

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**[COMMERCIAL DIVISION]**

**CIVIL SUIT No. 333 OF 2011**

**CYBER AUTO GARAGE ::: PLAINTIFF**

**VERSUS**

**ASKAR SECURITY SERVICES LTD ::: DEFENDANT**

**BEFORE HON. MR. JUSTICE BILLY KAINAMURA**

**JUDGMENT**

The Plaintiff brought this suit against the defendant seeking orders for; a) UGX 200,250,000/=, being compensation for the value of goods stolen, b) General damages c) Interest on (i) and (ii) above from the date of the theft till payment in full, d) Costs of this suit.

The plaint sets out the facts constituting the cause of action as:-

The plaintiff and the defendant entered into a contract of service on the 10<sup>th</sup> day of February, 2011 wherein the defendant was to provide security services at the plaintiff's premises in Mengo. The plaintiff through its sister company, Genuine Imports and Exports Ltd had imported bales of second hand clothes and shoes which were being kept at its premises. On the night of 18<sup>th</sup> April 2011, there was a break-in at the store where the plaintiff lost 450 bales of second hand shoes worth UGX 200,250,000/-. The Theft was executed by Amudi Moses, a security guard working with the defendant in connivance with others while on duty. The

plaintiff made several demands to the defendant to make good the loss it had suffered to no avail. The defendant breached its obligation under the contract of service and due to the defendant's breach; the plaintiff has suffered loss for which it is entitled to compensation from the defendant.

The defendant filed a written statement of defence in which it was stated that the defendant denies the liability as contained in the plaint and that the plaintiff shall be put to strict proof thereof. It was stated that the defendant's obligations to the plaintiff under the contract, paragraph 5 thereof, were waived in cases of connivance between the plaintiff's employees and the defendant's guard. That the contract existing between the defendant and the plaintiff was for guarding a motor repair garage which was turned into a shoes store without notification of the defendant which amounts to a variation of the guarding services contract and as such the defendant is not liable under the contract. The defendant owed a contractual duty to the plaintiff only and not third parties like the plaintiff's sister company, Genuine Imports Ltd, who was the owner of the shoes and a stranger to the contract. The shoes stolen were recovered by police and all the 303 sacks of shoes were handed over to the plaintiff. The plaintiff has no cause of action against the defendant either under the contract of service or at all as they are not the owners of the shoes and therefore are not entitled to any compensation as pleaded or at all.

At the commencement of the trial, the following issues were framed.

1. *Whether the plaintiff is legally entitled to bring a suit on behalf of M/S Genuine Imports and Exports Ltd on the stolen goods.*

2. *Whether the defendant was in breach of the contract for guarding services.*
3. *Whether the plaintiff is entitled to the reliefs sought.*

At the trial, Mr. Wyclif Tumwesige appeared for the Plaintiff; and Mr. Francis Ninye appeared for the Defendant.

***Issue One – Whether the Plaintiff is legally entitled to bring a suit on behalf of M/s Genuine Imports and Exports Ltd on the stolen goods.***

Mr. Musa Sibeti, the Managing Director of the plaintiff testified as PW1.

PW1 stated that the plaintiff entered into a contract of security services with the defendant to guard and protect the premises and properties of Cyber Auto Garage Services on the 10<sup>th</sup> day of February 2011. The contract terms and conditions were that Askar Security was to provide security to the premises and all the properties of Cyber Auto Garage Services or in the possession of the plaintiff.

On the 18<sup>th</sup> April 2011, Askar Security Services deployed one of their guards by the name of Amudi Moses to guard the premises (store) of Cyber Auto Garage in Mengo. On the same day in the night, there was a break-in at the store where 450 bags of second hand shoes worth UGX 200,250,000/- were stolen.

He further testified that on the same day of 18<sup>th</sup> April 2011 after he learnt of the robbery, he went to the premises and did not find the guard, Amudi Moses, at the site but instead found an abandoned gun. He immediately reported the case of the break-in at Kafumbe Mukasa police post. He believes that the robbery was executed by the defendant's guard Amudi Moses in connivance with other thieves

because Amudi Moses on the same night abandoned the defendant Company's gun in the same store where the theft took place and ran away.

In cross-examination, PW1 stated that apart from repairing cars, the plaintiff was using their premises to sell shoes which belong to Genuine Import and Export Ltd, who is their tenant at the premises and that they disclosed this fact to the defendant's company. He also stated that he knows the Directors of Genuine Imports, which is himself and one Ibrahim, and that the directors of the plaintiff are one Jeff and himself (PW1).

The defence called two Witnesses: Ms. Hope Atuhaire as DW1 and Ms. Rubayiza Joy Sheilla as DW2.

It was DW2's evidence as the General Manager of the defendant that the defendant executed a security services agreement with the plaintiff to provide guards to its motor repair garage located at Mengo. The defendant was contracted to guard the premises that were used only as motor vehicle garage and prior to the incident was never informed that other entities were storing their goods there. She testified that the defendant had no contract with or legal obligation to the Company called Genuine Imports and Exports Ltd, the purported owner of the shoes.

DW2 also testified that the contract under *Clause 13* only binds the defendant if their clients like the plaintiff are engaged in legal business but investigations revealed that the storage of the shoes at the garage was illegal and contrived to cheat government authorities.

In cross examination, DW2 admitted that there's no particular provision in the agreement that says that the defendant was guarding a garage in Mengo. She also admitted that the agreement mentions Cyber Auto Services, and does not specify that it was a garage.

In re-examination, DW2 stated that upon carrying out an assessment of the premises of the plaintiff, they found an office, vehicles inside the garage, wall fence and a gate. They did not see any stores and did not know the plaintiff was using the garage as a shoe store.

In his submissions, Counsel for the plaintiff submitted that the plaintiff contracted the defendant to guard its premises and that it is nowhere in the contract that the defendant's liability was limited to only those goods whose property in title was that of the plaintiff. The plaintiff as a result of the defendant's breach of contract suffered a wrong which was meant to be guaranteed and protected by the defendant. Thus, the plaintiff is both in law and equity entitled to claim against the defendant for not keeping its part of the bargain. That in the circumstances, the plaintiff had a right under the contract to bring the suit for recovery of any of the goods including the ones in question which were lost or destroyed as a result of the defendant's breach of the contract.

Counsel further submitted that under **S. 117(1)** of the Contracts Act, 2010 the law permits any person in the custody of goods as that in the position of the plaintiff to sue for recovery of the goods or their value as if it was the owner of the goods. That the plaintiff therefore has locus standi to bring this suit for recovery of the value of the goods that were stolen as a result of the defendant's failure to keep its part of the contract of guarding its premises.

In reply, Counsel for the defendant submitted as follows:-

The plaintiff has no cause of action against the defendant. The plaintiff sued on the basis of a contract between them and the defendant, but *paragraph 4b* of the Plaintiff states that the “plaintiff through its sister company, Genuine Imports and Exports Ltd had imported bales of shoes...and kept them at its premises”. The Bill of Lading, and the URA Customs entry documents annexed to the plaintiff both show that the consignee, importer and taxpayer of the said bales of shoes was Genuine Imports and Exports Ltd of Ntinda Trading Centre. The legal owner of the shoes is clearly and evidently Genuine Imports and Exports Ltd. The plaintiff defines it as ‘a sister company’ of the plaintiff company. The law does not recognize such a relationship and neither is it explained in the plaintiff. The facts and the evidence therefore show that the plaintiff is not the owner of the shoes. No authority by way of powers of attorney or any other was filed in court authorizing the plaintiff to sue on behalf of Genuine Imports and Exports Ltd.

Counsel for the defendant cited the case of ***Auto Garage & Ors Vs Motokov (NO.3) [1971] E.A 514***, where Motokov, a Czechoslovakia company, supplied motor vehicles to Auto Garage Ltd, a Tanzanian Company, who paid by bills of exchange through Grindlays Bank of Tanzania. The Bills were in the name of Statni banka Ceskoslovakia which was Motokov’s clearing bank. The Bills were dishonored and Motokov sued Auto Garage Ltd on the dishonored bill although it was not the party named on the bills but the beneficiary thereof.

Auto Garage Ltd in their defence said the plaintiff is not entitled to bring the suit as they are not the holders in due course of the bills of exchange the subject of the suit as they are not endorsed in their favor. *Spry V-P*, at p.520, while

dismissing Motokov's appeal said "...the High Court had before it a **plaint, in which Motokov was suing on dishonored bills of exchange, copies annexed to the plaint. Reference to the copies shows that... Motokov was not the holder. Looking at the plaint...it would appear that the right to sue on the bills lay with the bank and Motokov had no right of action...**"

Spry V-P also stated that in order to disclose a cause of action, the plaint must show that the plaintiff enjoyed a right, the right has been violated and the defendant is liable. He further stated that "**if, on the other hand, any of those essentials is missing, no cause of action has been shown....**"

It was Counsel for the defendant's submission that accordingly, where a plaint does not disclose a cause of action, it is not a plaint at all. What is important in considering whether a cause of action is revealed by the pleadings is the question as to what right has been violated. He stated that the plaintiff must appear as a person aggrieved by the violation of the right and the defendant as a person who is liable. The plaint must allege all facts necessary to establish the cause. The fundamental rule of pleading would be nullified if it were to be held that a necessary fact not pleaded must be implied.

It was also Counsel for the defendant's submission that under **Order 7 rule 11 of CPR S.I 71-1**, a plaint should be rejected for not disclosing a cause of action, and that the words "**shall be rejected**" were interpreted to mean that they are "mandatory" by Wilson J in *Hasmani Vs National Bank of India Ltd (1937) 4 E.A.C.A 55* and further that **0.7 r. 11(a)** does not give court any discretion.

Counsel for the defendant further emphasized that the case before this court is in **pari meteria** with the *Auto Garage Case*. The Bill of lading, the customs entry

documents and tax payments receipts are all in the names of Genuine Imports and Exports Ltd and not the plaintiff. The plaint does not disclose any legal relationship the plaintiff has with the shoes and a mere statement that they were imported by a 'sister company' is neither permissible at law nor does it amount to a cause of action. The plaintiff sued as the owner of the shoes and not merely as a custodian. No ownership has been disclosed by the plaintiff and the Plaint does not disclose what right the plaintiff enjoyed vis- a- vis the shoes, how the right was violated and how the defendant is liable. The plaintiff cannot sue merely because they were in possession of the said shoes. That might lie within the ambit of the law of tort, not in contract law.

In conclusion, Counsel for the defendant prayed that court makes a finding that the plaint does not disclose a cause of action and be pleased to reject and dismiss the case with costs, and that the first issue be decided in favor of the defendant.

### **Decision of court**

It was not in dispute that the goods stolen from the plaintiff's premises belonged to M/S Genuine Imports and Exports Ltd. Counsel for the plaintiff submitted that contract for guard services did not limit the liability of the defendant to only goods whose title was that of the plaintiff. Counsel argued that the plaintiff had a right under the contract to bring the suit for recovery for any loss of goods lost or destroyed as a result of breach of contract for provision of guard services by the defendant. Counsel relied on S. 117(1) of the Contracts Act to support the plaintiff's case. On his part Learned Counsel for the defendant argued that the plaintiff has no cause of action against the defendant since the plaintiff was not the owner of the goods. Counsel relied on the case of **Auto Garage** (supra) for the



proposition that to disclose a cause of action the plaintiff must show that the plaintiff enjoyed a right, the right has been violated and the defendant is liable. Counsel argued for that the plaintiff should be dismissed for under O.7 r 11 CPR for not disclosing a cause of action.

S. 117 (1) (2) of the Contract Act 2014 provides

- (1) *“whether a third person wrongfully deprives a bailee of the use of bailed goods or the possession of those goods or damages the goods, the bailee is entitled to use any remedies that the owner may have used if bailment had not been made”.*
- (2) *“A bailor or a bailee may bring a suit under subsection (1) against a third person for deprivation or damages”.*

The word *bailee* is defined in BLACK'S LAW DICTIONARY 9<sup>th</sup> Edition at pg 161 as:-

*“A person who received personal property from another and has possession of but not title to the property. A bailee is responsible for keeping the property safe until it is returned to the owner”*

Based on the above, in my view the plaintiff as clearly borne in the evidence adduced was a *bailee* and therefore entitled to bring this suit under S. 117 (2) of the Contracts Act 2010.

In the result issue one is answered in the affirmative.

***ISSUE TWO- Whether the Defendant was in breach of the contract for guarding services.***

PW1, testified that the plaintiff on 10<sup>th</sup> February 2011 entered into a contract of security services with the defendant to guard, and protect the premises and properties of the plaintiff. That the contract terms and conditions were clear that the defendant was to provide security to the premises and all the properties of the plaintiff or in possession of the plaintiff.

He further testified that on the 18<sup>th</sup> April 2011, Askar Security Services deployed one of their guards by the name of Amudi Moses to guard the premises of Cyber Auto Garage in Mengo. On the same day in the night, there was a break-in at the store where 450 bales of second hand shoes worth UGX 200,250,000/= were stolen. He testified that on the same day of 18<sup>th</sup> April 2011 after he learnt of the robbery, he went to the premises and did not find the guard, Amudi Moses, at the site but instead found an abandoned gun. He immediately reported the case of the break-in at Kafumbe Mukasa Police Post. He testified that he believes that the robbery was executed by the Defendant's guard Amudi Moses in connivance with other thieves because the one Amudi Moses on the same night abandoned the Defendant Company's gun in the same store where the theft took place and ran away.

He stated that Amudi Moses was the guard attached to Askar Security Services, a fact not denied by the defendant. That when he reported the case to Askar Security Services about the acts of their guard, Amudi Moses, it was not in contention that he committed the offence.

In Cross-examination, PW1 stated that the guard of the defendant was never arrested. He testified that he did not remember whether the contract between the plaintiff and defendant stated that the defendant will not be liable for any loss if there's any connivance between the plaintiff's employees and the guard. He emphasized that Manisulu Setaala, who was found with some of the stolen shoes, was not the plaintiff's employee, but that he used to come to the garage looking for a job.

In re-examination, PW1 stated that the person in charge of managing the affairs of the Cyber Auto Garage Ltd after 6pm was the Askari, that is, the askari of the defendant.

Defence called Hope Atihare as DW1.

She testified that she was appointed as a security consultant and investigator by the defendant from September 2010 to September, 2011, during which period she advised both the defendant and its clients on the best practices and security systems and also carried out investigations when security systems were breached resulting into criminal incidents.

It was her testimony that on or about 14<sup>th</sup> February 2011, a case was reported by the plaintiff involving the theft of bales of shoes purportedly by one of the guards assigned to guard the plaintiff's motor repair garage. That she immediately carried out investigations and established that the theft was perpetrated through possible connivance and collusion between the defendant's guard, Amudi Moses and Manisulu Setaala and one 'Designer', both of whom were employees of the plaintiff.

DW1 further testified that it was never proved that the said Amudi Moses participated in the theft but it was assumed because his gun was found abandoned at the Plaintiff's premises. He was never arrested and no information is available as to his whereabouts.

She stated that the following people were found with the stolen shoes and arrested and charged in court and remanded in Luzira prison: Manisulu Setaala, an employee of the plaintiff was found with 2 bags of shoes, Onoriya Julius was found with two bags of shoes, Kasio Christopher with some pairs of shoes, Kavulu Aziz found with some pairs of shoes, Haji Nasser Selubende had bought 282 pairs of shoes, Muwere Ibrahim was found with seven bags of shoes, Munana Emmanuel was found with some pairs of shoes.

That a total of 291 bags of shoes were identified and recovered from the thieves and were all returned to the plaintiff.

She further testified that during the investigation of the theft the plaintiff's officials showed her the Bill of Lading on which the shoes were imported and there was a disparity between the number of shoes indicated on the bill of lading and those allegedly stolen and when she asked why there were more shoes stolen than were imported, she was informed that they understated the number of shoes on the bill of lading to evade taxes.

DW1 further testified that upon asking one Musa, a plaintiff officer, how the shoes that were consigned to Genuine Imports and Exports Ltd of Ntinda Trading Centre found their way into their motor vehicle garage without informing the defendant, no sufficient answer was provided.

She further stated that before the theft, she used to carry out on-spot checks on most of the defendant's client premises including the plaintiff's, and in all the time they never informed her that they were storing bales of shoes. She said that she had identified all the vulnerable areas at the plaintiff's premises and recommended better lighting and reinforced doors and that if she had been informed that the plaintiffs were storing bales of shoes, she would have taken sufficient measures to curtail such an incident.

In cross-examination, DW1 stated that she had established that Setaala was the plaintiff's employee when Musa communicated to her verbally, that Setaala was one of his laborers at his garage. She admitted that among other reasons, she carried out the investigations to verify whether the defendant was liable or not. In reference to the understatement of the bales of shoes, she stated that she did not verify how many bales of shoes were understated. She testified that in her investigations, she did not establish whether there was any destruction of the lighting system. However, she established that the plaintiff's properties were stolen from their premises, and that she suspected that Setaala and Amudi, the security guard did it.

In re-examination, DW1 stated that though she is a serving police officer attached to Kibuli Police station, she worked with the police at Kafumbe Mukasa Police Station during the investigations, since they were the ones authorized to investigate the theft. She testified that she was helping them on on-spot checks and consultation.

DW2, Rubayiza Joy Sheilla, testified that the defendant executed a security services agreement with the plaintiff to provide guards to its motor vehicle repair

garage located at Mengo. She testified that the defendant was contracted to guard the premises that were used only as motor vehicle garage and prior to the incident was never informed that other entities were storing their goods there. She stated that the defendant has no contract with or legal obligation to the company called Genuine Imports and Exports Ltd, the purported owner of the shoes.

DW2 further testified that the contract under *Clause 13* only binds the defendant if their clients like the plaintiff are engaged in legal business but the investigations revealed that the storage of the shoes at the garage was illegal and contrived to cheat government authorities. She emphasized that it was a specific provision of the contract under *Clause 5* thereof that the defendant shall not be responsible for any loss of property that shall arise out of theft as a result of connivance between the staff of the plaintiff and the defendant's guard(s).

She stated that the theft in question was perpetrated through collusion of the plaintiff's employees to wit Manisulu Setaala and others who were found with the stolen shoes and charged in court. That therefore the defendant is not liable under the contract as its obligations are those envisaged under the contract and theft through collusion and connivance with client's employees was specifically excluded.

It was also DW2's testimony that it was never conclusively proved that the defendant's guard on duty, one Amudi Moses participated in the theft as he was never apprehended or found with the shoes and to date his whereabouts are unknown. That it was only assumed that he participated in the theft because his

gun was found at the plaintiff's premises. He could have been overpowered and killed and his body dumped elsewhere or some other explanation.

DW2 further stated that the defendant was obliged to keep an Insurance Policy to cover such contingencies and the plaintiff is only entitled to compensation under the agreed limits. The defendant at all material time maintained that Insurance policy in favor of the plaintiff like all other clients.

In conclusion, DW2 pointed out that the defendant is not liable to the plaintiff as the shoes were stolen by the plaintiff's employees and that most, if not all of the shoes were recovered and handed over back to the plaintiff.

In cross-examination, DW2 stated that the defendant signed an agreement with Cyber Auto Services, which was a garage in Mengo and that they deployed there one night guard for a period of one year. That according to the agreement, the defendant was to 'guard the motor garage'. She however admitted that that statement was not there in the agreement. She stated that when they inspected the premises upon making a contract, the premises of the plaintiff were inspected and found to be a garage, but that this was not specified in the contract. In reference to the Insurance Policy, DW2 stated that the Company policy is to compensate up to 25 million Shillings, but she admitted that the Insurance Policy was not brought to the attention of the plaintiff at the time of signing the contract.

DW2 also admitted that she did not have the proof that Manisulu was an employee of the plaintiff. She stated that the defendant as a precautionary measure had inspected the garage and assessed that the garage needed only one guard at night since the client had put in CCTV cameras. She also admitted that

she did not know how many employees the plaintiff had at the premises before signing the contract, but that Manisulu had testified at the police station that he was one of the plaintiff's employees. She admitted that the defendant Company did not have proof that the plaintiff had recovered part of the bales of shoes.

In re-examination, DW2 stated that upon inspection of the premises of the plaintiff, they only found an office, vehicles inside the garage, a wall fence around the gate, but did not see any store. She emphasized that the defendant was not informed that another company is keeping their property in the plaintiff's premises. The witness also stated that the whereabouts of the defendant's guard, Amudi Moses, who had worked with the defendant from 2009 are unknown up to now, and they are worried he might have been killed. She testified that Manisulu was arrested and charged at the police station and later released.

In his submissions, Counsel for the plaintiff submitted that although the defendant in its attempt to run away from liability argues that the theft of the goods in question was carried out in concert with the employees of the plaintiff and that under *Clause 5* of the contract, the defendant is not liable to indemnify the plaintiff, there's no scintilla of evidence that a one Manisulu Setaala was an employee of the plaintiff. Counsel stated that PW1 was on record stating that the said Manisulu as not the plaintiff's employee. The witness told court that Manisulu was a person who used to come around the premises looking for a job and that he had never been an employee of the plaintiff. He stated that upon the plaintiff denying being the employer of the said Manisulu, it was the duty of the defendant to adduce evidence to prove that fact as required by **Section 102** of the Evidence Act, Cap.6



Counsel for the plaintiff submitted that the defendant was contracted to guard the plaintiff's premises against intrusion. The defendant failed to carry out its duties as required by the contract, but its employee instead of keeping the plaintiff's premises turned around and robbed the plaintiff, causing it losses which the plaintiff is yet to recover from.

It was Counsel for the plaintiff's argument that for a person to rely on an exclusion clause in a contract it must be proved that, the person acted with due care and that the one seeking indemnification as against him acted or conducted him/himself negligently hence leading to the damage that was occasioned. He stated that courts in our jurisdiction and outside have dealt with the issue of exclusion clauses and the position taken is that negligence on the part of the claimant leading to loss must be proved. Counsel cited the case of ***Express Transport Co. Ltd Vs B.A. T Tanzania Ltd (1968) E.A 443.***

He further argued that in the instant case, the defendant never attempted to prove any mistake or wrong doing occasioning negligence on the part of the plaintiff. That PW1 testified that the defendant and its agents on site had been strictly instructed that as Company policy of the plaintiff, no one, except for the Directors of the plaintiff was allowed to access the premises after 6:00pm, therefore, even if one was to believe the defendant's allegations that one of the plaintiff's employee was engaged in the theft, it would be difficult for the defendant to evade liability since the employee being referred to is not among those that were permitted to access the premises past the hour of 6:00pm as per the Company's directives and policy. Further that, no evidence was adduced to

prove that the person who was claimed to be the plaintiff's employee was indeed one.

In conclusion, Counsel for the plaintiff submitted that the defendant breached the contract when its guards deployed to protect the plaintiff's premises instead orchestrated the breach of the plaintiff's security and stole goods that were in the custody of the plaintiff at the premises which were to be guarded by the defendant and therefore the defendant is vicariously liable to the plaintiff.

Counsel for the defendant submitted that the contract in question was tendered by both parties as *Exh.1*. He argued that the controversy arises out of *Clause 5* thereof which provides that, **“the company (meaning the defendant) shall not be responsible for any loss of any property that shall arise out of the theft as a result of connivance between the staff, relative, and or any person influential to the client, and the guard”**. That it is the contention of the defendant that all available evidence points to the fact that the theft was perpetrated by the plaintiff's own employees namely, Manisulu Setaala and another one only known by his alias 'Designer'.

Counsel for the defendant further submitted that *Exh.4*, the Police Report dated 14<sup>th</sup> July 2011 at paragraph 3 thereof states that 'inquiries were conducted...and one Manisulu Setaala, the Company mechanic was arrested with two sacks of shoes in his house in Natete. Manisulu Setaala led us to other suspects namely, Onoriya Julius, Kasio Christopher, Kavulu Azizi, Munawa Emmanuel and Muwere Ibrahim who were also arrested with seven sacks of second hand shoes...'

That the above was an independent and reliable finding of the Divisional CID Officer at Old Kampala Police Station. The plaintiff did not and could not rebut the

finding. Instead, they actually relied on the report as part of the annexures to the plaint. It is incontrovertible piece of evidence that the said Manisulu Setaala, the prime suspect in the theft of the shoes, was actually an employee of the plaintiff.

The employment of Manisulu Setaala was further corroborated by the report of the Investigating Officer ASP Hope Atuheire, which is Exh.5 and in paragraph 1 thereof, stating”....Amudi Moses...colluded with their worker, one Manisulu Setaala and others and stole unspecified bags of second hand shoes....”

Counsel stated that ASP Hope Atuheire was cross examined at length on whether Manisulu Setaala was an employee of the plaintiff and in an emphatic and unwavering manner she confirmed that (a) Manisulu Setaala himself admitted to the police that he was the plaintiff’s employee (b) she established from Musa Sbeity, a Director to the plaintiff, that Setaala Manisulu was one of their labourers (c) that Manisulu Setaala and ‘Designer’ both employees of the plaintiff connived to steal the shoes.

It was Counsel for the defendant’s submission that ASP Hope Atuheire is a lawyer and a Police Officer and that she was confident and unshaken at the witness stand during cross examination, and thus her evidence on this issue should be believed. Ms. Joy Sheilla Rubayiza, DW2 in cross-examination further corroborated the fact of Manisulu Setaala’s employment with the plaintiff which fact he admitted at Kafumbe Mukasa Police Station.

Counsel submitted further that Mr. Musa Sbeity, a witness for the plaintiff also admitted knowing Manisulu Setaala who was arrested with the stolen shoes but that he deceitfully lied to the court that he was not their employee but was always coming to the plaintiff’s garage to look for a job. He stated that the

plaintiff had never denied that Manisulu Setaala was not their employee in their pleadings as in their reply to the defendant's WSD, in paragraph 7 thereof, they stated that, '...the allegations and or accusations against Manisulu Setaala have never been proved against him as his trial is still on-going.'

He stated that it is fundamental rule of pleading that a party must be bound by their pleadings and the plaintiff cannot, at a later stage of the trial deny that Manisulu Setaala was not their employee. **O.6 r.7 CPR** provides that a party cannot depart from its previous pleading. He cited the case of *Pusha d/o R.M Patel Vs The Fleet Transport Company Ltd [1960] E.A 1025*, where it was held that, 'it is statutory and necessary rule that a party is bound by his pleading.'

It was Counsel for the defendant's submission that the defendant had proved to the required standard that Manisulu Setaala and 'Designer' were employees of the Plaintiff and that they participated in the theft and were arrested and charged with the theft of the shoes. That accordingly, *Clause 5* of Exh 1, the contract of service, comes into effect since there was connivance of employees of the plaintiff. That the clause is binding on the plaintiff and therefore the defendant is not responsible and should be absolved of any liability to the plaintiff in respect of the stolen shoes. Counsel cited **Section 91** of the Evidence Act, Cap.6, which provides that "when the terms of a contract...shall be given in proof of the terms of that contract..."

Counsel for the defendant pointed out that although the plaintiff in their submissions on page 3, insist that the exclusion of liability embedded in clause 5 is not available to the defendant because there must be an allegation and proof of negligence against the plaintiff, the defendant need not allege or prove any

negligence on the plaintiff's part. He stated that the case quoted by the plaintiff, ***Express Transport Co. Ltd Vs B.A.T Tanzania Ltd [1968] E.A 443***, is distinguishable and misapplied on the facts. He stated that the case concerns the liability of a common carrier and there was no express exclusion clause limiting liability in that case and the appellant merely wanted to imply exclusion of liability for negligence on the basis of prior dealings between the parties. However, the instant case is dealing with interpretation of a specific term of a written contract. The defendant need not allege or prove any negligence on the plaintiff's part. All they need to prove is that there was connivance of the staff or employees of the plaintiff and they have ably done so.

In respect to whether the guard of the defendant participated in the theft or not, Counsel submitted that there was no evidence that the robbery was executed by Amudi Moses, a security guard working with the defendant. That during cross-examination of Mr. Sbeity, he stated that he did not know if Amudi Moses was ever arrested, and whether he was ever found with the shoes. No evidence of Amudi's involvement in the theft was proved except for the abandoned gun.

Counsel argued that this showed that the plaintiff had not proved their case or this part of the case to the required standard as required under **Section 10** of the Evidence Act, Cap.6, which provides that, **"whoever desires any court to give judgment as to any legal right or liability dependant on the existence of any fact which he asserts, must prove that those facts exist."** He stated that it was never proved that Amudi Moses participated in the theft but it was assumed because his gun was found abandoned at the plaintiff's premises and there's no

information as to his whereabouts, and thus, there's no concrete evidence of his involvement.

Counsel further submitted that Amudi Moses, an elderly gentleman of more than 55 years of age, with a wife and children and who had served the defendant for more than 6 years, has never been seen since the robbery, and there's likelihood that he could have been killed and his body disposed of during the robbery. Therefore, since there's no evidence of Mr. Amudi's participation in the theft, then the defendant cannot be held vicariously liable for the act of their employee.

It was Counsel's argument that there are other ancillary but nonetheless fundamental issues regarding the legality and efficacy of the plaintiff's suit. He stated that it is the contention of the defendant that the plaintiff was involved in an illegal activity regarding the storage of the shoes. In **paragraph 10** of the WSD the defendant avers that they are only bound by the contract only when the Plaintiff is engaged in lawful business. This position is well captured in *Clause 13* of the contract that, "the company (defendant) shall only be bound where the client is involved in legal business only keeping the laws governing this country."

Counsel submitted that the evidence on record showed that there was a disparity between the number of shoes indicated on the Bill of Lading and those actually stolen. ASP Hope Atuheire, in her witness statement paragraph 8 states that, '... when I asked why there were more shoes stolen than were imported, I was informed that they understated the number of shoes on the bill of lading to evade taxes.' The witness was emphatic that the documents showed a variance in the quantities of shoes and the plaintiff's official told her that they understated the number of shoes to evade taxes.

Counsel for the defendant further stated that the plaintiff did not rebut this assertion and that according to the principle of law that where a party makes averments in the pleadings and the same is not rebutted or traversed the same is taken to have been admitted. He submitted that the act of understating goods on shipment documents and URA customs entry documents in order to evade government taxes is illegal.

Counsel emphasized that a court of law cannot sanction what is illegal and illegality once brought to the attention of court, overrides all questions of pleading. He cited the Supreme Court case of *Makula International Ltd Vs Cardinal Nsubuga & Anor [1982] HCB 11* at page 15. Counsel submitted that since the plaintiff is suing on contract, contracts by law are vitiated by illegality and public policy. The plaintiff by engaging in illegal activity of evading taxes contrary to law and public policy and in clear violation of **clause 13** of the contract vitiated and breached the contract and cannot be heard to sue on and benefit from it.

Counsel prayed that this finds the plaintiff in breach of contract and be pleased to decide the second issue in favor of the defendant.

In the plaintiff's submissions in rejoinder, Counsel for the plaintiff argued that although Counsel for the defendant submits that there is no evidence that Amudi Moses participated in theft, both the Police Report on court record marked as Exh.4 and the Investigator's Report, which was sanctioned by the defendant itself, marked Exh.5 refer to one Amudi Moses as the prime suspect.

Counsel for the plaintiff submitted that the defendant had failed to prove that a one Manisulu Setaala was an employee of the plaintiff. He stated that PW1 told Court that the person referred to as his employee was not the plaintiff's

employee. The defendant did not adduce any evidence except for the assertions that the said Manisulu was the plaintiff's employee. It is the duty of the defendant in bid to mitigate liability to prove to court that the person being referred to was indeed an employee of the plaintiff, but it failed to do this.

It was Counsel for the plaintiff's submission that in an attempt to divert court's investigation in this matter, Counsel for the defendant delved into issues which were not part of the trial by accusing the plaintiff of being engaged in illegal business in his submissions. Counsel for the plaintiff argued that there is no evidence anywhere that the plaintiff is or was engaged in any sort of illegal business. The representations being made by DW1 about the confessions of the plaintiff's officials are baseless with no evidential value, and therefore no court of law should rely on such malicious representations of being engaged in an illegal business to condemn a person.

Counsel also stated that in any case the defendant and her witnesses had ample time to report the revelations of their investigations either to the Police or the Uganda Revenue Authority (URA), but they did not. Moreover DW1 is a police officer, but chose to remain silent only to raise it up in their defense when they cannot prove it against the plaintiff. He argued that the plaintiff attached all its documents relating to the import of the bales of shoes, the subject of the suit properly cleared by URA, and has not, all through the trial attempted to hide any information from court, and thus the allegations at the trial without any proof are an unfair ambush and should not be sustained by court.

In conclusion, Counsel for the plaintiff submitted that the plaintiff has proved its case that the defendant breached the contract when its guards deployed to



protect the plaintiff's premises and instead orchestrated the breach of the plaintiff's security by stealing goods in the custody of the plaintiff at the premises which were contracted to be guarded by the defendant, for which the defendant is vicariously liable to the plaintiff.

## **Decision**

The plaintiff's case is that the defendant was contracted to guard the plaintiff's premises against intrusion which it failed to do when its guards deployed to protect the premises instead orchestrated the theft of the goods stored at the premises. It was PW1's evidence that on 18<sup>th</sup> April 2011 the defendant deployed one of its guards in the name of Amudi Moses to guard the plaintiff's premises and during the night the premises were broken into and 450 bales of second hand shoes worth UGX 200,250,000/= were stolen. He further testified that the guard ran away after the break in and abandoned his gun at the premises. PW1 testified in cross examination that the said guard has never been arrested and that Manisulu Setaala who was found with some of the stolen shoes was not an employee of the plaintiff.

In its defence, the defendant relied on clause 5 of the Contract of Service EX 1 which is an exclusion clause and argued that the theft was perpetrated by the plaintiff's employees namely Manisula Setaala and another commonly known as "Designer"

In her testimony DW1 the Security Consultant and Investigator for the defendant stated that her investigation pointed to the fact that the theft was carried out through possible connivance and collusion between the defendant's guard and Manisulu Setaala and one "Designer" who were employees of the plaintiff. She

further testified that Manisulu Setaala was found with 2 bags of shoes, Onoriya Julius was with 2 bags of shoes, Kasio Christopher was found with some parts of shoes, Haji Nasser Selubandu was found with 282 pairs of shoes which he had bought, Muwere Ibrahim was found with seven bags of shoes and Munona Emmanuel was found with some pairs of shoes and that in total 291 bags of shoes were identified and recovered from the thieves and returned to the plaintiff.

It appears to me that the resolution of this issue revolves around the import of Clause 5 of the Contract of Services and whether or not those suspected to have connived in the theft of the shoes were employees of the plaintiff.

Clause 5 of the Contract of Service provided:-

*“That the company and/ or its employees shall not be responsible for any loss of any property that shall arise out of the theft as a result of connivance between the staff, relative and or any person influential to the client and the guard”.*

In order to benefit from this exclusion clause, the defendant had the *onus* to prove that the perpetrators of the theft or at least some of them were staff, relative or persons influential to the plaintiff company. In her testimony Hope Atuhaire DW1 an Investigating Officer working for the defendant testified.

*“I immediately carried out investigations and established that the theft was perpetrated through **possible** connivance and collusion between the defendant’s guard Emudi Moses and Manisulu Setaala and a one designer both employees of the plaintiff”*

When asked during cross examination to indicate how she established the above facts as to whether Manisulu and “designer” were employees of the plaintiff, DW1 stated that she had not and that it was the police who were investigating. The case Section 103 of the Evidence Act cap 8 provides:-

*“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its evidence unless it is provided by any law that the proof of that fact shall lie on any particular person.”*

Clearly under S.103 of the Evidence Act the burden of proof for a particular fact is upon the person who wishes the court to find such fact proved.

In this case the defendant has asserted that Manisulu Setaala and one “Designer” were employees of the plaintiff. Accordingly the burden of proof was on the defendant to show that they were indeed the employees of the plaintiff. The defendant produced no evidence other than the evidence of DW1 which evidence was not, in my view, sufficient to discharge the burden placed on the defendant to show that the two were employees of the plaintiff so as to take benefit of Clause 5 of the contract of service.

The above, finding leads me to the conclusion that the plaintiff based on the fact that the break in and theft of goods is not in dispute, has proved to the satisfaction of court that the defendant was in breach of the contract of guarding services. Accordingly issue No. 2 is answered in the affirmative.

### ISSUE No. 3

#### ***Whether the Plaintiff is entitled to the reliefs sought.***

Counsel for the plaintiff submitted that according to *Clause 9* of the contract, the defendant is obliged to indemnify the plaintiff for any losses suffered as a result of the deliberate act or omissions of the defendant. That has been established that the theft of the goods at the plaintiff's premises which the defendant was contracted to guard was principally executed by the guard of the defendant deployed to guard the premises. The plaintiff thereby seeks for compensation for the value of the goods stolen to tune of UGX 200,250,000/=, General Damages, and Costs of the suit.

It was Counsel's submission that having proved that the defendant is vicariously liable to the plaintiff for the acts or omissions of its employee, that in line with the contract and the law, the defendant be ordered to pay the plaintiff a sum of UGX 200,250,000/= being the value of the goods that were stolen.

Counsel stated further that General damages have been classified by Courts of law as a compensation for the loss and injury suffered; See ***Attorney General Vs Blake (2000) 4 ALL ER 385 at pg.391***, where Lord Nicholls stated that, **"...the general principle regarding assessment of damages is that they are compensatory for loss or injury...damages are measured by the Plaintiff's loss..."**

He submitted that in assessment of general damages the court takes into account several factors including injury and malice among others to ensure that the plaintiff receives commensurate compensation to the gravity of the act complained of. He cited the case of ***Obongo Vs Kisumu Municipal Council (1971) EA 91 at pg. 96***, where the East African Court of Appeal stated that **"...it is well**

established that when damages are at large and court is making a general award, it may take into account factors such as malice or arrogance on the part of the defendant and the injury suffered by the Plaintiff, as, for example by causing him humiliation or distress. Damages enhanced on account of such aggravation are regarded as still being essentially compensatory in nature. On the other hand, exemplary damages are completely outside the field of compensation and, although the benefit goes to the person who was wronged, their object is entirely punitive.”

It was Counsel’s submission that the courts in Uganda have awarded compensatory damages in several cases, for example in *Fredrick Zaabwe Vs Orient Bank & 5 Ors*, SCCA No.4 of 2005, where court awarded compensatory damages to the appellant on two grounds i.e, wrongful deprivation of property and put emphasis on the second, which was the conduct and arrogance of the respondents in that case.

Counsel argued that the conduct of the defendant from the very beginning since the time of the incident has not been to help the plaintiff recover its goods. The defendant instead insisted on unsubstantiated allegations that the plaintiff’s employee was a party to the theft without proof, and thus the suit has come this far because of the defendant’s conduct of attempting to evade liability.

It was Counsel for the plaintiff’s submission that the plaintiff has proved a case for award of general damages as against the defendant, for the inconvenience and suffering she has gone through since 2011 and the loss of business she has suffered since the goods were stolen and prayed for an award of UGX 60,000,000/= in general damages as proved above. Further that court awards

interest on the decretal sum of 18% p.a from the date of judgment until payment in full.

In conclusion, Counsel stated that as the rule goes, costs follow the event, and invited court to award costs to the plaintiff should it be pleased to find that the plaintiff is entitled to Judgment.

Counsel for the defendant submitted that the evidence on record shows that all the shoes or at least most of them were recovered and returned to the plaintiff. Exh.4, page 14, last paragraph states that a one Manisulu Setaala, the Company Mechanic, was arrested with two sacks of shoes in his house. Others including Onoriya Julius, Kasio Christopher, Kavulu Azizi, Munawa Emmanuel and Muwere Ibrahim were arrested with seven sacks of second hand shoes, Hajji Nasser Serubende was arrested with 294 pairs of shoes. All these were returned to the plaintiff.

Exh.5, the report by ASP Hope Atuheire states that a total of 291 bags of shoes were identified and returned to the plaintiff. The plaintiff however in paragraph 4(c) of the plaint still claims for 450 bales of shoes completely hiding the fact that most of them were recovered. The plaintiff is dishonest and is attempting to unfairly gain from the alleged robbery. To the extent that the Plaintiff does not disclose how many bales were recovered and how many, if any, were not recovered, it is not reliable to prove the plaintiff's loss if any.

It was the Counsel for the defendant's submission that the plaintiff's prayer for UGX 200,250,000/= be rejected for being dishonest and not being backed by evidence.

In respect of plaintiff's prayer for general damages, Counsel for the defendant stated that the damages are based on fault and since the defendant has indicated and proved that the defendant was not at fault at all, then no damages should be awarded to the plaintiff.

Counsel for the defendant prayed that a finding be made that the plaintiff is not entitled to any reliefs and all the reliefs sought. He further prayed that considering the law and evidence detailed herein, court should find that the plaintiff has not proved their case and should dismiss it with costs to the defendant.

#### Decision

In this suit, the plaintiff prayed for UGX 200,250,000/= being the value of goods stolen i.e special damages and in addition prayed for award of general damages.

It is trite that special damages must be specially pleaded by the injured party and this must also be proved exactly on the balance of probabilities (see ***Mutekanga Vs Equator Grower (u) Ltd {1995-1998} EA 205 SC***)

It is now generally accepted that the purpose of grant of special damages is to place the injured party back into the position they would have been had the contract been performed (see ***Uganda Telecom Ltd Vs Tanzanite Corporation CA 17 of 2004***).

The plaintiff in this case seeks for value of the goods stolen which it put at UGX 200,250,000/=. It was PW1's testimony that the value of the shoes stolen was UGX 200,250,000/=.

In proof of this, the plaintiff tendered in EX 2 being a bill of lading issued by the shipping company M/s Maersk Line. In addition the plaintiff tendered in EX 3 being the clearance receipt issued by Uganda Revenue Authority. They all attest to the fact that M/S Genuine Imports and Exports Ltd imported 672 bags of used shoes. The value of the imported shoes is put at UGX 32,268,902/=. In its pleadings and from the evidence on record, the plaintiff alleges that of the 672 bags imported, 450 bags were allegedly lost due to the negligence of the defendant.

The plaintiff puts the value of the lost shoes at UGX 200,250,000/=. The plaintiff does not explain how it arrived at the value of the shoes. As noted above the invoice value for purposes of the tax was UGX 32,268,902/= for all the 672 bags. In my view the plaintiff should have indicated how it arrived at the loss of UGX200, 250,000,000/= by adducing evidence to that effect. As seen above special damages must not only be pleaded but must also be proved exactly. In my view there is no of evidence adduced by the plaintiff to show that the lost shoes were valued at UGX 200,250,000/= and that the bags lost were 450. It has been established from the report of police EX 4 and that of the investigator of the defendant - EX 5- that a total of 291 bags were recovered and returned to the plaintiff.

That, to me is proof that some bags of shoes were stolen from the premises of the plaintiff and of those stolen 291 bags were returned to the plaintiff. It would however be idle talk on my part to find that indeed 450 bags valued at UGX 200,250,000/= were lost as a result of the breach of the contract of service by the



defendant as the plaintiff has failed in my view to discharge its evidential burden to prove the magnitude of the special damages it seeks to recover.

As seen earlier, the plaintiff also seeks to recover general damages from the defendant for the breach of contract which as held under issue two the defendant by its actions was in breach thereof. The position of the law is that general damages may be awarded for inconvenience caused by the defendant and to be eligible for general damages the plaintiff should have suffered loss or inconvenience to justify award of general damages. It is also now settled that substantial physical inconvenience, or an inconvenience which is not strictly physical and discomfort caused by breach of contract will entitle the plaintiff to damages.

(see *UCB Vs Kigozi* [2002] EA 305 *Musisi Edward Vs Babihuga Hilda* [2007] HCB Vol 83 and *Robbidac Pants (u) Ltd Vs KB Construction Ltd* [1976] HCB 49).

The evidence on record indicates that the plaintiff clearly suffered inconvenience as a result of the defendant's conduct.

It is trite law that the measurement of the quantum of damages is a matter for the discretion of the individual judge which of course has to be exercised judiciously (see *Southern Engineering Company Ltd Vs Mulia* [1986-1989] EA 541)

The plaintiff sought for an award of UGX 60,000,000/= (Uganda Shillings Sixty Million] as general damages for inconvenience and suffering. The plaintiff suffered theft at his premises and has since 2011 been pursuing the recovery of compensation. On its part I find that the defendant in fact co-operated in trying to find a solution and answers to the break-in at the plaintiff's premises. Bearing the

above in mind I find that the sum of UGX 60,000,000/= proposed by the plaintiff as general damages is excessive. I would award a sum of UGX 25,000,000/= as general damages.

On interest, the plaintiff prayed for interest of 18% p.a from date of judgment until payment in full. I consider an award of 12% p.a appropriate.

Costs follow the event and accordingly the plaintiff is entitled to the costs of the suit and are hereby awarded.

In the result judgment is entered for the plaintiff in the following terms.

1. UGX 25,000,000/= being general damages for the inconvenience suffered by the plaintiff.
2. Interest on the general damages at the rate of 12% per annum from date of judgment until payment in full.
3. Costs of the suit.

**B. Kainamura**  
**Judge**  
**23.10.2015**