

THE REPUBLIC OF UGANDA,
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
CIVIL SUIT NO 230 OF 2013

MPANDI IVAN}.....PLAINTIFF

VERSUS

PRISM TRADING AND CONSTRUCTION CO LTD}.....DEFENDANT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

JUDGMENT

The Plaintiff filed this suit against the Defendant claiming payment for a contractual sum, motor vehicle hire payments since 2006, compensation for his motor vehicle tipper registration number UAE 084 F, general damages, interests and costs of the suit. The particulars of the claim, the Plaintiffs claim is for Uganda shillings 132,000,000/= for motor vehicle hire from September 2006 up to April 2013 at the rate of Uganda shillings 1,500,000/= per month. Secondly the Plaintiff claims payment of Uganda shillings 45,000,000/= being compensation for the value of the vehicle. Thirdly the Plaintiff claims payment of the contractual/motor vehicle hire sum that continued to accumulate during the pendency of the suit, general damages for loss of income and business and interest at commercial rate together with costs of the suit.

In support of the claim the Plaintiff avers that on the 6th of June, 2006, he made an agreement with the Defendant wherein the Defendant hired his motor vehicle at the rate of Uganda shillings 1,500,000/= and on the said date he handed over the vehicle to the Defendant. The Defendant Company only paid for three months covering the months of June, July and August 2006. The Plaintiff demanded for payments for the subsequent months but the Defendant refused to pay or return the motor vehicle up to the time of filing the action. Furthermore the Plaintiff's claim is that since September 2006 the motor vehicle hire charges accumulated to Uganda shillings

132,000,000/= by April 2013. The Plaintiff travelled on two occasions to the Southern Sudan to retrieve the vehicle which was in working condition but the vehicle was hidden from him.

In the written statement of defence the Defendant agrees that he had an agreement with the Plaintiff for the hire of motor vehicle registered as UAE 084 F for two months with a provision for an extra month in case of delay. Under the contractual arrangement the Defendant was required to pay in advance Uganda shillings 2,900,000/= for track repairs and the balance of Uganda shillings 900,000/= was to be paid later and an extra 600,000/= was to be paid for the third month according to clause 4 of the agreement. Under the agreement the Plaintiff was required to ensure that the truck was in sound condition for use/hire. The Defendant commenced using the truck but found it to be in a dangerous mechanical condition and therefore had no option but to terminate the agreement. On the basis of the above averments the Defendant claims that it is not liable and seeks to have the suit against it dismissed with costs.

The Defendants raised a preliminary objection to the action on the ground that it is caught by the statute of limitation. I overruled the preliminary objection without prejudice to the exclusion of any ground of claim on the basis of any limitation period since the torts of conversion or detainment are continuous torts.

At the scheduling conference of the parties under order 12 rule one of the Civil Procedure Rules, held to sort out points of agreement and disagreement and the possibility of settlement or ADR, Counsels for the parties filed a joint scheduling memorandum in which it is agreed that the Plaintiff and Defendant executed a motor vehicle hire agreement with the Defendant company and the Defendant company hired the Plaintiff vehicle registration number UAE 084 F Isuzu Forward at a rate of Uganda shillings 1,500,000/= effective from the 6th of June, 2006 for two months.

Counsel Mugerwa Vincent of Messrs Mugerwa and Partners Advocates represented the Plaintiff while Counsel Alexander Kibandama of Messrs ENSafrica Advocates represented the Defendant.

At the commencement of the hearing the Defendant objected to the suit on the ground that it is caught by the statute of limitations and the ruling of the court was delivered on the 15th of

January, 2014 overruling the preliminary objection. The ruling is that the Defendant's objection to the entire suit is overruled and without prejudice to raising points of law on any quantum of claim to exclude any claim falling outside any limitation period. Secondly the matter could not be concluded without evidence. The basis of the ruling was that both Counsels relied on a contract dated 6th of June, 2006 on the question of breach of contract. The contract was for a period of two months and for the provision of transportation services by the Plaintiff. I ruled that inasmuch as both Counsels submitted on the basis of the contract terms on the question of the statute of limitations which gives a period of six years from the date the cause of action arose for the action to be filed, the claim of the Plaintiff could not be limited to the period immediately after the alleged expiry of the contract but included a claim for hire and it was alleged in the plaint that the Defendant was still in possession of the vehicle against the Plaintiffs will.

In other words the preliminary objection on the point of law arising could not be concluded without adducing evidence. I however concluded that the limitation period of six years would affect causes of action outside the six year period prior immediately before the time the suit was filed and would not affect causes of action falling within the six year period next before the commencement of the action in court.

Before considering the causes of action which would properly form the subject matter for determination of this suit, it is necessary after the party's adduced evidence to consider the those causes of action which are caught by the limitation period as to whether they are excluded. The ruling of the court was that in any case, evidence needed to be adduced for the matter to be concluded.

It is averred in paragraph 4 (b) that on the 6th of June, 2006 the Plaintiff entered into an agreement with the Defendant wherein the Defendant hired out his motor vehicle at the rate of Uganda shillings 1,500,000/= per month. Pursuant to the execution of the contract, the Plaintiff handed over the vehicle to the Defendant. It is alleged that the Defendant Company only paid for three months namely the months of June, July and August 2006. Subsequently the Plaintiff demanded for payments for the preceding months but the Defendant Company refused to pay and/or return the motor vehicle. Breach of contract was not alleged in the plaint. What is alleged is that the Defendant company since September 2006 refused to pay despite several

demands from the Plaintiff and has accumulated motor vehicle/contractual payments of Uganda shillings 132,000,000/= by April 2013. The plaint was filed on the 6th of May, 2013.

Six years from September 2006 would be August 2012. The issues raised in the joint scheduling memorandum were categorised as the Plaintiff's issues and the Defendant's issues. The Plaintiff's issues are as follows:

1. Whether the Defendant Company is liable for the return of the motor vehicle or compensation for the Plaintiff's motor vehicle?
2. Whether the Defendant company is liable to pay for the continued use of the Plaintiffs vehicle after expiry of the contract at the rate of Uganda shillings 1,500,000/= per month from September 2006 till judgment is entered?
3. Remedies available to the parties?

The Defendants Counsel added one more issue which is whether the Defendant breached the contract entered with the Plaintiff?

The question whether the Defendant company is liable for the return of the motor vehicle or compensation of the Plaintiff's motor vehicle is related to the rights of the Plaintiff. It can be considered in trying the issue of whether the Defendant is in breach of the contract. This may also be (depending on whether the cause of action is one in contract or tort) whether the Defendant is in breach by failure to return the motor vehicle of the Plaintiff. From the evidence adduced, the starting point is the contract of the parties which contract is not in dispute.

There are a few facts which are in controversy and therefore I will consider the facts together with the written submissions of Counsel which summarise the main facts in this suit.

The Plaintiffs case as contained in the written submissions of his Counsel and as is relevant to the issue is that he hired out his motor vehicle registration number UAE 084 F to the Defendant for a period of two months with effect from the 6th of June, 2006 at the rate of Uganda shillings 1,500,000/= per month and the Defendant company took the said motor vehicle to the Republic of Southern Sudan Rumbek province where the vehicle was supposed to work. Under the contract executed between the parties at Kampala the motor vehicle was handed over to the Defendant company at Kampala and the Defendant Company had the duty to provide a driver for

the vehicle. Since that time and up to date the Defendant Company has never handed back the said motor vehicle to the Plaintiff hence the filing of the suit.

On the question of whether the Defendant Company is liable for the return of the motor vehicle or compensation of the Plaintiff for the said motor vehicle, the Plaintiff's case is that it is proper and that the vehicle was handed over to the Defendant Company at the head office in the Kampala. It was the contractual duty of the Defendant Company to provide a driver or to drive the motor vehicle to any destination where the vehicle was supposed to carry out its intended work. Both that the Plaintiff's witnesses and the Defendant's sole witness agreed that a contract was executed and the vehicle was handed over to the Defendant Company at Kampala in Uganda. During the cross examination of DW 1 who is the chief executive officer of the Defendant, he testified that he has never handed over the vehicle to the Plaintiff but that he handed over the vehicle to the turn boy without authorisation from the Plaintiff. On the other hand PW2, the said turn boy Mr. Mulindwa Edison testified that he left the motor vehicle in Rumbek Province in working condition being driven by the Defendant's driver to ferry materials. The vehicle has never been handed to him on behalf of the Plaintiff.

On the basis of the above submission the Plaintiff's Counsel posed two questions. The first is why the Defendants did not return the vehicle to Kampala where it was handed over and instead purported to hand over the motor vehicle in Rumbek, Southern Sudan. Secondly he wondered why the Defendant would hand over the Plaintiff's motor vehicle to a turn boy who did not even know how to drive without the consent or written authorisation of the Plaintiff?

The Defendant's witness did not even remember the date he claimed to have handed over the motor vehicle to the turn boy. There was no document proving that he had handed over the vehicle to the Plaintiff's turn boy. In those circumstances the only clear answer to the two questions posed is that the Defendant company did not hand over the vehicle to the Plaintiff as much of the contract is silent about handing over the vehicle and it is an implied duty/term imposed on the person hiring the vehicle to return and handover the vehicle to the owner at the end of the contract.

The turn boy was not privy to the contract between the Defendant and the Plaintiff and there was no written consent or authorisation from the Plaintiff authorising the Defendant Company to

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

hand over the vehicle to the turn boy. It is clear that at the end of the contract, the Defendant company did not return or hand over the Plaintiff's motor vehicle hence the Defendant company is liable to return or hand over motor vehicle or pay compensation for the same upon its failure to do so.

On the question of whether the Defendant company is liable to pay for the continued use of the Plaintiffs motor vehicle after expiry of the contract at the rate of Uganda shillings 1,500,000/= per month effective September 2006, it is clear that the contract executed by the parties expired on the 6th of August 2006. Secondly the contract was not renewed. However even though the contract was not renewed, the Defendant Company did not return the Plaintiff's motor vehicle according to the contract. This vehicle was making or earning a sum of Uganda shillings 1,500,000/= per month which was its business and the failure to return it constitutes loss of income/business. From September 2006 up to March 2015 days is a total of 102 months giving loss of income of Uganda shillings 153,000,000/=. The loss is the direct result of failure by the Defendant to return the Plaintiff's motor vehicle and the Defendant is liable according to the case of Jane Bwiriza vs. John Nathan Osapil SCCA No. 5 of 2002.

Whether the Defendant breached the contract with the Plaintiff?

On this issue the Plaintiff's Counsel submitted that the contract between the parties was for two months and was executed by the parties and completed. The Plaintiffs claim is not under the contract but is basically the Defendant's failure to return the motor vehicle after the contract thereby causing loss of income and business to the Plaintiff. The Defendant took the motor vehicle at the rate of Uganda shillings 1,500,000/= per month. The issue of breach of contract does not arise because the Defendant Company took the motor vehicle and paid as agreed.

In reply the Defendants Counsel agreed that there was a contract dated 6th of June 2006 between the Plaintiff and the Defendant for the hire of the Plaintiffs motor vehicle at the rate of 1,500,000/= per month for a period of 2 months which was the anticipated period for the truck to work in South Sudan. The Defendant however relies on the fact that the car was not in the good mechanical condition and it was agreed that the Defendant would advance the Plaintiff Uganda shillings 2,000,000/= to enable the Plaintiff to undertake urgent repairs on the truck. The Defendant availed a driver while the Plaintiff provided the turn boy. He contended that it was an

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

agreed fact that they travelled to Rumbek in southern Sudan, the vehicle experienced some mechanical problems relating to the injector pump and at some point it had to be returned to Kampala for repair. By August 2006 the truck had completely broken down and had been taken to a garage in Rumbek though it had done some work.

As far as factual controversy is concerned the Defendant's Counsel submitted that it is the Plaintiff's contention that from August 2006, the Defendant had refused to return the truck to Kampala as it was obliged to do. On the other hand, the Defendant maintained that its agreement with the Plaintiff terminated in August 2006 when the truck became unable to perform any transportation works and was handed over to the turn boy would appear to the garage in Rumbek in South Sudan.

At the trial evidence emerged that sometime in 2008, the Plaintiff was employed by the Defendant in Juba, South Sudan as a site manager and was earning a monthly salary of US\$2000. The Plaintiff also confirmed this testimony in cross examination that he travelled to Rumbek in South Sudan and at no time did he make any attempts to find or collect his truck from the garage.

On the question of whether there was breach of contract dated sixth of June 2006, the Defendants Counsel submitted that the terms and conditions of the agreement the Plaintiff would provide transport in the form of the vehicle registered as UAE 084 F for two months. The truck to be used by the Defendant is a tipper truck which was to work within Uganda and South Sudan. The Plaintiff was to ensure that the truck is in sound condition for usage. The Defendant was required to pay an advance sum of Uganda shillings 2,900,000/= save that only Uganda shillings 2,000,000/= had been advanced by the Defendant to the Plaintiff for truck repairs and the balance of Uganda shillings 900,000/= was to be cleared later. It was agreed that the Defendant would take care of the driver while the Plaintiff would take care of the turn boy. The Defendant was responsible to carry out any repair as may be found necessary and the accrued bill was to be deducted in any future dealings. Lastly the contract sum was for 60 days but in case the contract was delayed by an extra month, the Defendant will effect the advance payment of Uganda shillings 600,000/= to cover the extra month.

The Defendants Counsel submitted that the contract created obligations for each party and it came to an end and 6 August 2006. At the commencement of the hearing the Defendant raised a

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

preliminary objection that this suit was statute barred whereupon the court ruled that the Defendant is entitled to submit on what part of the claim not excluded by the law of limitation. The Plaintiff was allowed to continue with this suit on the basis of the continued use of the motor vehicle which was not necessarily covered by the period stipulated in the agreement. Following the ruling, the Plaintiff cannot sustain any claim against the Defendant arising out of breach of the agreement signed on 6 June 2006 as it would be statute barred. Save for any claim which relates to the alleged continuing breach by failure to pay for the hire services the court should find that there is no claim against the Defendant arising out of the contract signed on 6 June 2006.

In the alternative and without prejudice the Defendant's Counsel submitted that the Defendant performed all its obligations under the contract. Payment slips tendered in court as evidence of the payments were not contested by the Plaintiff and there is no dispute that the Defendant paid the entire contractual amount due to the Plaintiff under the contract.

Whether the Defendant is liable for the continued use of the motor vehicle from September 2006 and whether the Defendant is liable for the returned and/or compensation of the motor vehicle?

The Defendants Counsel submitted that the crux of the Plaintiffs claim is that the Defendant unlawfully appropriated and converted the Plaintiff's vehicle from the time it was handed over to the garage in August 2006. He submitted that the connecting thread in conversion is that the wrong is committed by dealing with the goods of a person which constitutes an unjustifiable denial of his rights in them or the assertion of rights inconsistent with such right according to Winfield and Jolowicz on Tort 15th edition page 588. In the **Moorgate Mercantile Company Ltd versus Finch and Read (1962) 1 QB 701**, the court set out the key elements of conversion as an act of wilful interference, without lawful justification, with any chattel in a manner inconsistent with the right of another and thereby that other is deprived of the use and possession of it. The two elements are the dealing with the chattel in a manner inconsistent with the right of the person entitled to it and secondly the intention in so doing to deny the person's right or to assert a right which is in fact inconsistent with such right. The definition is in accord with the cases of **Barclays Mercantile Business Finance Ltd and Another versus Sibec Developments Ltd and Others [1993] 2 All ER 195** and the Ugandan case of **Departed Asian Property**

Custodian Board versus Issa Bukenya SCCA 92 of 1992. For the Plaintiff to succeed he had to prove the two elements necessary to prove conversion. This was firstly that the Defendant dealt with the truck in a manner that was inconsistent with the rights of the Plaintiff and secondly that the Defendant had an intention to deny the Plaintiff and in fact asserted rights on the truck that were inconsistent with the rights of the Plaintiff. Secondly that the Defendant had an intention of denying the Plaintiff's rights or in fact asserted rights on the truck that were inconsistent with the rights of the Plaintiff.

As far as the evidence is concerned the Defendants Counsel maintains that the truck left Uganda under the agreement between the Plaintiff and the Defendant. The Defendant paid the Plaintiff in full. PW2 failed to prove that the Defendant unlawfully withheld the truck from the Plaintiff at the end of the agreement period in August 2006. It is proven that at the beginning the truck was experiencing mechanical problems. It required repairs before commencement of the journey to the Sudan. Furthermore the truck continuously broke down even during the journey to Rumbek and upon reaching Rumbek. In August 2006, the truck could no longer function and had to be handed over to the turn boy who took it to the garage. PW2 remained in charge of the truck during this time. It confirmed that following the repairs on the truck, the truck no longer operated and that the Defendant's employees. The mechanics within the garage started driving the truck and undertaking small jobs with PW2 as a turn boy.

The Defendants Counsel submitted that it was unclear as to when the Plaintiff came to learn about the state of affairs. PW2 claimed that he had no form of communication with the Plaintiff and only returned to Uganda in February 2007. The Plaintiff claimed he got to learn about the state of the truck in December 2006 after the return of PW2. It is clear that by February 2007 the Plaintiff had learnt of the state of the truck that it was no longer performing any work for the Defendant and was in fact in the custody of mechanics. On the basis of the facts, this honourable court should not find that the Defendant unlawfully withheld the truck of the Plaintiff to the Plaintiff's detriment. The Plaintiff failed to prove that the truck was and still remains in the custody of the Defendant. Furthermore the Defendant's Counsel submitted that the Plaintiff's assertion that the Defendant had an obligation to return the truck to Kampala is acceptable on two grounds. Firstly it is not a term of the original agreement between the Plaintiff and the Defendant that the Defendant would return the truck to Kampala. Secondly the Defendant could

never assume responsibility to use a truck that was clearly unable to perform its obligations under the contract. It was not the intention of the parties for the Defendant to use the truck as it pleased.

The Defendant handed over the truck to PW2 who engaged a mechanic to repair it. Thereafter PW2 was on a frolic of his own. It is the Defendant's submission that the Defendant never dealt with the said motor vehicle in any manner inconsistent the Plaintiffs rights nor did it deny Plaintiff his right to the motor vehicle. The Defendant never used the Plaintiff's truck in a manner that was inconsistent with the terms of the contract.

On whether the Defendant had an intention to deny the Plaintiff of his rights or in fact asserted rights of the truck that were inconsistent with the rights of the Plaintiff, the Defendants Counsel submitted that the evidence of DW1 is that the Defendant has never been in possession of the truck since August 2006. This fact was always known by the Plaintiff. The Plaintiff testified that since 2007, he had travelled to Rumbek in person during the troubles but never made any claims or attempts to recover the vehicle from the Defendant. Furthermore the Plaintiff was employed by the Defendant in Juba for at least six months. In those times, the Plaintiff never made any claim for the truck against the Defendant. The Defendants witness DW1 testified that he advised the Plaintiff to lodge his complaint with the police against the alleged mechanics who had taken possession of the truck from PW2. While working with the Defendant in South Sudan, the Plaintiff informed the Defendant that he had discovered that his turn boy was using his truck in Rumbek. When the Plaintiff's employment contract expired, he returned to Uganda and never made any further investigations as regards his truck.

The decision of Jane Bwiriza vs. John Nathan Osapil SCCA No 5 of 2002 is distinguishable because the loss suffered by the Plaintiff is not attributable to the Defendant in anyway but to the Plaintiff himself. In the premises the Defendant prays that this court should find it is not liable for the continued use of the motor vehicle from September 2006 and consequently the Defendant cannot be liable for the return of the vehicle or for compensation of the Plaintiff and the suit should be dismissed.

In rejoinder the Plaintiff agrees that there was no breach of contract because the written contract was successfully accomplished. On the question of whether the Defendant is liable for the

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

continued use of the motor vehicle from September 2006, the Plaintiff's Counsel relies on Black's Law Dictionary 8th Edition at page 1008 for the definition of conversion as the wrongful possession or disposition of another person's property as if it were one's own property.

With regard to the premises upon which the Defendant's Counsel submitted on the definition of conversion in the case of **Moorgate Mercantile Company Ltd versus Finch and Read [1962] 1 QB 701**, the Plaintiff's Counsel submitted that it was a term of the contract that the Defendant had to provide for the driver. The purpose of the driver was to drive the vehicle to the desired destination from Kampala. Secondly it was an implied duty on the Defendant to effect delivery of the vehicle to the Plaintiff after fulfilment of the contract but the Defendant failed to do so. There is no dispute that the vehicle had mechanical problems at the time of making the agreement.

The Defendants claim is that the vehicle was mechanically not usable and opted to leave it to the turn boy as effective delivery of the vehicle to the Plaintiff. However PW2 testified that the vehicle was in a sound mechanical condition and successfully carried out its work. It was known to the parties that the turn boy was unable to drive the vehicle even if it was handed over to him. There is no evidence by the Defendant showing acknowledgement of delivery. There was no attempt by the Defendant to notify the Plaintiff of the alleged delivery. He further submitted that it defeated common sense for the Defendant to have a person to drive the vehicle to South Sudan and be unable to return the vehicle. Consequently Counsel submitted that the Defendant was reckless and dealt with the vehicle in a manner inconsistent with the right of the Plaintiff as owner of the vehicle.

On the question of whether the Defendant had an intention to deny the Plaintiff's rights or in fact asserted rights to the truck that were inconsistent with the rights of the Plaintiff? The Plaintiff's Counsel submitted in rejoinder that the contention that the vehicle was not in a good working condition is not true because according to PW2, the vehicle was in the good working condition and he left the vehicle in Rumbek in good working condition and was being driven by the Defendant's driver. Consequently the Defendant's intention was to stay with the vehicle. There was unjustified denial of goods belonging to another. The Defendants kept on telling the Plaintiff that the place was unsafe and that at the same time they should go and report to the police. From

the evidence available, the Plaintiff's Counsel contended that the acts were acts of denial and intention of the Defendant to deny the Plaintiff of his own property.

Judgment

I have carefully considered the pleadings, evidence on record, the submissions of Counsel and authorities cited. There are few facts which are in controversy. The material facts in controversy relate to whether the Defendant handed over the Plaintiffs vehicle after the Defendant hired the same. It is agreed that the Defendant hired the Plaintiffs vehicle for a contractual period of two months renewable for one month and pursuant to which the vehicle was taken to work in Southern Sudan for the duration of the hire period. The written agreement of the parties was made in June 2006 and the hire period written in the agreement expired in August 2006. The vehicle has remained in Southern Sudan up to the time of this judgment.

The issues written in the joint scheduling memorandum are:

1. Whether the Defendant is liable for the return of the motor vehicle or compensation of the Plaintiff's motor vehicle registration number UAE 084 F?
2. Whether the Defendant is liable to pay for the continued use of the Plaintiffs motor vehicle after expiry of the contract at the rate of Uganda shillings 1,500,000/= per month from September 2006 until judgement is entered?
3. Whether the Defendant breached the contract entered into with the Plaintiff?
4. Remedies available to the parties.

The question of whether the Defendant is liable for the return of the motor vehicle or compensation of the Plaintiff's vehicle is intertwined with the question of whether the Defendant is liable whether contractually or under the common law of tort for keeping the vehicle after the expiry of the contract. Issue number two depends on the resolution of issue number one and deals with the question of remedies or the quantum of remedies.

Issue number three was resolved by Counsels in their final address. The question of whether the Defendant breached the contract is not the basis of the Plaintiff's claim in the suit. The Plaintiff's Counsel submitted that the written contract was fully performed. Secondly it is contended that the term or period of the contract expired. In those circumstances there can be no breach of

contract. However this is not the end of the matter. The submissions of the Plaintiff's Counsel suggest that the Defendant is liable for breach of an implied term of contract to return the vehicle. The resolution of the question of whether the Plaintiff is liable for breach of contract was simply answered by the Defendant on the basis of the limitation period of six years under section 3 of the Limitation Act laws of Uganda. Section 3 (1) (a) of the Limitation Act cap 80 laws of Uganda provides that an action based on contract shall not be brought after the expiration of six years from the date the cause of action arose. From the above premises, it is the Defendant's contention that the Plaintiff could not bring an action for breach of contract for a cause of action that arose in September 2006. This suit was filed on the 6th of May 2013 more than six years after the alleged breach of contract.

The ruling of the court on the preliminary objection on whether the Plaintiff's action is caught by the law of limitation is that any cause of action that arose within six years immediately prior to the filing of the action is not caught by the law of limitation and those falling outside that period have to be excluded by the law of limitation. The question that begs an answer is whether the alleged failure to return the Plaintiff's motor vehicle constituted a continuing tort not caught by the law of limitation?

As far as there was failure to return the motor vehicle, the cause of action is impliedly one arising from the contract of hire. Right of possession reverts back to the owner of the vehicle after the expiry of the hire period. Without considering the merits of whether the contract imposed an obligation on the Defendant to return the motor vehicle, the question of whether it was an implied term, presupposed a contractual obligation and therefore the cause of action is deemed to have arisen from the time the contract expired. This was around September 2006. In the premises, the implied term of the contract (without considering the merits of whether such an implied term needs to be read in the contract) is caught by the law of limitation.

In any case subsequent submissions were made on the issue of whether the Defendant had converted the Plaintiff's vehicle. Going back to the pleadings, the Plaintiff claims motor vehicle hire since 2006 at the rate of Uganda shillings 1,500,000/= per month. Subsequently in the proceedings the Plaintiff proceeded to claim this sum as loss of income for detinue or

conversion. The facts constituting the cause of action are averred in paragraph 4 (e) of the plaint as follows:

"That the Defendant company since September 2006 to date has refused to pay despite several demands from the Plaintiff, the accumulated motor vehicle hire/contractual payments of Uganda shillings 132,000,000/= By April 2013."

In paragraph 5 of the plaint, the Plaintiff avers that he bought the motor vehicle for business purposes and the Defendant's actions have caused him loss of business income. The subsequent paragraphs of the plaint show that the Plaintiff claims that in 2008 he travelled to Southern Sudan with one Kennedy from the Defendant company to check on the status of the motor vehicle which was in working condition and the said Kennedy promised to organise payment for the Plaintiff which he failed/ignored to do despite several phone calls from the Plaintiff. In paragraph 7 the Plaintiff avers that sometime in 2012, he travelled to southern Sudan to check on the status of the motor vehicle and to retrieve the same. The said motor vehicle was in working condition in Rumbek province however he could not retrieve the same as it was later hidden by the employees of the Defendant Company.

From the pleadings, it can only be implied whether the Plaintiff's cause of action is for hire charges and subsequently after the alleged hiding of his vehicle by the Defendant after he went to retrieve it in conversion or unlawful detention of goods.

With facts disclosed in the pleadings in mind, the starting point is to consider the contract of the parties. The contract is not in dispute. Clause 1 of the contract dated 6th of June 2006 stipulates that the Plaintiff agreed to provide transport for a two months period. Secondly in paragraph 2 it is agreed that the truck that would be used by the Defendant is a Tipper truck which will work within Uganda and Southern Sudan. In paragraph 3 the Plaintiff was to ensure that the truck is in sound condition for usage. Paragraph 4 stipulates that the Defendant was to pay and advance of Uganda shillings 2,900,000/=. However, 2 million shillings had been advanced for truck repairs and the balance of 900,000 shillings/= was to be cleared later. In clause 5 it is also agreed that the Defendant would take care of the driver while the Plaintiff would take care of the turn boy. Furthermore it is provided in clause 6 that the Defendant will do any repair as may be found necessary and the accrued bill is to be deducted in any future dealings. Lastly clause 7 provided

the Defendant will effect of the advance payment of Uganda shillings 600,000/= paid to the contractor to cater for the extra month.

Clause 6 of the agreement envisages possible future dealings. There is however no provision in the contract on how the future dealings would be agreed. In effect the submissions of Counsels for both parties are that there was no further future dealings based on mutual consent.

Both Counsels agreed in their submissions that the contract executed between the Plaintiff and the Defendant was executed and concluded. The Plaintiff provided the services contracted and the Defendant paid for those services. The contract was time bound and was deemed to have expired in August 2006. In other words the Plaintiff's Counsel agrees that the claim of the Plaintiff is outside the ambit of the contractual obligations as contained in the written contract executed between the parties. I however reserved the question of whether there was an implied term of a contract that imposed obligations on the Defendant. The Defendant on the other hand maintains the position that the vehicle of the Plaintiff was handed over to the Plaintiff's turn boy. I shall in due cause consider the implications of the Plaintiff's claim for loss of income or the equivalent of hiring the vehicle per day from the time the written contract period expired.

According to Halsbury's laws of England fourth edition reissue volume 45 (2) paragraph 301 at page 221:

"Those civil rights of action which are available for recovery of unliquidated damages by persons who have sustained injury or loss from acts, statements or omissions of others in breach of duty or contravention of right imposed or conferred by law, rather than by agreement, are rights in tort. The proposition thus formulated shows that the nature of tort can, perhaps, best be approached by way of distinctions. The principle distinctions to be drawn and distinctions between the claim in tort and a claim in the contract, and the distinction between a civil wrong and a civil crime, although the same circumstances may give rise to claims for breach of contract or in tort, and many tortious acts are also crimes.

Where facts are such as give a person a right of action in tort or a right of action in restitution for money had and received, his election to pursue the remedy in restitution,

and it's pursuance to judgement followed by satisfaction of the judgement, bar the right to sue in tort."

Underlying the nature and definition of tort is the important distinction to be made between contractual duties and rights which are enforceable under the law of contract and wrongs which amount to tort. The Plaintiffs action in this matter does not specifically plead species of the cause of action whether in contract or in tort. However the facts averred in support of the claim disclose that the Defendant kept the vehicle after expiry of the contract and continued using it. Secondly the Defendant is alleged to have refused or neglected to hand over the vehicle after a demand for the same by the Plaintiff. Where a Plaintiff elects to sue for breach of contract, he may not subsequently and under the common law sue for tort on the same facts. The doctrine of waiver of tort by suit was considered in the case of **United Australia Ltd v Barclays Bank Ltd [1940] 4 All ER 20**. Viscount Simon LC considered the issue of whether a suit against MFG which was not concluded constituted a valid ground of defence to a suit against the respondent bank to the extent of discharging it from liability. The appellant claimed 1,900 Pounds Sterling from the bank. The action had been brought against MFG and it was argued that the appellant had elected to waive the tort against the respondent bank. At page 30 Viscount Simon LC said:

"In the present case, however, the action which is said to be barred by former proceedings against MFG is not an action against MFG at all, but an action against Barclays Bank. I am quite unable to see why this second action should be barred by the Plaintiffs' earlier proceedings against MFG. In the first place, the tort of conversion of which the bank was guilty is quite a separate tort from that done by MFG. MFG's tort consisted in taking the cheque away from the appellants without the appellants' authority. That tort would have equally existed if MFG, instead of getting the cheque cleared through the bank, had kept it in its own possession. The bank's tort, on the other hand, consisted in taking a cheque, which was the property of the appellants, and without their authority using it to collect money which rightly belonged to the appellants. MFG and the bank were not joint tortfeasors, for two persons are not joint tortfeasors because their independent acts cause the same damage."

The nature of the Plaintiff's claim in this suit is clearly for motor vehicle hire charges as well as for compensation for the vehicle. The underlying assumptions show a very unclear purpose in pleading on the Plaintiff's part. The Plaintiff on the first claim alleges an implied contract but by claiming for hire charges. The underlying assumption is a continued contract though not in writing. This cause of action was negated by the submissions of the Plaintiffs own Counsel in the haste of avoiding the axe of the limitation law. Compensation on the other hand is a broad term which suggests loss of the vehicle and can arise from an action in conversion or unlawful detention of goods. Can the case for hire charges proceed on the same premises as a claim for conversion or wrongful detention of goods? The case law is that it cannot. One has to elect to sue in tort or in contract as the authorities cited below suggest.

According to common law precedents a Plaintiff has the option and may elect to sue in conversion or sue for the money had and received through the conversion of the goods by the Defendant. Where the Plaintiff elects to sue for the money he cannot also treat the act constituting the cause of action as wrongful. This was held by Lord Wright MR in **Sutherland Publishing Company Limited v Caxton Publishing Company Limited [1936] 1 All ER 177**. Lord Wright MR held that:

“But dealing only with conversion, it is perfectly true that when goods are converted, the Plaintiff may have a right instead of suing in conversion to waive the tort and sue as for money had and received (...), and if he does so he cannot also treat the act as wrongful. And the measure of the claim is different. In conversion, the damages are the value of the goods at the time of conversion, whereas the claim for money had and received is for the actual proceeds, which may be more or less than the value.”

I have noted that the Defendant's Counsel submitted as if the Plaintiff's claim is a claim in conversion and the Plaintiff's Counsel in rejoinder did not disagree with such a case of action specifically. He also submitted on whether there was breach of contract in which case he raised the issue of limitation of the cause of action. He contended that the Plaintiff cannot sustain a claim for breach of the agreement. The Plaintiff's Counsel sidestepped this issue and instead agreed that this suit was not a claim for breach of agreement but for continued use and possession of the motor vehicle. In other words it was a claim in the province of the law of tort

for the “implied” wrongful possession and use of the Plaintiff vehicle after the expiry of the contract for hire of the vehicle. Before concluding the matter I must say that the pleadings of the Plaintiff leave a lot to be desired by not specifying the particular cause of action in terms understood by lawyers. The court has the additional task of establishing the cause of action (if any) from the facts in support of the suit. The question remains whether I should treat the failure to plead distinct and known causes of action such as conversion as a matter of form and not substance or as fatal to the suit? In the case of **Sullivan v Alimohamed Osman [1959] 1 EA 239**, It was held that the plaint must allege all the necessary facts that establish the cause of action. Yet in that case the cause of action pleaded was that of trespass to goods. Windham JA at pages 243 – 244 held:

“On these grounds I would hold that the plaint, by reason of its not having alleged that the Defendant’s order to the Plaintiff’s driver was given in circumstances amounting to duress such as compelled obedience to it, failed to make an allegation of fact which, in the light of the other facts alleged, was necessary to success in an action for trespass to goods. The omission of one such material fact makes a claim bad ... For some reason which does not appear clear, but by consent of the parties, the question whether the plaint disclosed a cause of action, though raised in the statement of defence, was not tried in limine but was framed as an issue along with three issues of fact, and the case went to trial. The issue was disposed of by the learned trial judge at the outset of his judgment in the following passage:

“Trespass to goods is essentially wrongful interference with possession of the goods—see Winfield on Tort (3rd Edn.), p. 333. To be wrongful, interference must be direct and forcible but that need not be pleaded. It is alleged that the Plaintiff was deprived of the use of his vehicle as from the time of the wrongful order, the alleged act of interference. If the driver drove the vehicle away willingly the Plaintiff was not deprived of its use. In my view therefore there is an implied allegation that the circumstances of the giving of the order amounted to a taking by duress. I find on this issue that the plaint does disclose a cause of action.”

With respect, I consider that in the foregoing passage the learned judge erred on two points. In the first place it was not, in my view, sufficient to allege in the plaint merely that the interference was wrongful, nor did that word import an allegation that it was direct or that it was carried out in circumstances of duress. ... So in the present case, the plaint should have stated briefly the facts or circumstances constituting duress. The allegation that the Defendant's act was "wrongful" was insufficient; it was a pleading of law and merely begged the question.

In the second place, to conclude, as the learned trial judge did, that a taking by duress must be implied in the plaint because "if the lorry was driven away willingly the Plaintiff would not be deprived of its use" is, with respect, illogical reasoning. The plaint must allege all facts necessary to establish the cause of action. This fundamental rule of pleading would be nullified if it were to be held that a necessary fact not pleaded must be implied because otherwise another necessary fact that was pleaded could not be true."

The question of whether the cause of action is in conversion or unlawful possession or detention of goods or implied contract is necessary to be pleaded because the remedy in each of the actions is distinct. This is demonstrated in the case of **Ballett v Mingay [1943] 1 All ER 143** where Lord Greene MR held that the issue of whether the cause of action was in a contractual bailment or tort was material when he held at page 145:

It was said that the attempt to make him liable in tort was a breach of the principle which is laid down in *Jennings v Rundall*, where an infant, having hired a mare, rode it carelessly with the result that she was injured. As Byles J pointed out in the argument in a subsequent case (to which I shall refer in a moment), that was a case where the act of the Defendant was not an act distinct from the contract of hire, but was an act which was within the four corners of the contract itself. In my opinion, the present case does not fall under that principle at all, because here the respondent parted with possession of the articles to Chapman and Chapman failed to produce them, various stories being told by him, or apparently at his instigation, as to what had happened to them. On looking at the evidence, it seems to me that, when properly construed, the terms of the bailment of these articles to the infant appellant did not permit him to part with their possession at all. If it

was the bargain that he might part with them, it was for the infant to establish that fact and it seems to me that he has failed to do so. On that basis, the action of the appellant in parting with the goods was one which fell outside the contract altogether...

In the present case it seems to me, therefore, that the infant was properly sued in detinue in that, on receiving a demand for the return of the goods, he refused or neglected to return them and failed to prove that in parting with the goods he had not stepped outside the bailment altogether. On that basis, there is a remedy against the infant in tort because the circumstances in which the goods passed from his possession and ultimately disappeared were circumstances outside the purview of the contract of bailment altogether or, at any rate, were not shown by him to be within it.”

The issue of whether the action constituting the cause of action falls within the contract or constitutes a tort is material. Furthermore the type of tort alleged is also material to plead and prove for purposes inter alia of seeking the relevant remedy. Going back to the principles of pleading in **Sullivan v Alimohamed Osman [1959] 1 EA 239**, the pleadings of the Plaintiff disclose wrongful possession of the goods by the Defendant without asserting that the act of keeping the vehicle without payment amounted to wrongful possession or that there was an implied contract of hire on the basis of which the Plaintiff kept demanding for hire charges until he demanded for the vehicle to be given back to him and it was not.

What is material in the action is based on the nature of the contract and the resolution of the issue of who had possession after execution of the contract. Both parties are in agreement that the written contract for hire expired. Secondly they are in agreement that the Plaintiff’s duty under the contract was to take care of the turn boy while the Defendant’s duty was to take care of the contract. It was the Defendant’s duty under paragraph 6 to do any repairs as may be found necessary. However in paragraph 4 the Defendant was required to advance the Plaintiff Uganda shillings 2,900,000/= for truck repairs. This read together with clause 1 and 2 of the agreement gives part of the intention of the parties on who was intended to be in possession of the vehicle at the time of the hire.

In clause 1 of the agreement the Plaintiff is contracted to provide transport in a vehicle registration number UAE 084F for a two months period. In clause 2 of the agreement it is stipulated that:

“The truck to be used by the Client is a Tipper Truck, which will work within Uganda and South Sudan.”

Last but not least clause 3 provided that the Plaintiff was to ensure that the truck is in a sound condition and usage. From these clauses it can be discerned that the intention of the contracting parties was to hand over the truck to the Defendant though the persons who would work in the truck such as the truck driver and turn boy were agreed to. Moreover the vehicle was hired out for a period of two months with an option to extend the period by an additional month in case of delays. The rate of hire was monthly while the work the tipper vehicle was to do was at the discretion of the Defendant. In other words the vehicle was in possession of the Defendant for a period of two months or as extended for an additional month in case of delays. There is no express stipulation about the purpose the Defendant was going to put the vehicle to except that the vehicle is a tipper. The crux of the issue is that the Plaintiff did not hire out services of the vehicle but hired the vehicle. Had the Plaintiff hired out the services of the vehicle, the parties would have stipulated what those services were and it would have been the duty of the Plaintiff to use the vehicle which would remain in his possession to carry out those services. The evidence and the contract clearly demonstrate that the vehicle was hired out to the Defendant and the Defendant determined what the vehicle was going to do in South Sudan as there was no contractual provision on the specific work. Finally the hire was for a specified sum of money per month and not for the volume of work that the vehicle would do. All these show the intention of the parties to hand over possession to the Defendant. Last but not least the vehicle was hired from Uganda and taken outside the jurisdiction of this court. It was taken by the driver of the Defendant assisted by the Plaintiff's turn boy.

The parties never provided in their agreement what would happen to the vehicle upon completion of the stipulated hire period. However the obvious consequence of hire is that the vehicle possession would be given back to the Plaintiff. It therefore remains to examine the material facts. The material facts are that the vehicle was handed over to the Defendant. The Defendant

was responsible for the driver while the Plaintiff remained responsible for the turn boy. The responsibility included payment for upkeep and remuneration of the said staff by their principals respectively.

Secondly the vehicle was taken to Rumbek province in South Sudan where it was put to use by the Defendant. It indeed experienced mechanical problems which were rectified. According to DW1 Mr. Kennedy Losuk Lokule the Defendants Chief Executive Officer, the contract expired and was not renewed. Mr. Kennedy Losuk in his testimony in chief testified that after expiry of the contract the vehicle was handed over to the Plaintiff's turn boy. That the Plaintiff's turn boy who was responsible for the overall management and control of the vehicle and the Plaintiff was informed. He testified that he advised the Plaintiff to follow up the motor vehicle and lodge a complaint with the South Sudan police but the Plaintiff did not follow it up this up. On the issue of who was in possession of the vehicle the Defendants chief executive officer testified as follows:

“14. When the contract ended, the said motor vehicle was handed back to the Plaintiff's “turn man” who was responsible for its management and control and the Plaintiff was informed of this position which he agreed to and had no problem whatsoever.

15. The Plaintiff later informed me that his truck had not been returned to Uganda by his turn man and asked me if I could assist in facilitating its return to Uganda in the Plaintiff's possession.”

16. I informed the Plaintiff that I would assist him to ensure that we follow up the said motor vehicle and I advised him to lodge a formal complaint with the police in South Sudan but he did not follow up this.”

PW1 Mr. Edison Mulindwa the turn boy was extensively cross examined on his role in the matter by the Defendant's Counsel. In his witness statement he testified that the Plaintiff gave him a job to work as a turn boy. He was informed by the Plaintiff that the vehicle was going to South Sudan. It took them two weeks to reach Rumbek in South Sudan. This was in June 2006. Sometime in August 2006 the vehicle developed some mechanical problems and after repairs they resumed work in October 2006. He worked for three months without pay and he left for

Kampala while he left the vehicle in a good working condition. In cross examination he testified that the weather conditions hindered the vehicle from working full time. The driver left with him for Kampala. Subsequently the vehicle was in the hands of a certain man in the garage who would drive it. From an assessment of his testimony the period he was in the South Sudan was about six months. This meant that he worked for three months for which he was paid in advance a sum of Uganda shillings 300,000/= being 100,000/- shillings per month. Thereafter he claimed to have worked for three months without pay. In his written statement he left around April 2007 when the truck was with a certain Sudanese man driver.

From the Plaintiff's testimony after the vehicle was repaired he did not get a feedback about the extra months and he travelled to Sudan and was informed that the vehicle was in Rumbek. On cross examination his testimony was that it was hard to communicate with Rumbek and the turn boy. He used to communicate with the Defendant Company. He did not maintain the vehicle because it was in the hands of the Defendant. When the injector pump of the vehicle got damaged, he received it and had it repaired from Kampala. He travelled to South Sudan in 2008 and even got employed by the Defendant in Juba. He demanded for his vehicle after he came back from Juba. He took no positive steps to recover the vehicle while in Juba. The Plaintiff was in Rumbek between November 2011 and September 2012 when he was constructing a school. He never reported the matter to the police. It was further suggested to him that the place was unsafe.

For his part Kennedy Losuk Lokule the Chief Executive Officer of the Defendant agreed during cross examination that the truck was handed over to the Defendant in Arua Park in Kampala. On the question of whether the company returned the vehicle to the Plaintiff, he testified that the Defendant Company handed over the vehicle to the Plaintiff's representative though he did not have written evidence. The Defendant handed over the vehicle to the Plaintiff's representative in August 2006. According to him the vehicle had mechanical issues. He further testified that he thought the vehicle was earning money in Rumbek. He did not have information about the vehicle.

The only direct testimony on who had possession of the vehicle is that of Edison Mulindwa the turn boy (A turn boy in East African means an assistant to the Driver). He testified that he left

the vehicle and even the Defendant's driver left. The vehicle was left in a garage and a certain garage man used to drive the vehicle. There is no specific evidence as to who had or has actual possession of the vehicle at the time the suit was filed. The Plaintiff relies on the fact of having handed over the vehicle to the Defendant in Kampala and the facts that he has not received it back in Kampala from the Defendant.

I have carefully considered the material causes of action on the basis of facts. Can it be held that the Defendant is guilty of detinue? According to Osborn's concise law dictionary 11th edition the word "detinue" meant:

"Formerly the action by which a person claimed the specific return of goods wrongfully retained or their value. Abolished by the Torts (Interference with Goods) Act 1977 section 2 (1). The tort of conversion has been extended to cover what used to be dealt with by an action in detinue under a generic heading of wrongful interference with goods."

The Plaintiff does not claim for return of the motor vehicle but seeks compensation for loss of the vehicle and hire charges. The only direct evidence is that of PW1 who testified that the Defendant had the vehicle up to around April 2007 when he left. The driver left with him and he brought the injector pump for repairs in Kampala in December 2006. Thereafter there is no clear testimony about the vehicle. PW2 testified that he left the vehicle working. The vehicle had also been left in the garage. DW1 testified that the Plaintiff was advised to report the matter to police but did not do so. The Plaintiff was also advised that Rumbek could be unsafe for travel thereto by DW1. The Plaintiff was in Rumbek in the years 2011 and 2012 but took no action to recover the vehicle or trace its whereabouts.

According to **Clerk and Lindsell on Torts, 18th Edition Sweet and Maxwell**, at page 726, the essence of conversion lies in the unlawful appropriation of another's chattel, whether for the Defendant's own benefit or that of a third-party. It covers:

"...the deliberate taking, receipt, purchase, sale, disposal, or consumption of another's property."

As far as the tort of detinue is concerned, normally the action only lay against a Defendant who was in possession of the chattel. According to **Clerk and Lindsell** (supra), the right of action was extended to cover a Defendant out of possession, namely a bailee who in breach of his duty to the bailor had parted with the goods or allowed them to be lost or destroyed. The basis was that a bailee could not invoke his wrong in order to evade liability to restore the Plaintiff's property.

I generally find the principles useful in resolving this dispute. It is the common law. My conclusion is that in the circumstances of this case, the Defendant had an obligation to hand over the goods/vehicle to the Plaintiff. The Defendant had to show that it was beyond its power to help the Plaintiff recover his vehicle. If there was a third-party intervention, it occurred while the property was deemed to be in possession of the Defendant. The Defendant cannot purport to hand over the goods without the consent of the principal to the turn boy when the turn boy was all along with the vehicle together with the driver employed by the Defendant. The Defendant further cannot say that the vehicle was under the management of the turn boy when in fact the Plaintiff handed over possession to the Defendant in Kampala. As noted a "turn boy" is an assistant to the driver though answerable to the Plaintiff in this case he remained under the control of the Defendant. He was paid for his transport back to Uganda by the Defendant. Even if the contract had come to an end, the Defendant remained a bailee charged with the duty of keeping the property for the benefit of the Plaintiff irrespective of whether the driver and the turn boy had actual physical control of the vehicle. It was the Defendant who determined what the vehicle could do. The Plaintiff discharged his burden of proof by proving that he handed over the possession of the vehicle to the Defendant under a contract of hire of the vehicle and the Defendant took the vehicle to South Sudan to carry out his work. The vehicle was hired to the Defendant and was under its power and control to carry out duties only known to the Defendant but not disclosed in the written agreement between the parties. I will further consider the implications of the Plaintiff's possession on the question of remedies before concluding on the issue of whether the Defendant is liable and for what.

Remedies

As far as the vehicle remaining in the hands of the Defendant is asserted by the Plaintiff, and without having to prove the same, and in the circumstances of this case, the Plaintiff who had no knowledge of what happened to the vehicle acquiesced to the supposed possession of the Defendant after expiry of the written contract period in August 2006 by demanding for payment of hire charges. In exhibit P5 which is a letter dated 3rd August 2009 the Plaintiff lawyers wrote to the Defendant demand hire charges of Uganda shillings 51,000,000/= being the sum for a period of three years hire. They also wrote that the Plaintiff has not seen his vehicle since 6th of June 2006.

Halsbury's Laws of England, 3rd Edition Volume 14 at paragraph 1177 acquiescence in its proper legal sense means or implies that a person abstains from intervening in a violation of his legal rights which is in progress. Acquiescence operates by way of estoppels. For the periods the Plaintiff demanded for hire charges up to the year 2012 the Plaintiff cannot claim that the purported possession by the Defendant was wrongful. This arises from the pleadings and is concluded without reference to the evidence of who was in actual possession of the Plaintiff's vehicle up to the year 2012.

At that material times between Augusts 2006 and 2012 it cannot be said that the Defendant was in adverse possession of the chattel. The Plaintiff cannot have his cake and eat it. Either the Defendant was in breach of obligations to pay the Plaintiff under an implied or unwritten contract of hire or the Defendant was in unlawful possession of the chattel.

In paragraph 6 of the plaint, the Plaintiff avers that sometime in 2008 he travelled to South Sudan with one Kennedy from the Defendant Company to check on the status of the motor vehicle which was in working condition and the said Kennedy promised to organise payment for the Plaintiff which they failed or ignored to do so. Thereafter in paragraph 7 the Plaintiff avers that sometime in 2012 he again travelled to South Sudan to check on the status of the motor vehicle and to retrieve the same. He avers that the motor vehicle was in working condition in Rumbek province. However he could not retrieve it because it was hidden by the employees of the Defendant Company. Herein is the only fact pleaded alleging adverse possession by the Defendant.

It is apparent that the Plaintiff initially founded his cause of action on an alleged implied contract of hire up to the year 2008 and up to the year 2012. Subsequently after 2012 he alleges wrongful interference with the vehicle by the Defendant's employees hiding the vehicle.

The evidence adduced at the trial has not proved the Plaintiff's allegations in the plaint that the Defendant promised to organise payment. Quite the contrary the evidence shows that the Defendant's driver left for Kampala together with the Plaintiff's turn boy initially at the end of the year 2006. Thereafter a garage man used to drive the vehicle. The turn boy left in April 2007 on complaint that he was not paid his salary. There is no evidence that the vehicle was working for the Defendant thereafter. The evidence on record is consistent with the abandonment of the vehicle by the Defendant in the year 2007.

Since there is no proof that the Defendant was in possession of the vehicle, there can be no cause of action in conversion that arose by January 2007 or earlier. The cause of action would be caught by the law of limitation since no continuing tort of adverse possession was proved. The Plaintiff's evidence only shows that he was making the requests of the Defendant but to no avail. It does not prove that the Defendant was in possession of the chattel at the time of making the demand. Before taking leave of the matter, upon expiry of the written contract the Defendant became a bailee charged with the common law duty of safe custody of the vehicle or taking reasonable care of it. In the case of **Morris v C W Martin & Sons Ltd [1965] 2 All ER 725** it was held among other things that the duty of the bailee is to take reasonable care of the goods of the bailor and not convert them. According to the case of **Houghland v R.R. Low (Luxury Coaches) Ltd [1962] 2 ALL E.R. 159**, where there is a claim in detinue and once the Plaintiff establishes that there was bailment and failure to return the goods by the Defendant, there is a prima facie case established and the onus shifts on the Defendant to prove a defence to the satisfaction of the court for the loss of the goods in the words of Ormerod LJ at page 161:

“Supposing that the claim is one in detinue, then it would appear that once the bailment has been established, and once the failure of the bailee to hand over the articles in question has been proved, there is a prima facie case, and the Plaintiff is entitled to recover unless the Defendant can establish a defence to the satisfaction of the court;...

So far, so good; but, of course, it is, in those circumstances, for the Defendant to establish affirmatively, not only that the goods were stolen, but that they were stolen without default on his part; in other words, that there was no negligence on his part in the care which he took of the goods.”

The conclusion is that the Plaintiff established that he handed over possession of his vehicle to the Defendant in Uganda. In those circumstances the Defendant became a bailee charged with the duty to take reasonable care of the Plaintiff’s tipper lorry. Most importantly the onus shifted on the Defendant to prove that there was a good defence why the vehicle could not be handed over to the Plaintiff. It was not sufficient to allege that the Defendant’s Chief executive Officer advised the Plaintiff to report the matter to the police of South Sudan. There are no facts proved showing that the Defendant had a good defence not to hand over the vehicle to the Plaintiff and in Uganda. Instead the Defendant claimed to have handed over the vehicle to the Plaintiff’s agent who is the turn boy. Yet the turn boy was always employed to work with the vehicle. I do not agree with the Defendant’s submission. There had to be an actual hand over of the vehicle to the Plaintiff and if to another person with the consent of the Plaintiff. In those circumstances the legal and actual possession of the vehicle remained with the Defendant. Whatever happened to it had to be explained to the satisfaction of the court. In the circumstances the Defendant has not discharged the burden of proving that it had a satisfactory defence not to hand over the goods to the Plaintiff.

As I have held above the Plaintiffs cause of action arose in the year 2012 after demand for return of the vehicle.

The remedy in those circumstances and in the absence of the Defendant having knowledge of the whereabouts of the vehicle is to compensate the Plaintiff for the loss of the vehicle.

The claim for hire of the vehicle under an implied contract of hire cannot be sustained for the reason given that the Plaintiff could not prove possession and use of the vehicle by the Defendant at the material time and six years immediately prior to filing the suit. The claim for hire charges of Uganda shillings 132,000,000/= is dismissed with costs.

On the other hand DW1 admitted that he advised the Plaintiff to report the matter to the police in South Sudan. The vehicle was admittedly outside the power of the Defendant but no reasonable facts explaining such a state of affairs has been given. The onus shifted to the Defendant to explain where the vehicle is and the grounds why it should not be accountable for the loss of the vehicle. Because the Defendant has no defence to the satisfaction of the court, the Plaintiff is awarded as against the Defendant a sum of Uganda shillings 15,000,000/= being the price at which the Plaintiff purchased the vehicle according to exhibit P1 which is the agreement by which the Plaintiff acquired the vehicle from one Richard Wasswa on the 16th of September 2003.

The Plaintiff is further awarded general damages of Uganda shillings 10,000,000/= for the pain and suffering trying to pursue the vehicle or payment from South Sudan.

As far as interest is concerned section 26 (2) of the Civil Procedure Act gives discretionary powers to court to award interest in the following terms:

“26. Interest.

(1) ...

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

The Plaintiff is awarded interest at 20% per annum on the sum adjudged as the compensation sum from October 2012 to the institution of the suit, with further interest at 20% per annum from the date of the suit till payment in full. The Plaintiff is awarded interest on the aggregate sum adjudged from the date of judgment till full satisfaction of the judgment at the rate of 20% per annum.

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

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

Judgment delivered in open court on the 19th of June 2015

Christopher Madrama Izama

Judge

Ruling delivered in the presence of:

Mugerwa Vincent for the Plaintiff

Plaintiff in court

Samuel Kakande Counsel for the Defendant

No Defendant official in court

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

19 June 2015

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