as the lease is concerned is also contained in a letter exhibit P2 written on behalf of the Plaintiff by the Plaintiff's former lawyers informing the Defendant bank that there was overpayment by the Plaintiff on the lease account. PW1 testified on monies paid by the Plaintiff which were not reflected in the lease account and those which were paid on another account. PW2 on the other hand testified about having paid her monthly rental and that she was surprised to hear that her account was in arrears. She however relied more on the testimony of PW1. Secondly the Defendant reversed several payments made for the bus UDU 422 account to another account in respect of bus registration number UAA 044Q.

As far as the audit report is concerned the Plaintiff's Counsel submitted that under section 26 (1) of the Judicature Act, the report of a special referee may be adopted wholly or partly and if so adopted may be enforced as a judgement. On that basis be relied on Halsbury's Laws of England 4th edition volume 17 (1) page 331 paragraph 764 on the duties of a special referee and that the question or issue should be within his expertise. The Plaintiff's Counsel submitted that the audit report is self-explanatory and eases the courts work in resolving the first issue and prayed that the report is adopted as part of the courts findings.

Submissions of Defendant's Counsel in reply on issue 1

On the first issue the Defendants Counsel submitted in reply that it was imperative to understand the nature of the transaction governing the parties to the dispute before a resolution of issues. It was not in dispute that the transaction is a finance lease in respect of a vehicle Isuzu bus registration number 422 UDU. The transaction was governed by a Master Lease Agreement dated 14th of January 1998 exhibit D1 and a vehicle is schedule attached hereto dated 14th of January 1998 exhibit D2. Particularly the Defendants Counsel submitted that the documents covered the relationship between the parties and DW1 referred to clause 2 (a) for the contention that during this period, the borrower holds the vehicle on behalf of the lessor and has no right of ownership until full completion of the lease. Counsel further relied on the case of **Nassolo Farida versus DFCU Leasing Company Ltd HCCS 536 of 2006,** a decision of Honourable Justice Lameck Mukasa. The conclusion is that the transaction between the Plaintiff and the Defendant was a finance lease under which the Defendant was the registered proprietor of the suit vehicle and had proprietary rights over the same. The Defendant permitted the Plaintiff to use the vehicle and that the Plaintiff would have quiet possession and enjoyment of the bus on condition that she fulfilled all the terms and conditions of the lease. The right to quiet possession was subject to the terms and conditions of the agreement. The primary lease period was three years from 1 February 1998 to the 31 January 2001. The second lease if any would be for a period of two years commencing on the day following the expiration of the primary lease period.

As far as the first issue is concerned the Defendant's case is that the Plaintiff was indebted to the Defendant as at 17th of January 2001 when the Defendant repossessed the suit bus. DW1 the administrator/a technician in the Defendant Company was involved in managing the portfolio of customers assigned to him for queries and payment correspondences. He assigned the Plaintiffs account in 2000 when her loan had problems. The Plaintiffs account was stagnant because the scheduled rental payments were not being made by the Plaintiff. From the date of 14th of March 2000 the account of the Plaintiffs started accumulating arrears from Uganda shillings 3,474,000/= and continued growing steadily up to Uganda shillings 23,561,689/=. By 30th of November 2000, DW1 testified that from the statement of account on 17 October 2000 the Plaintiff was in arrears of Uganda shillings 17,600,000/= and only managed to pay Uganda shillings 1,000,000/=. At the time of termination of the lease, the Plaintiff was indebted to the Defendant to the tune of Uganda shillings 23,561,689/=. Upon termination this amount increased to Uganda shillings 29,337,430/= inclusive of the termination settlement fee. The Defendant terminated the lease agreement on 14 December 2007 they applied the security deposit of Uganda shillings 15,000,000/= towards reducing the termination rental payment amount and therefore what was owed was Uganda shillings 14,337,430/=. The security deposit would only be refunded if the Plaintiff did not breach any terms or if there was no breach. Where there was a breach, it would be offset against the final rental payments and that is what happened. Upon termination an application of the security deposit to offset the debt, the outstanding balance was Uganda shillings 14,337,430/=.

As far as the joint auditor's report is concerned, the Defendants Counsel does not agree with the Plaintiff's Counsel's submission that the court was right to appoint auditors to produce an audit report under section 26 (1) of the Judicature Act or the interpretation of the audit report. The Defendant's case is that the major question for the auditors to determine was whether at the time of termination of the lease, there was any outstanding amount due to the Defendant and if so how much. This question was answered by the joint auditor's report in the affirmative. The audit report indicates that at the date of termination, according to undisputed facts regarding rentals.

The Defendants defence is that is that the total sum owing is Uganda shillings 23,637,439/= and upon offsetting Uganda shillings 15,000,000/=, the debt would be reduced to Uganda shillings 8,637,439/=. Counsel concluded that because the auditors did not offset the settlement fee of Uganda shillings 5,775,740/= the erroneously arrived at on outstanding amount of Uganda shillings 2,861,699/=. The Defendant was entitled to charge the said amount upon termination of the lease prior to its expiry. Termination settlement is a right accruing under clause 9A (ii) of the lease agreement exhibit D1. It is also provided for under clause 3 (h) of the lease agreement. It is also future rental under the financial lease. The obligation ends upon full payment under the lease arrangement. After termination of the lease agreement and offsetting the security deposit, the Plaintiff was indebted to the Defendant in the sum of Uganda shillings 2,861,699/=. Given that the Plaintiff was in breach of the financial lease, the Defendant was entitled to charge the settlement/termination fees amounting to Uganda shillings 5,774,740/= giving an outstanding

balance owing of Uganda shillings 8,637,439/=. The audit report shows that the undisputed facts prove that the Plaintiff was indebted to the Defendant. The defence is only on the exact amount outstanding. If the court adopts the auditors findings, the undisputed amount is Uganda shillings 8,637,439/=.

As far as the disputed payments are concerned, it was the instruction of the court for the auditors to state the disputed issues for determination by the court. The auditor's terms of reference were limited to auditing and reconciling payments for the account in question. The auditor's opinion regarding reversals of payment was based on suppositions made from disputed facts. For instance the reversal of payments does not take into account the fact that the payments were applied to discharge the Plaintiff's obligations on the second bus and to settle the bounced cheque. The Defendant's evidence proving the application of the disputed amounts stands unchallenged as the Plaintiff did not adduce any evidence to rebut the fact that the payments indeed were reversed and applied to the second bus. The Plaintiff benefited from the reversal of the payments and her obligations on the other bus had been reduced on that account. Secondly the reversals were used to settle a bounced cheque. The Defendant evidence remained unchallenged as the Plaintiff did not adduce any evidence to rebut the fact that the payments indicated as reversals were accordingly applied. Both buses were leased under the same Master Lease Agreement and the Plaintiff cannot seek to have a double application of the same payments.

Furthermore the Defendants Counsel disagreed with the Plaintiff's submission that the reversals of payments from one bus account to another was illegal on account of the lack of consent of the Plaintiff. The Defendant's submission is that the bank has the right to combine two or more accounts belonging to the same person and this is known as a right of set-off. Counsel relied on the case of **Obed Tashobya versus DFCU bank Ltd HCCCs No. 722 of 2004** where Honourable Justice Geoffrey Kiryabwire (judge of the High Court as he then was) quoted with approval the statement of law in **Halsbury's laws of England volume 3 (1)** (fourth edition) paragraphs 198 which provides that unless precluded by agreement, a banker is entitled in the course of business to combine accounts kept by the customer in his own right even though at different branches of the same bank and to treat the balance, if any, as the only amount really outstanding to his credit. According to Paget's Law of Banking, the bank may combine two accounts at any time without notice to the customer, even though the accounts are maintained at different branches. See also **Halesowen Presswork and Assemblies Ltd versus Westminster Bank Ltd** (1971) 1 QB 1 at page 34 per Lord Denning.

On the testimony of the court referee who presented the joint auditor's report, the Defendants Counsel prayed that the court disregards his alleged testimony which was not on oath as his mandate was only to present the joint report and not testify. She relied on the case of **Tight Security Ltd versus Goldstar Insurance Company Ltd HCCS number 665 of 2002 and 667 of 2002** for the proposition that the findings of the experts can be adopted as a judgement of the

court and enforced as such which means that the court looks at the report itself and nothing else to base itself on whether to endorse the same as a judgement.

Without prejudice the Defendant's Counsel contended that the ledger clearly shows that the entire Uganda shillings 15,000,000/= that was paid by the Plaintiff as a contribution to the capital costs of the suit vehicle was clearly reflected as such in the ledger. It was upon deduction of the said amount that the Defendant's portion of the funding was determined at Uganda shillings 76,775,275/=. According to clause 10 of exhibit D2 the Plaintiff was to pay 15,000,000/= as the front end deposit to offset against the costs of the bus but the agreement did not provide for payment of 15%. Calculation and figures provided for in the offer letter was superseded by those provided for under the lease agreement and the schedules thereto.

Plaintiff's submissions in rejoinder on issue No 1

In rejoinder the Plaintiff's Counsel reiterated earlier submissions on issue number one. The Plaintiff's Counsel contends that the Defendant relies on the testimony of DW1 and exhibit D3 for the submission that the Plaintiff was indebted to the Defendant in the sum of Uganda shillings 14,337,430/=. However some entries in exhibit D3 were not properly explained by DW1 neither did the Defendant adduce evidence in support of the. An example is the debit entry on 14 March 2000 of Uganda shillings 3,476,308/= which was claimed to be a bounced cheque. The alleged bounced cheque was never exhibited or presented to the auditors for consideration in their report. The testimony of PW1 was that they used to either pay by cheque or by cash and had never been informed of any bounced cheque by the Defendant. The evidential burden was on the Defendant to prove that the Plaintiff issued a cheque that bounced and her account was accordingly debited but that evidential burden has not been discharged. Schedule D to the auditor's report discloses that between 4 July and 22nd of June 2000 payments of Uganda shillings 5,700,000/= were not reflected on any of the lease accounts kept by the Defendant. Furthermore the reversal of payments meant for UDU 422 to the account of UAA 044Q is a further anomaly committed by the Defendant which led to confusion within the Defendants accounting system.

On the reversal of payments, reversals made by the Defendant bank cannot be justified as the right of set-off and was misuse and abuse of a cardinal principle of banking. Though the parties executed two similar finances facilities based on the same Master Lease Agreement, each facility was subject to a different vehicle lease schedule and separate letters were kept by the Defendant in respect of each facility. It was on this basis that Honourable Justice Lameck Mukasa declined to consolidate civil suit number 0536 of 2006 with the current suit. Furthermore the Plaintiff's Counsel submits that the Defendant is a successor in title of Uganda Leasing Company Ltd and the relationship was not that of a banker customer. The Defendant was not a banker according to the provisions of the Financial Institutions Act, 2004. There was no evidence to show that the Defendant was carrying out the business of banking. Counsel relied on the case of United Dominion Trust versus Kirkwood [1966] 1 All ER 968 where Lord Denning discussed the two

characteristics found in banks. Plaintiff's Counsel further relied on the case **of Nkoloma versus NBC Holdings Corp Ltd [2000] 1 EA 187 at 188** that the power to combine accounts was a common law right. However the Defendant's relationship with the Plaintiff was not that of the banker – customer and the Defendant was not a banker in its legal sense.

On the application of the security deposit, the Plaintiff's submission is that it cannot be considered as payment or compliance by the Plaintiff of her obligation but was only enforceable upon default or termination of the lease. The security deposit was money that had belonged to the Plaintiff and was already held by the Defendant as surety for compliance by the Plaintiff of the terms of the contract. The sum could be used by the lessor to offset any arrears. The Plaintiff's Counsel further submitted that the auditor's were within their mandate for the opinion that the Plaintiff overpaid the Defendant by Uganda shillings 4,038,869/=. Counsel further supported the testimony of one of the auditors on the ground that it was expert evidence. He relied on authorities dealing with expert witnesses. Consequently it is the Plaintiff's case that the testimony of Suleiman Walugembe was admissible under sections 43 and 155 of the Evidence Act. In conclusion the Plaintiff had settled all her obligations under the lease agreement and was not indebted to the Defendant in any amounts but rather it was the Defendant who owed the Plaintiff by the overpayment amount of Uganda shillings 11,048,317/=.

Resolution of issue number one

1. **Whether the Plaintiff was indebted to the Defendant and if so to what extent by 14th of December 2000?**

I have carefully considered the pleadings, the written submissions, the evidence on record inclusive of the documentary evidence, the authorities cited and the audit report. The first question or issue deals with a matter of fact as to whether the Plaintiff was or was not indebted to the Defendant by 14 December 2000 when the lease was terminated by the Defendant. If the Plaintiff was indebted, the question of fact to be established is by how much? If the Plaintiff was not indebted, then the court does not have to answer the question of how much was owing to the Plaintiff if at all.

It is not in dispute that the Plaintiff had executed an agreement with the Defendant by which the Defendant leased motor vehicle bus UDU 422 and agreements were admitted in evidence. Exhibit D1 is a master or vehicle lease agreement dated 14th of January 1998 executed between Uganda Leasing Company Ltd as the lessor and the Plaintiff as the lessee. In the agreement the term "termination event" is defined as any event listed in clause 8. Clause 8 permits the lessor to terminate the lease and repossess the vehicle with or without notice upon the occurrence of any of the termination events listed in clause 8. It is agreed that the Defendant terminated the lease on the ground of non-payment of rent on 14 December 2000.

Consequently the only question on the first issue is whether at the time of termination of the lease agreement, the Plaintiff was indebted to the Defendant. Despite the fact that PW1 and PW2 had testified and the Plaintiff had closed its case, the court advised the parties that the question involved required an examination of the accounts of both parties and a reconciliation effort to establish how much money was owing if at all to the Defendant at the time of termination of the lease agreement. I shall have due regard to the evidence adduced in court by PW1, PW2, DW1 and DW2 on the question of how much money if at all was owing to the Defendant at the time of termination of the lease. The direction that the court will take will depend on interpretation of sections 26 and 27 of the Judicature Act Cap 13 laws of Uganda. Prior to such an interpretation, it is imperative that the record of what transpired in the court should inform the interpretation of the law. As I have noted earlier the record shows that on 24 November 2011 the matter came for mention and the court was informed that it was a part heard case and the court directed that the record of proceedings should be typed and availed to the court. The court was also informed that the Plaintiff had closed its case and it was at the stage at which the defence was to commence. It was adjourned to 5 December 2011 for mention. The record shows that the court advised the parties to get an independent auditor to reconcile the accounts of the parties. The parties were required to choose an auditor and work out the terms of reference. On 13 December 2011 the record of the court reads as follows:

> "Court:
>
> In the circumstances each party shall appoint an auditor who will carry out a joint audit and file a single report to the court. The auditors will audit the accounts of the bank for the relevant period in the plaint and WSD for the lease until the notice of termination of the lease... The audit period is from the time of the lease commencement up to the termination thereof ... They should also establish whether there is any outstanding amount by the time of the termination and if so how much. Each party will pay the costs of its own auditor. The parties will appoint the auditors in writing and give them any other terms of reference that do not detract from the general objectives of the audit 'terms' given by the court.
>
> The auditors will be appointed before the 16th of December 2011 and the written appointment and terms will be filed on the court record."

The auditors were required to establish whether there is any outstanding amount by the time of termination and if so how much. Secondly the relevant period was the period averred in the plaint and written statement of defence and the notice of termination of the lease by the Defendant. The record shows that the court in giving directions to the parties did not quote any provisions of the Judicature Act. There are two sections which are relevant. The first section is section 26 of the Judicature Act which deals with reference to an official or special referee for inquiry and report any question arising in any cause or matter. Particularly section 26 (1) of the Judicature Act provides for reference by the court at its discretion. Such a reference does not

require the participation of the parties to the suit. In such cases the report of the official or special referee may be adopted wholly or partly by the High Court and if so adopted may be enforced as a judgement or order of the High Court. The second provision is section 27 of the Judicature Act which provides that all parties interested who are not under disability may with their consent have a matter referred for trial by a referee or arbitrator. The specific provision that is relevant is section 27 (c) of the Judicature Act which provides that where the question in dispute consists wholly or partly of accounts, the High Court may, at any time, order the whole cause or matter or any question of fact arising in it to be tried before a special referee or arbitrator agreed to by the parties or before an official referee or an officer of the High Court.

The first matter that can be determined is the intention of legislature in enacting sections 26 and 27 of the Judicature Act. This arises from the fact that the matter that was referred to the auditors was a matter consisting wholly of accounts. There are two differences between the two sections that can be highlighted. The first is that under section 26, a reference to a referee is made by the High Court and may be made without consent of the parties. Secondly it is made for inquiry and report upon any question arising in any cause or matter. In this case the questions arising concerns accounts. Secondly section 27 deals with a trial by a referee or an arbitrator of a question or issue referred by consent of the parties. By using the term "trial", it is clear that what is meant is determination of the question by the referee or arbitrator. What is of particular relevance is the fact that what was referred to the arbitrator's/referees is a question of fact as to what was outstanding by 14th of December 2000 when the lease of the vehicle was terminated by the Defendant.

Inasmuch as the question involved was a matter of accounts regarding the lease account of the Plaintiff and the question of how much money was owed if at all, the matter indeed proceeded without reference to which provisions of the Judicature Act applicable. It however proceeded with the full participation of the parties who made available all the documentary evidence and oral testimonies to the auditors. In either case because the matter was a reference to experts on a matter of accounts, the High Court is facilitated by the opinion of the auditors and adopts the report as part of the findings of the High Court under section 26 of the Judicature Act.

The audit report submitted on court record is a joint auditor's report by BMR Associates Certified Public Accountants and Team and Company Certified Public Accountants. It is signed by BMR Associates Certified Public Accountants and also signed by Team and Company Certified Public Accountants. The report shows that the auditors reviewed the relevant records and instruments relating to the lease. The instruments/records examined included the rental receipts issued by DFCU bank in acknowledgement of the rental payments received from the Plaintiff. Secondly the Plaintiffs lease statement of account issued by DFCU bank in respect of the lease for Isuzu bus UDU 422. Thirdly the auditors considered DFCU ledgers in respect of the lease for the Isuzu bus. Fourthly lease account statements and repayment schedules prepared by the Plaintiff were considered. The auditors also considered the lease agreement between DFCU

and the Plaintiff. In addition the auditors met the DFCU management staff, the Plaintiff and the partner of the Plaintiff Mr Atabu Ali. With regard to the methodology adopted by the auditors, both parties were given a fair chance to present their materials. Secondly an examination of accounts in the absence of considerations based on materials which ought not to be considered is better done by auditors than by the High Court.

The report shows that at the time of termination the lease rentals amounted to Uganda shillings 118,194,455/= for completed 34 months from February 1998 – 14 December 2000 which was the date of termination. The Plaintiff had made monthly and undisputed payments amounting to Uganda shillings 100,332,760/=. In addition on 14 December the Defendant bank applied the Plaintiffs security deposit of Uganda shillings 15,000,000/=. The auditors concluded that at the time of termination, the amount due to DFCU bank was Uganda shillings 2,861,689/= on the basis of undisputed facts.

As far as disputed matters are concerned the auditors noted that the details of the leases were not indicated on the rental receipts issued to the Plaintiff. The problem was that rental receipts were in respect of two lease agreements the Plaintiff had with the bank. This was the primary cause of the dispute on payments between the parties on receipts amounting to Uganda shillings 9,200,000/=. The auditors have established that the Defendant accepted the issuance of the receipts but the receipts were credited to the Plaintiffs other lease on the other hand the Plaintiff disagrees with the crediting of monies to the other lease and contends that the acknowledged payments were for the lease in the dispute. The summary of the disputes on receipts are summarised in the report.

Rental payments amounting to Uganda shillings 3,600,000/= were initially credited to the UDU 422 bus account but subsequently reversed and transferred to another account for bus registration number UAA 044Q which is another lease account also held by the Plaintiff. The Plaintiff contends that the transfers of the receipts to the second bus account ought not to have been done as they belonged to the UDU 422 bus account. Secondly the rental payments amounting to Uganda shillings 5,600,000/= were credited to account number for bus registration number UAA 044 Q however the Plaintiff contends that these were payments she made on account of bus UDU 422.

The Plaintiff disputes a reversal of the payment of Uganda shillings 3,476,308/= indicated as initially paid and credit reversed on account of a bounced cheque. The Plaintiff disputes the bounced cheque and claims not to be aware of it.

Lastly the principal outstanding/termination settlement fee of Uganda shillings 5,775,740/= claimed by the bank as the termination of the lease was not included in the outstanding debt which is not disputed. From the computation of the disputed amounts the auditors concluded that the outstanding amount which was without dispute was Uganda shillings 2,861,689/=. On it is added the termination settlement fee of Uganda shillings 5,775,740/= leaving an outstanding

balance of Uganda shillings 8,627,429/=. If the amounts disputed by the Plaintiff which the Plaintiff claims ought to have been included on the lease account of UDU 422 bus account are included, the Plaintiff would have overpaid the Defendant by Uganda shillings 4,038,879/=.

If the bounced cheque reversal was not taken into account, monies which had not been credited on the disputed account would be Uganda shillings 8,200,000/=. Finally the auditors noted that upon review of the lease ledger card provided by the Defendant bank, they established that the monthly rental deposits made by the Plaintiff to the bank for the period 1 February 1998 to 30 September 1999 were not credited monthly to the lease account. This was explained by the Defendant as caused by a change in the banks operating system and had no effect on the outstanding balance.

I have carefully considered the audit report and it is clear from the report that the auditors did not determine areas of controversy which have been set up above.

I will start with the point of law as to whether the bank is entitled to set-off monies owed from one account held by the Plaintiff to another account. From the beginning the plaint of the Plaintiff and particularly paragraph 4 thereof which gives the facts constituting the Plaintiffs cause of action indicates that the Defendant leased a bus registration number 422 UDU to the Plaintiff under a written understanding that upon successful completion of the rental fees, the bus would become the property of the Plaintiff. Secondly the Plaintiff avers that by 17 January 2001 the Plaintiff had paid all the monthly rental fees with an extra pay of Uganda shillings 4,338,317/=. Last but not least the Plaintiff avers that on 17 January 2001 for no justifiable cause, the Defendants agents in the course of their employment impounded the Plaintiffs bus number 422 UDU and have since converted it to their own use with the intention of permanently depriving the Plaintiff of the ownership thereof. This was on the ground that the Plaintiff had defaulted in the rental payments.

The entire cause of action and consequential loss claimed in the plaint is premised on the assertion of the Plaintiff that she had paid all the rental monthly fees under the lease agreement and that she had in fact overpaid by over Uganda shillings 4 million. Consequential losses claimed directly arise from the allegation of wrongful repossession or impounding of the bus number 422 UDU by the Defendant's servants. The defence of the Defendant on the other hand is that the Plaintiff consistently defaulted on rental payment obligations and by 14 December 2000 when the lease was terminated, the Plaintiff had accumulated arrears to the tune of Uganda shillings 29,337,430.47. Secondly the bus had been run down and its major engine components were missing. Thirdly the Defendant asserts that it lawfully terminated the lease and that it had a right to repossess the bus.

The statement of law that the Defendant as a banker is entitled to offset monies from one account of the Plaintiff to credit another account has been challenged by the Plaintiff on the ground that the relationship between the Plaintiff and the Defendant is not that of a banker/customer but that

of lessee and lessor. The relevant agreement exhibit D1 is the Master Lease Agreement. The agreement describes the parties as the lessee and the lessor. The term "vehicles" has been defined as the motor vehicle or motor vehicles described in the vehicle schedule. "Vehicle schedule" means every vehicle lease schedule entered into between the lessor and lessee pursuant to the agreement. Clause 2 (E) (iv) of the Master Lease Agreement gives the obligations of the lessor as the right to lease the vehicles to the lessee subject to receipt by the lessor of any instalment of rental or other amounts due under the agreement. Specifically clause 3 (A) provides that the lessee shall pay to the lessor in respect of the lease of the vehicles the rental and other payments specified in the vehicle schedule. Clause 3 provides inter alia that all payments should be made to the lessor at such address or account as shall be specified by not less than 14 days prior notice in writing to the lessee. Specifically the clause 1 E provides that each vehicle schedule shall constitute a separate contract for the letting of the vehicles the subject thereof. To quote it provides as follows:

> "The terms of this agreement shall be deemed to be incorporated into each vehicle schedule. In the event of any conflict between the terms of this agreement and the terms of a vehicle schedule, the latter shall prevail. Each vehicle schedule shall constitute a separate contract for the letting of the vehicles the subject thereof."

I have duly considered the submission of the Plaintiff's Counsel and the relationship between the parties as that of a lessor and lessee. That is true as has been demonstrated by the documents above. Secondly each vehicle schedule constitutes a separate contract. The Defendants Counsel relied on the case of **Halesowen Presswork & Assemblies Ltd v Westminster Bank Ltd [1970] 3 All ER 473** particularly the holding of Lord Denning. In that case the Plaintiffs account with the Defendant bank was in debit and it was agreed that the account would be frozen and there would be no further transactions on that account and the Plaintiff was allowed to open a second account on which it could transact business. The frozen account was in debit by £11,339 while the new account accumulated £8634. There was an agreement to keep the two accounts separate. By resolution the Plaintiffs went into voluntary liquidation and the liquidator claimed the sum of £8334 for the benefit of creditors generally while the bank maintains that it was entitled to it. The bankers argued that the agreement to keep the two accounts separate came to an end when the Plaintiff went into liquidation and it was entitled to offset the amount in debit. According to Lord Denning at page 477:

> "But when a banker has a lien over a cheque belonging to a customer or its proceeds, it means that the banker can retain the cheque or its proceeds until the customer has paid the banker the amount of his overdraft; and the banker can realise the cheque and apply the proceeds in discharge pro tanto of the overdraft. The banker does not lose the lien by allowing the customer to draw against the proceeds. That only means that he has released his lien to that extent. The result is that, in the ordinary way, when a customer has one account with the bank which is in credit, and another which is in debit, the banker has a

‘lien’ on the credit in the one account which entitles him to apply that credit in discharge of indebtedness on the other account."

The holding of Lord Denning is inapplicable to the circumstances of this case because it applies to instances where one account is in debit and another account is on the credit side. In this particular case the Plaintiffs account was in debit and it is illogical to debit the account which is already in debit. Secondly the contention that this was a lease agreement goes on to show that the relationship is not that of the common law banker/customer relationship as submitted by the Plaintiff’s Counsel but a relationship of a lessee and lessor governed by an express agreement. Upon payment of a specified rental the lessee is entitled to reflect in her books of account which account have been credited by the payment. The account cannot be arbitrarily debited by the Defendant thereby cancelling a rental payment which accrues monthly and which may be paid in advance if the lessee so wishes.

The audit report reveals that the above accepted receipt of a total of Uganda shillings 9,200,000/= from the Plaintiff and the Defendant’s issued the receipts in respect thereof. The Plaintiff claims that the receipts ought to have been issued in respect of motor vehicle UDU 422. A total of Uganda shillings 3,600,000/= were initially credited on the UDU 422 account but subsequently reversed and transferred to another account namely that of UAA 044Q. The Plaintiff claims that these transfers or reversal to another account ought not to have been done. The audit report attaches the receipts as schedule B. Schedule B shows that on 14th of April 2000 under receipt number 1086 the Plaintiff paid Uganda shillings 1,100,000/=. On 17 April 2000 the Plaintiff paid Uganda shillings 1,000,000/=. On 28 June 2000 the Plaintiff paid Uganda shillings 500,000/=. Lastly on 17 July 2000 the Plaintiff paid Uganda shillings 1,000,000/=. The payments are reflected in exhibit P2 which is a letter dated 10th of January 2002 from the Plaintiff’s advocates attaching a statement of account for lease bus number 422 UDU. The amounts were paid in cash. For the reasons given above the amount of Uganda shillings 3,600,000/= initially credited on the UDU 422 account ought not to have been reversed and transferred to yet another account. This is because the Plaintiff deposited the money as rent for the lease in respect of bus number 422 UDU and the Defendant had no authority to apply the money to another account. The fact that the Plaintiff had another account is irrelevant. Every account has to be dealt with on its own merits and the Plaintiff had applied the money to pay for the rentals of motor vehicle number 422 UDU which had a specific schedule. The vehicle lease schedule exhibit D2 is in respect of motor vehicle registration number 422 UDU.

Rental payments amounting to Uganda shillings 5,600,000/= according to the audit report schedule C were directly credited to the account of UAA 044Q. The Plaintiff claims that the payments were made for UDU 422. All the payments were made between the 4th of May 2000 and the 27th of May 2000. I have examined the receipt issued in respect of the payments and referred to in the audit report. The receipts were exhibited as exhibit P3. The first receipt is receipt number 01287 and dated 27th of May 2000 in the names of the Plaintiff. The receipt does

not indicate the lease agreement number where space is provided neither does it give details. It is entitled rental receipt and is for a sum of Uganda shillings 2,000,000/=. Another receipt number 02070 and dated 17th of May 2000 is issued in the name of the Plaintiff and Contour Coaches. No further details are given and it is for the sum of Uganda shillings 800,000/= in cash. Another receipt number 01418 has the same details revealed by the previous receipt namely the names of the Plaintiff but no further details are given. It is for the sum of Uganda shillings 2,300,000/= and is dated 27th of June 2000.

As noted earlier the Plaintiff relies on the testimony of PW1 who is the financial manager of the business. PW1 primarily relied on the statement of account attached to the Plaintiff's lawyer's letter dated 10th of January 2002 exhibit P2. Attached to the exhibit is a statement of account for bus number 422 UDU. It indicates that there were some payments which had been posted to the wrong account. The conclusion is that there was a balance refundable to the Plaintiff of Uganda shillings 4,338,317/=. The statement of account compares amounts paid by the Plaintiff with amounts received by DFCU according to the statement of account of DFCU. It is therefore the Plaintiff's evidence that the amounts ought to have been credited on account of bus number 422 UDU. The Plaintiff additionally adduced exhibit P4 which comprises of receipts of DFCU (Uganda Leasing Company Ltd) together with deposit slips of Standard Chartered bank. The deposit slips indicate that cash deposits were made on the account of Uganda Leasing Company Ltd with Standard Chartered bank. They include receipt dated 4th of May 2000 number 01333 for Uganda shillings 1,000,000/=. The receipt is issued by Uganda Leasing Company Ltd and indicates that it was a cash payment. Attached to the receipt is a deposit slip on the account of the Defendant's predecessor in title namely Uganda leasing company Ltd with Standard Chartered bank. The deposit was also made on the 4th of May 2000. All the Uganda shillings 5,600,000/= are supported by receipts issued by Uganda Leasing Company Ltd. The auditors also noted in their report that the lease details were not indicated in the rental receipts issued to the Plaintiff. In those circumstances, there is no evidence except the evidence of the Plaintiff as to which account was to be credited. It is also unlikely that the Plaintiff would pick a few payments and claim that they were for another account from the account of UAA 044Q. The Defendant ought to have produced the record of deposit slips or counterfoils of the receipts. However the records produced by the Plaintiff of receipts indicate that some monies were being paid cash to the Defendant's predecessor in title namely Uganda Leasing Company Ltd without details been noted in the receipts or without the money being paid on a bank account directly so as to specify which account was affected. The conclusion is that the Defendant has not successfully rebutted the Plaintiffs evidence of fact that Uganda shillings 5,600,000/= was supposed to be credited as the rental payments for UDU 422 account but was not and instead credited to a separate account. On the balance of probabilities, and the evidential weight is in favour of the Plaintiff for the assertion that the payments were made in respect of motor vehicle UDU 422 and in an amount of Uganda shillings 5,600,000/=.

The third category of payments is the reversal of Uganda shillings 3,476,308/= on 14 March 2000 on the ground that it was a bounced cheque. The Plaintiff disputed a bounced cheque and claimed to be unaware of the same. DW1 Mr Emmanuel Kwihangana testified on behalf of the Defendant on the question of the bounced cheque. Under cross examination he testified that he knew about the bounced cheque but had never seen it and that it had been taken to the police for action. The Plaintiff's case is that she was not aware or notified of the bounced cheque. Not being aware does not mean that there was no bounced cheque. The question of whether there was a bounced cheque on the basis of which credits were reversed is a question of fact. In the absence of any contrary evidence, the statement of the Defendant is the best evidence of what transpired. For the moment the debit dated 14th of March 2000 reflected as the reversal of the bounced cheque shall remain as provided for in the statement of the Defendant.

Finally there is an amount of Uganda shillings 5,775,740/= which the bank applied as termination settlement fee. The question of the application of termination settlement fee will be determined upon establishing whether the termination was lawful. On the other hand the question of the outstanding amount and the issues for consideration on issue number one is the sum that was due or outstanding if any at the time of termination of the lease. The audit report however notes that the principal outstanding termination settlement fee of Uganda shillings 5,775,740/= had not been included in the outstanding amounts above. Strangely the auditors included a schedule D duly endorsed by both auditors which captures undisputed payments amounting to Uganda shillings 5,700,000/= which were not captured in both lease accounts.

Guided by the summary of the auditors, it has been established that at the time of termination there were outstanding amounts on the basis of facts which were not disputed between the parties of Uganda shillings 2,861,695/=. If the termination settlement fee of Uganda shillings 5,775,740/= is taken into account and amounts reversed by the Defendant from the rentals paid by the Plaintiff and added on together with amounts directly credited on the account of UAA 044Q together with the bounced cheque which reversed a cheque payment, the Plaintiff would have overpaid DFCU as at 14 December 2000 by Uganda shillings 4,038,869/=.

On the other hand if the termination settlement fee is not taken into account, the Plaintiff would have overpaid by Uganda shillings 9,814,609/= at the time of termination on 14 December 2000. Consequently issue number one is answered in favour of the Plaintiff. The conclusions on the basis of the above evidence and analysis is that the Plaintiff was not indebted to the Defendant by 14 December 2000 if Uganda shillings 15,000,000/= security deposit was applied as DFCU bank did on 14 December 2000. Without application of the security deposit the outstanding amount would have been Uganda shillings 5,185,391/=. With the application of the security deposit of Uganda shillings 15,000,000/= the Plaintiff was not indebted to the Defendant at all and the Defendant was indebted to the Plaintiff to the tune of 9,814, 609/=. If the termination fee is applied, the Defendant would be indebted to the Plaintiff in the sum of Uganda shillings 4,038,869/= as far as the account of UDU 422 is concerned. Last but not least I have noted that

the audit report under schedules C includes a receipt dated 4th of May 2000 and receipt number 1333 for the sum of Uganda shillings 500,000/=. I examined the receipt dated 4th of May 2000 which is part of exhibit P4 and the number thereof is 01333. It indicates that a cash deposit of Uganda shillings 1,000,000/= was made on the 4th of May 2000. The receipt is backed by a deposit slip of Standard Chartered bank dated 4th of May 2000 in which Uganda leasing company Ltd account number 0100230756004 was credited by Uganda shillings 1,000,000/=. The inevitable conclusion is that the auditors made an error by writing 500,000/= instead of Uganda shillings 1,000,000/=. In those circumstances the money standing to the credit of the Plaintiff at the date of termination of the lease on 14 December 2000 has to be increased by Uganda shillings 500,000/= leaving an amount of Uganda shillings 4,538,869 standing to the credit of the Plaintiff showing that the Defendant was indebted to the Plaintiff in the said sum. Finally the auditors also established an amount of Uganda shillings 5,700,000/= which was included under the undisputed payments which had not been captured on both lease accounts of the Plaintiff. This was included in schedule D to the audit report. No comments can be made about this amount as far as issue number one is concerned.

2. **Whether any of the parties was in breach of the Master Lease Agreement and the vehicle lease schedule?**
3. **Whether the Defendant unlawfully repossessed the leased bus from the Plaintiff.**

Issues number two and three have to be handled together to the extent that where there is any breach by the Plaintiff of the Master Lease Agreement, the question of whether the Defendant unlawfully repossessed the vehicle can also be tackled partially on the basis of the submissions on issue number two.

Submission by Plaintiff's Counsel on issues 2 and 3

The Plaintiff's Counsel submitted on what constitutes breach and relied on the definition in Osborn's Concise Law Dictionary 8th Edition as the invasion of the right or violation of or omission to perform a legal duty. From the premises he submitted that the defence of the Defendant was about the Plaintiff consistently defaulting on rental payment obligations and that the Plaintiff had illegally and unlawfully tampered with the chassis numbers of the bus. Thirdly the Plaintiff illegally used the licence and third-party stickers for the leased bus on another bus registration number 974 UAM.

It is the Plaintiff's case that through the testimony of DW1 the grounds for termination of the lease was failure to pay their rentals leading to accumulation of interest and secondly failure to maintain and repair the buses which were then grounded. On the other hand the Plaintiff's testimonies were that the allegations of DW1 were not true and it was the Defendant Company that was in breach of the agreement. Counsel emphasised the events for termination of the lease provided for under clause 8 of the Master Lease Agreement and contends that the Plaintiff never violated any of the grounds or events for termination of the lease. Specifically clause 3H on the

Master Lease Agreement provide that the obligation of the lessee was to pay their rentals irrespective of whether damages were caused to the vehicle by the act of the lessee or not. It is the testimony of PW2 that the vehicle in question was collected from the Plaintiffs servicing yard where it was being serviced and undergoing repairs. It was the obligation of the lessee irrespective of the vehicle being nonoperational, to keep the vehicles in good working order and repair it while paying the rentals. Concerning exhibit D7 which gives a list of missing parts, the testimony of DW1 was an afterthought. This is because the head of the leasing Department of the Defendant Company removed the vehicle from the Plaintiff's custody in the presence of local Council officials on 17 January 2001 according to exhibit PE 8 but nowhere is it mentioned that there were any missing parts. Secondly the forensic report by Ezati Samuel is dated 10th of September 2001 over eight months after the vehicle was removed from the Plaintiff's custody. The Plaintiff's Counsel concluded that it could not be ruled out that the Defendant tampered with the bus.

The Plaintiff's Counsel submitted that it was common for financial institutions to terminate lease agreements for alleged breaches or fraud to mitigate loss. However the Plaintiff's case was not a case where the mitigation of loss concept was applicable since the Plaintiff was abiding with the terms of the lease agreement. The Plaintiff did not at any one time fail to execute obligations under the Master Lease Agreement and schedules. It was the Defendant company that breach the agreement by terminating the same prematurely thereby being in breach of several provisions of the agreement.

On the issue of whether the Defendant unlawfully repossessed the leased bus from the Plaintiff the Plaintiff's Counsel reiterated submissions on issue number two. Under clause 2A of the Master Lease Agreement exhibit D1, its vehicle schedule was a full pay and non-cancellable agreement which also provided that the lessee had no right to surrender the vehicle during the term of the lease. Secondly clause 2 (c) provided that the ownership of the vehicle shall at all times during the lease term remain in the lessor. It is the acknowledged and confirmed that she held that the vehicle as a mere bailee of the lessor and did not have any proprietary right or title during the lease term other than the right of quiet possession and use of the vehicle. The Plaintiff only had an option to purchase the vehicle or to pay a minimum rental payment upon completion of the rentals. Counsel further sought to define a bailment contract under the Contract Act 2010 sections 88 and 103 thereof. Consequently the Plaintiff was a mere bailee with no property rights to the vehicle and the Defendant as a bailor was in breach of its obligations under the contract of bailment having removed the bus from the bailee before accomplishment of the purpose of the bailment. Consequently the bailee missed the opportunity to purchase the bus and lost income for which the bailor should be held responsible.

Submissions by the Defendants Counsel on issues 2 and 3

In reply the Defendants Counsel submitted that the obligation to pay agreed rentals was a fundamental term of any financial lease. The Defendant was entitled under clause 8 of the Master

Lease Agreement, exhibit D1 to terminate the finance lease in the Plaintiff defaulted on her rental payment obligations within two business days of a written demand by the Defendant. With reference to the evidence Counsel submitted following the case of **Gladys Nyangire versus DFCU Bank** and following the case in **Lombard North Central Railway plc versus Butterworth [1987] 1 All ER 667**, **failure** to pay rentals was a fundamental breach of the finance lease.

The Defendants Counsel further submitted that there was a breach by the Plaintiff through failure to pay the rentals as and when they fell due.

The Defendants Counsel further submitted that there was failure to maintain the leased motor vehicle. Under clause 4 (1) the Plaintiff undertook to keep the vehicle in good working order, repair and condition and carry out the necessary maintenance, overhaul and replacement of parts through suitably qualified persons. The Plaintiff was also required to notify the Defendant of arrangements for maintenance of the vehicle and obtain the consent and approval of the lessor. Under clause 4 B the Plaintiff undertook not to change or remove any identification number or existing components of the vehicle except for necessary repairs and maintenance. DW1 testified that he was concerned about the Plaintiff's breaches of the lease agreement and upon discussion with the Plaintiff, he was not satisfied about the reasons for trying to repair the bus. He went to inspect the bus and discovered that it was in a sorry state. He made a report to the Defendant exhibit D5 dated 16th of November 2000. The report shows that the bus was grounded with many prime parts missing and exhibit D7 has a list of missing parts. In the circumstances the lessor had the right to terminate the lease and recover the debt. Furthermore according to exhibit D4 which is dated second of November 2000, the Plaintiff demobilised leased bus UDU 422. Secondly she failed to make rental payments and her account had accumulated to Uganda shillings 39,161,785/= for a period of three months. The Plaintiff failed to reimburse insurance premium of Uganda shillings 4,101,000/= paid on her behalf in respect of the renewal of policy. The Defendant made a demand for the Plaintiff to fulfil her obligations under the lease not later than 15 December 2000 failure for which the Defendant would exercise their right to recover the full outstanding amount.

DW1 testified that after a period of about six months, the bus repairs were not completed and it was repossessed without an engine. Secondly the chassis number of the bus was different from that leased to the Plaintiff. The conclusion was that the Plaintiff had altered the chassis number and engine number to woo the Defendant into believing that it was the leased bus. The report of PW1 is corroborated by the expert in exhibit D6 which confirms the same position and the evidence thereof stands unchallenged by the Plaintiff. The submission that exhibit D6 is an afterthought lacks basis because prior to the issuance of the report, DW1 had personally inspected the bus and found it with anomalies. When the bus was repossessed, it was a representative of the Plaintiff who pointed out the bus to the Defendant's representative according to DW1. The bus had the same number plates as appears in the logbook though the

number plate itself was not on the bus at the material time. Later on it was discovered that the bus that was repossessed had different details from the bus that was released to the Plaintiff and the matter was subjected to police investigations. The discrepancies on the identification features of the bus are unchallenged. The dismantling and tampering with the bus was already identified by DW1 prior to the forensic examination six months later.

The whereabouts of the leased bus to the Plaintiff to date are unknown. In the testimony of DW1 the grounds for termination of the lease included failure to maintain and repair the buses to the extent that they were grounded and secondly failure to pay the rentals. In the previously concluded case of **Nasolo Farida versus DFCU Leasing Company Ltd** (supra) at page 12 thereof it was held that the Defendant was justified in terminating the lease on the ground that the bus was grounded. Both parties do not dispute the validity of the finance lease agreement nor do they dispute the fact that the Defendant was entitled to terminate the lease of the vehicles under clause 8 of the Master Lease Agreement, exhibit D1. The Master Lease Agreement was freely executed by the parties under the doctrine of freedom of contract and the innocent party has a right to terminate. In the case of **Haji Asadu Lutale versus Michael Ssegawa HCCS number 292 of 2006** breach of contract was defined as breaking of the obligation which a contract imposes on the parties to the contract and which entitles the innocent party to treat the contract as discharged if the other party renounces the contract or makes its performance impossible or substantially fails to perform his promises. Similarly in the case of **Lombard North Central Plc versus Butterworth [1987] 1 All ER 667** it was held that where a breach goes to the root of the contract, the injured party may elect to put an end to the contract and both parties are thereafter relieved from those in obligations which remain unperformed.

The Defendants Counsel further relied on the law decided in previous cases that failure to pay amounts to repudiatory breach of the lease entitling the lessor to claim the whole of the rental instalments calculated exactly as a liquidated demand under the contract. Counsel further relied on **Treitel on the Law of Contract, 12th edition, 2007** where it is written that anticipatory breach is said to occur when the party disables itself from performing the contract whether due to the party's own act or default. Anticipatory breach can give rise to a right to terminate and that right arises immediately that is, even before performance is due. In the case of **Universal Cargo Carriers Corporation versus Citati [1957] 2 All ER 70,** it was held by Devlin J that a party is deemed to have incapacitated himself from performing his side of the contract not only when he deliberately puts it out of his power to perform the contract, but also when by his own act or default circumstances arise which render him unable to perform his side of the contract or some essential part of it.

In the circumstances and based on the evidence the Defendants Counsel concluded that the Plaintiff had made it impossible for her to meet her obligation under the financial lease and as a result it was prudent for the Defendant to terminate the contract. Counsel concluded that it was a

typical case of repudiatory breach and the Defendant rightly terminated the lease contract and the outstanding the rental payments fell due and payable to the Defendant.

Whether the Defendant unlawfully repossessed the leased a vehicle from the Plaintiff?

On this issue the Defendants Counsel relied on clause 2 of the Master Lease Agreement and paragraph B thereof. She emphasised that the agreement provided that the equipment at all times remained the property of the Defendant during the lease term. The right of ownership only changed upon the exercise of the right of purchase under clause 2 (c) of the Master Lease Agreement. The Defendant's case is fortified by the decision of the court in **Nasolo Farida versus DFCU Leasing Company Ltd. Tom Clark** in his book "**Leasing Finance" 2nd edition**" reiterates that a lessor retains legal ownership of the equipment during the lease term as a form of security for receipt of the full rentals payable on the lease. This right gives the owner the ability to immediately repossess equipment in the event of default by the lessee in payment of rental obligations.

As far as the evidence is concerned, the Defendants Counsel submitted that upon the occurrence of termination events as described in clause 8 of exhibit D1, the Defendant was entitled to, with or without notice, terminate the leasing of the equipment and repossess it. Upon termination of the agreement by reason of fundamental breach or repudiation of the agreement on the Plaintiff's part, the Plaintiff automatically loses the right of possession according to clause 10 of exhibit D1.

On the question of whether the Defendant breached the contract of payment by repossessing the leased equipment before expiry of the lease period, the Defendants Counsel agreed that the Plaintiff was holding the bus as a bailee. This was primarily to prevent the Plaintiff from being able to make a valid disposition of the property and prevent the Defendant from being held vicariously liable for any injuries or damages caused to third parties by the Plaintiff. When the Plaintiff fundamentally breached the agreement, the Defendant rightly terminated the contract with the Plaintiff and the bailment contract came to an end.

Submission in rejoinder by Plaintiffs Counsel on issues 2 and 3

In rejoinder on issues number two and three the Plaintiff's Counsel submitted that the question of whether the Plaintiff failed to pay rental payments was resolved by considering issue number one. Counsel reiterated submissions based on the evidence of PW1 and PW2 that the Plaintiff was always promptly paying her rental obligations. Counsel also sought to distinguish the case of **Gladys Nyangire and two others versus DFCU Leasing Company Ltd and three others HCCS number 106, 150, and 78 of 2007** on the ground that in that case it was the Plaintiffs who initiated the termination of the facility by their own letter. Secondly the case dealt with the issue of whether or not the Defendant was entitled charge and demand and recover future rentals

after repossession of the equipment. In this case the Plaintiff paid her lease rentals on time and it was illogical to terminate the lease which had only one month to expire.

On the question of whether the Plaintiff failed to maintain the leased bus thereby justifying the Defendant's action of termination for failure to maintain, the Plaintiff only made normal repairs on the bus which was part of her obligations under the lease agreement. Counsel reiterated submissions that exhibit P7 which gives a list of missing parts for the bus was an afterthought because by the time the bus was removed by Mr Juma Kisaame, from where it was parked and in the presence of local Council officials; the Defendant did not indicate that there were any missing parts on the bus. Secondly the photographs presented to court were not the real pictures of the bus in issue and that is why they were not admitted in evidence but tendered for identification purposes.

The issuance of the forensic report after six months was not genuine because it ought to have been a great priority. Counsel reiterated submissions that the forensic expert report made eight months after taking possession of the bus is tainted with malice and was not a bona fide report. With reference to the case of **Nasolo Farida versus DFCU Leasing Company Ltd HCCS number 536 of 2006** and on the point that the motor vehicle registration number UAA 044Q had been cannibalised amounting to breach of the lease agreement by the Plaintiff and justifying termination of the lease, the above case even though it was between the same parties concerned a different bus with distinct features and characteristics. Furthermore the decision is the subject of an appeal to the Court of Appeal. Furthermore the common law principle of anticipatory breach does not arise in the present case. This is because elements of repudiatory breach do not arise or exist. The Plaintiff never in any way incapacitated herself from performing her obligations under the agreement. The Plaintiff was only making repairs on the suit bus which was her obligation under the lease agreement.

On the question of whether the Defendant unlawfully repossessed the vehicle, the Plaintiff's Counsel reiterated submissions that there was no fundamental breach of the terms of the Master Lease Agreement and the vehicle lease schedule by the Plaintiff. The Defendant's agent breached the contract of bailment when they repossessed the suit bus before the agreed period or in the absence of any such event provided for under the agreement.

Resolution of issues number two and three

As I have held earlier on, issues number two and three are intertwined. This is because the first aspect of issue number two which is whether any of the parties was in breach of the Master Lease Agreement and the vehicle lease schedule, has been partially answered through resolution of issue number 1 by establishing the question of fact as to whether there was any outstanding rental due to the Defendant at the time of termination of the lease. By answering the issue in favour of the Plaintiff and holding that there was no outstanding rental amounts accrued and due to the Defendant and the further finding of fact that the Plaintiff had overpaid the Defendant, the

question which is latent in issue number two as to whether the Plaintiff was in breach of the obligation to pay rentals has been resolved. That would also partially resolve issue number three which is whether the Defendant unlawfully repossessed the leased bus from the Plaintiff to the extent that the ground for repossession cannot be failure of the Plaintiff to pay rentals that were due to the Defendant at the time of termination of the lease on 14 December 2000.

What is therefore left for resolution is whether any of the parties were in breach of the Master Lease Agreement and the vehicle lease schedule to the extent that the issue deals with the Plaintiff and whether the Plaintiff was in breach by failure to maintain the vehicle in good and sound condition and had vandalised the vehicle. On the other hand the Plaintiff submitted that the Defendant was in breach of the Master Lease Agreement by repossession of the leased vehicle before expiry of the lease term.

The court will not revisit issue number one that establishes a question of fact that the Plaintiff had completed payment of rentals and upon application of the security deposit of **Uganda shillings 15,000,000/=** by the Defendant, the Plaintiff was on the credit side as far as the lease account is concerned and it was the Defendant who owed the Plaintiff.

I will consider the contract on the question of rental payments. It is not in dispute that failure to pay rentals was a fundamental breach that entitled the Defendant to terminate the lease agreement. There is a subtle connection between the breach for failure to pay rentals and the right of the Defendant to repossess the vehicle on the ground of non-payment of rentals. This is because payment of rent was close to the core of the lease agreement between the parties. Payment of rentals is substantial fulfilment of the lease agreement. In dealing with the controversy of whether the Defendant unlawfully repossessed the leased bus from the Plaintiff, any ground for repossession is material. However the question whether such a ground for repossession amounted to repudiation of the whole contract is relevant. This however goes on to narrow down the matter for consideration to other grounds for termination and repossession of the vehicle other than non-payment of rentals.

As far as the applicable contract terms are concerned, exhibit D1 which is the Master Vehicle Lease Agreement is an agreed document. It governs the relationship between the Plaintiff and Defendant in respect of two vehicles governed each by a separate vehicle lease schedule. Paragraph 2 A provides that it is agreed and acknowledged by the lessee that each vehicle schedule is a full pay out non-cancellable agreement and the lessee has no right to surrender the vehicle during the lease term. It ensured that each lease agreement and schedule dealt with a separate vehicle. Secondly it ensured that the Plaintiff did not surrender the vehicle during the lease term and was obliged to pay all the rentals. The second important aspect can be found in clause 2 C which ensured that the vehicle at all times during the lease term remained under the ownership of the lessor. The lessee acknowledged under clause 2D of the Master Lease Agreement that it had no proprietary rights, title or interest in the vehicle during the lease term other than the right to quiet possession and use of the vehicle subject to the terms of the

agreement and that she was a mere bailee. The obligations are further defined by clause 2F which provided that subject to the lessee having made all the payments and having duly complied with all other obligations in each case under the agreement and having no other termination event, not less than 30 days prior to the expiry of the primary lease period and by notice in writing, the lessee was to notify the lessor of the wish to continue the lease of the vehicles for the secondary period or request the lessor to allow the lessee purchase the vehicles at the price to be agreed but not exceeding 5% of the capital cost of the vehicle.

Payment of the rental obligations did not automatically vest the vehicles in the Plaintiff/lessee. Under paragraph 3H the lessee had obligation to pay rentals whether damage is caused to the vehicles by any act of the lessee or not and whether the vehicles had been taken out for service. In case of any damage to the vehicles resulting in actual constructive or arranged total loss as defined, the provisions of clause 6E of the agreement shall apply. Clause 6 E of the agreement provides that following a total loss, the leasing of the vehicle shall be terminated upon the fulfilment by the lessee of its obligations under clause 6D without prejudice to any claims then outstanding between the lessor and lessee. The lessor shall not be liable to supply any vehicles in lieu if the vehicles are or become unavailable to or unfit for use by the lessee for whatever cause.

Under clause 4 B, during the lease term no alteration is to be made to the vehicle and no existing component removed except in the ordinary course of repair and maintenance without the prior written consent of the lessor. Any substitutions, replacements, renewals and additions whatsoever and whenever made to the vehicle shall become the property of the lessor free from any encumbrances and subject to the lease agreement.

In this case the alleged breach for non-payment of rentals cannot be considered because the obligations to pay rentals by the Plaintiff had been fulfilled and all future rentals have been secured. I have further considered the case of **Nasolo Farida versus DFCU Leasing Company Ltd HCCS number 536 of 2006** decided by Honourable Justice Lamech Mukasa. The case concerns the lease of the other bus namely motor vehicle registration number UAA 044Q. In that case the first issue was whether the Plaintiff was at the time of termination of the lease agreement indebted to the Defendant or not and if so, to what amount? Curiously the termination date was also 14 December 2000. The court established at page 6 of the judgement that the Defendant had failed to account for all other payments made by the Plaintiff according to the reconciliation exhibit P 27. A total of Uganda shillings 13,282,922/= was not credited on the Defendant's ledger account. Apparently the Defendant did not keep proper records of account in both cases.

The grounds for termination of the lease were non-payment of rent among other things according to DW1. DW1 testified that there was a problem with the Plaintiff’s account which was about 17.6 million in arrears. The Plaintiff had problems and the vehicles were grounded. The Plaintiff informed DW1 that the vehicle was undergoing repairs. DW1 inspected the vehicle and testified that they were in a sorry state. DW1 concluded that because the vehicles were not running, the

Plaintiff was unable to pay the rentals. DW1 first started talking to the Plaintiff in October 2000. DW1 established that the engine was missing but was also informed that the engine was with general machinery for engine overhaul. The witness took photos of the bus, including several parts which had been piled on the floor and which the Plaintiff told him had the missing parts. DW1 however could not verify which parts belong to the bus or not. In other words DW1 could not verify the assertion of the Plaintiff. Thereafter the management of the Defendant communicated to the Plaintiff in exhibit D4 and D5.

Exhibit D4 is a letter dated 2nd of November 2000. It informs the Plaintiff of instances of default in contravention of the agreement. In the letter written by the Head of Leasing Mr Juma Kisaame, the Defendant wrote that the Plaintiff had deliberately and consistently cannibalised motor vehicle registration number UAA 044Q. Secondly the Defendant alleged that the Plaintiff had embarked on another conspiracy to completely demobilise the second bus registration number 422 UDU in preference for other buses belonging to the Plaintiff. The Plaintiff was also informed that her account had accumulated arrears of Uganda shillings 39,161,785/= and no worthwhile attempts had been made to clear it in the last three months. Thirdly the Plaintiff was notified that she had failed to reimburse the Defendant of the insurance premium of Uganda shillings 4,101,004/= paid on her behalf in respect of the renewal of a comprehensive insurance for the leased vehicle UDU 422. The Defendant offered the Plaintiff one more chance to regularise her account and also fulfil obligations under the agreement not later than 15th of November 2000.

Exhibit D5 is dated 16th of November 2000 and is a motor vehicle inspection report by DW1. It is an internal memo. The report shows that the bus registration number 422 UDU was packed. The engine, gearbox, differential and front axels had been removed. The report further indicates that the motor vehicle engine was reported to be for re-boring while missing parts were at the residence of the Plaintiff however it was difficult to verify that they belong to bus registration number 422 UDU. The report also indicates that the motor vehicle registration card of the bus indicates that the bus had chassis number J300569 while the chassis that he found was number 3000060 and concluded that it had been unlawfully changed or the number plate had been planted on to another bus.

Exhibit D8 and D9 are correspondences concerning a report filed with the police and written by the Defendant asking the police to speed up investigations and to impound other vehicles of the Plaintiff. Exhibit D8 is dated 8th of December 2000 while exhibit D9 is dated 13th of December 2000.

It is not in dispute that the Defendant terminated the lease on 14 December 2000. It is further an established fact that the Defendant repossessed the vehicle on 17 January 2001. I have however not seen the letter of termination and the Defendant relied on the testimony of DW1. On the other hand the vehicle was repossessed in the presence of the local Council officials of the area according to exhibit P9 which indicate that the head of leasing Mr Juma Kisaame wrote that he

had taken possession of bus registration number UDU 422 which belongs to the Defendant company and all the necessary papers had been handed over to the chairman. It is also apparent that the Defendant alleged that motor vehicle had been cannibalised. What is in further evidence is the fact that the Defendant had reported a case of theft. It is also established from the correspondence admitted that motor vehicle parts had been kept in the home of the Plaintiff. The Defendant alleged conversion and theft according to exhibit P5. Criminal proceedings had been commenced by reporting the matter to the police. Another suit namely HCCS number 0536 of 2006 had been filed in respect of motor vehicle registration number UAA 044Q. The suit was decided by Honourable Justice Lameck Mukasa on 4 February 2012. In that suit, the court held that the Plaintiff admitted in her pleadings that the bus (UAA 044Q) had been grounded and therefore she was in breach of her contractual obligation to keep the bus in good working order, repair and condition. The court found that the termination followed consistent cannibalisation of the bus and termination of the lease was therefore lawful. The court interpreted clause 4 B of the Master Lease Agreement and concluded that it prohibited the lessee from making any alterations to the vehicle or removal of any components from the vehicle without the prior consent of the lessor. The court accordingly dismissed the Plaintiff's suit.

I have carefully evaluated the evidence and the agreement between the parties. The fact that the vehicle was grounded is not denied by the Plaintiff. It is an admitted fact that the vehicle engine was for repairs. However no further details have been established as to the whereabouts of the engine. What is evident is that the forensic report exhibit D6 dated 10th of September 2001 shows that the engine was not on the bus but another engine lying near the bus body bearing certain numbers was examined. It must be emphasised that by the time of the report, the bus engine and a bus body where in possession of the Defendant. It is not apparent how the Defendant obtained the possession of the engine which had been taken before for overhaul. The report of DW1 reports that the engine was missing. The expert report indicates that the numbers could have been tampered with. In other words the engine was available to the Defendant though no conclusion was made about whether it belonged to the bus in issue.

The Defendant adduced to the effect that there were alterations on the chassis and engine of the motor vehicle through exhibit D6 and the testimony of DW1. The motor vehicle remained the property of the Defendant under the Master Lease Agreement exhibit D1. The right of termination of the lease is governed by the Master Lease Agreement. Clause 8 thereof provides for termination events. The grounds for termination include failure to pay rentals; failure to perform or observe any of the undertakings, agreements obligations under the agreement by the lessee; selling the asset or any part thereof and any incorrect representation or warranty or statement made to the Defendant on any material point.

Last but not least I have considered the forensic expert report exhibit D6. The forensic report shows that there was a tampering with the engine parts particularly the numbers and the chassis numbers. The evidence is inconsistent with the finding of DW1 after an inspection of the bus

prior to termination of the lease. DW1 testified that the chassis number that he saw was different from the logbook and the number was 3000060. DW1 made this report on 16 November 2000. He indicates that the engine was purportedly with General Machinery for re-boring while other parts of the engine were at the residence of the Plaintiff. The report is exhibit D5. Exhibit P9 establishes that the Defendant removed the bus UDU 422 on 17 January 2001. Finally exhibit D6 dated 10th of September 2001 is the forensic report of one Ezati Samuel. It shows that his task was to verify the engine and chassis numbers. He examined the bus bearing registration number 422 UDU at a warehouse in Kawempe on 15 August 2001. Paragraph 1 of the report shows that there was no engine on the bus but there was an engine lying near the bus body bearing registration number 6RBI-120584. In his opinion the numbers 120 584 were tampered with. In other words there were not the original numbers of the manufacturer. There is no finding as to whether they were tampered with in the recent past or time at which they were tampered with. I have further considered exhibit D2 which is the vehicle lease schedule. It has the numbers 6RBI 120584 as the engine number consistent with the finding of the forensic expert. The issue as to when the alleged tampering was done would have been material to establish whether it was done by the Plaintiff or someone else. There is absolutely no evidence either way. Concerning the chassis exhibit D6 which is the forensic expert report indicates that the chassis number which the expert read was J 300 0569. The forensic expert was not satisfied with the letter J and the figure 9 and concluded that the numbers were not the original numbers of the manufacturer. However there is no evidence as to when the alleged alterations were made. Nonetheless the number of the forensic expert is at variance with the number of DW1 in exhibit D5. In exhibit D5 DW1 reported a number of 300 0060 as the chassis number which he established was at variance with the number on the logbook which was J3000569. The number on the logbook is the same number reported by the forensic expert in exhibit D6 which was allegedly not the original number. On the other hand exhibit D2 which is the motor vehicle lease schedule shows the chassis number as J 3000569. There is no information as to how DW1 had a different chassis number from that of the forensic expert who-made his examination about nine months after DW1 did.

I do not need to consider at what stage the alterations had been made on the bus as there is no evidence to this effect. What is material is that DW1 inspected the vehicle and in his opinion, it had been tampered with as far as the chassis is concerned. There is however no evidence to suggest that the Plaintiff had not received the vehicle in the state in which it was inspected by DW1. The particulars of the vehicle are given in the vehicle lease schedule .Clause 8 (xii) clearly gives the Defendant a right to form an opinion that any act of matter or thing which occurs would have a material adverse effect on the ability of the lessee to perform her obligations under the agreement.

In as much as there was evidence that the engine parts were with the Plaintiff at her residence and that the engine had been taken for overhaul, the Defendants officials were not satisfied with

the performance of the Plaintiff. Secondly the bus had been grounded for over four months. Thirdly clause 4B clearly provides as follows:

> "During the lease term no alteration shall be made to the vehicles and no existing component shall be removed from the vehicles (other than in the ordinary course of repair and maintenance) without the prior written consent of the lessor unless replaced immediately by the same component of by a component of a like make and model to that removed or an improved or advanced version thereof. The lessee hereby undertakes that all substitutions, replacements, renewals and additions whatsoever and whenever made in or to the vehicle shall be or thereby become the property of the lessor free from any encumbrances and subject to this agreement."

Failure to seek the prior written consent of the Defendant in the circumstances would be sufficient reason for termination of the lease in certain cases. However that is not the end of the matter. The Plaintiff could without the prior written consent have parts replaced with the same components or a component of a like make and model to that removed under clause 4B.

It therefore follows that the ground for termination of the lease on the ground that there were missing parts follows failure to notify or obtain a written consent of the Defendant prior to taking the vehicle engine for repairs or moving and keeping some of the parts.

It is my finding that there were contractual grounds for repossession of the leased vehicle. The only problem that arises is the fact that the Plaintiff had paid all her rental arrears. Secondly damage to a vehicle is not necessarily breach of contract but obliges the Plaintiff to make good to the Defendant any loss under the contract. Thirdly motor vehicle parts could be removed for ordinary repairs. Clause 4B clearly makes an exception for removal of existing components in the ordinary course of repair and maintenance. The Plaintiff testified that the vehicle was for repairs. The Defendant has not explained how it came to be in possession of the engine of the motor vehicle when the Plaintiff informed DW1 that the engine was for overhaul. The engine however ended up in the custody of the Defendant. The chassis number examined by the inspector of the Defendant DW1 was different from that examined by the forensic expert according to the report exhibit D6. Under those circumstances it cannot be maintained that the missing parts of the vehicle were not for ordinary repair and maintenance excepted under clause 4 B of the Master Lease Agreement. Furthermore the specific clause does not forbid the removing of parts if the parts are replaced by similar parts which would become the property of the lessor. I will reproduce the exception which starts the word "unless" for emphasis as follows:

> “... unless replaced immediately by the same component of by a component of a like make and model to that removed or an improved or advanced version thereof. The lessee hereby undertakes that all substitutions, replacements, renewals and additions whatsoever and whenever made in or to the vehicle shall be or thereby become the property of the lesser free from any encumbrances and subject to this agreement."

In other words a Motor Vehicle part can be removed if it is immediately replaced as prescribed under the clause. The evidence however shows that the parts had not been immediately replaced. There is evidence of the motor vehicle being under repairs. However the repairs had taken over five months which in the circumstances was unreasonable without prior written consent of the Defendant.

Issue number three is therefore resolved in favour of the Defendant in that there were contractual grounds for repossession of the bus. This flows from the finding that the Plaintiff was in breach of the covenant to obtain the prior written consent of the Defendant. Furthermore the sum of Uganda shillings 15,000,000/= was applied to offset the rentals after enforcement of termination procedures. I further noted that the court reached a similar conclusion with regard to the other lease in High Court civil suit number 536 of 2007 between the same parties. In this case however the Plaintiff was not in arrears and had paid excess money thereby fulfilling a fundamental obligation which entitled her to exercise the option either to purchase the vehicle or lease it for a secondary term. In that other case the court held that the vehicle had been packed or grounded in breach of the Master Lease Agreement. Secondly the court found that the motor vehicle parts were missing. It is illogical to vandalise a vehicle for which all the rentals have been paid when what has been left is the option to purchase the same or lease it for another period. The Master Lease Agreement gives the Defendant enormous advantages over the Plaintiff. In the case of UAA 044Q, grounding the vehicle was found to be in breach of the lease agreement. The rationale therein was that the vehicles needed to work in order to pay back. In the circumstances if the Defendant had the right to terminate the lease and repossess the vehicle, it could not do so for failure to pay rent. Secondly if it did it on the ground of missing parts, the Plaintiff was obliged to replace the parts. However the vehicle was removed in circumstances when it was undergoing repairs and there is no contrary evidence to suggest that the engine was not for overhaul.

The letter of the Defendant exhibit D4 giving notice of default clearly indicate that in respect of buses registration number 422 UDU the issue was the payment of insurance premium and outstanding rentals. There was no question of removal of motor vehicle parts. The letter was written in November 2000. In the letter exhibit P8 dated 8 December 2000 the Defendant writes to the authorities that the motor vehicle parts were missing and was requesting for investigation to trace the parts. In a letter dated 13th of December 2000 exhibit D9 the Defendant only sought for investigations. However on the balance of probabilities, the motor vehicle was grounded and the Defendant had cause apparently from the correspondence adduced to take various causes of action inclusive of initiating criminal investigations. Because of the wording of the contract, issue number four is answered in favour of the Defendant to the extent that the vehicle was grounded for more than five months. The Defendant was entitled to repossess the vehicle. Repossession can only be done after termination. After termination Uganda shillings 15,000,000/= security deposit was offset by the defendant putting the plaintiff on the credit side. In the premises the termination was not unlawful.

Resolution of issue number 4 on remedies.

I have carefully considered the written submissions on the question of remedies. The Plaintiff claims special damages, general damages, exemplary damages and costs of the suit. As far as special damages are concerned, the court has held that the termination of the lease was lawful under the Master Lease Agreement and it is therefore unnecessary to go through the written submissions of the parties on the question of special damages.

As far as the other claims are concerned, it is the broad premise that it is a contractual provision that the motor vehicle remained the property of the Defendant under the Master Lease Agreement. Even though the Plaintiff has proved that it has paid the rentals, what remained was for the implementation of the Master Lease Agreement. The Master Lease Agreement could not be implemented in the circumstances where there was a dispute as to whether the Plaintiff had actually paid all her rentals and secondly in light of the fact that the motor vehicle which remains the property of the Defendant had been dealt with in breach of the Master Lease Agreement by the Plaintiff by keeping it grounded without proper notice to the Defendant. The Defendant therefore accordingly repossessed the vehicle. The Master Lease Agreement specifically gives the lessee an option to purchase the vehicle or to execute a secondary lease. In the case of an outright purchase, the option is to buy it at not more than 5% of the capital costs of the vehicle while the lease would be at a nominal rate. The option is exercisable by the Plaintiff but the further terms of any option is negotiable.

Termination payments are contractual and provided for under clause 9 of the Master Lease Agreement. If there is termination of the Master Lease Agreement by reason of fundamental breach or repudiation of the agreement by the lessee, the lessee was obliged to pay to the Defendant an amount called the "termination sum" for the period in which the termination payment date occurs all arrears of rentals up to and including the termination payment date and any other money under the agreement up to the termination date together with interest on any overdue sum. Secondly an amount equal to the aggregate of all payments of rental which would have but for such termination been payable under the agreement up to the end of the primary lease period. Thirdly all costs and expenses incurred by the lessor on its behalf whether before or after such termination in connection with the repossession, refurbishment, storage insurance or sale of the vehicle. Finally all losses, costs, charges and expenses incurred and payable by the lessor arising out of the premature termination can be recovered.

In this particular case there are no arrears of rent to be paid to the Defendant after termination and application of the security deposit. Secondly there can be no interest payable on any overdue sum in accordance with clause 3 E because there was no overdue sum. Thirdly there are no future rentals since all the lease rental payments according to the evidence had been paid at the time of termination. The Defendant has not claimed any costs and expenses incurred before or after termination in connection with the repossession, refurbishment, storage or insurance or sale of the vehicles by way of counterclaim. Fifthly the Defendant has not claimed any losses, costs,

charges and expenses incurred or payable by itself arising out of the premature termination of any funding commitments in connection with the agreement. The Defendant however applied a termination fee settlement and charged the Plaintiff about **Uganda shillings 5,700,000/=**.

The question is whether the Plaintiff is guilty of repudiatory breach having settled all the rentals. I have carefully considered the provisions of the Master Lease Agreement. The relevant provisions at the end of the lease term which assumes the payment of all the rentals is clause 2F. It provides that subject to having paid all the payments that are due and having complied with all other obligations in each case under the agreement and there being no other termination event having occurred, the lessee may by prior 30 days notice before the expiry of the primary lease period by notice in writing notify the lessor of the wish to continue the lease of the vehicles for the secondary period or to allow the lessee to purchase the vehicle at a price to be agreed not being more than 5% of the capital cost. The plaintiff had one month to expiry of the lease term when it was terminated.

In the circumstances the Plaintiff is not obliged to pay any termination sum to the Defendant under clause 9 A of the Master Lease Agreement. Termination for breach of any term of the contract merely brought the lease to an end one month earlier. In the case of **Lombard North-Central Plc versus Butterworth [1987] 1 All ER 667** Lord Mustill held at page 671 that where a breach goes to the root of the contract, the injured party may elect to put an end to the contract and thereupon both sides are relieved from those obligations which remain unperformed.

I am furthermore not satisfied with the evidence concerning the motor vehicle in question. The Defendant alleged that certain parts had been tampered with but did not give any concrete evidence thereof. Even the forensic expert report exhibit D6 does not conclude that the engine that was examined was indeed the engine that the Plaintiff had taken for repairs or received from the supplier originally. That is no information as to how the Defendant ended up having possession of the engine which was supposed to be for re-boring. Even though the engine numbers were the same, the opinion of the forensic expert was that it could have been tampered with. A similar finding concerns the chassis. Exhibit D6 which is the expert report has the same numbers as exhibit D2 which is the motor vehicle leasing schedule. The only conclusion was that the numbers could have been tampered with to make it coincide with the original. There is however no information and it cannot be established whether the tampering was done by the Plaintiffs. Secondly there is no evidence as to what happened to the property.

I find it very strange for the Defendants Counsel to submit that the bus has not yet been recovered from the Plaintiff. Secondly the Plaintiff has demonstrated that the vehicle was removed in the presence of local Council officials. Thirdly whatever the state of the vehicle, the Defendant cannot have its cake and eat it. If that is any damage to the vehicle, the Defendant has not demonstrated that it has lost anything. There is no evidence that whatever has occurred is an insurable risk covered by the Master Lease Agreement clause 7 which deals with indemnity or grounds for indemnification of the Defendant by the lessee for partial or total loss.

Furthermore there is no evidence of loss or total loss of the vehicle. The evidence shows that the vehicle was undergoing repairs and it had been dismantled so that the engine is taken for overhaul. The only basis upon which the Defendant could have proceeded to terminate was the dismantling of the engine without the prior written consent. However the question of missing parts could be rectified by the Plaintiff. In the circumstances it is my finding that there was no repudiatory breach by the Plaintiff. Moreover the Defendant has received all the rentals due for the primary lease period and what were left were any negotiations for a lease for a secondary period or the option to purchase the vehicle.

In the circumstances, subject to the conclusion of criminal proceedings if any, the Plaintiff is entitled to apply to the Defendant to exercise the option of purchase of the property repossessed by the Defendant on the ground that the reason for repossession according to DW1 was to recover outstanding and future rentals. In the circumstances the Plaintiff's suit cannot be dismissed. However, the Plaintiff is entitled to apply to the Defendant (subject to the conclusion of any criminal proceedings) to exercise the option to purchase the vehicle there being no money owing to the Defendant at the time of termination of the lease. The claim for special, general and exemplary damages is disallowed in light of the finding of the court under issues number two and three and the fact the vehicle remained the property of the lessor subject to the agreement.

The amounts over paid under issue number one amounting to Uganda shilling 9,814,609/= are awarded to the Plaintiff shall carry interest at the rate of 14% per annum from 14 December 2000 to the filing of the suit. It shall carry further interest at 14% per annum from the date of filing the suit till the date of judgement. Interest is awarded on the aggregate sum from the date of judgement at 14% per annum until payment in full.

The Plaintiff's suit having partly succeeded, the Plaintiff is entitled to costs to the extent that issue number one succeeded and issue number four is partially resolved in favour of the Plaintiff.

Judgment delivered in open court this 14th day of February 2014

Christopher Madrama Izama

Judge

Judgment delivered in the presence of:

Mayanja Twaha for the Plaintiff

Assisted by Kigongo Kassim

Plaintiff in court

Martin Kakuru for the defendant

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

14 February 2014