THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL SUIT NO.339 OF 2012

K. ROGERS LTD::PLAINTIFF

VERSUS

SPEDAG INTERFREIGHT (U) LTD:::DEFENDANT

BEFORE THE HON. MR. JUSTICE HENRY PETER ADONYO

JUDGMENT

1. **Background:**

The Plaintiff Company is an importer and dealer in building tiles. It has its Head Office at 6th Street, Industrial Area, Kampala. In the year 2008 it imported dutiable granite tiles packed in 25 crates measuring approximately 24,000kg through a container No. CLHU 394204-5 from India to Uganda and 1450 cartons of glass blocks measuring approximately 20300kg through container No. EOLU 884354-4. The plaintiff and the Defendant have for a long time dealt with each other with the transporting and warehousing the plaintiff's goods and based on the prevailing good business relationship between the two the plaintiff still contracted the defendant to transport its goods in the above stated containers from Mombasa to Kampala as a carrier company and to ware house the same pending the plaintiff's meeting its import tax obligations in regards to the goods with the Uganda Revenue Authority(URA).

1: Judgment on alleged lost of goods which had been placed under bonded warehouse for which de-stuffing was made for tax purposes and eventually delivery made but claims made otherwise that it was not so: per Hon. Justice Henry peter Adonyo: March 2015.

The plaintiff is stated to have partially cleared and paid taxes for part of the goods contained in the mentioned above containers leaving some of the goods in the custody of the defendant for later clearance of the taxes as was stated to be the normal business practice in the industry. The first cleared goods are said to have included seven (7) crates of granite tiles and two hundred (200) cartons of glass blocks and they were released from the defendants Inland Container Depot (ICD) warehouse bond in the presence of a clearing agent and Uganda Revenue Authority officials. The goods were then delivered by the defendants to the plaintiff's warehouse along Bombo Road, Kampala to the plaintiffs store keeper with the rest of the plaintiffs stated uncleared goods remaining at the defendant's warehouse in bond. The plaintiff states that the remaining goods could not be traced from the defendant's bonded warehouse when it went to collect them later with the defendant stating that it had delivered the whole consignment in both containers based on two delivery notes. The plaintiff insists that it did not receive the remaining goods in question and thus sued the defendant for the recovery of the same which the defendant denied and indeed counterclaimed against the plaintiff for penalty taxes imposed upon it by URA for goods which was stated to have left the defendants warehouse un accustomed.

The defendant denies the plaintiff's claims but admits that in the year 2008 the plaintiff did import dutiable 25 crates of granite tiles and 1450 cartons of glass blocks in the mentioned containers which on arrival in Kampala were routed to its customs bonded warehouse/Inland Container Depot (ICD) at Nakawa. That during the process of warehousing, the Plaintiff requested the Defendant to apply to Uganda Revenue Authority (URA) to allow the goods to be de-stuff from the containers to avoid incurring demurrage charges and this was allowed and the goods were removed from the containers and placed in the defendant's transit shed ready to exit the defendant's bond for in the meantime the plaintiff was sorting out its tax appeal issues

concerning the goods with URA. Subsequently the plaintiff is said to have paid taxes on seven (7) crates of tiles and on 200 cartons of glass blocks with the URA authorizing the release of these particular quantities. But in the process, the defendant's officials released the entire consignment of twenty five (25) crates of tiles and 1450 cartons of glass blocks with the plaintiff taking delivery of the whole lots on the 23rd day of December, 2008 and on the 8th day of January, 2009 respectively. The plaintiff thus took all the goods including those had not been tax cleared by URA. Two years and seven (7) months later the URA carried out a post clearance audit on the plaintiff's tax transaction in regards to entry No. S64727/18.12.2008 and URA found that a total of eighteen (18) crates of tiles and 1250 cartons of glass blocks had exited the defendant's bonded warehouse without payment of due taxes. The URA then penalized the defendant since it was the owner of the licensed bonded warehouse from which the goods left not taxed by making the defendant to pay the equivalent tax liability of Uganda Shs. 28,736,300/= for those goods which the defendant paid on the 12th day of August, 2011.

The URA tried to make the defendant pay a further sum of Shs 40,840,240 in respect of 1250 cartons of glass blocks but later abandoned this claim after the defendant is said to have showed to the URA that it was the URA own officer, a one Mr. Ndozireho, who then resident at the defendant's warehouse was the one who had actually authorized the exit of the entire gross mass of the 1450 cartons of glass blocks. Thereafter, the defendant raised a tax invoice for Uganda Shs 28,736,300/= to the plaintiff for reimbursement of the taxes on tiles which it had paid to URA. But that strangely enough after all this period, that is after the lapse of two (2) years and seven (7) months, the plaintiff instead demanding from the defendant for its balance of retained cargo. The defendant thus pointed to the plaintiff that it had received all the goods but the plaintiff could not relent and thus sued the defendant for the balance of the which the defendant state was

an afterthought for the goods had been wholly received by the Plaintiff who even knew that it had not paid taxes for the same after receiving them and went on to fabricate documents claiming it had not yet received the goods including forging the defendant's stamps on order to avoid its obligation to refund the taxes paid on its behalf by the defendant for the goods which had left the warehouse un taxed. The plaintiff then sued the defendant upon failure to convince the defendant to release its balance of goods with the defendant denying that it still had the goods which it state the plaintiff had received and consumed for which it was penalized by URA to pay its due tax and thus the defendant made counter claim for the taxes paid on account of the plaintiff.

2. The issues for trial:

At the beginning of the trial of this matter the parties agreed framed and agreed to the below issues to be considered by the court for the resolution of the dispute between them. The issues are selves for trial and set these out as follows:

a) Whether the plaintiff received the entire consignment of 25 crates of granite tiles and 1450 cartons of glass blocks from the defendant.

b) What are the remedies available to the parties in the main suit and the counter claim?

The issues raised are resolved as below as follows.

3. Whether the plaintiff received the entire consignment of 25 crates of granite tiles and 1450 cartons of glass blocks from the defendant:

In the first place, the parties do agree as a matter of fact that the defendant was contracted by the plaintiff to transport and warehouse twenty five (25) crates of granite tiles and one thousand four hundred fifty (1450) cartons of glass blocks upon their arrival in the country pending the payment of taxes by the plaintiff and the goods being de-stuffed from the containers and

warehoused at the defendants ICD premises. These are facts as seen from documentary Exhibits P1, P2, P3, P4, P5, P6, P7 and P8. Both parties rely on the same documents in this matter and is not even disputed by the representative of the defendants who testified in court. The bone of contention is, however, whether as averred by the plaintiff it only received seven (7) crates granite titles and two hundred (200) cartons of glass blocks which was cleared and for which taxes were paid leaving a balance of the consignment in the custody of the defendant which the defendant denies indicating that the whole consignment of twenty (25) crates of granite tiles and one thousand four hundred fifty (1450) cartons of glass blocks were mistakenly delivered to the plaintiff.

In respect to this, the plaintiff reiterated that the process of releasing goods from a bonded warehouse to the custody of an importer involved two the clearing agent and the Uganda Revenue Authority officials during which process the goods are who declared, inspected, assessed tax payment made and that this was the process which involved the instant goods in dispute with Exhibits P. 34 and P. 39 showing that the plaintiff placed into the custody of the defendant at its ICD premises twenty five (25) crates of granite tiles and one thousand four hundred fifty (1450) cartons of glass blocks. That being the case, the plaintiff states that the records show later that the clearing agent only declared seven (7) crates of granite tiles and two hundred (200) cartons of glass blocks respectively to Uganda Revenue Authority for purposes of paying taxes and the eventual release of the goods as seen from Exhibit P.38 and P.42 with the Uganda Revenue Authority upon assessment of the goods from the declaration forms and upon its inspection issued release orders and Goods Exit Note for the declared goods. The plaintiff adds that in particular Uganda Revenue Authority issued documents marked as Exhibit P. 36 and

P.37 for container No. CLHU 394204-5 and Exhibits P.41 and 42 for container No. EOLU-884354-4 which shows that only two (200) cartons of glass blocks were cleared and released from the defendants ICD premises with this piece of evidence being confirmed by PW.4, PW.5 and PW6 who are Uganda Revenue Authority officials and the clearing agent respectively and who were directly involved in the transaction of clearing and release of the plaintiffs goods and even corroborated by the defence witness DW1 who said that;-

"On P.36 is a release order containing release of & packages and P 40 & P41 show release of 200 pallets."

Thus according to the plaintiff there could not be any mistake as to the goods which were cleared for release and so based from these facts there was sufficient evidence to prove that only above goods were cleared and taxes paid for by the plaintiff.

From the evidence before me and the fact that none of the parties dispute this particular position, my finding in respect to this particular aspect of taxes being paid and for the particular goods being cleared for release is no doubt not in dispute and thus I would state that the stated goods were received in the custody of the defendant, taxes for it assessed and paid for accordingly and the goods were cleared to be released. As to the release and delivery of goods of the goods, this is where there is a disagreement between the parties for the plaintiff states that as far as it is concerned it paid taxes for part of the consignment which involves seven (7) crates of granite tiles on container No. CLHU 94204-5 and two hundred (200) cartons of glass blocks on container No. EOLU 884354-4 and that is this is supported by evidence from Uganda Revenue

Authority and the defendant defence since PW4, PW5 and P6 confirmed in court that Uganda Revenue Authority released the partial consignment on both containers, then it should be found that those were the only quantities of goods released from the warehouse to the plaintiff. This fact further overwhelming supported by documentary evidence which shows that from container No. CLHU 394204-5 containing granite tiles Exhibit P37 which is a release order for goods specifically showing that only seven (7) crates of granite tiles were released with Exhibit P. 36 which is a goods exit note issued by Uganda Revenue Authority official who is resident at the defendants ICD showing the same quantity of goods as exited the defendants ICD premises on the 22nd day of December2008 and for container No. EOLU 84354-4 containing two hundred (200) cartons of glass blocks being proved by Exhibit P41 which is a release order that only those quantities of goods were released on the 7th day of January 2009.

In view of the above and in concurrence with oral testimonies of witnesses, the plaintiff does submit that the court ought to find that only those quantities of goods were released from the defendant's warehouse for there was no other tangible evidence to show that the balance of the goods which were eighteen (18) crates of granite tiles and one thousand two hundred fifty (1250) cartons of glass blocks in the two containers ever been cleared with taxes paid for and the same released from the warehouse bond accordingly for the basis of this argument being that as far as the testimony of PW5 during cross examination was concerned, no goods could leave the bonded warehouse unless taxes had been paid for and subsequent release orders and exit notes issued thereof. This fact the plaintiff states is further corroborated by the defence witness DW1 who during cross examination and re-examination she reemphasized this position when she stated, among others, that **"…no goods can leave the bond when not reflected in the exit note**

goods left at the bond house can never be released without payment of taxes… release of goods follow URA customs documents which give us instructions on what to release…"

While this is the case of the plaintiff, there is on record Exhibit D10 which was drawn to the attention of court for it is stated to be an exit note which provides evidence of exit of gross mass of two twenty thousand three hundred kilograms (20300) kg of glass blocks said to have been a consignment carried in a container NO. EOLU 884354-4. The plaintiff is suspicious this document though stating that it not be genuine but stops at merely raising a red flag without disproving the genuineness or not of the same as PW5 merely brushed aside the authenticity of this document by stating that because it was not clear and lacked essential information.

However, as a matter of fact and law, the plaintiff has the duty to disprove the authenticity of this or any document adduced in court to reinforce its case such as the discounting evidence of expert witness as the defendant's role in court is that of rebuttal which this document was tendered in court to do in relations to the plaintiff's case that only partial consignment was delivered to it for while it is a truism that gate passes are issued and they state the quantity when goods exit a bond as testified to by PW6, where contradictory evidence seems to water down the testimony of the plaintiff the contractor position has always been resolved in the favour of a defence where no concrete explanation is offered by a plaintiff in a situation where the court has to place weights on the evidence it has received and balance them with the claim of a plaintiff. This is the basis of the principle that states that it is the duty of the plaintiff to prove its case on a balance of probability.

The probity of this document is not doubtful for the testimony of the plaintiffs witnesses in it themselves unsure since they give contradictory quantities of goods were received by the

plaintiff at is stores either at Industrial Area or at Bombo Road. Further the plaintiff's reliance on the post release audit carried out by the Uganda Revenue Authority on the defendant in 2011 to prove its case for it is not helpful either as the said audit was carried out to establish the going in and out of the defendant's which resulted in the defendant being penalized for goods which left its warehouse without taxes being paid and it is apparent that from the said audit the defendant paid the relevant taxes in accordance with that audit findings and nothing more. Of note is that the Plaintiff was availed copies of gate passes by the defendant in form of Exhibits P26 and P27 which though not showing exactly the quantity of goods released, they discounted the plaintiff's evidence to the effect that not all goods had been released to it. While it is true that delivery notes are not prima facie evidence to prove delivery of goods, such documents must be tested against other evidence to disprove them for the duty to prove a civil case on a balance of probability does not shift from the person alleging certain facts thus while the cited case by the plaintiff of **Halal Shipping Co. Ltd v Securities Bremer Allegemeine & Another (1965) EALR 690** is good authority as regards loss of goods in the custody of a bailee, it is distinguishable from the instant one in that herein are glaring omissions as to what really took place in regards the goods in question the facts show that the plaintiff had in the first place applied to the URA de-stuff the entire cargo into the defendant's transit shed to avoid demurrage costs while tax appeal were being pursued thus if the evidence of DW1 which is to the effect that a transit shed is reserved for cargo which is about to exit customs bonded warehouse then there is the very likelihood that the alleged delivery of the whole consignment could have taken place during this particular confusing status of the goods. This is a situation confirmed by PW2 in cross examination and also from Exhibits D5 and D6 which confirms that the plaintiff lodged customs entries No. C 46614 and C 57013 for entire cargo in the two containers clearly creating

situation that the entire cargo was to or was about to exit the bond since the remaining issue only was that of tax obligations being pursued with no indication that this could be a restraint to the release of the whole for the transit shed is storage area of a temporary nature as goods are deemed to be in motion (transiting from one place to another) as ably testified to by PW2 in cross examination when he confirmed this fact and thus delivery to the plaintiff of the whole consignment cannot be ruled. This particular situation is not helped by the fact that in her testimony DW1 alluded to the fact that at that particular it was not possible for the defendant to know for certain whether the plaintiff had paid taxes for the goods or not being that the plaintiff had applied for review of the taxes to URA with the defendant having no access to the URA computerized tax system called ASYCUDA to electronically cross check whether taxes had been paid for whole consignment or not to enable it compared the situation with the URA's release orders for the whole consignment with this witness's testimony being believable in that she referred to a letter Exhibit D12 dated the 19th of July , 2011 written to URA attesting to the challenges the defendant had in working without ASYCUDA which indicated the challenges defendant's system had at that time for it was manual and susceptible to mistakes and errors and thus could be manipulated with the situation not being helped when the order releasing the whole consignment was caused by the URA resident officer at its bond called D. Ndozireho who authored the Goods Exit Note for the entire weight of the goods imported by the plaintiff's as shown by Exhibits D10, Exhibits D4 and Exhibit P7. This allegation was never rebutter for this particular URA officer was never brought to court to discount this position leaving the court to have before it the situation where a defence rebuttal was not disproved since the alleged confusion created by both the URA and the Plaintiff were not cleared and thus could have resulted as alluded to by the defence that the whole consignment was released to the plaintiff for

even the plaintiff never followed up the matter for over two years till the defendant needed it to refund the tax obligation the defendant had met on behalf of the plaintiff after the URA audit.

To further strengthen the case of the defence, an ocular examination of the signatures appearing on Exhibits P36 and D10 would tend to show that there was a high possibility that that they were made by both PW4 and PW5 which would leave no contest over P36 with the only conclusion being that D10 was authored by David Ndozireho who was the URA bond officer who at the time stationed at the defendant's bonded warehouse who did authorise the release of the whole consignment for **Section 72(1) of Evidence Act** allows this conclusion as it provides that ;

"In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal admitted or approved to the satisfaction of the court to have been written or made by that person may be compared with the one which is to be proved, although that signature, writing or seal has not been produced or proved for any other purpose".

The above provision of the law was upheld by the Supreme court while considering an appeal from the Court of Appeal in the case **Premchandria and another v Maximov Oleg Petrovich SCCA No. 9 of 2003,** when it stated that by examining available evidence without a handwriting expert, an author of a document can be determined. Thus it is apparent that the error made by the URA bond officer, Mr. David Ndozireho in addition to other errors and mistakes made by plaintiff's clearing agent could have resulted in the stated cargo exiting the defendant's bonded warehouse without taxes being paid thus resting the case that goods could only leave the warehouse when taxes for them were paid as the plaintiff would want this court to believe. There was also no URA inspection report tendered in court to boost the claim that part of the

goods were inspected by URA officials after part payment of taxes since this fact was never pleaded and no single inspection report authored by URA that was exhibited in court to prove this position. Thus the court cannot rely on the oral submissions by counsels to this fact which was untested for veracity.

In regards to the delivery of the goods, it was the defendant's contention that it delivered the entire consignments of twenty five (25) crates of tiles and one thousand four hundred fifty (1450) cartons of glass blocks to the plaintiff on the 23rd day of December, 2008 and on the 8th day of January, 2009 respectively in a 1 x 20 feet container to the plaintiff and that the same were received by the plaintiff's agents who signed delivery notes Exhibited D13 and Exhibit D14 respectively. These documents show the number of crates of tiles as twenty five (25) and one thousand four hundred fifty (1450). These were the similar quantities imported by the plaintiff with the documents themselves showing that one Prossy, a staff of the plaintiff who signed for the receipt of goods and did put on the face of the goods receive notes stamp impressions of the plaintiff which seems uncontested for they are similar in size, shape, and general appearance as those stamp impression produced with those on Exhibit D13 confirmed signing. No other delivery note signed in December 2008 for tiles were produced in court by this witness apart from Exhibit D13 with PW1 confirming the signing of the delivery note had been signed at that time in her presence after the verification of the container numbers on the delivery notes which was confirmed to one Prossy signed the same as containing the correct information. This witness did not contest the container number on D13 as being CLHU 3942004-5 even though she testifies to the fact While she confirmed that the said delivery notes were signed in her presence at the plaintiff head office neither she nor Prossy knew what quantity had been delivered"

proving that the delivery notes were signed by the plaintiff through its representatives**.** This witness was though never near the place where goods were delivered or of loaded from the containers and she testified that she was sure that she did not see the actual containers to either note their numbers and the quantities of the goods they carried. In fact she went on to state she was told by PW2 that upon his going to the store the next day after the delivery of the goods he PW2 found less goods.

I would find this witness testimony to be most unreliable for the reason that she had no reason to sign and stamp documents confirming receipt of goods which she one had not seen for she never received the goods at all and was not at the Bombo Road store to verify the contents delivered yet she signed the necessary delivery note and want the court to believe that the goods were not delivered in the quantities expected. This can only be termed as absurdity in the least. In addition PW2 testified to the fact that he was also not at the Bombo Road store when goods were delivered on the two occasions. But only went there a day after delivery on both occasions and so could not have received the goods and in any case he did not sign delivery notes for them signifying that he had no knowledge of the actual goods received for he was merely told much later. Even Kimera Bosco PW3 who is stated to be the Plaintiff's store keeper did not sign any delivery notes to confirm the receipt of less goods which he testified to having received at his stores since he did not even accompany the truck driver to plaintiff's head office to inform them of the alleged quantities delivered at the store at Bombo Road for it was impossible for him to physically receive goods at point Bombo road without verifying their quantities yet the same goods bearing certain quantities had been received at the head office by another person. This kind of action would in the normal circumstances offend common sense. Indeed to prove that

this witness did not know what he was stating in court for he went on to state in cross examination that the quantities of goods were confusing since the papers in respect of them were not corresponding y et he does not tell the court whether he whether he did see the URA release orders and exit notes before he received the goods at the store and seemed to only have relied on the two delivery notes without even checking the quantities physically which he had received yet he wanted the court to believe that the plaintiff received less quantities of goods.

As regards the evidence of PW2, he was neither at alleged point of delivery at Bombo Road neither was he at the point of signing of delivery notes at Industrial Area for he admitted that he was not at either site but later on went to Bombo Road the next day to check and stated that it was Prossy who counted yet the said Prossy stated otherwise. ”and that he normally delegates. He did not know factually of the deliveries and thus was not competent to testify about quantities of the goods delivered as he was neither physically when the goods were received nor signed for any the delivery notes thus offending the provision of Section **103 of the Evidence Act** which provides that that one can only prove a particular fact which to his or her knowledge.

Another witness of the plaintiff PW6 testified that he received seven (7) crates and two hundred (200) cartons at the defendant’s bond and that he signed for those quantities but does not produce the copies of the documents he signed in court to prove this assertion yet he never accompanied the goods to the plaintiff’s premises neither did he call them to alert them about the quantities being delivered for which he had signed for at the defendant’s bond. It is possible that this witness was lying since he could not produce the documents to prove his assertion at all.

There was also the issue differences on delivery notes Exhibit D14 on the basis of the address and telephone numbers contained in it thus making them forged. However, this assertion could not be further from the truth for PW1 and PW2 admitted signing and stamping it and this leaves

the question begging as to how the plaintiff's witnesses could signing a document which was forgery.

From all the above, it is clear to me that the plaintiff was fishing in unknown waters for evidence on record tend to show that all the whole consignment of goods belonging to the plaintiff exited the defendant's bond and thus I would find that the plaintiff has failed to prove the lingering doubt that it did not receive what it ought to receive since its own conduct after the allege shortage of deliveries cannot be explained in the ordinary course of business for it was only after the URA carried out a post release audit on the plaintiff's transaction in August 2011 that the plaintiff then took the opportunity to pursue the release of its goods from the defendant's warehouse after over two years in limbo and when the defendant demanded that it repays the tax penalty which had been imposed on it by the URA then the plaintiff then realized that it still had goods in the warehouse. Yet even any cargo left in a customs warehouse for more than years could be subject to auctioned by URA as testified to by Tanda Benon PW4 and that there was a resident URA officer at every bond to oversee cargo deliveries and releases. It thus follows that if indeed there was any remaining cargo of the plaintiff in defendants' bond and taxes had not been paid since the 8th day of January, 2009 then such goods would naturally have been auctioned off by URA for auction but nothing of that instance did occur lending credence to the view that there was no cargo at all in the bond thus I find that this kind of conduct by the plaintiff cannot be explained in the ordinary course of business for even evidence adduced in court pointed to the fact that during all this time the plaintiff kept importing large quantities of cargo through the defendant's bond and using its services as its transporter and goods keeper in its warehouse.

Another unexplained occurrence was when the defendant filed its written statement of defence questioned the inordinate lapse of time without a demand for retained goods as seen from paragraphs 8(i), (j) of the written statement of defence and in its reply the plaintiff attached letters dated 17/1/2009, 26/2/2009, 20/2/2009 and 7/8/2009. These are Exhibits D22, D23, D24 and D25 stating that they had been received by the defendant to explain away the inordinate lapse of time. The defendant denied knowledge of these letters and questioned the stamp appearing thereon and with the assistance of Directorate of Government Analytical Laboratory to proved so. It is therefore clear to me the attempt to connect the defendant with fraud cannot be sustained since the plaintiff never pleaded fraud with the required particulars thereof nor did it lead evidence to prove the same as an allegation of fraud bears with the huge responsibility to strictly prove it so as was held by Platt JSC at in the case of Kampala **Bottlers Ltd v Damanico (U) Ltd SCCA NO. 22 Of 1992.**

All in all I find that in regards to this issue , there is overwhelming circumstantial and documentary evidence to show that the plaintiff did received the goods in issue after examining the whole transaction and taking into account the documents exhibited in court vis a vis the testimony of witnesses and the general conduct of the plaintiff in relation to the suit claims, it clearly emerges that the only conclusion that this court can come to is that indeed the plaintiff the plaintiff received the entire twenty five (25) crates of granite tiles and one thousand four hundred fifty (1450) cartons of glass blocks and so I do find so accordingly .

4. **Remedies:**

a. **Special damages**

The plaintiff prays for special damages of **Uganda Shillings Two Hundred Seventy One Million only (Ushs 271,000,000/=)** as shown in evidence in chief of the plaintiff which is captured in paragraph 32 and 35 of the witness statement of Mr. Kakooza Rogers the Managing Director of the plaintiff for both containers. The same was proved by Exhibits P29 to 33. The law on special damages in a case similar to the instant one can be found in the holding in the case of **Mbabazi & Co. Ltd v Uganda Railways Corporation [1994] 4 KALR 147** where it was held that where goods are lost the special damages that are awardable would be the replacement market value of the lost goods as at the time of judgment. This position is supported **Chitty on Contracts 25th Edition, Vol 2**, at page 236 where it is stated that the bailee is liable for loss of the chattel, the bailor can recover damages the actual value of the chattel. However, the defendant has shown that it delivered the cargo to the plaintiff and so the plaintiff's claims to relief ought to fail. But that notwithstanding I must point that in the plaint at paragraph 8 thereof, the plaintiff claimed for Uganda Shs. 238,050,000/= as special damages but this position changed with the plaintiff seeking a higher sum of Uganda Shs. 271,000,000/= as special damages through its submission yet this higher amount did not come out as a result of an amendment of the plaint to explain the sudden increase. The new claim is departure from **Order 6 Rule 7 of the Civil Procedure Rules** and cannot be entertained since special damages must be pleaded and be proved in any court proceedings. My finding is that the plaintiff failed even to prove the special damages for even PW2 during cross examination stated that he calculated the damages basing on the import documents together with the URA documents to come to the total customs value for remainder cargo in the sum of Uganda Shillings Sixty Million only (Ug. Shs. 60,000,000/=). This was also the calculation by DW1 in her paragraphs 35, 36 and 37 of her witness statement. The customs value of 18 crates of tiles and 1250 cartons of glass blocks

would have been Shs. 60,000,000/=. This is a far cry from the amount either stated in the plaint or even submitted upon. It should also be noted that the plaintiff has never to date any paid taxes so as to claim the increased amount in the value of the goods meaning that the goods which had a total customs value of above even before the taxes are paid cannot suddenly skyrocket to an the value submitted as being Shs 271,000,000/=. It would be difficult to justify even if it were true that the plaintiff lost such value in terms of the goods it was to receive from the defendant which is in any case not true. This would simply be incredible for even no loss assessor was called to testify about the alleged new market values prices for the plaintiff carried the burden to prove that it was entitled or had right to such a sum but even failed to do so since under **Section 101(1) and (2) of Evidence Act i**t is not for the defendant to disprove the plaintiff's claim but the plaintiff has the duty to prove it and this burden was not discharged at all.

b. <u>General damages:</u>

The plaintiff also prayed for general damages for the inconvenience it has suffered financial constraints and anguish it has suffered as a result of the defendants' actions and conduct since the plaintiff took all its cargo. There was no evidence in this respect for finding of this court is that overwhelming evidence showed that the plaintiff received its due goods at its stores and thus suffered no constraints or anguish. No evidence from a commercial point of view through independent audited accounts was adduced to show that the plaintiff's business was crippled in its operations at any one time at all. General damages cannot so casually be proved.

c. Interest:

The plaintiff pray for interest on both special and general damages at commercial and rate of 21% and costs of the suit which follow the event but my findings above show that the plaintiff deserves nothing as it did not prove its case to the required standard and consequently, even the

prayer for interest cannot be allowed as was ably pointed out by Lord Denning in the case of **Miller v Minister of Pensions (1947) All ER 372** thus;

"In order to discharge the burden of proof, the plaintiff's evidence must carry a reasonable degree of probability but no so high as is requires in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not, the burden is discharged but if the probabilities are equal, it is not.'

By looking at all evidence adduced in this matter, the plaintiff's claim lacks the degree of probability required in a matter of this nature as its conduct in this whole transaction is questionable for there are clear incidences of forgery of documents coupled with fertile imaginations of witnesses and unexplained lapse of time.

In regards to the Defendant's Counterclaim of Shs 28, 736,300/=, it is my finding that this is based on the undisputed payment by the defendant of the above sum of money to the URA, being taxes that would naturally have been paid on the 18 crates of tiles that the plaintiff took and consumed. The plaintiff's goods were dutiable and plaintiff had the obligation to pay the corresponding taxes. The sum of money was assessed by URA after conducting an audit on the plaintiff's transaction and was paid by the defendant on 12/8/2011 with Exhibits D15 and D16 showing evidence of the payment. Therefore, the payment of this sum is clearly proven with documentary evidence. DW1 also testified in paragraph 26 of her witness statement that this sum was taxes for the 18 crates of tiles that the plaintiff took before tax payment. The payment of Shs. 28,736,300/= to URA was not an administrative penalty by URA but payment of taxes that were naturally and legally supposed to be paid by the plaintiff. PW4 indentified D15 and D16

and stated that the payments were for tax payments. These are the counterclaimed sums. The consignee of the goods was K. Rogers Ltd, the plaintiff here. PW4 further testified that if a customs bonded warehouse releases taxable goods without tax payment you account by producing the goods or paying the taxes as per **Section 67(1) and (2) of East Africa Customs Management Act 2004.** In this case, the defendant could not retrieve the 18 crates of tiles from the plaintiff to produce them to URA. It had to pay the taxes as shown above. However in regard to the 1250 cartons of glass block, the defendant provided a good explanation through D10 which is the goods exit note and URA abandoned the claim of Uganda Shs. 40,840,240 which would have been imposed on it as penalties for dodging the payment of taxes. Arising from this abandonment of the punitive action against it, the defendant wrote to the plaintiff demanding a refund of the tax money paid on its behalf as seen from Exhibits D17 and D18 with the invoice for refund being made as early as the 20th day of September, 2011. As has been found the final liability to pay taxes rests with the plaintiff who took and consumed the goods before taxes were paid and the defendant paid the same on its behalf clearance. The mistakes or errors made by the defendant to release cargo cannot extinguish the plaintiff’s tax liability which is statutory duty as these goods were dutiable. As requirement of restitution integrum the plaintiff would be condemned to pay the counter claim sums to the defendant.

In the circumstances, that plaintiff is ordered to pay to defendant the counterclaim sum of Twenty Eight Million, Seven Hundred Thirty Six Thousand, Three Hundred Shillings only (Ug Shs. 28,736,300/=) and since the defendant demanded for the refund of the said money far back as 2011 but the plaintiff declined to to do so in time it thus did denied the defendant the use of its money and consequently interest on the same at commercial rate of 21 % from date of filing

counterclaim till payment in full would be occasioned together with its inevitable costs. The defendant is thus entitled to its counterclaim for the payments it made on behalf of the Plaintiff to URA in terms of penalty which clearly showed that the Plaintiff received the goods but was trying to hide its obligations through means not commensurate with proper conduct as it was not and liable for plaintiff's loss. The plaintiff has to meet its obligations for it received and consumed the goods in question.

d. <u>Costs:</u>

Costs usually follow the event and in this matter, I have found that the plaintiff has failed to prove its case against the defendant who is thus entitled to costs. In addition, the defendants counterclaim has been successfully proved and so it would inevitably attracts costs if any was incurred in prosecuting it.

5. <u>Orders:</u>

Thus the plaintiff having failed to discharge its burden to the required standard of proof would have its claim fails inevitably fail and thus dismissed with costs to the defendant.

a) This suit is dismissed against the defendant with costs.

b) The defendants counterclaim succeeds against the plaintiff for the sum of Uganda Shs. 28,736,300/= (Twenty Eight Million, Seven Hundred Thirty Six Thousand, Three Hundred Shillings only) with interest at commercial rate of 21 % from date of filing counterclaim till payment in full.

c) The counterclaim also succeeds with costs.

21: Judgment on alleged lost of goods which had been placed under bonded warehouse for which de-stuffing was made for tax purposes and eventually delivery made but claims made otherwise that it was not so: per Hon. Justice Henry peter Adonyo: March 2015.

These orders are made at the High Court of Uganda Commercial Division holden at Kampala this 13th day of March, 2015.

HENRY PETER ADONYO

JUDGE