

THE REPUBLIC OF UGANDA,

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

HCCS NO 0340 OF 2013

SWIFT COMMERCIAL ESTABLISHMENT LTD}.....PLAINTIFF

VS

NEW UGANDA SECURIKO LTD}.....DEFENDANT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

JUDGMENT

The Plaintiff claims against the Defendant for breach of contract for provision of security guard services and for recovery of a sum of Uganda shillings 140,136,000/=, general damages for breach of contract, interest and costs of the suit.

The Defendant denies the claim and contends that by the security services contract, the Plaintiff was required to take out a comprehensive insurance policy to cover any losses that would occur over and above the cover undertaken by the Defendant which it never did and is therefore barred from making the claim. Secondly its liability is limited. Thirdly the liability of the Defendant is limited and the Plaintiff is barred by the doctrine of estoppels from claiming against the Plaintiff because it fundamentally breached the terms of the contract by failure to pay for the Defendants invoices. In the alternative the basis of the claim was stage-managed by the Plaintiff and its employees to evade its liability to the Defendant.

The Defendant further counterclaimed against the Plaintiff for payment of a sum of Uganda shillings 21,062,800/= as the outstanding balance/debt accruing to the Defendant company for the security services offered to the Plaintiff. The counterclaimant claims damages for breach of contract as well as interest at the rate of 28% per annum from the date of the accrual of a cause of action and costs of the suit.

The Plaintiff is represented by BKA Advocates and Legal Consultants while the Defendant is represented by Mwesige Mugisha and Company Advocates.

It is an agreed fact in the joint scheduling memorandum endorsed by both Counsel that on the 27th day of April 2010, the Defendant executed a security guard services contract with the Plaintiff wherein the Defendant was contracted to provide security guarding services for the Plaintiff's business premises at Najjanankumbi where the Plaintiff carried out the business of distributorship and sale of Uganda breweries products (beers and spirits). At all material times, the Plaintiff has been the distributor of Uganda Breweries products for Najjanankumbi, Entebbe and Makindye areas with a depot at Najjanankumbi.

Agreed issues for trial:

1. Whether the parties breached the security guard services contract?
2. What remedies are available to the parties?

At the end of the trial the court was addressed in written submissions.

In the written submissions, the Plaintiff's case is that the Plaintiff and Defendant entered into a contract for security guarding services on 27 April 2010 according to exhibit P1. The parties agreed that the Defendant would deploy 2 day and night guards to guard the Plaintiff's premises in Najjanankumbi and were deployed accordingly. On the 9th of May 2010, employees of the Defendant one Bayo Felix and Otto John while on duty broke into the storeroom at the premises robbed and took away the safe containing money from the weekend sale. The Plaintiff at that time had money in a safe from weekend sales for the period 7-9th of May 2010 which had not been banked. The incident was reported by the Plaintiff at Katwe police station. Investigations were carried out by the police which led to the arrest of the Defendant's employee Mr Bayo Alex and two others who allegedly participated in the robbery. The three were prosecuted and eventually convicted and sentenced for the offences of theft and store breaking at the Chief Magistrates Court Nakawa in Criminal Case Number 21 of 2010. Thereafter the Plaintiff filed this action for recovery of Uganda shillings 102,226,000/= deposited in the safe. Uganda shillings 7,000,000/= for the costs of replacing the stolen safe; Uganda shillings 4,510,000/= for

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the costs of repairs of damages and the premises and Uganda shillings 1,200,000/= for the costs of replacing the companies Compaq Computer and general damages.

On the other hand the Defendant filed a defence and counterclaim contending that its liability under the contract for any liability that may arise against it was limited under the contract for guarding services. Secondly the Defendant averred that the security services contract required that the Plaintiff take out a comprehensive insurance policy cover any losses that could cover what was above that undertaken by the Defendant which the Plaintiff failed to do and is barred from making this claim. Last but not least the Defendant counterclaimed for the sum of Uganda shillings 21,062,800/= as the outstanding balance accruing to the Defendant company for the security services provided to the Plaintiff.

Issues for resolution:

1. Whether the parties breached the security guard services contract?
2. Whether the liability cover set out in clause 5 of the security guard services contract limit the Defendant's liability?
3. What remedies are available to the parties?

Whether the parties breached the security guard services contract?

On this issue the Plaintiff proposed to address the court on two sub issues which are **whether the Defendant breached the contract for guarding services?** And **whether on the question of whether the Defendant breached the contract for security guarding services?** The Plaintiff's case is that it failed to fulfil its fundamental obligation to provide security for the Plaintiff's premises.

On the definition of breach of contract in the case of **Ronald Kasibante versus Shell (U) Ltd HCCS 542 of 2006 reported in [2008] HCB 162**, as breaking of the obligation which the contract imposes. Secondly this court held in **Lloyds Forex Bureau versus Securex and Agencies Ltd** that where a firm provides security services and is supposed to prevent robbery of the Plaintiff's assets such as money, if the robbery occurred due to the fault of the Defendant, it would amount to a fundamental breach that went to the root of the contract. The Plaintiff relies on the fact that there was evidence that on the night of the robbery which is the 9th of May 2010

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the Defendant had deployed guards at the Plaintiff's premises at Najjanankumbi when the Plaintiff's premises were broken into. The robbers took away the safe containing money from the weekend sales. The Plaintiffs at the time of the robbery had in the safe money for weekend sales for the period 7th up to the 9th of May 2010 along with other property belonging to the Plaintiff. The evidence of PW3 is that subsequently and upon investigation by the police, it was discovered that the Defendant's employee Bayo Felix and Omwony Joseph and Otto John participated in the robbery. They were charged, prosecuted, convicted and sentenced for the offences of store breaking and theft in Criminal Case Number 21 of 2010 at Nakawa court. The Defendant is vicariously liable for the conduct of its employees who had been deployed at the Plaintiff's premises on the fateful night.

In the action of the Defendants employees amounted to breach of obligation to provide security/guarding services to the Plaintiff as contracted. It was the Defendant's responsibility to hire responsible employees. The Defendant was therefore vicariously liable for the actions of its staff. Furthermore it amounted to breach of the contract for security/guarding services.

In reply the Defendant's Counsel submitted on the question whether the Defendant breached the contract for security/guarding services. He contended that the contracted obligation of the Defendant was to provide guarding services of the Plaintiff's premises which it did at all times of the contract. The Plaintiff did not prove on the balance of probabilities that any theft took place nor has the Plaintiff proved that any of the Defendant's employees participated in the alleged robbery. He submitted that the guards who apparently were guarding the Plaintiff's premises and who probably robbed the Plaintiff were from SECUREX Uganda Limited and not the Defendant. He contended that the Plaintiff had another security services contract at the material time but only chose to sue the Defendant as an afterthought. This is apparent from paragraph 2 of the judgment of the Magistrate's Court relied upon by the Plaintiff's Counsel Exhibit P1, D1. Whereas the Defendant deployed and rendered guard services at the Plaintiffs premises, in fulfilment of her contractual obligations, the Plaintiff in violation of the terms of the contract deployed other guards who later participated in the alleged robbery possibly with the connivance of the Plaintiffs own employees.

In the premises the Defendants defence is that it provided to guard services as provided for under the contract and was not in breach of its obligations.

In rejoinder the Plaintiff submitted that it proved on the balance of probability that the robbery occurred at its premises on the night of 9th of May 2010. PW1 testified that the Plaintiff's premises were broken into while being guarded by the Defendant's employees. Property including computers and a safe were taken by the Defendant's employees, guards or servants. Furthermore in the judgment, in the Chief Magistrates Court of Nakawa, the Defendant's employees were charged, convicted and sentenced for offences of theft and breaking into the Plaintiff's stores. Furthermore the Defendant admitted that on the night of the 9th of May 2010, it deployed guards to guard that the Plaintiff's premises.

Additionally under cross-examination of DW1, he admitted that Omwony Joseph was deployed at the Plaintiff's premises on the night of the robbery. PW3 who had instructions to investigate the matter, proceeded to the office of the Defendant and obtained the personal files of Bayo Felix and Omwony Joseph from where he was able to retrieve the contact details of the suspects referee and to get the whereabouts of Bayo Felix from him. Bayo Felix was subsequently arrested in the Democratic Republic of Congo. In the premises the Plaintiff's Counsel reiterated submissions that the Defendant is vicariously liable for the conduct of its employees.

On the sub issue of whether the Plaintiff breached the contract for security/guarding services? The Plaintiff's Counsel submitted that the Plaintiff was not in breach thereof. The Defendant failed to adduce evidence to the effect that the Plaintiff owes it the sum of Uganda shillings 21,062,800/= for the security/guarding services provided at Najjanankumbi premises. PW1 and PW2 confirmed that the Plaintiff had contracts with the Defendant for guarding services for several of its premises and his contract was considered to be independent of and separate from the other contracts. DW2 failed to point out to the court evidence that the Plaintiff owed any sums of money to the Defendant for security/guarding services and the Najjanankumbi premises. If the court was to find that the Plaintiff does owe such money, those services rendered by the Defendant do not relate to the site of the dispute before the court in respect of which robbery at the Plaintiff's Najjanankumbi premises had taken place.

In reply the Defendants Counsel submitted that the testimony of the Defendant's witnesses particularly DW2 is that the Defendant provided security services to the Plaintiff and the Plaintiffs premises at Kawempe, Najjanankumbi, and Namasuba among others. The Plaintiff fundamentally breached the contract by failing to pay for the security services and at the time of termination of the security services contract, the Plaintiff owed the Defendant Uganda shillings 21,062,000/=. Whereas the service orders were taken out for different premises, all payments including payments in respect of the premises at Najjanankumbi and all the accounting records were made in the names of the Plaintiff. The argument that the counterclaimant did not adduce evidence of the Plaintiff's indebtedness at Najjanankumbi should be disregarded. The amount owed is in respect of all the branches of the Plaintiffs business in the various places. The Defendant suffered operational costs, loss of business or potential clients and was inconvenienced by the Plaintiff's acts of breaching the contract. The Defendant counterclaimed for general damages of Uganda shillings 14,000,000/= for the loss.

In rejoinder the Plaintiff's Counsel reiterated that there was a separate contract for each premises similar to exhibit P1. DW2 failure to prove what amount was outstanding in respect of the premises at Najjanankumbi from where the dispute arises. There is no evidence that the Plaintiff was indebted in respect of the Plaintiff's premises in Najjanankumbi. In the premises the Defendant cannot claim that the Plaintiff fundamentally breached the contract for guarding services. The Plaintiff's Counsel agrees that general damages are awarded to a party who has suffered loss or injury at the instance of another. Upon failure to prove that the Plaintiff breached its contract for the guarding services, the Defendant is not entitled to any damages as claimed.

On the second issue of **whether the liability clause set out in clause 5 of the security guard services limited the Defendant's liability?**

The Plaintiff's Counsel submitted that the exemption clause does not limit the liability of the Defendant due to the Defendant's fundamental breach of contract which prohibits reliance on the exclusion clause. The position of law in relation to limitation clauses was considered in **SDV Transami (U) Ltd versus Nsibambi Enterprises, Court of Appeal Civil Appeal Number 56 of 2006**, where it was held that an exemption clause must be enforced by the court if it is clear

and unambiguous and accepted by the parties. However they are not enforceable if the conduct of the party relying on it amounted to a fundamental breach of the contract.

The Plaintiff contends that in the circumstances that led to the robbery at the Plaintiff's premises, the Defendant cannot rely on a limitation clause to limit their liability. The Defendant breached a fundamental term of the contract of guarding services when it failed to provide skilled, efficient and upright guards, constituting a primary obligation on the part of the Defendant under the contract. In the premises the Plaintiff's Counsel maintains that the Plaintiff is entitled to be compensated for the loss incurred regardless of the fact that the total sum it requires as compensation exceeds the limits set out in the exclusion clause.

In the reply the Defendant's Counsel submitted that clause 5 of the security guard services contract is clear and unambiguous and properly brought to the attention of the Plaintiff and is therefore binding and limits the Defendant's liability. A person is bound by the writing to which he has put his signature whether he read the contents of the agreement or not according to Cheshire and Fifoot, Law of Contract Fifth Edition page 211. The authors with reference to the case of *L'Estrange v Graucob* quote the holding of court to the effect that where the terms of the contract were in small print and that the Plaintiff did not read the document, and in cases in which the contract is contained in an ordinary ticket or other unsigned document, it is necessary to prove that an aggrieved party was aware or ought to have been made aware of the terms and conditions. In the present case however before signing the security services contract, the Plaintiffs Sarah Ssajjabi read through the terms and conditions of the contract with the help of DW1 before she signed. In cross examination he admitted having appreciated all the terms and conditions of the contract.

Counsel relies on section 62 (1) of the Contracts Act 2010 which provides:

"Where a contract is breached, and a sum is named in the contract as the amount to be paid in case of breach or where a contract contains any stipulation by way of penalty, the party who complains of the breach is entitled, whether or not actual damage or loss is proved to have been caused by the breach, to receive from party who breaches the contract, reasonable compensation not exceeding the amount claimed or penalty stipulated, as the case may be."

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The Defendants Counsel further relies on the case of **Photo Production Ltd versus Securicor Transport Ltd [1980] 1 All ER 556** for the holding that: "there is no rule of law by which an exemption clause could be eliminated from a consideration of the parties position, where there was breach of contract (whether fundamental or not) by which an exemption clause could be deprived of its effect, regardless of the terms of the contract, because the parties were free to agree to whatever exclusion or modification of the obligations they chose, and therefore the question whether an exception clause applied when there was a fundamental breach... Or any other breach than in the construction of the whole contract".

Clause 5 of the service contract Ltd the Defendant's liability in case of breach, negligence or any loss or liability of whatever nature to Uganda shillings 500,000/=. Counsel further contends that it is trite law that where parties have agreed on certain amount payable in the event of breach of contract as damages, that is the only payable amount and no more according to the case of **Cellulose Acetate Silk Company versus Wildness Foundry (1925) Ltd, [1933] AC 30** where the parties agreed that in case of delay of delivery of erection plant, the Defendant would pay the Plaintiff 20% damages a week. The Defendant failed to deliver and relied on the limitation clause to which the court agreed. Counsel further relied on Cheshire and Fifoot, fifth edition page 229, Anson's Law of Contract 23rd edition pages 155 – 157 to the same effect. He contended that the so-called fundamental breach principle sought to be relied upon by the Plaintiff is an old position that has since been eroded by precedents and the present practice is that where there are clear terms consented to by the parties; the parties are bound by the bargain.

In this case the parties did not exclude the Defendant's liability but rather liquidated that liability. The agreed to compensate the other in the sum of Uganda shillings 500,000/= and cautioned the Plaintiff to take out an insurance cover for the rest of the claims. The parties are bound by the agreement in the security services contract and cannot go back against their words. Clause 5 of the security services contract is enforceable and if it is established that the Plaintiff suffered loss, it would be entitled to an amount not exceeding Uganda shillings 500,000/=.

The Defendants Counsel also sought to distinguish the case of **Transami (U) Ltd versus Nsibambi Enterprises** (supra) as being distinguishable on the ground that in that case there was total failure of consideration. The appellant had been contracted to deliver the goods to the

respondent which it did not deliver. In the current case however the Defendant was contracted to provide security services which it did by the time its services were terminated by the Plaintiff in May 2013. On the other hand the **Transami (U) Ltd** case (supra) did not involve the issue of demurrage i.e. where the parties have mutually agreed on the amount of demurrage or amount of compensation in case of breach. In the present case the parties agreed on the demurrage or fixed loss according to condition 5 of the agreement. In the Trans Am the case the Defendant had excluded or liability whereas in the present case the parties only limited liability or liquidated their liability. The case of **Lloyds Forex Bureau versus Securex Agencies (U) Ltd** (supra) relied on by the Plaintiff's Counsel was a case where a default judgment was entered upon the Defendant's failure to file a defence. It is a case where the issue of applicability of limitation clauses was not considered.

The Defendant's Counsel further submits that the Plaintiff cannot seek to treat the alleged breach as a fundamental breach, since by its conduct it's elected to treat it as a warranty. PW1 admitted that even after they allegedly breached in May 2010, the Defendant continued guarding the Plaintiff's premises until 2013 when the Defendant terminated the contract.

According to **Cheshire and Fifoot, Fifth Edition** pages 688 - 689 where a party by words or conduct refuses to treat the fundamental breach as the discharge of the contract, the contract remains in force. By the Plaintiff's conduct, it was clear that it had elected to treat the alleged breach not as a fundamental breach and therefore the Plaintiffs are estopped from claiming that the alleged breach (which they failed to prove before court) was a fundamental breach.

Without prejudice the Defendant's Counsel prayed that the court be pleased to find that the alleged breach did not amount to a fundamental breach since the Plaintiff did not elect to treat it as such. The court should find that the Plaintiff is only entitled to the compensation agreed in the contract in case the court is inclined to hold that there was any breach of contract.

In rejoinder the Plaintiff's Counsel submitted that the terms of the contract are not in dispute. The Defendant however fundamentally breached the contract because it breached the primary obligation of the contract to provide security and protect and prevent theft or loss in the Plaintiff's premises. He invited the court to determine the primary role of a security firm which is specialised in nature as a breach of the nature alleged constitutes a breach of the fundamental

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term. The expression breach of a fundamental term was considered in the case of *Transami (U) Ltd versus Nsibambi Enterprises (supra)* as a breach going to the root of the contract for which the court would be reluctant to release a defaulting party from its own breach. The Defendant is vicariously liable for the conduct of its employees who robbed the Plaintiff's premises. The Defendant failed to fulfil its primary obligation of guarding and preventing theft/loss occasioned at the Plaintiff's premises. The effect of such a fundamental breach would render the contract unenforceable and entitle the Plaintiff to claim for damages for any loss suffered.

Regarding the decision in **Photo Production Ltd versus Securicor Transport Ltd (1980) 1 All ER** for the holding that in determining whether an exclusion clause limiting liability is applicable when there is a fundamental breach, this depended on the construction of the contract. The Plaintiff's Counsel contended that the scope of the clause limiting liability does not extend to cover a fundamental breach. The construction of the limitation clause does not extend to cover loss incurred as a result of theft according to the construction of clause 5. The clause was not intended by the parties to cover loss that will arise from theft that was perpetuated by the Defendant's own employees. At the time of executing the contract both parties believed that the Defendant Company was able to provide security/guarding services up to the standard of well-qualified guards. Clause 5 is intended to cover losses including theft by third parties as a result of negligent conduct on the part of the Defendant and its employees but not theft by the Defendant's employees. No reasonable person running a business entity would enter into an agreement for security/guarding services and spend money for such services, if such person was aware that the security company was incapable of fulfilling its primary obligation and that it would be bound to suffer losses as a result of incompetent services.

In the premises the Plaintiff is entitled to claim compensation for losses incurred over and above the sum of Uganda shillings 500,000/=. The case of *L'Estrange v Graucob (supra)* is not applicable in the circumstances as the Plaintiff does not claim to be unaware of the terms and conditions of the contract.

With reference to reliance on the Contracts Act 2010, at the time the formation of the contract on 27 April 2010, it had not come into force. The Acts of Parliament Act and section 14 thereof provides that an Act of Parliament only comes into force on the date of publication in the

Gazette. The Contracts Act 2010 commenced on the 20th of May 2010 when it was published in the National Gazette and therefore the Defendant cannot be permitted to rely on its provisions. Secondly the Contracts Act cannot have retrospective effect unless it provides so. In the premises the section relied on by the Defendant's Counsel should be disregarded. The case of **Cellulose Acetate Silk Company Ltd versus Wildness Foundry Ltd** (supra) is inapplicable because it dealt with a clause on the measure of damages and not an exclusion clause. In the premises the court ought to find that the conduct of the Defendant's servants amounted to a fundamental breach of the contract that excludes the Defendant from relying on the exclusion clause.

Without prejudice if the court finds that the Plaintiff chose to treat the breach as a warranty and is still bound by the agreement, the Plaintiff contends that the Defendant cannot be seen to rely on the exclusion clause to limit its liability because the clause does not cover liability arising out of theft by the Defendant's servants.

Judgment

The Plaintiff's suit is for recovery of damages for a theft that occurred in its premises on the 9th of May 2010 and is against the Defendant which is a company providing security services. The contention of the Plaintiff is that the property was stolen on the fateful night by the Defendant's servants. Secondly that it is a fundamental breach of the contract and the Defendant cannot rely on a limitation clause limiting its liability to Uganda shillings 500,000/= for loss or to exclude liability altogether.

At the hearing and in the submissions filed in court it became apparent that the primary matter for resolution depends on the interpretation of the contract but before that can be done what needed to be resolved was a matter of fact as to whether the guards of the Defendant were involved in the theft of the Plaintiffs property. The issue of fact is whether the theft was by the servants of the Defendant. If the theft was not by the servants of the Defendant then there would be no need to consider the rest of the Plaintiff's suit as they are not alleging negligence on the part of the Defendant.

The Plaintiff called three witnesses to prove its case. The first witness is Sarah Ssajjabbi, a shareholder and director in the Plaintiff Company. She had received a telephone call on the 10th

of May 2010 at around 6 AM in the morning from the Operations Manager of the Plaintiff informing her that the Najjanankumbi stores had been broken into. The matter was reported to the police and secondly the storeroom had been broken into. One of the Defendant's guards who had been on the night duty was still at the scene of the crime and he appeared to have been drugged and had just come to his senses. Subsequently it was established that he had been given chloroform. The second guard by the name of Bayo Felix who had been on duty the previous night was not found at the scene of the crime. The police later arrested Bayo Felix. The Plaintiff lost Uganda shillings 102,226,000/= in the theft. She was extensively cross examined on the incident and specifically about the deposits of money the Plaintiff had made on Thursday, Friday, and Saturday which were the 6th, 7th and 8th of May 2010 respectively. It also transpired that the accountant of the Plaintiff died on the 10th of May 2010 after getting involved in a motorbike accident. She was cross examined on whether Bayo Felix was a security guard for SECUREX Ltd and she could not confirm because she did not know him. She had not personally seen Bayo Felix, the security guard said to be involved in the robbery.

The second witness Mr Stephen Galabuzi testified as PW2. His testimony is about the sales of the Plaintiff.

Lastly PW3 Mr Adupa Vincent Barkis Inspector of police testified about the robbery incident. Sometime in 2010 he had received instructions from the Deputy Director Crime Intelligence to thoroughly investigate the incidents of robbery at the Plaintiff's residence in Najjanankumbi. He was informed that Bayo Felix who was on duty guarding the premises had been involved in the robbery. They were able to positively identify him on the Plaintiff's CCTV footage. He traced Bayo Felix after getting his contact details. The suspected guard was no longer staying in Kampala. He traced one of the phone numbers of the suspect to a person resident in Arua district. She happened to be the sister of Bayo Felix. The suspect was traced to the Democratic Republic of the Congo and arrested. The suspect also led him to one Omwony Joseph, a security guard at the Defendant Company.

I have also considered the judgment of the Senior Magistrate Grade 1 dated 27th of September 2011 at the Chief Magistrates Court at Nakawa in Criminal Case No. 21 of 2010. In that judgment the Magistrate found as a question of fact that Bayo Felix was an employee of

SECUREX Uganda Limited. The other accused were Mr Otto John and Omwony Joseph who were associated with Bayo Felix by virtue of their employment/job. However the employer of the co – accused of Bayo Felix was not identified in the judgment.

I have further considered the testimony of the Defendant's witnesses. DW1 Mr Kennett Sseguya Ntanda testified that in April 2010 the Defendant was approached by the Plaintiff for purposes of providing security guard services at the Plaintiff's premises at Najjanankumbi, Kawempe and others sites. DW1 is the Field Coordinator in Charge of Operations of the Defendant. He testified that the Plaintiff signed a contract with the Defendant exhibit P1. He was not aware that any of the company's guards stole property of the Plaintiff and was charged and convicted of stealing any of the Plaintiff's property or money. He was surprised that the Plaintiff served the Defendant with a plaint and summons in the mid-2013 claiming a lot of money allegedly lost during the term of the contract. Sometime in 2013 the security services contract was terminated for non-payment for the services by the Defendant. On his cross examination he admitted that security guards had been posted by his company on the 9th of May 2010. The security guards posted were Muhindo Justus and Omwony Joseph.

I agree with Counsel for the Defendant that Bayo Felix was not the Defendant's employee at the time of the incident but an employee of Securex Ltd. He however worked with Omwony Joseph who was an employee of the Defendant. It is an assumption which was not proved that Bayo Felix had previously guarded the premises but not under the Defendant. PW3 the Police officer established that Joseph Omwony was employed by the Defendant. Both suspects were prosecuted for the theft and convicted by the Chief Magistrate's Court at Nakawa. The status of the third accused is unknown.

In the premises the Plaintiff proved on the balance of probabilities that one of the guards of the Defendant was involved in the theft of the Plaintiff's stores on the night of 9th of May 2010. Moreover he was a guard on duty on the fateful night. That being the case, I can consider the points of law as to whether by virtue of exhibit P1, the liability of the Defendant is excluded or if established limited to a sum of Uganda shillings 500,000/=.

At the scheduling conference both Counsels agreed to two major issues namely:

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1. Whether the parties breached the security guard services contract?
2. What remedies are available to the parties?

The resolution of the second issue depends on the first issue as to whether there was a breach of contract.

I will start with the sub issue of whether the Plaintiff breached its services by failure to pay for the guard services. DW1 the Plaintiff's witness testified that they provided the services on the fateful night of the 9th of May 2010. In other words the Defendant had not avoided the contract. Secondly it is a material question of fact that the contract was signed on 27 April 2010. The contract was only terminated sometime in 2013. The incident complained about occurred on 9 May 2010, about a week and a half after the contract was signed or services of the Defendant engaged. The question of whether the Plaintiff did not pay for the services rendered by the Defendant is easily answered by saying that the Defendant has counterclaimed for the amount of money and has not tried to repudiate the contract. Both parties continued in the relationship until the services were terminated by the Defendant in 2013. The counterclaim is for Uganda shillings 21,062,800/= for arrears of security services already provided. It was further in issue as to whether the arrears in respect of the Najjanankumbi premises or other premises which the Plaintiff guarded. The issue does not affect the question of whether the Defendant is liable for the manner in which it provided security services on the 9th of May 2010. Last but not least the Defendant proved that the Plaintiff as an entity owed it the money in question. The fact that it could be for other sites guarded is not material as the parties to the contract are the same. The Plaintiff breached the services contract by non-payment.

For that reason I will first consider the Plaintiff's suit before considering the counterclaim of the Defendant as it does not affect the question of whether the Defendant is liable for the claim of the Plaintiff for provision of security services at the material time of theft of the Plaintiffs money through breaking into the stores of the Plaintiff in Najjanankumbi on the 9th of May 2010. This is because the services were provided for over two years after the incident complained about.

Secondly the resolution of the issue of whether the Defendant is liable to make good the loss suffered by the Plaintiff revolves on interpretation of the contract exhibit P1 and the limitation clause therein.

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The exclusion clauses which are relevant are provided for under clauses 1 and 5 of exhibit P1 which is the service order form/conditions of service of the Defendant. The document is not in dispute. The Plaintiff's argument is that the theft by an employee which is the foundation of the cause of action in this suit amounted to a fundamental breach of the contract and therefore the exclusion clauses would not apply to the Plaintiff. The Defendant does not agree and submitted that exclusion/limitation clauses would apply.

I have carefully considered the submissions and the authorities cited by the parties. It is important to set out the provisions of clause 1 and 5 of **the Standard Conditions of Contract** provided overleaf to where the parties signed before resolving the issue. Clause 1 of the standard conditions of contract provides as follows:

"General provisions as to liability of Company. The Company in providing services and in acting for the purposes of the contract herein will (to the extent only set out below) be responsible for any want of proper care on the part of the Company itself in the selection of employment of the men put on and in charge of such services. The Company, however shall not be responsible to the customer under any circumstances whatever for any deliberately wrongful act committed by any servant of the Company in or with reference to such services or otherwise. The company shall as far as concerns any loss suffered by the customer due to burglary theft, fire or any other cause (to the extent set out below) be liable only if and so far as such loss is caused by the sole negligence of the company's employees acting within the course of their employment."

Clause 1 excludes liability for loss occasioned by any deliberate wrongful act committed by a servant of the company. It accepts liability for loss due to burglary, theft, fire or any other cause if it is caused by the sole negligence of the employees acting in the course of their employment. The provision envisages loss caused by burglary, theft, fire or any other cause and so far as such loss is caused by the sole negligence of the company's employees acting within the course of their employment. The company is not responsible under any circumstances whatever for any deliberately wrongful act committed by any servant of the company in or with the reference to such services. The first question of course that arises is whether the act of burglary by breaking into the stores of the Plaintiff was a deliberately wrongful act committed by any servant of the

company in or with the reference to the service of guarding the premises. Before concluding the matter clause 5 is the limitation of the extent of liability of the Defendant if it is found liable under clause 1.

The Plaintiff sought to exclude the exemption and limitation clauses in the contract on the ground that there was a fundamental breach of the contract by the Defendant because it was the Defendants guard who stole the Plaintiffs property. The Plaintiff's Counsel relied on the case of **SDV Transami (U) Ltd vs. Nsibambi Enterprises, Court of Appeal Civil Appeal Number 56 of 2006 (2008) Uganda Law Reports 497**. The above case was decided by the Supreme Court of Uganda and concerns the enforcement of exemption clauses. In that case the goods the subject matter of the suit was never delivered and the court noted that there was no evidence adduced showing that the failure to deliver was due to reasons beyond control or negligence of the consignee. The appellant had a duty to deliver the respondent's cargo according to the contract except for good reason. Notwithstanding the exemption clause, the appellant was held to be liable for the loss to the respondent.

The primary submission of the Defendants Counsel is that under the Contracts Act 2010, Act 7 of 2010 and particularly section 62 (1) thereof, the parties agreed to the amount payable upon the Defendant's liability and the Defendant can only be liable up to Uganda shillings 500,000/=. In other words if the Defendant is liable the amount of damages have been set out. Section 62 (1) of the Contracts Act provides as follows:

“62. Compensation for breach of contract where penalty is stipulated.

(1) Where a contract is breached, and a sum is named in the contract as the amount to be paid in case of a breach or where a contract contains any stipulation by way of penalty, the party who complains of the breach is entitled, whether or not actual damage or loss is proved to have been caused by the breach, to receive from the party who breaches the contract, reasonable compensation not exceeding the amount named or the penalty stipulated, as the case may be.

(2) The penalty stipulated under subsection (1) may provide for an interest on the amount of compensation to be paid.”

The provision supports the Defendants submission that the limitation of liability of the Defendant to Uganda shillings 500,000/= was enforceable as the bargain of the parties. The Plaintiffs Counsel argued that the provision was inapplicable because the law was not yet in force at the time of the contract and therefore cannot apply retrospectively. I agree with the Plaintiff Counsel. The Interpretation Act Cap 3 Laws of Uganda enacts the common law position on retrospective legislation but in relation to statutory instruments under section 17 (3) which provide that:

“Nothing in this section shall be deemed to empower the making of a Statutory instrument so as to make a person liable to any penalty in respect to any act committed before the date on which the instrument was published in the gazette”.

The Acts of Parliament Act Cap 2 provides that the date of commencement of a statute is the date when a retrospective effect is to be given to it. Section 14 (4) of the Acts of Parliament Act cap 2 makes this provision consistent with the common law. The common law principle is stated in the Latin maxim “*Nova constitution futuris formam imponere debet, non praeteritis*” which means that unless there be clear words to the contrary, statutes do not apply to a past, but to a future, state of circumstances. Section 14 (4) of the Acts of Parliament Act provide as follows:

“14. Commencement of Acts.

(1) Subject to this section, the commencement of an Act shall be such date as is provided in or under the Act, or where no date is provided, the date of its publication as notified in the Gazette.

(4) Where an Act is made with retrospective effect, the commencement of the Act shall be the date from which it is given or deemed to be given that effect.

(5) Subsection (4) shall not apply to an Act until there is notification in the Gazette as to the date of its publication; and until that date is specified, the Act shall be without effect.”

The Contract Act was not intended to have retrospective effect and there is no provision which provides that it has retrospective effect. Furthermore the doctrine that a statute should not be construed to have retrospective effect is a well established rule of law. It was applied in **Re**

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Athlumney Ex Parte Wilson, (1898) 2 QB 547 and in the judgment of Lord Wright at pages 552 to 553 that:

“no rule of construction is more firmly established than this – that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, or otherwise than as regards matter of procedure...”

The rule of construction was also applied in **Re School Board Election for the Parish of Pulborough (1894) 1 QB 725** by Lopes L.J. at 737:

“It is a well established principle in the construction of statutes that they operate only on cases and facts which come into existence after the statutes were passed, unless a retrospective effect is clearly intended. This principle of construction is especially applicable when the enactment to which retrospective effect is sought to be given would prejudicially affect vested rights or the legal character of past transactions.”

There are several other authorities applying the same rule of construction which in Uganda has been re-enacted in the Acts of Parliament Act cap 2 and section 14 (4) and (5) as well as the Interpretation Act. As far as the facts of this case are concerned the date of assent to the Contracts Act 2010 is the 22nd of April 2010 while the date it was to come into force is provided for under section 1 thereof. Section 1 provides that the commencement date shall be declared by the Minister in a Statutory Instrument. The Contracts Act, 2010, (Commencement) Instrument, 2011 S.I. 2011 No. 45 and section 2 thereof declared that the Act shall come into force on the 15th of September 2011. The Plaintiff’s cause of action arose on the 9th of May 2010 while the contract exhibit P1 was executed on the 27th of April 2010. In the premises section 62 (1) of the Contracts Act cannot be applied to the facts and issue in question before the court and the issue shall be resolved on the basis of the law before the enactment came into force.

I was referred to the case of **Photo Production Ltd v Securicor Transport Ltd [1980] 1 All ER 556** being the authority relied on by the Defendant’s Counsel for the proposition that the rule of law that an exemption clause can be avoided by a where there was a fundamental breach of contract by the defaulting party seeking to rely on it is not good law. The Defendants Counsel submitted that this was not good law because it has since its inception been overruled by the

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House of Lords. The contention is that in commercial contracts the court should interpret what the parties having voluntarily set up in the contract itself to determine the question of and the extent of liability of the Defendant.

In **Photo Production Ltd v Securicor Transport Ltd [1980] 1 All ER 556** the Plaintiff company owned a factory and engaged the services of the Defendant to provide security services at the factory, including night patrols. In the course of a night patrol at the factory an employee of the Defendant's deliberately lit a small fire which got out of control and destroyed the factory and stock at valued £615,000. The Plaintiff sued the Defendant on the ground that they were vicariously liable for acts of the patrolman who caused the fire and hence the damage to the factory and stock which ensued. The Defendants relied on an exemption clause quoted in the law report which provided that:

“Under no circumstances shall [Securicor] be responsible for any injurious act or default by any employee of [Securicor] unless such act or default could have been foreseen and avoided by the exercise of due diligence on the part of [Securicor] as his employer.”

No negligence was alleged against the Defendant for employing the employee and the trial judge upheld the exemption clause. On appeal to the Court of Appeal, the decision was reversed on the ground that there was a fundamental breach of the contract by Securicor and the Plaintiff was not bound by the exemption clause. On further appeal to the House of Lords, Lord Wilberforce reviewed the authorities on what he doubted was a rule of law relied on by the Court of Appeal. He noted that the question:

“... as to what extent, an exclusion clause is to be applied to a fundamental breach, or a breach of a fundamental term, or indeed to any breach of contract, is a matter of construction of the contract”.

He held that:

At the stage of negotiation as to the consequences of a breach, there is everything to be said for allowing the parties to estimate their respective claims according to the contractual provisions they have themselves made, rather than for facing them with a legal complex so uncertain as the doctrine of fundamental breach must be.

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Many difficult questions arise and will continue to arise in the infinitely varied situations in which contracts come to be breached: by repudiatory breaches, accepted or not, anticipatory breaches, by breaches of conditions or of various terms and whether by negligent, or deliberate, action, or otherwise. But there are ample resources in the normal rules of contract law for dealing with these without the superimposition of a judicially invented rule of law.”

He held that the duty of Securicor was to provide a service and there was implied an obligation to use care in selecting their patrolmen. The breach of duty lay in failure to discharge some obligations and the question is whether the exemption clause applied. He noted that the exemption clause was drafted in strong terms and:

“... Whether, in addition to negligence, it covers other, e.g. deliberate, acts, remains a matter of construction requiring, of course, clear words. I am of opinion that it does and, being free to construe and apply the clause, I must hold that liability is excluded. On this part of the case I agree with the judge and adopt his reasons for judgment. I would allow the appeal.”

The holding of Lord Wilberforce was supported by Lord Diplock at page 565. He agreed that the so called ‘rule of law’ considered in **Harbutt’s Plasticine Ltd v Wayne Tank and Pump Co Ltd [1970] 1 All ER 225**, which seemed to find support in the reasoning in **Suisse Atlantique Société d’Armement Maritime SA v NV Rotterdamsche Kolen Centrale [1966] 2 All ER 61** had been rejected by the House of Lords and they held that there was no such rule of law. The so called rule of law was that a fundamental breach is one which entitles the party not in default to elect to terminate the contract. On his doing so the contract comes to an end together with the exemption clause and the party in fundamental breach cannot rely on it.

In further support of their lordships quoted above Lord Salmon also agreed that the exemption clause should be construed as contracts are construed. He held that:

This appeal turns in my view entirely on certain words in the contract which read as follows “...”

There seems to be no authority in Uganda which has addressed the controversy raised in this suit. As a matter of fact the case of **SDV Transami (U) Ltd vs. Nsibambi Enterprises, Court of Appeal Civil Appeal Number 56 of 2006 (2008) Uganda Law Reports 497** did not consider a controversy as to whether a rule of law existed that fundamental breach releases the aggrieved party from the terms of the contract if the exemption clause is raised by the defaulting party. The case was decided on the basis of a general proposition of law and the demands of justice in that case. The validity of the rule is being raised for the first time. The House of Lords authority in **Photo Production Ltd v Securicor Transport Ltd [1980] 1 All ER 556** been brought to my attention for the first time. The decision of the Supreme Court was general and never specifically addressed the question of a rule of law.

That notwithstanding the beginning point of every construction is the perusal of the contract itself. What does the contract provide about exemption of the Defendant or the limiting of the liability of the Defendant? Can the matter be resolved by a perusal of the contract itself? Clause 5 of the standard conditions of contract provides as follows:

"General provisions as to amount of liability. If, pursuant to the provisions set out here in, any liability on the part of the Company shall arise (whether an express or implied terms of this contract, or at common law, or in any other way) to the customer for any loss or damage of whatever nature arising out of or connected with the provision of or purported provision of, or failure in the provision of the services covered by this contract such liability shall be limited to the payment by the Company by way of damages of a sum.

- (a) Not exceeding Uganda shillings 200,000 only in respect of anyone claim arising from any duty assumed by the company which involves the operations, testing, examination, or inspection of the operational condition of any machine, plant or equipment or upon the customer's premises, or which involves the provision of any services not solely related to the prevention or detection of fire or theft.
- (b) Not exceeding the maximum of Uganda shillings 500,000, for the consequence of any incident involving fire, theft or any other cause of liability in the company under the terms hereof and further provided and total liability of the company shall not in any

circumstances exceed the sum of Uganda shillings 500,000 in respect of all and any incidents arising during any consecutive period of 12 months.

- (c) The company shall not be responsible in any circumstances or to any extent for any loss arising out of non-performance, breach or negligence as long as the clients account for services described in clause (2) will have not been cleared by the client."

I have carefully clause 5 (b) which is the relevant provision. It limits the amount the Defendant can pay to Uganda shillings 500,000/= as a maximum for inter alia theft. The Plaintiff's case is that the Defendant's servant had stolen the Plaintiff's money by breaking in and stealing the Plaintiff's 'safe' which contained money and also damaging items in the premises and stealing a computer. A perusal of clause 1 clearly provides that the Defendant is not liable for deliberate wrongful acts of the Defendant's servants. However the contract under clause 1 makes the Defendant liable for theft. A careful perusal of clause 1 leads me to the conclusion that the theft envisaged in clause 1 is theft by another person other than an employee of the Defendant and the question remained as to whether any deliberate wrongful act of the Defendant's servant which is thereby excluded includes theft by an employee of the Defendant. I further agree with the Plaintiff's analysis of clause 1 and 5 of the contract.

Clause I is repeated for ease of reference:

"General provisions as to liability of Company. The Company in providing services and in acting for the purposes of the contract herein will (to the extent only set out below) be responsible for any want of proper care on the part of the Company itself in the selection of employment of the men put on and in charge of such services. *The Company, however shall not be responsible to the customer under any circumstances whatever for any deliberately wrongful act committed by any servant of the Company in or with reference to such services or otherwise. The company shall as far as concerns any loss suffered by the customer due to burglary theft, fire or any other cause (to the extent set out below) be liable only if and so far as such loss is caused by the sole negligence of the company's employees acting within the course of their employment.*"(Emphasis added)

The Company is not liable under any circumstances whatever for any deliberately wrongful act committed by any servant of the Company in or with reference to such services or otherwise. By

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using the phrase “with reference to the services” in means they are not responsible for a deliberately wrongful act committed in the course of the services contracted. They also excluded liability for selection of their employees. If they are not responsible for any deliberate wrongful act why are they responsible for theft (except in a limited sense) under clause 5? My conclusion is that the deliberate acts of an employee envisaged cannot extend to cover theft by an employee. Secondly the provision for liability for loss occasioned by theft covers theft due to negligence of the employees and not theft by the employees. The provision is that the Defendant company shall as far as concerns any loss suffered by the customer due to burglary theft, fire or any other cause to the extent set out in clause 5 be liable only if and so far as such loss is caused by the sole negligence of the company's employees acting within the course of their employment. The theft by an Employee of the Defendant of the goods the Defendant was contracted to guard is outside the purview of clause 5 of the services contract.

In the case of **Photo Production Ltd versus Securicor Transport Ltd [1980] 1 All ER** (supra) it was the Defendant's employee who had deliberately lit a fire. It was clear that the employees tried to put out the fire but they could not control it. In the case before the court, the act complained about is a criminal act. The Defendant apparently excluded liability for negligence in recruiting its staff. However this is not a case of negligence in recruiting staff. As I will demonstrate hereunder, the primary services undertaken by the Defendant are expressly provided for under the contract. The rest of the services may be implied because there are not explicitly provided for.

There are no clear and unambiguous words excluding liability for the theft by a servant of the Defendant. The primary duty of the Defendant which can be implied was to prevent loss of property and life at the premises. The contract exhibit P1 provides in clause 2 of the contract the details of the service to be provided by the Defendant which are as follows:

"To deploy two day guards and two night guards at the above-mentioned premises to guard, patrol within the perimeter fence at the above depot (total of four guards) at the rate of eleven thousand eight hundred only per guard VAT inclusive payable at the end of the month."

The loss suffered by Plaintiff was caused among other persons by the theft by an employee of the Defendant. The other guard deployed by the Defendant had been drugged and could not do anything. One Joseph Omwony participated in the store breaking and theft and was arrested, charged, tried, convicted and sentenced by the Nakawa Chief Magistrates Court. There was breach of a fundamental term of the contract. It is clearly implied that the guards would keep the Plaintiff's property safe from other intruders such as thieves. This was the very core purpose for which the Plaintiff engaged the services of the Defendant. I agree with the Plaintiff's Counsel that the Plaintiff, and if the Plaintiff's directors are reasonable people, would not be expected to execute an agreement to protect its property and premises if they knew that the Defendant would not be bound or liable for the theft by the very people who were engaged to prevent the theft.

For instance in contracts of bailment, the custodian of the goods is bound to take reasonable care to see that the chattel is in proper custody according to the case of **United Service Co., Johnston's claim (1870) 6 Ch App 212**. The custodian is expected to seek to recover the stolen chattel if it is stolen according to the case of **Coldman v Hill [1919] 1 K.B. 443**, even where the theft occurred without the default of the bailee.

What is the case where the custodian of the goods engaged to provide security from intruders such as thieves steals the goods? The duty of care should be equivalent to that of a bailee. If anything where the bailee gets involved in the theft, it would be a breach of a fundamental implied term of every contract where a custodian of goods is expected to take good care of the goods.

A bailee is answerable for the manner in which the servant or agent carries out his or her duties according to the case of **Morris v C.W. Martin and Sons Ltd [1956] 2 ALL ER 725**. Lord Denning MR at page 731 held that where a man takes charge of goods for reward,

“it is his duty to take reasonable care to keep them safe and if the goods are lost or damaged, whilst they are in his possession, he is liable unless he can show—and the burden is on him to show—that the loss or damage occurred without any neglect or default or misconduct of himself or of any of the servants to whom he delegated his duty”.

He further held that in a contract to take care or to protect the goods, although there may be no bailment,

“nevertheless circumstances often arise in which a person is under a contractual duty to take care to protect goods from theft or depredation”. He is under an implied contract to take reasonable care for the safety of property brought into the house by a guest. If his own servants are negligent and leave the place open so that thieves get in and steal, he is liable ... *So also if they are fraudulent and collaborate with the thieves.* (Emphasis added).

The obligation to take care exists independently of contract and an action based on breach of obligation is an action founded on tort. In **Jackson v Mayfair Window Cleaning Co. Ltd [1952] 1 ALL ER 215** the Plaintiff had contracted with the second Defendant to overhaul her chandelier and five months later with the first Defendants to clean it. In the course of the cleaning the chandelier fell from the ceiling. The court held that the second Defendant had improperly carried out the work under her contract and that servants of the first Defendants had failed to exercise sufficient care in the cleaning and awarded the Plaintiff £90 damages against both Defendants. The Defendants contended that the Plaintiff’s claim against the first Defendant, though framed in tort, was founded on contract, and that, therefore, under the County Courts Act, 1934, s 47(1)(b)(i), the Plaintiff, having recovered more than £40 but not more than £100, should be limited to the costs to which she would have been entitled if the action had been brought in a county court. The Plaintiff contended that the claim was founded on tort, and, therefore, that s 47(1)(b)(i) of the Act of 1934 had no application and costs on the High Court scale could be awarded.

BARRY J held at page 218:

“on the evidence in this case, the Plaintiff would have been equally entitled to recover damages had the Defendants carried out this work gratuitously or had the contract for cleaning been made by some third party, not her agent, on which contract she could found no right of action. *In either of those hypothetical cases the Defendants would, I think, owe a duty to the Plaintiff—independently of contract—to take due care not to*

damage her property. Any breach of this duty would render them liable to an action for negligence. (Emphasis added).

In **Chesworth v Farrar and Another [1966] 2 All ER 107** the Plaintiff has been a tenant of an antique shop and dwelling house and then went absent for some time whereupon the landlord obtained an order for possession and for payment of arrears of rent. When the landlord took possession he became a bailee of her goods left in the premises in her absence. The Plaintiff alleged that antiques worth £2,291 17s 6d remained unaccounted after the landlord sold some to recover rent arrears. Edmund Davies J agreed with the principle that the alleged failure to take proper care as bailee of the Plaintiff's goods rested on the fact of the landlord's possession of the goods independent of the circumstances giving rise to that possession (such as contract) and was a cause of action in tort.

My conclusion is that torts impose duties by law independent of contract.

Having considered all the relevant factors, I am satisfied that the Defendant was in breach of a fundamental term and the exclusion clause itself when read in context of the express words in clauses 1 and 5 as well as the implied terms of contract does not apply to the circumstances and the Defendant cannot rely on it. The exclusion clause does not cover acts of theft of a servant of the Defendant which act is contrary to the purpose of the Defendant's services.

Remedies

I have considered the submissions of Counsel on the claim in the main suit and counterclaim. Starting with a counterclaim I believe the testimony of DW1 that the Plaintiff owes some money but not Uganda shillings 21,062,800/= in respect of all sites guarded by the Defendant. The testimony is supported by exhibit D1 which is an account statement of the dues and payments by the Plaintiff to the Defendant and exhibit D6 which shows that the Plaintiff had been in arrears by the 9th of May 2013 to the tune of Uganda shillings 10,502,000/= . The Defendant threatened to terminate the services if payment is not made. The Plaintiff filed this action in June 2013. By that time of the of termination of services what was owing to the Defendant for the various sites was Uganda shillings 10,502,000/=

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The Defendant is entitled to claim from the Plaintiff Uganda shillings 10,502,202/= and the same is hereby awarded to the Defendant.

As far as the claim for damages is concerned the Defendant is awarded Uganda shillings 2,000,000/=.

The above principal claim sum attracts interest at 19% per annum from the date of filing the suit till date of judgment. Furthermore interest is awarded on the aggregate sum constituting the principal claim, general damages and interest from the date of judgment at the rate of 19% per annum till payment in full.

The Defendant is also awarded costs of the counterclaim.

The Defendant challenged the claim on the ground that it was a special damage which had not been proved. Paragraph 5 (VI) only particularises the claim but does not aver special damage.

It is a claim for loss of property on account of theft which was proved on the balance of probabilities. As far as the claim of the Plaintiff is concerned the Plaintiff proved loss of Uganda shillings 102,226,000/= stolen on the 9th of May 2010. Secondly the Plaintiff's claim for Uganda shillings 7,000,000/= as the cost of replacing the stolen safe succeeds on the balance of probabilities. The safe was not recovered and had been damaged. Uganda shillings 4,510,000/= for the cost of repairs due to damages occasioned to the premises succeeds. Last but not least Uganda shillings 1,200,000/= as the cost of replacing the Compaq Computer succeeds.

The Plaintiff is awarded Uganda shillings 114,936,000/= for loss of property occasioned by theft and breakages as General Damages.

As far as loss of future earnings claimed as general damages are concerned, they are supposed to be compensatory. The Plaintiff's Counsel relied on the evidence of PW2 that the Plaintiff's average daily income and profit margin for Najjanankumbi depot was greatly affected. In the premises the Plaintiff's Counsel prayed for damages of Uganda shillings 613,355,940/= being the loss of earnings for six months immediately after the theft of the goods.

On the other hand the Defendant's Counsel contended that the claim was a claim for special damages which were not proved and there was a high likelihood that the claims were fabricated

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by the Plaintiff's witnesses. He wondered how the Plaintiff who failed to pay for security services can claim to have such a huge profit margin. Lastly there was no evidence proving the connection between the theft and the loss of earnings. The Defendant's Counsel invited me to consider exhibits D3 which is a letter for termination of the Defendant's services at Makindye Depot. The ground indicated by the Plaintiff in that letter is that their territory had been annexed. They asked for withdrawal of the guards from the depot. In D5 the Plaintiff wrote to the Defendant in a letter dated 20th of March 2013 that there was inactivity at the premises at Najjanankumbi and Kawempe and asked the Defendant to reduce the guards to one night guard at each of the premises.

According to **Halsbury's Laws Of England, 4th Edition Vol. 12(1) at par 810**, the term 'prospective' in respect of damages is applied to the damages which are awarded to a Plaintiff, not as compensation for the ascertained loss which he has sustained at the time of trial, but in respect of future damage or loss which is recoverable in law.

In **Halsbury's Laws of England, 4th Edition Vol. 12(1) at par 809**, pecuniary damage or pecuniary loss refer to any financial disadvantage past or future, whether precisely calculable or not. Thus past loss of earnings and an assessment of loss of earnings, loss due to damage to a chattel, loss on breach of a contract for the sale of goods, and loss of profits constitute pecuniary damage. Consequential damage or loss usually refers to pecuniary loss consequent on physical damage, such as loss of profit sustained due to fire damage in a factory.

I agree with the Defendants Counsel that loss of earnings were alleged on account of loss of Uganda shillings 102,000,000/= but the Plaintiff's PW2 could not directly relate it to the loss of profit occasioned by loss of funds. There was no connection to damages to premises or loss of a computer. How did loss of the money occasion loss of profit at close to Uganda shillings 100,000,000/= per month? The loss of earnings was not proved.

In the premises the Plaintiff is only awarded additional general damages of Uganda shillings 8,000,000/= only for the inconvenience caused by the robbery.

The principal award carries interest at 19% per annum from the date of filing the suit till date of judgment.

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Further interest is awarded at 19% per annum from the date of the judgment on the aggregate sums awarded till payment in full.

The Plaintiff is awarded costs of the suit as well.

Judgment delivered in open court on the 11th of September 2015.

Christopher Madrama Izama

Judge

Judgment delivered in the presence of:

Doreen Ninsiima Counsel for the Plaintiff

Plaintiff in court through Mrs Ssajjabi Sarah Director and Elizabeth Kwikiriza

Amos Bamucwanira holding brief for Patrick Mugisha for the Defendant

Enos Gwesigye Defendant's Legal Officer in court.

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

11th September 2015