

**THE REPUBLIC OF UGANDA,  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
(COMMERCIAL DIVISION)  
CIVIL SUIT NO 143 OF 2012**

**STANBIC BANK (U) LTD}.....PLAINTIFF**

**VS**

**MUGISHA JUSTUS BAKETUNGA}.....DEFENDANT**

**BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA**

**JUDGMENT**

The Plaintiff Messieurs Stanbic Bank (U) Ltd filed this action against the Defendant for breach of contract and recovery of Uganda shillings 207,270,361/=, for interest thereon at the prevailing market rates and costs of the suit.

The facts of the Plaintiff's action as disclosed in the plaint are that sometime in June 2008, it offered the Defendant a finance lease facility amounting to Uganda shillings 212,215,000/= for purposes of financing the purchase of one brand-new five axle drawbar trailer and one used Mercedes-Benz tractor head (2002) and insurance premium facility of Uganda shillings 16,415,000/= which the Defendant accepted. The facility was repayable within 36 months through payment of equal monthly instalments of approximately Uganda shillings 4,420,600/= with interest and thereafter 24 equal monthly instalments of approximately Uganda shillings 2,409,121/=. The insurance premium facility was repayable in 10 monthly instalments of approximately Uganda shillings 1,776,924/= with interest. The lease facility was secured by original log book of the vehicle, irrevocable letter of undertaking from the insurance company and an automatic settlement benefit over the Defendant. The Defendant defaulted on his undertaking to make regular payments and was in breach of the agreement with the Plaintiff. On 16 April 2010, the Plaintiff notified the Defendant of the default and requested him to hand over the lease assets to the Plaintiff. The Defendant failed to pay the outstanding balance of Uganda shillings 207,270,361/= despite various demands to do so. Consequently the Plaintiff avers that due to the Defendant's failure to honour his obligations, it suffered great financial loss and inconvenience.

In his written statement of Defence, the Defendant avers that the Plaintiff is not entitled to the entire amount of Uganda shillings 207,270,361/=. Furthermore while the Defendant was operating the vehicle which had been leased, its gearbox completely failed to operate and it required a replacement gearbox at a cost of US\$15,600. Secondly the Defendant was frustrated

during the lease term by the political situation in Kenya that resulted into the closure of Uganda cement factories due to lack of raw materials that the Defendant was transporting from Mombasa to Uganda and also the well-known global credit crunch crisis period. Furthermore the Defendant had to modify and change the vehicle to a three axle which proved to be costly. Despite this situation faced by the Defendant, the Plaintiff went ahead to impound the vehicle and sold it and further never informed of the Defendant of the proceeds of sale so as to take into consideration the actual outstanding amount. The Plaintiff acted in disregard of the Defendant's request in writing to reschedule the loan payment terms. In the premises the Defendant contends that the Plaintiff is not entitled to any remedy against him as prayed for in the plaint and sought dismissal of the suit.

In reply the Plaintiff attached copies of bank statements reflecting the state of account of the Defendant. The Plaintiff further denied receiving copies of the request of the Defendant to reschedule the loan repayment. Additionally the Plaintiff maintains that the responsibility to carry out repairs on the leased vehicle was that of the Defendant. Furthermore the Plaintiff was not informed of the business-related challenges or problems of the Defendant.

At the hearing of the suit the Plaintiff was represented by Counsel Isaac Bakayana of Messieurs M.B. Gimara Advocates and Legal Consultants while the Defendant was represented by Counsel Musa Bale of Messieurs Owen Murangira and Co Advocates. In accordance with Order 12 of the Civil Procedure Rules Counsels filed a joint scheduling memorandum and trial bundle in which certain facts were agreed.

The facts which are not in dispute are that the Defendant acquired from the Plaintiff a finance lease facility in the form of motor vehicle Mercedes-Benz Actros truck registration number UAK 469 R. The Plaintiff was at all material times the registered proprietor of the motor vehicle. The parties executed a finance lease agreement where the Defendant took possession of the motor vehicle leased for a period of 36 months and was to pay equal monthly instalments of approximately Uganda shillings 4,420,600/= with interest, and thereafter one final payment of Uganda shillings 5,020,600/=. After expiration of the lease the Defendant could exercise an option to purchase the Plaintiffs leased motor vehicle. The Plaintiff cancelled that the lease and repossessed the motor vehicle by letter dated 16th of April 2010. It was further agreed that the Defendant initially made some payments in partial settlement of the monthly rental instalments. The Plaintiff repossessed the leased assets from the Defendant.

The agreed factual matters in dispute are whether the Defendant owes the sum of Uganda shillings 207,270,361/= asserted by the Plaintiff but denied by the Defendant. Secondly the Defendant asserts that the Plaintiff is not entitled to the said sum. Thirdly it is in dispute that the Plaintiff did not provide information regarding the sale proceeds of the leased assets/vehicle.

The Plaintiff called two witnesses who filed witness statements and were cross examined on the same. The Defendant called three witnesses all of who filed witness statements and DW1 cross

examined while cross examination of DW2 and DW3 did not take place and was dispensed with by consent. Thereafter the court was addressed in written submissions.

The agreed issues are:

1. Whether the Defendant is indebted to the Plaintiff in the sum of Uganda shillings 207,270,361?
2. Whether the possession and sale of the leased asset was lawful?
3. What remedies are available to the parties?

Whether the Defendant is indebted to the Plaintiff in the sum of Uganda shillings 207,270,361?

On this issue the Plaintiff's Counsel submitted that the Defendant has admitted to being indebted to the Plaintiff in the written statement of defence paragraph 3 thereof by the averment that the Plaintiff is not entitled to the entire amount of Uganda shillings 207,270,361/= thereby admitting indebtedness but only disputing the entire claimed figure. In annexure "BB1" in paragraphs 3 and 4 of the plaint, the Defendant made a commitment to the Plaintiff to settle his indebtedness. The letter reads in part "formally submit my personal commitment for my loan recovery proposal" and concluded by saying that: "I am committed to this loan recovery proposal." Furthermore admission is made in the joint scheduling memorandum where both parties agreed that the Defendant initially made some payments in partial settlement of the monthly rental instalments. In paragraph 8, 9 and 10 of the Defendants witness statement, the Defendant admits having problems paying the monthly rentals. Under **Order 13 rule 6 of the Civil Procedure Rules** the court may enter judgment where an admission of the claim is made in the pleadings or otherwise. The Defendant admits indebtedness to the Plaintiff but only disputes the amount due to the Plaintiff. Consequently Counsel prayed that the court enters judgment on admission under **Order 13 rule 6 of the Civil Procedure Rules**.

In paragraph 3 of the written statement of defence, the Defendant avers that the Plaintiff is not entitled to the entire claim as it was not proved by any bank statement. However the Plaintiff in the reply to the written statement of defence attached the bank statements. Counsel contended that the denial of the Defendant was conditional upon the Plaintiff producing the requisite statements. The only payments that the Plaintiff ever made were spread only within 2009. As far as insurance premium is concerned, payments were made within 2009. The Plaintiff proved through the testimony of PW1 Mr Dennis Kizza and particularly paragraphs 8 to 11 of the witness statement that there was an outstanding amount owing to the Plaintiff from the Defendant. The conclusion is that the Defendant is truly indebted to the Plaintiff.

The Defendant has not denied ever signing the lease facility and is under the law bound by the terms of the lease agreement. Counsel relied on the case of **Behange versus School Outfitters (U) Ltd [2000] 1 EA 24** for the proposition that the court will enforce a contract executed by the parties. The lease facility is exhibit P1 and Counsel submitted that the Plaintiff is entitled to the

entire lease repayments as stipulated by the lease agreement. The lease agreement stipulates the amounts due to the Plaintiff as standing presently and those that the Plaintiff would be entitled to in the future according to the case of **Gladys Nyangire Karumu and Two Others versus DFCU Leasing Company Ltd HCCS/106, 150 and 788 of 2007**. The rental arrears and future rental instalments are calculated exactly and is a liquidated demand under the contract. Counsel submitted that the Plaintiff is legally entitled to Uganda shillings 237,129,744/= from which an amount of Uganda shillings 25,000,000/= which is the amount at which the property was sold should be deducted leaving an outstanding balance of Uganda shillings 212,129,724/=. He further contended that even if the court were to believe that the Defendant that sourced other buyers of the leased property willing to offer Uganda shillings 100,000,000/=: the Defendant would still be indebted to the Plaintiff in the amount of Uganda shillings 112,129,724/=. However the testimony of the Defendant that there were other buyers who are willing to offer about Uganda shillings 100,000,000/= should be rejected.

In reply the Defendant's case is that the financial lease is a commercial arrangement whereby an equipment owner conveys the equipment or the right to use of the equipment in return for rentals. Counsel submitted that PW1 testified on cross examination that the lease facility was offered with the limited value of Uganda shillings 212,215,000/= with an insurance premium of Uganda shillings 16,415,000/= according to exhibit P1. The Defendant paid 40% of the amount of the lease offer before procurement of the asset according to clause 7 of the lease agreement and this was confirmed by the Defendant when he testified that he paid 40% which amounts to Uganda shillings 84,886,000/= up front before obtaining the lease equipment. According to exhibit P2 the amount included the cost price, which includes the principal debt, stamp duty, comprehensive insurance, documentation fees and total additions inclusive of VAT giving a cost price of Uganda shillings 169,000,000/= and not Uganda shillings 212,215,000/= as stipulated in the lease offer. The Defendant made an initial payment of Uganda shillings 50,700,000/=. There were financial charges of Uganda shillings 41,739,100/= leaving the total collectable amount of Uganda shillings 160,039,100/=. It was a condition precedent for the Defendant to first pay 40% of Uganda shillings 212,215,000/= before procurement of the asset. According to DW1 exhibit P2 demonstrates that he paid Uganda shillings 50,700,000/= and not Uganda shillings 84,886,000/=. The sum of Uganda shillings 34,186,000/= is not reflected anywhere yet he paid it. Furthermore he paid monthly rentals totalling to Uganda shillings 62,310,028/=: unless the total collectable sum of Uganda shillings 160,039,100/= which would give a balance of Uganda shillings 65,018,972/=:

According to the testimony of PW2 the forced sale price or reserve price of the vehicle was Uganda shillings 35,000,000/=: The testimony of PW1 is that the vehicle was sold at Uganda shillings 25,000,000/= below the reserve price. However no sale agreement was produced to prove the purported sale below the reserve price. However if the vehicle had been sold at the reserve price of Uganda shillings 35,000,000/= it would have left an outstanding amount of Uganda shillings 30,018,972/= if this sum of Uganda shillings 34,186,000/= which is part of the

initial deposit had been included in computation and there would be no outstanding balance. In fact it would be the Plaintiff who owes the Defendant a sum of Uganda shillings 4,107,028/=. That was the testimony of the Defendant which has not been rebutted by contrary evidence.

The burden is on the Plaintiff to prove the outstanding sum of Uganda shillings 207,270,361/=. The standard of proof is that of the balance of probabilities which requires the Plaintiff to convince the court that he is entitled to the relief sought. The Plaintiff failed to prove the claim on the balance of probabilities. PW1 who was the key witness exhibited a higher degree of inexperience or ignorance about the transaction. He did not know when the Defendant received the financed lease asset or how much the Defendant paid in rentals on the lease. He did not know how much was outstanding on the Defendant's account at the time the facility was terminated.

Counsel prayed that the court relies on the testimony of the Defendant, DW1. On several occasions DW1 testified that he requested for his bank statement but the Plaintiff refused to provide it to him. He further testified that at the time of preparing his defence, he did not know how much the vehicle had been sold at. The valuation report and the amount the vehicle was sold at were brought to the Defendants notice after filing the suit. The Defendants Counsel submitted that if the Plaintiff had provided information according to the request therefore, he would not have pleaded the way he did. Upon discovering information concerning the sale of the vehicle, the Defendant realised that he was not indebted to the Plaintiff at all. It is true that the Defendant was committed to settling his indebtedness before the sale of the vehicle. The Defendant's written statement of defence that the Plaintiff is not entitled to the entire amount of Uganda shillings 207,270,361/= was due to the refusal of the Plaintiff to provide the Defendant his statement of account reflecting the sale of the vehicle. The Plaintiff owed a duty to provide the customer information about the sale of the vehicle and should not benefit from the breach of that duty. DW1 doubted the bank statement because the Defendant refused to provide him with timely information. He could not tell how much the Defendant paid in rentals and how much was outstanding at the time of attachment of the asset. On that basis the Defendants Counsel prayed that exhibit P 12 which is the statement of account is rejected.

On the question of the binding nature of a contract Exhibit P2 shows that the collectable total value was Uganda shillings 160,039,100/= while Uganda shillings 212,215,000/= was the finance lease offer and not the lease value. The Plaintiffs witness PW1 confirmed that the Defendant paid 40% of Uganda shillings 212,215,000/= before the lease in the acceptance offer. It was confirmed by the Defendant that he paid Uganda shillings 84,000,000/= before entering into the lease agreement being 40% of Uganda shillings 212,215,000/=. Furthermore the Defendant paid Uganda shillings 62,000,000/= in monthly rentals. PW1 failed to state how much the Defendant had paid in rentals. The submission that the Defendant paid less than Uganda shillings 62,000,000/= is not supported by evidence and was a submission from the bar. The Plaintiff's contention that the outstanding balance is Uganda shillings 208,135,402/= is at variance with the plaint. The testimony of PW1 on that ground should be rejected. The testimony

was that after the sale of the vehicle the outstanding amount was Uganda shillings 183,468,808/=. Thereafter the bank wrote off interest of Uganda shillings 28,591,175/= leaving a balance outstanding of Uganda shillings 154,877,633/=. The Plaintiff's Counsel furthermore submitted on the basis of calculations that the collectable amount was Uganda shillings 237,129,724/= contradicting exhibit P2 which gives a total collectable amount of Uganda shillings 160,039,100/=. This submission ought to be rejected. Furthermore he deducted the sum of Uganda shillings 25,000,000/= being the amount at which the vehicle was sold thereby leaving a balance of Uganda shillings 212,129,744/= as the outstanding amount. Thereafter Counsel concludes that the Plaintiff is entitled to a lesser sum of Uganda shillings 207,270,361/= which contradictions go to the root of the matter and should not be taken lightly.

Without prejudice the Defendants Counsel submitted that exhibit P2 was not signed by the Plaintiff and there was no asset finance lease agreement between the parties. Exhibit P2 was not duly executed. Counsel further relied on section 33 of the Companies Act Cap 110 which provides for contracts executed on behalf of the company. It has to be proved that the signature belonged to an officer of the Plaintiff. He relied on the case of **General Parts versus NPART Supreme Court Civil Appeal number 5 of 2009**.

In rejoinder the Plaintiff's Counsel submitted that the Defendant insists on moving away from his pleadings which is not permissible in law. The Defendant laboured to make out a strange case to his written statement of defence and on that ground the defence should be rejected. Without prejudice on the first issue submitted to above, on the question of whether upon consideration of the Defendant's contribution, rentals paid and taking into account the forced sale value of the vehicle the Defendant does not owe any money to the Plaintiff, the argument was flawed in five respects.

Firstly it ignores the fact that the Defendant agreed to the rental repayments outlined in clause 8 of exhibit P1 which is the lease agreement and he cannot depart from his freely executed bargain. Secondly the Defendant makes no reference to the lease agreement to sustain his argument. Thirdly the Defendant completely ignores the fact that the Plaintiff has to make a profit from the arrangement based on lease rentals including future lease rentals as established by judicial precedents. Fourthly the Defendant casually made reference to figures he purportedly paid without any document to prove the payments. Lastly it was agreed in the scheduling memorandum that the Plaintiff only initially made some payments. The amounts paid by the Defendant as reflected in exhibit P12 and cannot be based on evidence from the bar.

On the question of availing the valuation report and amount at which a vehicle was sold, the Defendant never took advantage of provisions for discovery of documents and cannot complain. Secondly the Defendant did not seek to amend the pleadings to cater for the alleged "new information". If the Defendant doubted the bank statement availed by the Plaintiff, he ought to have produced deposit slips proving the money he paid to the Plaintiff.

On the question that the lease agreement was never signed, it is an admitted fact that the parties executed a finance lease agreement. It is not permissible for the Defendant to depart from his admission. It is unimaginable that the Defendant who took the benefit of an unsigned facility wants to turn away from it upon default in payment. As far as section 33 of the Companies Act cap 110 is concerned, there is indeed a signature of the bank. Consequently the contention that the agreement is without a witness has no basis for invalidating the contract in law. The case of **General Parts (U) Ltd versus NPART** (supra) is inapplicable because it deals with a mortgage executed by a company under the Registration of Titles Act. On the other hand the matter before the court is a lease facility agreement which is not governed by the Registration of Titles Act.

### **Resolution of issues**

I have duly considered the question of whether the Defendant is indebted to the Plaintiff in the sum of Uganda shillings 207,270,361/=.

Without much ado I agree with the Plaintiff's submission that the fact of the Defendant's indebtedness is admitted in the written statement of defence and particularly paragraphs 3 thereof where it is written as follows:

"In answer to paragraph 3 of the plaint, the Defendant shall aver and contends that the Plaintiff is not entitled to the entire amount of Uganda shillings 207,270,361/= as claimed given the fact that it is not proved by any bank statement that would be filed in court upon filing the plaint as required by law."

Furthermore in paragraph 4 of the written statement of defence the Defendants defence is as follows:

"In answer to paragraph 4 (a) – (g) of the plaint, notwithstanding the fact that the Defendant disputes the amount sued upon/claimed of Uganda shillings 207,270,361/=, the Defendant contends and shall aver that: –..."

The two paragraphs are unequivocal that what is in dispute is the amount sued upon. In reply to the written statement of defence the Plaintiff denies that it is not entitled to the entire amount claimed in the plaint. On the question that the plaint does not prove the amount by any bank statement, the Plaintiff attached annexure "C1" and "C2". Consequently the question in controversy is how much money is owed to the Plaintiff if any.

PW1 Mr Dennis Kizza is the principal witness of the Plaintiff and the manager rehabilitations of the Plaintiff bank. He relied on the lease offer document which offered Uganda shillings 212,215,000/= for purposes of financing the purchase of one brand-new five axle drawbar trailer

and one used Mercedes-Benz tractor head model 2002. The lease facility was repayable by 36 monthly instalments of approximately Uganda shillings 4,420,600/= with interest and thereafter 24 equal monthly instalments of approximately Uganda shillings 2,409,121/=. The insurance premium facility was repayable in 10 equal instalments of Uganda shillings 1,776,924/=. PW1 testified that the Defendant defaulted on its undertakings to make regular payments and was notified on several occasions to pay up on the instalments. On 16 April 2010 the Plaintiff notified the Defendant of his default and further requested him to hand over the leased assets. The lease asset was subsequently impounded and sold off by Messieurs Armstrong Auctioneers at Uganda shillings 25,000,000/= out of which on the 1 March 2011, shillings 17,000,000/= was deposited and a further Uganda shillings 7,000,000/= was reversed on 21 March 2011. Subsequently on 21 March 2011 Uganda shillings 15,000,000/= was reflected as paid. He testified that prior to the sale on 28 February 2011 the Defendant owed the Plaintiff Uganda shillings 208,468,808/= and upon the sale of the leased asset the outstanding balance was Uganda shillings 183,468,808/=. On 24 March 2011 the Plaintiff decided to write off the debt and accrued interest as at that date which amounted to Uganda shillings 28,591,174/=. Even after the sale the Defendant was and is still indebted to the Plaintiff. In his cross examination he admitted that a deposit was supposed to be made by the lessee prior to disbursement of the loan of 10% and 30%. The 10% and 30% is of the pro forma invoice. This was paid. The witness was however not familiar with exhibit P2. He did not have information on the cost price of the procurement and did not know the pro forma invoice amount. Interest on the lease was 8.25% per annum. The rate of interest depended on different market conditions. Particularly the witness was cross examined on what the principal amount was and the cost price of the vehicle. The witness was however not familiar with several aspects of the lease.

PW2 Felix Musiime is a director of Messieurs Armstrong Auctioneers and Court Bailiffs and testified that he received instructions to sell the leased assets from the Plaintiff. They advertised the leased assets after the Plaintiff availed a valuation report prepared by Automobile Association of Uganda which auction was attended by the Defendant himself. Thereafter the Auctioneers and Court Bailiffs received three offers one of Uganda shillings 17,000,000/=: another of Uganda shillings 20,000,000/= and the last offer of Uganda shillings 25,000,000/=. Upon consulting the Plaintiff, the Plaintiff authorised them to sell to the person who offered Uganda shillings 25,000,000/= which was the highest bid in the circumstances.

The cross examination did not change the testimony of PW2.

Exhibit P1 is the letter of offer of leasing dated 24th of June 2008 and is signed by the Defendant on 25 June 2008 accepting the terms of the offer. Clause 2 of the lease offer transaction gives the limit of the offer as Uganda shillings 212,215,000/= and IPF Uganda shillings 16,415,000/=. The purpose of the facility was financing the purchase of one brand-new five axle drawbar trailer and one used Mercedes-Benz tractor head. Secondly it was for financing the insurance premium for the financed assets to ensure that the financed assets are insured during the tenure of the lease.



The period of the lease was 60 and 36 months for the trailer and tractor head respectively. For the insurance it was 10 months. It was a requirement that an initial payment of 10% and 30% deposit on the trailer and tractor head respectively of the total pro forma invoice price was to be paid to the supplier by the lessee prior to the disbursement of money on the facility. The Defendant was to repay in 36 equal monthly rental of approximately Uganda shillings 4,420,600/= and thereafter 24 equal monthly rentals of approximately 2,509,121/= Uganda shillings inclusive of interest commencing one month after delivery of the financed assets. Subject to the full payment of the rentals and VAT at the expiry of the lease term, the Defendant had an option to purchase the financed assets for 0.5% of the original amount financed by the bank.

The invoice of the supplier of the leased assets was supposed to be addressed to the Plaintiff bank. The security for the facility is the original logbook of the Mercedes-Benz tractor head and was to be transferred into the names of Stanbic Bank Uganda Limited. Similarly the original logbook of the trailer would be registered in the names of Stanbic Bank Uganda Limited. An irrevocable letter of undertaking from the insurance company to pay back any unutilised portion of the insurance premium was also a requirement and automatic settlement benefit over the Defendant. Interest was 4% above the banks Uganda shillings prime rate which was at 16% at the time of execution. 8.25% interest was to be charged on the IPF. Furthermore 4% is chargeable on top of the agreed rate on delayed rental payments and upon failure to make rental repayments as scheduled.

Exhibit P2 is entitled "Vehicle and Asset Finance Lease Agreement". The Defendant's Counsel submitted that exhibit P2 was not duly executed. However exhibit P2 is endorsed by two signatures one of which is that of the Defendant. It provides that the lessor lets to the lessee the goods described. The document is supplementary to the lease offer agreement. In the joint scheduling memorandum exhibit P2 is an admitted document. Under **section 57 of the Evidence Act cap 6:**

“No fact need be proved in any proceeding which the parties to the proceeding or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings; except that the court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions.”

Exhibit P2 is a fact agreed to be admitted in writing before the hearing. In any case the Defendant in the written statement of defence does not deny the lease. Exhibit P2 fully describes the lease equipment. It further provides that the total cost is Uganda shillings 160,039,100/=. The figure is consistent with the provisional statement exhibit P12 which shows that there was an initial debit of Uganda shillings 118,300,000/= together with the finance charge of Uganda shillings 44,259,100/= totalling to Uganda shillings 162,559,100/=. It is further admitted that the Defendant failed to service the loan as scheduled. Correspondence admitted in evidence shows

*Decision of Hon. Mr. Justice Christopher Madrama*

that the Defendant failed to pay. By exhibit P3 the Plaintiff writes that the outstanding amount by 16th of April 2010 was Uganda shillings 207,270,861/=.

DW1 testified that the asset was used in the transport business. On the question of the outstanding amount, the bank approved Uganda shillings 212,215,000/=. He was required to contribute 40% when the asset reaches to help with taxes. He paid Uganda shillings 84,886,000/= which was his contribution. Calculation of the amount which DW1 claimed to have paid demonstrates that the amount is exactly 40% of the loan amount approved as the limit of the facility. DW1 further testified that the contribution of the bank was 127,329,000/= for the entire lease. Along the way he claims to have paid monthly rentals amounting to Uganda shillings 62,310,028/= as reflected in the bank statements. If he deducted the monthly rentals he had paid, he would get a total of Uganda shillings 65,018,972/=. He further testified that at the time of filing his written statement of defence he had not factored the above facts. Secondly he got to learn that the amount at which the vehicle was sold was Uganda shillings 25,000,000/=. He further testified that he had informed the bank that he had someone who was willing to pay for the leased equipment at Uganda shillings 100,000,000/= and he requested that person to put in his bid. He wondered why the vehicle or leased equipment was sold at a mere Uganda shillings 25,000,000/=. He admitted under cross examination that he never made reference to the sum of 40,000,000/= and 60,000,000/= which he referred to in total in his written statement of defence. He further testified that interest was over Uganda shillings 41,000,000/= for the entire lease. He did not know how much the leased asset cost. Upon being reminded of exhibit P2 he recognises his signature and agreed that the cost price was Uganda shillings 169,000,000/=. Secondly he testified that his contribution in the initial payment of cash was of Uganda shillings 59,000,000/=. However he did not have any proof with him. He confirmed that the crisis in Kenya started in December 2007 and continued for a long time affecting many business persons involved in the transportation business. He alleges that the changes made to the vehicle axle came about six months after the lease agreement. He admitted that he did not blame the bank for selling the vehicle but he protested the way it was sold. Upon his re-examination he testified that he had financial difficulties and the bank did not help him. The witness wrote exhibit D2 dated 5th of August 2012 being a loan recovery proposal after repossession of the vehicle. He was however unsure about the bank statement exhibit P12 which he claimed had not been given to him after several requests therefore.

After considering the requirement for the Defendant to deposit 40% before obtaining the lease equipment, the submissions of the parties and the evidence leaves a lot to be desired. I agree with the Defendant's contention that PW1 was not able to explain with exactitude what actually transpired. Similarly the Defendant did not prove the deposits that he alleged he had made. It is quite important that the amount of money used to purchase the leased equipment together with any taxes or costs is established since the amount indicated in the lease offer was the limit of the facility. It has to be established what the actual amount disbursed for the facility was. Secondly it has to be established whether the Defendant deposited 40% before obtaining the lease facility

equipment. Thirdly any instalment payments made by the Defendant has to be established. Fourthly the lease rental entitlement of the Plaintiff has to be calculated at the rate agreed upon at the time of termination of the lease. This would include the future rentals. Fifthly the amount of Uganda shillings 25,000,000/= said to be the amount at which the vehicle was sold should be taken into account. If all the above factors are taken into account, the actual amount if any that is outstanding as at the date of the termination of the lease can be established. In my opinion the court cannot establish what the outstanding amount is without doing an audit and accordingly I would refer the issue for trial by a referee under the provisions of section 27 (c) of the Judicature Act. Section 27 of the Judicature Act provides as follows:

“27. Trial by referee or arbitrator.

Where in any cause or matter, other than a criminal proceeding—

(a) all the parties interested who are not under disability consent;

(b) the cause or matter requires any prolonged examination of documents or any scientific or legal investigation which cannot, in the opinion of the High Court, conveniently be conducted by the High Court through its ordinary officers; or

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

In this case issue number one consists wholly of accounts and requires a reconciliation of accounts. It will be referred to a referee or arbitrator agreed to by the parties and failing the agreement will be sent to an officer of the High Court or an official referee to determine the amount that may be outstanding. The amount that is established by the auditor, if any, will become the amount due and payable.

Issue number two deals with the question of whether the repossession and sale of the lease assets was lawful.

On this issue the Plaintiff submitted that the defence does not make a single averment that repossession on sale of the assets was unlawful. The Plaintiff in the reply to the written statement of defence did not deal with this issue. Parties are bound by their pleadings and the court should be pleased to ignore the issue.

In reply the Defendant’s Counsel submitted that the parties raised the issues for determination by the court and the question ought to have been addressed then.

The issue raised is a preliminary issue and requires a consideration of the written statement of defence. On the first issue it has already been resolved that there was an admission of liability for

any outstanding amount save for the amount. The question of whether there is any outstanding amount shall be determined by the auditors. Secondly in paragraphs 3 and 4 of the written statement of defence the issue was whether the outstanding amount claimed by the Plaintiff is due and owing. In paragraph 4 of the written statement of defence the Defendant further raises the question of frustration on the ground that the motor vehicle failed to operate and it required a replacement gearbox at a cost of US\$15,600 and that he had duly notified the Plaintiff of that development. Secondly the Defendant avers that he was frustrated by the political situation in Kenya which resulted in the closure of the Ugandan cement factories due to lack of raw materials that the Defendant was transporting from Mombasa to Uganda. The Defendant was also frustrated by the well-known global credit crunch crisis period. Furthermore the Defendant averred in the written statement of defence that the transaction was affected by a change in the axle limit and axle load regulations that required the Defendant to change and modify the vehicle to a three axle that was very costly. Paragraph 4 (d) of the defence is particularly revealing about the Defendant's defence and it provides as follows:

"The Plaintiff despite the afore stated situation went ahead and impounded the said motor vehicle (s) Mercedes-Benz registration number UAK 469 V from the Defendant, sold it and it/they never informed the Defendant of the proceeds of sale to take it into consideration of the actual outstanding amount liability despite the fact that the Defendant had vide/by his two letters dated 5/8/2010 and 19/11/2010 attached hereto and marked annexures "BB1" and "BB2" written to the Plaintiff inter alia requiring and requesting the Plaintiff to reschedule the loan payment terms."

Under **Order 15 rule 1 of the Civil Procedure Rules**, issues arise when a material proposition of law or fact is affirmed by one party and denied by the other. Furthermore it provides that material propositions are those propositions of law or fact which the Plaintiff must allege in order to show a right to sue or a Defendant must allege in order to constitute a defence. Finally under Order 15 rule 1 (3) of the Civil Procedure Rules each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue. For the court to determine whether the termination, repossession of the lease equipment and the sale thereof was illegal, it had to be asserted by the Defendant in the defence for it to constitute a defence. I agree with the Plaintiff's Counsel that because the matter was not raised in the defence, it was never denied by the Plaintiff. Secondly the facts averred of not taking into account the request of the Plaintiff to reschedule the loan does not deal with the question of whether the repossession was unlawful but only raises the question of whether the Plaintiff was obliged to take into account the request of the Defendant to reschedule the lease repayment terms in the circumstances of the Defendant. Particularly the Defendant in annexure "AA" in a letter dated 6th of January 2010 wrote requesting for a refinance of US\$15,600 to enable him replace the gearbox. He wrote that the vehicle gearbox completely failed though the rest of the vehicle engine and other parts were in a very good working condition. In annexure "BB1" to the defence the Defendant wrote a loan recovery proposal dated 5th of August 2010. He indicated that he had a personal commitment to

recover the loan. He requested the vehicle to be returned to him and proposed payment of Uganda shillings 5,000,000/= at the end of every month. He further offered additional security. By those actions the Defendant had conceded and represented to the Plaintiff that he was indebted and the Plaintiff had properly repossessed the facility vehicle.

The letters reveal that the Defendant was indebted to the Plaintiff and that the vehicle had been repossessed in accordance with the lease agreement. In annexure "BB2" to the written statement of defence and in a letter dated 19th of November 2010 the Defendant offers additional security for loan restructuring.

The summary of evidence in the written statement of defence indicates that the Defendant shall rely on the evidence contained in his written statement of defence.

Whereas it is true that an illegality once brought to the attention of court overrides all questions of pleadings including admissions made, the pleadings cannot reveal a cause for trial of the defence of illegality. The lease agreement exhibit P1 permits the Defendant to repossess the vehicle for non-payment. Just like all finance leases, the terms seem to favour the financial company offering the lease. Clause 3 of the terms and conditions indicate that the lessor shall at all times remain the owner of the goods. Clause 4 thereof provides that the lessee carries all the risk in the goods and their use from the date of signing the agreement from the date the lessee takes delivery of the goods. Clause 11 provides that the lessee shall be in breach of the agreement if he does not pay the dues on the due date. Finally under clause 11.2.2 the Plaintiff may upon giving 14 days written notice demand from the Defendant immediate payment of all amounts outstanding including future rentals and expenses incurred by the Plaintiff in repossession, save and transportation valuation or storage of the goods or any other charges. By exhibit P3 which is a letter dated 16th of April 2010 the Defendant was given notice for the payment of the balance of Uganda shillings 207,270,861/= and he was required to park the leased equipment at the parking yard of the Plaintiff not later than 23rd of April 2010. It is also apparent from the correspondence admitted in evidence that the vehicle was in the possession of the Plaintiff for over three months. During that period the Defendant tried to negotiate for rescheduling of the terms of payment. By exhibit P4 dated 16th of August 2010 on the subject of loan recovery proposal, the Plaintiff bank wrote to the Defendant making reference to his letters dated 4th of August 2010 and 5th of August 2010 advising that his application regarding the loan recovery plan to support operations was reviewed by the Creditor Committee but was unsuccessful because the Defendant was not adhering to recommendations put forward by the bank as a way forward. The letter of fifth of August 2010 was admitted as exhibit D2 and is a proposal for loan recovery written by the Defendant. In that letter the Defendant requested for return of the vehicle so that he can do all repairs and resume work by the start of September 2010. In exhibit D3 which is a letter dated 19th of November 2010, the Defendant further wrote that he had several people whose offers were in the region of 40,000,000 Uganda shillings to 60,000,000 Uganda shillings who had been calling him to ask him to sell the vehicle to them and

that he had their contacts. However he requested that the vehicle is put off the market so that priority is given to his proposal. He wrote that the bank should allow him to service his loan with manageable instalments.

The evidence produced proves that notice was given and the vehicle was repossessed. Furthermore the Defendant negotiated for release of the vehicle and the new repayment terms. The Defendant according to the written statement of defence and correspondence attached thereto sought to negotiate after repossession of the vehicle. On the basis of the averments and attachments to the written statement of defence, it cannot be said that the question of illegality was raised in the pleadings. It is admitted by the Plaintiff that the first auction was called off. In the testimony of the Defendant he was present when the first auction which had been advertised was to take place. His admitted action was not to object to the sale of the equipment. To the contrary he testified that he had other buyers who had better offers. The question therefore is why, being present at the auction site, he did not come up with the alleged potential buyers? Thereafter he kept checking on the auction site for the date of the auction after it had been called off. He later learnt that the vehicle had been sold and that he was supposed to pay the outstanding balance on his account amounting to Uganda shillings 207,270,861/=. He further testified that he did not know why the truck was sold at such a low price when there were better offers. The truck had been sold at Uganda shillings 25,000,000/=. On the other hand PW2 established that the initial three offers were below the reserve price and they had called the auction off. There were no better prices offered in the market at the time of the first auction event. PW2 had not received any offers as testified to by the Defendant. The Plaintiff's Counsel objected to the testimony of DW 2 and DW 3 because they are not on the list of witnesses in the written statement of defence and they are not mentioned in the joint scheduling memorandum endorsed by both Counsel. Consequently Counsel submitted that the testimony of the two witnesses is suspect. Secondly their bid offers was not attached to the written statement of defence and neither were they referred to in the joint scheduling memorandum. The only witness Mr Mwesigwa Emmanuel referred to in the joint scheduling memorandum did not testify.

DW 2 and DW 3 made statements and their statements were admitted. This was presumably to avoid further adjournments. What is material is that they did not come to court on 19 March 2014 when the matter was fixed for their cross examination. Mugizi Moses in his witness statement testified that he had made an offer of Uganda shillings 45,000,000/= to the auctioneer at the time the auction was conducted. He made the offer verbally. Attached to his witness statement is a letter exhibit D5 dated 14th of July 2010 which he claimed to have made or addressed to the auctioneer. The second testimony on the question of the auction is that of DW3 Mushabe Jackson who testified on the witness statement that he had made an offer of Uganda shillings 50,000,000/= for the truck. The auctioneer thereafter withdrew the vehicle from the auction. He further testified that if he had the chance he would have bought the truck at Uganda shillings 60,000,000/=. He was not cross examined and he attached exhibit D4. The evidence

does not raise a question of illegality and ought to have been submitted as an issue of selling below the prevailing market rates.

Furthermore the Plaintiff relied on exhibit P7 which is a valuation report by the Automobile Association of Uganda dated 26th of October 2010 giving a valuation report of the tractor head as at a fair open market value of Uganda shillings 20,000,000/= and the forced sale value of Uganda shillings 14,000,000/=. In exhibit P6 dated 26th of October 2010 the valuation of the trailer at the open market value was Uganda shillings 28,000,000/= and the forced sale value at Uganda shillings 20,000,000/=. In other words the total fair market value of the entire leased equipment as valued by Automobile Association of Uganda is 48,000,000/= while the forced sale value was valued at Uganda shillings 34,000,000/=.

In the premises issue number two on whether the repossession and sale of the leased asset was lawful cannot be considered on the basis of the review of the evidence and pleadings since neither the pleadings nor the facts disclose a question of illegality. In any case the Defendant acquiesced to the repossession and negotiated for release of the vehicle. As far as the sale is concerned, it does not disclose any breach of law. The sale was conducted with the participation of the Defendant. As to why if at all the auctioneers ignored the Defendant's alleged offers, it is simply a matter of evaluation of evidence. DW 1 testified that there were three offers by Mr. Mushabe Jackson, Mr. Mugizi Moses and one Bukenya when the auction was called off. On the other hand PW2 the auctioneer who was cross-examined testified that they received three offers exhibit P8, P9 and PE 11. The evidence of PW 2 is more credible. Exhibit P8 is an offer for Uganda shillings 17,000,000/= by one Kabugo Ronald. Exhibit P9 is another offer by one Alingo Med for Uganda shillings 20,000,000/= while exhibit P10 is another offer for Uganda shillings 25,000,000/= by Twinomugisha Benson. Exhibit P 11 is a letter accepting the offer of Uganda shillings 25,000,000/=.

The testimonies of PW2 and the defence witnesses are at variance. Additionally the Plaintiff's Counsel submitted on some inconsistencies in the testimony of the Defendant particularly the fact that he alleges in the written statement of defence that there was a political crisis in Kenya pursuant to 27 December 2007 Kenya elections. The Plaintiff's Counsel pointed out that the lease offer to the Defendant is by its letter dated 28th of June 2008 was written long after the crisis had subsided. Furthermore the defendant started defaulting in 2009 after he had made initial payments on the lease rentals as demonstrated by exhibit P12.

I have duly considered the submissions of the Defendant's Counsel and the Plaintiff's Counsel on this issue but before I conclude it I would make reference to some of the submissions. On the question of material deterioration in the financial position of the Plaintiff, I agree with the Plaintiff's Counsel that the bank reserved the right to immediately withdraw from the arrangement and renegotiate the terms and conditions of the agreement or call for additional security. The bank however did not withdraw but opted to repossess the leased equipment which was also one of its rights. The Defendant could not insist that on the ground of deterioration in

his material conditions, the bank ought to have withdrawn and sought renegotiations and additional security. Clause 19 of the lease offer agreement provides as follows:

"If there is a material deterioration in your financial position, the bank reserves the right to immediately withdraw from current arrangements, renegotiate the terms and conditions of the agreement and or call for additional security.

If you do not agree within 14 days of being advised that a material deterioration has taken place, then the matter will be referred to an independent auditor for the opinion, with the opportunity for both parties to present their case. You agree that this opinion would be binding."

The material deterioration refers to the financial position of the Defendant. However it was the bank to exercise the right of withdrawal and the Defendant cannot insist on it.

On the question of sale below the market price, the defence is plausible but the evidence of the prevailing market prices is suspect. On that basis the Defendant has not discharged the burden of proof since both witnesses who could have testified positively about the facts were never cross examined and their witness testimony in writing contradicted that of PW2 who was cross examined and this testimony stood up to cross examination. The two witnesses of the Defendant never turned up when the suit was adjourned specifically to have them cross examined. On the balance of probabilities I find for the Plaintiff on issue number two.

On the question of remedies, the issue of the outstanding amounts under the lease arrangement has been referred to auditors in accordance with the resolution of issue number one. The deputy Registrar shall within one week from the date of this judgment refer the issue of outstanding amounts to an independent auditor chosen by the parties' failure for which he shall refer it to an official referee or officer of the High Court in accordance with the judgment in issue number 1.

As far as the issue of interest is concerned, any amount established through the audit shall bear reasonable interest of 17% per annum from the date of judgment till payment in full.

Costs follow the event and costs of the suit are awarded to the Plaintiff. However the costs shall be taxed after the reconciliation efforts made under **section 27 (c) of the Judicature Act** to establish whether there is any outstanding amount under the lease facility and if so how much.

Judgment delivered in open court this 2nd of May 2014

**Christopher Madrama Izama**

**Judge**

Judgment delivered in the presence of:

*Decision of Hon. Mr. Justice Christopher Madrama*



Isaac Bakayana Counsel for the plaintiff

Musa Baale Counsel for the defendant

None of the parties in attendance

Charles Okuni: Court Clerk

**Christopher Madrama Izama**

**Judge**

2 May 2014