

THE REPUBLIC OF UGANDA,
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)

HCCS NO 219 OF 2012

ROLLTEX INTERNATIONAL FOREX BUREAU LTD}.....PLAINTIFF

VS

HABA GROUP (U) LTD}.....DEFENDANT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

JUDGMENT

The Plaintiff's action against the Defendant is for payment of general damages for breach of contract, for compensation in the sum of Uganda shillings 188,484,786/= and for costs of the suit.

The Plaintiff's averment in the plaint is that between the years 2001 and 2002 she entered into an oral agreement with the Defendant to rent the Defendant's premises and has been a tenant on City Centre Complex Building managed by the Defendant for over eight years. An oral agreement and express term of contract with the Defendant is that as part of management of the building, the Plaintiff would provide its own security during the day and the Defendant would be responsible for security during the night. The agreement remained subsisting and was implemented without any problem until there was a break in of the premises.

On 27 March 2012 burglars broke into the Plaintiff's rented premises and a total of **Uganda shillings 188,484,786/=** was stolen. At the time of the event the Defendant's employees or agents were in charge of the building but run away and the next day they were arrested and the Defendant is vicariously liable for the actions. The manager of the Defendant was informed of the incident and visited the building. The Plaintiff notified the Defendant of property stolen by letter dated 28th of March 2012 but no action was taken. The police established that the Plaintiff's Forex Bureau was accessed through the main entrance of the City Centre Complex and the front door thereof was broken in by using gas welding equipment. Employees of the Defendant were arrested and taken to Kampala Central Police Station for the breaking in. The Plaintiff alleges a misrepresentation by the Defendant that it would take care of the security in the premises at night. The Plaintiff further alleges negligence or breach of duty on the part of the Defendant's agents/employees. By virtue of the Defendant locking up of the whole building at night and putting guards at the building, the Defendant assumed the responsibility of protecting the premises on which the Plaintiff was a tenant and is liable to compensate the Plaintiff for the loss and damage suffered as a result of the burglary. The Plaintiff also prays for general damages for breach of duty of care and misrepresentation as well as for breach of contract and for inconveniences suffered. The Plaintiff prays for 25% interest per annum on the liquidated demand and on the general damages.

The Defendant filed a written statement of defence and counterclaim. The written statement of defence generally denies the allegations in the plaint. Secondly the Defendant avers that the actions of Mr Kabagambe Edward and Wanyama Robert, if established are not the responsibility of the Defendant. Thirdly the Plaintiff could not have such large sums of money in its premises contrary to banking regulations which do not allow it to keep the money in the premises. The

*Decision of Hon. Mr. Justice Christopher Madrama Izama *^*~?+:*

Plaintiff was guilty of negligence in keeping such astronomical amounts of money in its premises and failing to install a security alarm system.

In the counterclaim the Defendant claims rent by the end of May 2012 owed to the Defendant of shillings 8,400,000/=. Despite reminders the Plaintiff refused or failed to pay rent and is barred by estoppels from claiming that it had no money in its premises. The Defendant further seeks general damages on account of the Plaintiff's conduct in refusing to pay rent which conduct is unlawful. In total the Defendant claims Uganda shillings 9,600,000/=:, general damages for breach of the tenancy agreement, interest at commercial rate from the date of judgment until payment in full and costs of this suit.

The Plaintiff is represented by Messieurs Omongole and Company Advocates while the Defendant was represented by Niwagaba and Mwebesa Advocates who eventually withdrew from representing the Defendant.

In a joint scheduling memorandum filed on the 2nd of May 2013 it is an agreed fact that the Plaintiff was a tenant in City Centre Complex Building for over eight years. Secondly on 27 March 2012 in the night, the Plaintiff's Forex Bureau was broken into and money was stolen from the Forex Bureau. The theft was reported to a nearby police post and the security guards were pursued by the police.

What is in controversy is whether the Plaintiff defaulted in paying rent to the Defendant. Secondly whether despite several reminders the Plaintiffs who refused or failed to pay money owed in rent arrears.

As far as the Defendant is concerned what is in controversy is whether City Centre Complex Building was managed by it at all material times. Secondly whether there was an oral agreement for the Plaintiff to provide its own security only during the day and for the Defendant to provide it at night. Thirdly the question is whether the theft occurred at night while the Defendant was in charge of security of the premises. Fourthly whether the Defendant is responsible for the acts of Kabagambe Edward and Wanyama Robert who were the security guards employed by the Defendant. Whether the said employees aided the break in of the Forex bureau? Whether after the break-in the Defendant did not collect rent for the months of March, April and May 2012 from the Plaintiff.

Agreed issues for trial:

1. Whether there was an agreement between the parties?
2. Whether the agreement was breached?
3. Whether the Plaintiff was negligent in the course of its duties?

The hearing of the suit was fixed for 1 October 2013 and because there was no evidence of service of the hearing notice on the Defendant, I ruled that the suit was not ready for hearing. It was adjourned for hearing on 25 November 2013. On that day Counsel Bosco Okiror appeared for the Defendant and the Plaintiff's Counsel informed the court that Messieurs Niwagaba and Mwebesa and Company Advocates had withdrawn from the conduct of this suit. Consequently Counsel Bosco Okiror was on holding brief for Counsel Caleb Alaka and they were required to give notice of instructions and they sought adjournment to obtain the file and get ready to file witness statements. The suit was adjourned to 20 January 2014 for mention. By 20th of January 2014 no notice of instructions had been filed by Counsel Caleb Alaka and the suit was further

*Decision of Hon. Mr. Justice Christopher Madrama Izama *^*~?+:*

fixed for hearing on 15 April 2014 with an order that the Defendant be served personally because there was no notice of change of advocates as the previous advocates represented that they had no further instructions.

The record shows that the Defendants were eventually served through the newspapers. I directed that further evidence of service of the Defendant be filed and the affidavit information indicates that the Defendants were indeed served with a hearing notice issued by the assistant registrar of the commercial court. The hearing had proceeded ex parte by the time I saw the clarification. Upon establishing that the hearing notice was published had indeed been signed by the assistant registrar, I fixed the matter for judgment.

On the 12 June 2014 the matter proceeded ex parte under Order 9 rule 20 (1) (a) of the Civil Procedure Rules. Witness statements were admitted and cross-examination was dispensed with on account of absence of the Defendant. Thereafter the Plaintiff's Counsel filed written submissions.

I have carefully considered the submissions, the evidence adduced as well as the authorities relied upon.

The gist of the submissions are that at the time of the break in and theft the employees/workers or agents of the Defendant were acting in the ordinary course of employment were in charge of the building and its security. By the morning the security guards were on the run but were later arrested by the police. The incident was reported to the Defendant's manager who visited the scene. The Plaintiff shared the same building with the manager of the Defendant. By a letter dated 28th of May 2012 the Plaintiff notified the Defendant of the stolen property. It was also established by the police that the Forex bureau was accessed through the main entrance of the

*Decision of Hon. Mr. Justice Christopher Madrama Izama *^*~?+:*

City Centre Complex. Entry was constructively obtained and from further investigation it was also established that the Forex bureau front door was broken in by using gas welding equipment. The employees/agents of the Defendant one Kabagambe Edward and Wanyama Robert were on duty during the night of the break-in and were arrested and taken to Central Police Station for the break-in in the Forex bureau and theft of the money. The Plaintiff holds the Defendant vicariously liable for the negligent acts/omissions of the Defendant's agents while in the ordinary course of their duties as security guards for which they claim adequate redress.

Agreed issues:

1. Whether there was a contract between the parties?
2. Whether the Defendants breached the contract to provide security, leading to the break in of the Plaintiff's Forex bureau?
3. Whether the Defendants employees were negligent in the course of their duties and if so whether the Defendants are liable?
4. Whether the Defendants are liable to compensate the Plaintiff the sum of Uganda shillings 188,484,786/= that was stolen as a result of the Defendant's negligence?
5. Remedies available to the parties.

On the issue of whether there was a contract between the parties, the Plaintiff's Counsel relies on section 2 of the Contract Act 2010 for the definition of the contract is an agreement which is enforceable by law according to its definition in section 10 which he also relies upon. With reference to the various authorities the Plaintiff's Counsel submitted that in the matter in dispute the Plaintiff Company was a tenant of the Defendant. The contracts of the Plaintiff to rent the Defendant's premises for a fee of Uganda shillings 2,600,000/= were produced in evidence by

*Decision of Hon. Mr. Justice Christopher Madrama Izama *^*~?+:*

way of payment receipts annexure "A". As a term of the agreement the Plaintiff provided security for the Forex bureau during the daytime while the Defendant was responsible to secure the premises at night. This agreement can also be implied by the conduct of the parties and is not denied in the written statement of defence. The evidence of the Managing Director of the Plaintiff Mr Mohammed Ali PW4 testified that the Plaintiffs always had a security guard during the day for all the years that they occupied the building and the guard left in the evening as the building was completely locked of by the Defendants who retained the keys to the main entrance and also put armed guards to secure the building.

Despite the fact that no written agreement was ever executed between the parties, there was an oral agreement reached and each party diligently performed its obligations over the years and both parties were bound by the agreement. Consequently the Plaintiff's Counsel contended that the court should find that there was an oral agreement between the parties and their conduct showed it. He relied on the testimony of the Managing Director of the Plaintiff Mr Mohammed Ali for the assertion. The Plaintiff had been a tenant for 10 years. In the course of the relationship the Defendant always required everybody to vacate the building at the close of business hours and or lock the main entrance after ascertaining that all shops were closed and there was no one in the building.

The Plaintiff's Counsel relies on the doctrine of estoppels defined in Black's Law Dictionary Abridged Fifth Edition at page 225 as well as section 114 of the Evidence Act which provides that:

"When one person has, by his or her declarations, act or omission, intentionally caused or permitted another person to believe a thing to be true and act upon that belief, neither he

or she or his or her representative shall be allowed, in any suit or proceeding between himself or herself and that person or his or her representative, to deny the truth of that thing.

The Plaintiff's Counsel further relies on the case of **Chamute Agencies Company Ltd versus Mbale District Administration HCCS No. 24 of 1996 reported in [1998] one KALR at page 12** where the doctrine of estoppels was applied to imply a contract because the Defendant had represented to the Plaintiff that it would supply and receive a local purchase order on delivery and there was a clear intention on the part of the Defendant that the Plaintiff would act upon the representation and the Plaintiff did act on the representation so the Defendant was estopped from denying the contract.

As far as the evidence is concerned, the Defendant represented that the premises would be secure at night and the Plaintiff did not need to hire a guard during the night. There was a clear intention that the Plaintiff should act upon the representation of the Defendant and the Plaintiff acted upon that representation and removed security when it got to night hours and on the doctrine of equitable estoppels, the Defendant cannot turn around and argue that there was no contract simply because it was not in a written agreement.

Alternatively the Plaintiff's Counsel argued that if the court finds that there was no contract, he invited the court to hold that the Defendant is liable for failure to provide security for his tenants yet he represented that there was security by placing night guards in the building. He invited the court to find the Defendant liable for misrepresentation.

In the case of **Tiger Night Guard Services (U) Ltd versus Matthew Odoki Opoka and Company Limited [1978] HCB 156** Sekandi J held that a guard must, apart from being dressed

*Decision of Hon. Mr. Justice Christopher Madrama Izama *^*~?+:*

in uniform, be regular on duty and behave in such a way as to instil confidence in the person regarded. Failure to provide these qualities in a guard is a fundamental breach of service contract. He further held that it is not agreements in writing or words that matter in business, but delivery of the goods (services) to the satisfaction of the customer.

The Plaintiff's Counsel contended that the Defendant failed in their duty to protect the Plaintiff's premises which action resulted in the break in and loss and therefore the Defendant is liable. They failed to deliver security services to the satisfaction of the customers and are liable to compensate the customers for the losses suffered. Furthermore he submitted that the Defendant's servants owed a duty of care according to the judgment of Lord Denning MR in **Esso Petroleum Co Ltd versus Mardon [1976] 2 All ER 3 at page 16**. He held that if a man who has or professes to have special knowledge and skills, makes representation by virtue thereof to another with the intention of inducing him to enter into a contract with him, he is under a duty to use reasonable care to see that the representation is correct and the advice, information or opinions is reliable. If he negligently gives unsound advice or misleading information or expresses an erroneous opinion and thereby induces the other side into a contract with him, he is liable in damages.

He submitted that the Defendant represented that its guards, could secure the premises and are therefore liable for misrepresentation.

Issue 2:

Whether the Defendants breached the contract to provide security services?

On this question Counsel relies on the cases of **Ronald Kasibante versus Shell Uganda Limited [2008] ULR 690** and the judgment of honourable Mr Justice Bamwine for the definition of breach of contract as the breaking of an obligation which the contract imposes. He further relied on **Nakana Trading Company Ltd versus Coffee Marketing Board (1994) one KALR 15** for the same definition of breach of contract.

On the basis of the submission in issue one as to whether there was a contract between the parties; Counsel contended that the Defendant breached their part of the contract. He relied on the same submissions for the existence of the contract and particularly for the arrangement of providing security services at night by the Defendant while the Plaintiffs were free to provide security services during the day only. He further submitted that there was an implied obligation in the absence of any written stipulation and that obligation was breached to the detriment of the Plaintiff and for which the Defendant is liable. This was because on 27 March 2012; the Plaintiff's Forex bureau was broken into. It happened at night when the Defendant had routinely made his employees to guard the premises and the Plaintiff understood that it was the obligation of the Defendant to do so. He further relied on the testimony of the Commander of Special Investigations Unit D/ASF Umar Mutuya for the police action that was taken after the robbery incident. The commander testified that they arrested two security guards namely Wanyama Rogers of Blue water Security Group and Kabagambe Edward, a private guard of the Defendant. The two guards were charged with break in and theft contrary to section 297 (a) of the Penal Code Act and neglect to prevent a felony contrary to section 389 of the Penal Code Act. There were efforts to trace other suspects.

Furthermore he testified that Kabagambe Edward was an employee of the Defendant who was in charge of the security of the entire premises. The Forex bureau was accessed through the main
Decision of Hon. Mr. Justice Christopher Madrama Izama *^*~?+:

entrance of the City Centre Complex which was not broken into but constructively opened. The Defendant misled the Plaintiff to believe that the building was secure and therefore their business was also secured. The Defendant did not honour its part of the bargain and was in breach of contract.

Issue 3:

Whether the Defendants employees were negligent in the course of their duties and if so whether the Defendant was liable?

The Plaintiff's Counsel again relied on the testimony of PW4, the Managing Director of the Plaintiff. He testified that the police carried out investigations and established that the Forex Bureau had been accessed through the main entrance of the City Centre complex which was however not broken into but constructively opened. Secondly the police further established that the Forex bureau front door was broken by the use of gas welding equipment. The police further arrested and detained Kabagambe Edward and Wanyama Robert who were the Defendant's employees guarding the premises that night. At the time of the break in, the Defendant's servants and therefore Defendant were in charge of the security. Consequently at all material times the Defendant's employees were in charge of the building. He submitted that there was failure to use reasonable care which a prudent and careful person would use in similar circumstances.

Counsel further submitted that the Defendant is vicariously liable for the acts of his servants. He relied on the **Kafumbe Mukasa versus Attorney General [1984] HCB 33** that what a servant does in the course of employment makes his employer vicariously liable. He further relied on **Uganda Commercial Bank versus Kigozi [2002] 1 EA 305** for the proposition that where a person delegated the task or duty to another or employed another to do something for his benefit

*Decision of Hon. Mr. Justice Christopher Madrama Izama *^*~?+:*

and for the benefit of both parties, the employer would be liable for the negligence of that other in the performance of the task.

The evidence is that the Defendant had employed Kabagambe Edward and Wanyama Robert to perform the tests for the benefit and therefore cannot escape liability. For the proposition that a master is liable for the Torts of his servant he further relied on the case of **Muwonge versus Attorney General [1967] EA 17** as well as the case of **Cross, Tetley & Co. Ltd vs. Calterall [1926] 1 KB 488**. The question of whether somebody was acting in the course of employment is a pure question of fact. "In order to be in employment, you must say to some point or another that the man was actually doing something on his employer's behalf" (Lord Halsbury's LC).

Remedies:

The Plaintiff's Counsel submitted that the evidence through the various witnesses is that the Plaintiff lost money in the amount of Uganda shillings 188,484,786/= and they suffered general damages. He relied on the testimony of PW1, PW2 and PW3.

As far as the prayer for general damages is concerned, he submitted that it is pecuniary compensation or indemnity which may be recovered in the courts by any person who were suffered loss, detriment or injury whether to his person, property rights, due to unlawful act or omission or negligence of another according to the definition in Black's Law Dictionary. He further relied on the case of **John Nagenda versus Sabena Belgian World Airlines [1992] 1 KALR 13**. The Plaintiff's Counsel submitted that the damages for breach of contract are those reasonably considered as either arising naturally i.e. according to the usual course of things for such a breach of contract itself or as may be reasonably supposed to have been in the

*Decision of Hon. Mr. Justice Christopher Madrama Izama *^*~?+:*

contemplation of the parties, at the time they made the contract as the probable result of the breach of it according to the cited case of **Hadley versus Baxendale 156 ER.**

Counsel further prayed for interest as well as costs according to the authorities.

Judgment

I have carefully considered the Plaintiffs suit. The Plaintiffs case is simply that its Forex bureau located at the Defendant's premises where it was a tenant was broken into at night when the Defendant was in charge of the security and therefore the Defendant is vicariously liable for the loss occasioned thereby. The Plaintiff advances the liability of the Defendant under various headings. He submitted that there was negligence and lack of reasonable care. He further submitted that there was breach of contract. I have already set out the submissions in the earlier part of this judgment and I do not need to repeat it here.

The hearing of this suit proceeded ex parte even though the Defendant had filed a defence. Subsequent hearings were without the participation of the Defendant after there was evidence of service. Before Counsel for the Defendant withdrew from the conduct of this suit, they had filed together with the Plaintiff's Counsel a joint scheduling memorandum in terms of Order 12 rule 1 of the Civil Procedure Rules. The facts disclosed by the pleadings which are agreed are that the Plaintiff was a tenant in City Centre Complex building for over eight years. Secondly on 27 March 2012 at night Roltex International Forex Bureau was broken into and money stolen from the Forex bureau. It was additionally admitted that the theft was reported to a nearby police post and the security guards were pursued by the police.

The issues agreed are whether the Defendant breached the contract to provide security between it and the Plaintiffs leading to the break in of the Plaintiff's Forex bureau.

Secondly whether the Defendant's employees were negligent in the course of their duties and if so whether the Defendant is liable?

Thirdly whether the Defendant is liable to compensate the Plaintiff the sum of Uganda shillings 188,484,786/= that had been stolen as a result of the Defendant's negligence?

Lastly what remedies are available to the parties?

The question of whether there was a contract between the parties was conceded to by the Defendant's Counsel and rightly so when they filed their joint scheduling memorandum. The evidence is overwhelming that the Plaintiff was a tenant at the Defendant's premises for several years. The Defendant's witnesses proved annexure "A" which consists of several receipts indicating that there was a tenancy agreement with the Plaintiff as the tenant and the Defendant as the landlord. The receipts issued by the Defendant show that the rent was Uganda shillings 2,600,000/= per month. The receipt inter alia contained terms of the contract which provides that if no payment is made in the 1st to 10th days, a 5 % fine shall be levied on the rent amount. It also clearly specifies that the receipt was issued for rent. No written agreement was produced. Even if there is no written agreement the Registration of Titles Act cap 230 implies certain covenants in a tenancy in such a situation. These covenants are implied under sections 102 and 103 of the RTA cap 230 Laws of Uganda and provide as follows:

“102. Covenants to be implied in every lease against the lessee.

In every lease made under this Act there shall be implied the following covenants with the lessor and his or her transferees by the lessee binding the latter and his or her executors, administrators and transferees—

(a) that he or she or they will pay the rent reserved by the lease at the times mentioned in the lease;

(b) that he or she or they will keep and yield up the leased property in good and tenantable repair, damage from earthquake, storm and tempest, and reasonable wear and tear excepted.

103. Powers to be implied in lessor.

In every lease made under this Act there shall be implied in the lessor and his or her transferees the following powers—

(a) that he or she or they may with or without surveyors, workers or others once in every year during the term, at a reasonable time of the day, enter upon the leased property and view the state of repair of the property;

(b) that in case the rent or any part of it is in arrear for the space of thirty days, although no legal or formal demand has been made for payment of that rent, or in case of any breach or nonobservance of any of the covenants expressed in the lease or by law declared to be implied in the lease on the part of the lessee or his or her transferees, and the breach or nonobservance continuing for the space of thirty days, the lessor or his or her transferees may reenter upon and take possession of the leased property.”

Once a tenant enters into the house of a landlord for rent, the law implies certain covenants on both of them. It cannot be suggested that there is no contract. A tenancy by its nature is a contract wherein the tenant pays the rent and enjoys quiet possession while the landlord receives rent and expects the property to be kept in a tenantable condition and repair. Other covenants are implied by the conduct of the parties. I have carefully considered the testimony of the Plaintiff's witnesses. PW1 Hassan Ali testified about what was in the Plaintiff's premises and the Forex bureau and in light of the robbery which took place on the 27 March 2012. PW2 Mr Henry Kasozi also testified as an accountant. PW3 Namagga Nawiirah also testified about the money that was in the premises by the close of business on 27 March 2012. PW4 Mr Mohammed Ali the Managing Director of the Plaintiff testified that the Plaintiff rented the premises at City Centre Complex Plot 12 Luwuum Street in Kampala about 2001. The premises are managed by the Defendant. Whenever rent fell due the Defendant's servants would move from one office to another collecting rent and issuing the receipts adduced in evidence.

PW4 further testified that there was an oral agreement and the management informed the Plaintiff that tenants would provide their own security during the day and the management would secure the premises in the night hours. The Plaintiff occupied the premises for about 10 years without any disturbances or major inconveniences on the above understanding. The Plaintiff had a private guard during the day and at the close of business, the Plaintiff's guard would leave and the Defendant's management would deploy private guards to secure the premises. Most importantly he testified among other things and I quote:

"The Defendant always required everybody to vacate the building at the close of business and they would lock the main entrance after ascertaining that all shops were closed and there was no one in the building.

*Decision of Hon. Mr. Justice Christopher Madrama Izama *^*~?+:*

The Defendant and its employees who locked the building would remain with the keys to secure the main entrance to the building and always placed guards to secure the building throughout the night....

On 27 March 2012, the guards deployed by the Defendant to secure the building were one Wanyama Rogers of Bluewater Security Group and Kabagambe Edward, a private guard of the Defendant.... On 27 March 2012 at the close of the business, the Plaintiff had an equivalent of Uganda shillings 188,484,786/= in the safe, the money from the money remittance business, for its bureau business and other sources of money."...

Early morning on 28 March 2012, the head cashier called him and informed him that the Forex bureau had been broken into. He saw that the door had been broken. The premises had been sealed off by the police with tapes and all employees were standing in one place."

The police investigation report contained in exhibit "F" dated 16th of May 2012 confirms the testimony of the Managing Director. According to the report, investigations revealed that Kabagambe Edward was responsible for securing the main entrance of the City Centre Complex on the night of the break in and theft. Kabagambe Edward and Wanyama Rogers were produced in Buganda road court on 16 April 2012 and charged with the offence of breaking in and theft as well as with the offence of neglect to prevent a felony.

The Plaintiff was not responsible for securing the premises at night. The entire complex was locked at the close of the business and all control was vested in the Defendant's employees. The Plaintiff was not responsible for recruiting anybody from Bluewater Security. It is immaterial that the Defendant also recruited somebody from Bluewater Security to guard the premises.

*Decision of Hon. Mr. Justice Christopher Madrama Izama *^*~?+:*

Though the Defendant did not participate at the hearing, the Defendant filed a written statement of defence. In paragraph 7 of the written statement of defence the Defendant avers as follows:

"In further answer thereto, the Defendant avers that it is not responsible for the actions of Kabagambe Edward and Wanyama Robert and if the Plaintiff has established that the money was stolen by them, it should pursue them."

The Defendant counterclaimed for rent arrears for the period of March 2012, April 2012 and May 2012.

Unfortunately the Defendant did not participate in the hearing. It is proven on the balance of probabilities that the Defendant was responsible for the premises at night and had employed security personnel to secure the premises by guarding it and locking the gate after the complex was emptied of all tenants.

I have further reviewed the issues agreed upon in the joint scheduling memorandum and I am of the opinion that the crux of the dispute is whether the Defendant owed a duty of care and was negligent and therefore vicariously liable for the robbery.

The evidence is that the property could be secured by one gate and the Defendant's employees had the keys to the gate. Secondly the Defendant deployed security guards to keep the premises safe. It was established by the police that there was no break - in and the thieves must have entered through the gate. Secondly the Plaintiffs Forex bureau was broken into using gas welding equipment. Where were the guards when all this was happening? And why were they unavailable? They were arrested and charged with offences.

From the evidence, it is established on the balance of probabilities that one of the terms of the contract was for the Defendant to deploy security to guard the Plaintiff's rented premises which premises the Plaintiff rented from the Defendant. Secondly the Plaintiff had no access to the premises at night after the closure of business for the day. The premises were handed over to the Defendant's servants after all tenants vacated the premises. Thirdly the theft occurred at night when the Defendant's security guards were in charge of the entire premises inclusive of that of the Plaintiff.

I have carefully considered the evidence and I am further of the opinion that it is not a case of misrepresentation or negligent misrepresentation which the Plaintiff's Counsel submitted on. It is a case of whether the Defendant was negligent through the acts or omissions of its servants or agents. The Plaintiff further submitted on whether there was a breach of contract. The evidence is not about breach of contract because the Defendant indeed provided the security as agreed. The only issue is whether there was negligence or complicity on the part of the Defendant's servants and whether the Defendant is vicariously liable for that.

In 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”.

Lord Denning MR further held that in a contract to take care or to protect goods, although there may be no bailment, circumstances arise where the contracted party is under a duty of care to protect the goods from theft and he said:

“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.”

In this case the Defendant undertook to secure the premises which included the goods of the shopkeepers as well as that of the Plaintiff who run the business of a Forex bureau. The Defendant was under a duty of care to protect the goods from theft. This was the very purpose for the Defendant's engagement of security guards to protect the premises. In this very case the Defendant's servants either omitted to take care or were negligent in that they let thieves break in after gaining access to the main gate to the extent of going to the door of the Plaintiff's Forex bureau and using gas welding equipment to breakthrough and enter into the Forex bureau. The thieves further accessed the safe of the Plaintiff where money was kept. The Defendant's servants were further charged with the offence of breaking in and neglect. The Defendant owed a contractual duty but the cause of action is founded in the tort of negligence or omission which led to the robbery complained about in this suit. According to the case of **Jackson versus Mayfair Window Cleaning Co Ltd [1952] 1 All ER 215** the duty of care exists independently of the contract to provide services. Even though in that case there was a contract to provide cleaning services, the servants of the Defendant provided the services carelessly as a result of

*Decision of Hon. Mr. Justice Christopher Madrama Izama *^*~?+:*

which the Plaintiff's Chandelier fell from the ceiling and was damaged. The duty of care was imposed by the law of tort and existed independently of the contractual obligations.

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.”

I agree entirely with the holding because the law of tort is a general law that imposes duties on persons irrespective of their contractual obligations. The Defendant undertook to provide security services and had over a long period of time provided such services to the satisfaction of the Plaintiff according to the testimony of PW4. Secondly the Defendant having undertaken to provide security services at night owed a duty of care to provide it with diligence. The way the robbery occurred clearly indicates that the robbers entered through the front gate which was secured by the guards. How did they access the front gate? Secondly gas welding equipment was used to break into the Plaintiff's Forex bureau. Where were the guards? Lastly the duty to take good care of the property of an absent tenant is emphasised by the case of **Chesworth v Farrar and Another [1966] 2 All ER 107**. In that case the Plaintiff had rented premises and was absent for a while. The landlord took possession of the premises for the payment of arrears of rent. It

was held that when the landlord took possession of the premises, he became a bailee of the goods of the Plaintiff left at the premises. Edmund Davies J held at page 111:

“Question 1. It is common ground that the deceased became bailee of the Plaintiff’s antiques when he took possession of the premises in August, 1960. That relationship imposed a common law duty on the bailee (a) to take reasonable care to keep the goods safe and (b) not to do any intentional act inconsistent with the bailor’s rights in the goods, e.g., not to convert them (Morris v C W Martin & Sons Ltd ([1965] 2 All ER 725 at p 738)). On the assumption that he thereafter failed to take proper care of the goods as such bailee and that in consequence they were lost, does the claim to damages for such failure sound in tort?”

At 112 Edmund Davies J answers the question and held:

“I find myself, however, compelled to hold that the claim rests basically on the simple fact of possession of the Plaintiff’s goods and is independent of the circumstances which gave rise to that possession. If this is right, it follows that the claim is one “in respect of a cause of action in tort”

In this case the Defendant assumed the responsibility of maintaining security in the premises at night. It does not matter how they sought to carry out that responsibility whether through their own servants or through a third party. It is up to the Defendant to claim from any third parties. The Defendant servants carried out the duty negligently or omitted their duty as can be deduced from the evidence summarised above. In the premises the Defendant is vicariously liable for the acts of the servants who were on duty on the fateful night.

Remedies:

PW1, PW2 and PW3 or confirmed that the Plaintiff had in total according to the various testimonies and equivalent of Uganda shillings 188,484,786/= at the close of business on 27 March 2012. This was calculated as follows according to the testimony of Hassan Ali PW1. PW1 is the head cashier of the Plaintiff. He testified that he always checks how much is in the safe in total after all the money had been forwarded to him to keep in the safe. On 27 March 2012, he had Uganda shillings 75,527,475/=; another Uganda shillings 38,257,311/= and US dollars 30,000 (when the exchange rate was 2490 shillings to 1 dollar). This gave an equivalent of Uganda shillings 188,484,786 which was locked in the safe. It was checked by the Managing Director and he went with the key after work. The next day on 28 March 2012, when he was allowed entrance after the police had cordoned off the area, he found that the safe was open because it had been broken into and all the money was taken. His testimony is confirmed by PW3 Namagga Nawiirah a cashier in charge of buying and selling foreign currency. Finally PW2 and PW4 the Managing Director also confirmed the testimony.

The Defendant did not call any witnesses to rebut the Plaintiff's evidence because the matter proceeded ex parte. In the premises there is evidence that the Plaintiff had in the safe Uganda shillings 188, 484,786/= which was locked in a safe on 27 March 2012. The same night when the Defendant's security personnel were guarding the premises, the Forex bureau was broken into and all the money in the safe was taken. The Defendant's servants were facing prosecution proceedings for the offence at the time of the hearing. I agree with the Plaintiff's Counsel that the Plaintiff is entitled to recover the said sum from the Defendant. The Plaintiff is awarded Uganda shillings 188,484,786/= against the Defendant.

*Decision of Hon. Mr. Justice Christopher Madrama Izama *^*~?+:*

The Plaintiff also prayed for general damages. I have considered the Plaintiff's evidence. The Plaintiff's safe was broken into as well as the doors. It is in natural consequence of the breaking in that the Plaintiff lost other property through damage thereof. Secondly there was breach of the duty of care by the Defendant through its servants who were guarding the premises. The Plaintiffs suffered inconveniences and had to report the matter to the police as well as suffering as a consequence of the disruption of the business. Under this head I would award the Plaintiff Uganda shillings 10,000,000/= as general damages.

As far as the prayer for interest is concerned, the Plaintiff's Counsel relied on section 26 (2) of the Civil Procedure Act.

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

The provision allows the court to award reasonable interest where the decree is for the payment of money. In this case the Plaintiff lost the property on 27 March 2012. Interest is compensatory. In the Plaintiff's case, it had the business of a Forex bureau and its capital is money which was robbed as a consequence of negligence of the Defendant's servants acting in the course of their employment. What is the natural consequence of the loss of the money by the Plaintiff?

According to the case of **Riches v Westminster Bank Ltd [1947] 1 All ER 469 HL at page 472** Lord Wright held interest may be regarded as representing the profit they might have made if he had had the use of the money, or, conversely, the loss he suffered because he had not that use. The purpose of the award of interest is to compensate the Plaintiff for deprivation of the money. This principle was also applied in the case of **Tate & Lyle Food and Distribution Ltd v Greater London Council and another [1981] 3 All ER 716** where Forbes J held that an award of interest fulfils the purpose of an award of damages because it falls under the principle of *restitutio in integrum*. At page 722 he further held that the rate of interest should be a rate the Plaintiff would have borrowed the money to supply the place of the money which was unavailable (on account of the Defendant's action). In the premises the Plaintiff is awarded interest at 19% per annum from April 2010 until the date of judgment. The Plaintiff is awarded additional interest on the aggregate sums at the date of judgment from the date of judgment till payment in full at the rate of 19% per annum.

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

The counterclaim of the Defendant was not prosecuted and is dismissed with costs under Order 17 rule 6 (1) of the Civil Procedure Rules.

Judgment delivered in open court 17th of September 2015.

Christopher Madrama Izama

Judge

Judgment delivered in the presence of:

*Decision of Hon. Mr. Justice Christopher Madrama Izama *^*~?+:*

Priscilla Agoye Counsel for the Plaintiff

Henry Kasozi account with the Plaintiff in court

Defendant not represented

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

17th September 2015