

**THE REPUBLIC OF UGANDA,**

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

**(COMMERCIAL DIVISION)**

**CIVIL SUIT NO 80 OF 2012**

**DFCU BANK LTD}.....PLAINTIFF**

**VS**

**1. MS NDIBAZZA NAIMA}**

**2. CORONET CONSULTANTS LTD}.....DEFENDANTS**

**BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA**

**JUDGMENT**

The Plaintiff bank brought this action inter alia to recover Uganda shillings 156,438,241/= from the Defendants, general damages for breach of contract and interest thereon. The claim of the Plaintiff is that on 17 December 2010, the Plaintiff granted credit facilities to the Defendant of Uganda shillings 166,873,500/= and the first Defendant secured the credit facility by her personal guarantee as well as a chattels mortgage over motor vehicle registration number UAM 863 J. The Plaintiff executed a collateral management contract with the first and second Defendants and the stock of the first Defendant acted as further collateral to the credit facilities she had obtained on 15 March 2010.

It is alleged that in total breach of the collateral management contract the first Defendant accessed the goods and diverted them in a manner inconsistent with the collateral management facility. Secondly the Defendant did not clear her outstanding balances and instead requested for a rescheduling of the payment of her debt. On 22 December 2011 the Defendant in a letter addressed to the Head of Credit of the Plaintiff undertook to deposit US\$60,000 upon sale of stock worth that amount. She is alleged to have failed or refused or neglected to clear her indebtedness to the Plaintiff.

The suit against the second Defendant is for alleged breach of contractual obligations owed the Plaintiff leading to loss and damages to the Plaintiff. The Plaintiff alleges as against the first

Defendant that he knowingly and with intention to defraud the Plaintiff accessed the goods/stock she had pledged as collateral for her personally guaranteed credit and diverted it for purposes other than that in the loan plan. Upon discovering the missing stock, the collateral manager registered a complaint with the police and the Defendant admitted her complicity in her statement to the police. On the other hand the Plaintiff alleges that the diversion of the goods pledged as collateral resulted from the negligence of the second Defendant. The claim is therefore against the Defendants jointly.

Summons to file a defence were issued and the affidavit of service is that of Ashaba M Moses sworn on 27 March 2012. It attaches a return of summons acknowledged by the first Defendant on 26 March 2012. He deposes that on 26 March 2012 he proceeded to the first Defendant's place of work situated along Channel Street Zibulatudde House shop No. Z116 and served her with the summons. In an application for default judgment filed on court record on 19 April 2012, the Plaintiff's advocates applied for judgment in default of filing a defence against the first Defendant. Indeed on 24 April 2012, judgment in default was entered against the first Defendant under Order 9 rule 10 of the Civil Procedure Rules and the suit set down for formal proof under Order 9 rule 11 (2) of the Civil Procedure Rules.

The second Defendant on the other hand filed a written statement of defence denying any liability as claimed in the plaint. The second Defendant denies having breached any terms of the collateral management contract and maintains that the warehouse where the goods were stored was forcefully an illegally broken into by the first Defendant or some other unknown persons and both the police and the Plaintiff were duly informed. Furthermore the first Defendant admitted having forcefully broken into the warehouse and agreed with the Plaintiff to repay the whole outstanding loan. In the premises the Plaintiff is barred by the doctrine of estoppels by its own conduct. Furthermore the second Defendant notified the Plaintiff about the expiry of the insurance policy in respect of the goods but the Plaintiff refused or neglected to renew the insurance in total breach of contract.

The second Defendant objected to the suit on the ground that the plaint discloses no cause of action and the objection was overruled by the court in a ruling delivered on 31 August 2012. Subsequently the matter proceeded for hearing.

At the hearing the Plaintiff was represented by Counsel Edwin Tabaro while Counsel Sarah Naigaga represented the second Defendant. The matter proceeded ex parte and in default of having filed a defence against the first Defendant.

The facts relevant to the dispute are covered in the written submissions of both parties and are considered in the judgment. The Plaintiff called one witness and the second Defendant called one witness.

Agreed issues:

1. Whether the first Defendant breached the contract with the Plaintiff?
2. Whether the second Defendant acted negligently?
3. What remedies are available to the parties?

Both Counsels addressed the court in written submissions.

On the issue of whether the first Defendant breached the contract with the Plaintiff? The Plaintiff's Counsel submitted that there was a breach by the first Defendant by failure to pay the outstanding amounts which are established by exhibit P5 of Uganda shillings 166,873,500/=. The loan was secured by a personal guarantee and a chattels mortgage. The first Defendant therefore was in breach of the contract to make the payments in the loan agreement.

**On whether the second Defendant acted negligently?** The Plaintiff's Counsel submitted that the second Defendant owed a duty of care to the Plaintiff and failed in that duty to control the goods. That was a breach of duty owed to the Plaintiff by the second Defendant. That breach led to damages/loss of the goods and therefore loss to the Plaintiff. Counsel submitted that the duty of the second Defendant is contained in paragraph 7 of the contract and included the conducting of both external and internal inspection of the warehouse and issuing a statement in respect thereof to the Plaintiff. They were not to grant access to the storage facilities to any person unless authorised in writing by the Plaintiff. They were required to supervise the intake of consignments into storage and the discharge of consignments from the storage facility. The bank gave the second Defendant authority to manage the goods on its behalf. And the degree of care is higher because the second Defendant is a professional who uses its skills to carry out collateral management services.

Secondly there was supposed to be dual control. Under this system none of the two parties could access the premises without the presence or the keys of the other. This suggests that the two had met in agreement in order to gain access to the premises. So the question was how the goods got removed from the designated warehouse? The Plaintiff's Counsel suggested that there was collusion between the collateral manager and the first Defendant. Counsel argued that because none of the parties could access the goods without the other, there had to be collusion for such access to be possible.

Secondly the second Defendant neglected or failed to carry out a thorough due diligence on the suitability of the premises. The Plaintiff's Counsel submitted that paragraph 5.2 of the collateral management agreement provided in part that the collateral manager shall be responsible for the approval of the suitability of the premises and shall notify the bank and the borrower shall be at liberty to shift the goods to another location if it has reason to suspect that the security of the goods are at stake. He further submitted that the second Defendant Company having explicitly and impliedly represented to the Plaintiff that it had the skills and abilities to conduct the collateral management services had a higher standard than that of the reasonable man as far as the duty of care is concerned. He relied on the case of **Hedley Byrne and Co versus Heller and partners Ltd (1964) AC 465** for the proposition that the second Defendant has held out as a person whose services can be relied on as a person with the requisite skill or abilities to make careful enquiry and to give information and advice on that basis to his clients and therefore a duty of care arose.

The Defendant Company had two directors. One of the directors DW1 testified that he was working with the second Defendant for a period of eight years. He has been working in the collateral management business since 1995. He has a diploma in Marketing and a Masters in Business Administration as well as a Bachelor of Arts of Makerere University. He was therefore expected to act professionally and has to be held to a professional standard. The bank relied on his expertise to assess the viability of the premises to hold such goods, the subject matter of the contractual relationship. It was due to the failure by the second Defendant as the collateral manager to carry out a thorough due diligence on the suitability of the premises, that the second Defendant was not aware of certain access points making it possible for the first Defendant to

access the goods. The Plaintiff relied on the reasonable care and skill obligation of the second defendant stipulated in the collateral management contract.

Alternatively the Plaintiff's Counsel submitted on the basis of the contract of bailment. Under the contract the Plaintiff bank gave authority to the collateral manager to manage the goods and the collateral manager would not let go of the goods without permission of the bank. On the other hand the first Defendant pledged the goods to the Plaintiff bank as security for payment of the debt or performance of a promise. In the premises the Plaintiff bank and the borrower had deposited the goods to the second Defendant as the collateral manager. Counsel submitted that a contract of bailment existed because the following characteristics of bailment were present namely: there was transfer of possession without intention to transfer the title to the bailee. Secondly the possession to the goods was for a temporary purpose. Thirdly possession was to revert to the bailor or designated representative upon fulfilment of the purpose of the bailment and at the expiration of the designated period of time and upon the happening of a specific event or on the demand of the bailor unless otherwise agreed to. According to the case of **Mbale Exporters and Importers Ltd versus Ibero (U) Ltd Court of Appeal Civil Appeal No. 84 of 2005** Honourable Justice Twinomujuni, justice of the Court of Appeal approved a passage from Halsbury's laws of England third edition volume 2 at page 96 that as the bailee actually accepts the chattel, he becomes in some degree responsible for it while it remains in his possession or under his control and is also upon demand to redeliver it to the true owner or his nominee unless he has a good excuse legally for not doing so.

The Plaintiff entrusted the second Defendant as a bailee/collateral manager to hold the goods pledged by the borrower for purposes under the contract. This was because the Plaintiff did not have the requisite infrastructure and capacity to monitor and manage the goods.

The second Defendant under clause 7 of the collateral management agreement was commanded not to grant access to the storage facilities to any person unless authorised in writing by the bank. Counsel relied on the case of **Martin versus London County Council [1947] KB 628** for the proposition that it is the duty of a bailee to take reasonable care to ensure that the place in which the chattel is kept is fit and proper for the purpose of custody. According to Holt CJ in *Coggs vs. Bernard* (1895) AC 632 custodian for reward is bound to use due care and diligence in keeping

and preserving the article entrusted to him on behalf of the bailor. The standard of care and diligence imposed on him is higher than that required of a gratuitous deposit and it must be the care and diligence which a careful and diligent man would exercise in the custody of his chattels of a similar description and in similar circumstances.

In conclusion the Plaintiff's Counsel submitted that the second Defendant failed in his duty to ensure that there was due diligence in assessment of the suitability of the warehouse in which the goods were stored which led to the theft of the goods. The second Defendant did not or ignored to take good care and exercise diligence which a careful and diligent person would exercise in the custody of his own chattels of a similar description and character in similar circumstances. Failure by the second Defendant to carry out the duty stipulated in the collateral management contract meant that it was negligent to that extent.

The Plaintiff's Counsel further submits that should a bailee be considered not liable for loss or damage occurring without his fault, greater responsibility can be imposed upon him by his express contract. The collateral management agreement imposes on the second Defendant a greater responsibility for the goods. Furthermore the Plaintiff's Counsel contends that the vigilance of the second Defendant's officials after the goods had been stolen was not a relevant factor to be taken into account.

The burden was on the bailee upon loss or damage to prove that he has exercised the duty of care (See **Justice Ogoola in Trago (U) Ltd vs. Notay Engineering Industries HCCS No. 623 of 1998**). From the evidence the Plaintiff's Counsel submitted that the second Defendant failed to meet its part of the bargain and failed to meet the standard of care causing immense financial loss to the Plaintiff.

As far as remedies are concerned the Plaintiff seeks to recover Uganda shillings 166,873,500/= against both Defendants together with commercial interest at prevailing rates from the date of default until payment in full; general damages and costs of the suit.

In reply the second Defendant's Counsel submitted, that the suit should not be granted. According to him on 11 March 2011 the first Defendant applied for and obtained a business tax and freight loan to a tune of Uganda shillings 306,499,200/= for six months and placed her stock of Basuti Yards valued at Uganda shillings 616,500,000/=. Upon failure to pay the sums due, the

Plaintiff adjusted the loan as a temporary loan facility to the first Defendant for three months which was again not paid in time. Thereafter on 17 December 2010 the Plaintiff executed another contract with the first Defendant as a temporary loan facility to the tune of Uganda shillings 166,873,500/= for six months. The Plaintiff appointed the second Defendant as the collateral manager to receive and manage ceramic tiles from the first Defendant as collateral goods. The first Defendant did not deliver the pledged goods according to the contract but subleased to the second Defendant the premises where fabric materials including the Basuti Yards were being kept. On an unknown date and in the absence of the second Defendant and without authorisation from the Plaintiff and the second Defendant, the first Defendant took the collateral goods from the warehouse. It is likely that after this incident, the first Defendant also resisted and dodged stock checks when scheduled by the second Defendant. When the Plaintiff was notified of the breach by the first Defendant, she issued demand notices for payment and subsequently issued an auction order for the collateral goods. When it opened the warehouse where the collateral goods were kept, it was found missing.

The second Defendant immediately reported the matter to police and the first Defendant was arrested whereupon the second Defendant had impounded a motor vehicle which was later sold. The Plaintiff managed to recover approximately Uganda shillings 90,000,000/= but now claims Uganda shillings 166,873,500/=, damages, costs and further relief against the second Defendant. The second Defendant's position is that it was not negligent and therefore not liable for the claim and remedies sought in the plaint.

As far as the first issue of **whether the first Defendant breached the contract** to the Plaintiff is concerned, the second Defendant does not have to defend the issue as the matter lies squarely with the first Defendant.

### **On the second issue of whether the second Defendant acted negligently?**

The second Defendant's Counsel submitted that the Plaintiff misconstrued the law of negligence and failed to discharge the burden of proof. The particulars averred in the plaint constitute elements of breach of contract terms rather than particulars of negligence and falls short of the key elements like the use of reasonable skill and care. The Plaintiff failed to show and proof

damage or loss occasioned and did not link the particulars to the principles of law. Above all, there is no contract between the parties on which to base the Plaintiff's claim.

In the submissions the Plaintiff's Counsel relied on the alleged failure to keep custody or control on the release of pledged goods in accordance with the Plaintiffs instructions. Secondly the Plaintiff alleged failure to maintain continuous and exclusive possession of the goods held in the storage facilities. Thirdly the Plaintiff averred that there was failure to supervise the discharge of consignments from the storage facilities.

Defendant's Counsel relied on the case of **Henderson versus Henry E Jenkins and Sons (1970) AC 232 and 301** where the court decided that in an action for negligence the Plaintiff must allege and has the burden of proving, that the accident was caused by the negligence of the Defendant. The judge is asked to decide whether he is satisfied on the balance of probabilities that the accident was caused by the negligence of the Defendant and if not the Plaintiff's action fails. The second Defendant adduced evidence to the effect that the loss was due to the irregular conduct of the first Defendant. The Plaintiff was notified of the matter but delayed to take action and by the time action was ordered, the collateral goods had been stolen and the first Defendant is responsible for the theft.

The second Defendant's Counsel further submitted that the goods were stolen due to the dishonest conduct of the first Defendant. It was reported to the police and the first Defendant was arrested. The second Defendant at all times acted prudently and notified the Plaintiff in time for the Plaintiff to mitigate its losses or even avoid the loss.

As far as the duty of care is concerned, the basic test is whether the damage was reasonably foreseeable. Whether there was a relationship of proximity between the claimant and the Defendant and whether it is just and reasonable to impose a duty. And the matter should not be summarily dealt with as exhibited in the Plaintiff's submissions. In the case of **Anns versus Merton London Borough (1978) All ER**, the case involved economic loss arising from the claimant's house being badly constructed with defective foundation that caused cracking in the walls. The court held that a defect is not the same thing as damage. Where a product is defective in its manufacture, claims may be made for any personal injury caused as a result of the defect or any damage to other property but not for the defect itself which is considered economic since the



loss arises from the reduced value of the object. Lord Wilberforce proposed a significant extension of the situations where a duty of care would exist and argued that it is no longer necessary to find a precedent with similar facts. He suggested that the question of whether a duty of care arose in a particular factual situation was a matter of general principle. In order to decide on this principle of law, the court should not stop at foreseeable risk of harm but should also consider whether there are policy considerations that would not allow a duty of care in the situation.

The Defendant's Counsel prayed that the court takes judicial notice of the fact that loan and their recovery are governed by statutory instruments and policies. It was clearly foreseeable to the Plaintiff that the first Defendant could or would fail to pay the loan and to minimise the risk of harm occasioned to the Plaintiff, Security in the form of collateral goods, a motor vehicle and a personal guarantee were provided for. The Defendant's Counsel also relies on the case of **Caparo Industries Plc versus Dickman (1990)** where the claimant Caparo were a company who had made a takeover bid for another firm, Fidelity. When deciding whether to make a bid, they used figures prepared by Dickman for Fidelity's annual audit and showed that fidelity was making a healthy profit. When they take over was completed, Caparo discovered that fidelity was in fact almost worthless whereupon they sued Dickman. The House of Lords considered whether Dickman owed them a duty of care. Because the annual report was meant for shareholders, and could be relied on by strangers to the maker of the audit statement for any one of a variety of purposes which the maker of the statement had no reason to contemplate, they held that there was no relationship of proximity between Caparo and Dickman and therefore no duty of care. A duty arises in relation to a particular kind of harm which the Defendant could reasonably foresee from their actions rather than to the possibility of causing any kind of harm whatsoever.

In the circumstances of this case the Plaintiff did not particularise the damage or loss sustained. As noted above the duty must relate to the particular kind of harm which the Defendant could reasonably foresee arising from their actions rather than to the possibility of causing any kind of harm whatsoever. The question generally revolves around what the second Defendant actually did and what damage was occasioned. The second Defendant was not contracted as a bailee nor

was the second Defendant a guarantor to the first Defendant as seems to be implied by the Plaintiff. The second Defendant was not contracted to provide security against theft.

The Defendant's Counsel further submitted that the second Defendant adduced evidence to show that the Plaintiff's conduct in the execution of the contract was irregular in as far as loan facilities are concerned and the goods in the contract were ceramic tiles and not fabric material. There was therefore no contractual relationship as a foundation for the suit. The contract was executed on 17 December 2010 and is not and should not be the basis for the Plaintiffs claim because there was no contract for fabric materials. It was held in **Mburui Matiri and Sons v Nith Timber Co-operative Society Ltd (1987)** that a written contract cannot be amended by an implied stipulation unless it can be said to be mutually only intended and necessary to give efficacy to the contract. In the premises Counsel submitted that the basis of contract terms and conditions for collateral management are ceramic tiles and not fabric materials.

Counsel further submitted that it was not reasonable that the second Defendant should be made liable for an unpaid loan amount whose security was stolen by the debtor. The debtor undertook to indemnify his liability as far as the payments are concerned.

As far as dual control is concerned Counsel submitted that if the possibility of danger emerging is only a mere possibility which would never have occurred to the mind of a reasonable person, there is no negligence in not having taken extra ordinary precautions (see *Jones versus Boyce* (1816) 171 ER 540). Counsel emphasised that instead of delivering collateral goods of ceramics as agreed to the second Defendant, the Plaintiff chose goods that were in the custody of the first Defendant as collateral goods. The Plaintiff did not pay insurance premium to mitigate loss and damage that may arise due to theft, burglary and other risks. Furthermore, the Plaintiff had ample time to impound the goods by the delayed action when notified of suspected mischief by the first Defendant, occasioned loss of goods and hence the security to the loan facility. Counsel submitted that the Plaintiff should not be allowed to gain from its own wrong. This extends to cases in which fraud has been committed by one party to a transaction. The architect of the wrong who has put a person in a position in which he has no right to put him should not take advantage of his own illegal act or in other words shall not avail himself advantage of his own wrong.

Counsel further emphasised that the contract was for ceramic tiles. Secondly it was for six months and by the time the claim arose the contract from which liability should be construed had expired and there is no record of any extension thereof. In the case of **Magezi and another versus Ruparelia (2005) 2 EA 156** Karokora JSC held that the object of construction of the terms of a written contract is to discover there from the intention of the parties to the agreement. Furthermore a written contract cannot be varied by a verbal agreement (see **Manasseh Kamugisha versus Uganda Prefabricated Building Ltd (1995) III KALR 161** per Okello J).

#### Contract of bailment

The Defendant's Counsel submitted that the contract was not of bailment but of collateral management. According to the four ingredients of a contract of bailment, Counsel submitted that there was no contract of bailment. The four ingredients are that there has to be a chattel the subject matter of the bailment. Secondly possession of the chattel must be capable of transfer from one party to another and the chattel should actually be transferred. Thirdly custody of the chattel must be transferred to the bailee and fourthly the transfer must be temporary and not permanent.

Counsel further submitted that a bailee cannot be liable for thefts committed by their servants or otherwise (**Manju Patel versus Express Kenya Ltd (1996)**). In the premises Counsel submitted that issue number two should be resolved in favour of the second Defendant because there was no negligence.

#### Remedies available

On this issue the Defendant's Counsel submitted that the testimony of PW1 was that the sum claimed is Uganda shillings 162,166,130/= and not 166,873,500/= pleaded. Secondly PW1 revealed that the Plaintiff had recovered approximately Uganda shillings 90,000,000/=. On the basis that there was no contract and no duty of care Counsel prayed that the suit is dismissed with costs.

In rejoinder the Plaintiff's Counsel attacked the Defendant's version of the brief facts. He contended that it was not an agreed fact that Uganda shillings 90,000,000/= had been recovered by the Plaintiff after selling of a motor vehicle. Secondly the fact is not supported by any

evidence. The true facts in evidence are that the Plaintiff recovered Uganda shillings 30,000,000/=. Upon further analysis of the facts Counsel submitted that the debt was not paid but the balance accumulated after further default and interest continued until the sum of Uganda shillings 154,438,242/= accumulated to Uganda shillings 288,772,761/= at the time when the banking officer gave evidence.

On the issue of whether the Defendant acted negligently? The Plaintiff's Counsel submitted that he relied on the decision of this court on the preliminary objection. The court dismissed the preliminary objections since evidence was required to prove the averments made. The court also held that the plaint only implied but did not plead that the recovery of special damages was the result of an action based on contract. The court further advised that the Plaintiff should make a decision on whether to sue for breach of contract or negligence. That the contractual obligations depend on the terms of the contract and any cause of action alleging breach should prove the time of the contract and how it was breached. Now the evidence has been led or adduced, in response to the argument of misconstruing cause of action in tort and breach of contract. The Plaintiff furnished exhibit P5 which is the collateral management agreement signed by the Plaintiff's officers, the first Defendant and the second Defendant's officers. It was a tripartite agreement for the provision of services. Paragraph 4.2 provides inter alia that:

"the collateral manager shall always act in respect of any matter relating to this agreement or the services as a faithful adviser to the bank, and shall at all times support and safeguard the bank's legitimate interests in any dealings with parties including the borrower."

There was a duty of care imposed for keeping the goods from loss or unauthorised movement by the borrower which had been imposed on the collateral manager. The collateral manager was hired because the bank did not have the warehouse personnel to manage the goods. The testimony of DW1 is that the first Defendant used another access point which was not known to them and stole her stock. There is an issue about the suitability of the premises which has already been submitted upon. Counsel reiterated submissions that the stealing of the goods was due to the negligence of the collateral manager/second Defendant.

As far as the contract of bailment is concerned the tripartite agreement created a contract of bailment. A bailee can be held for negligence based on the relationship arising out of bailment. A bailee is also obliged to guard against wrongful and even criminal acts of third parties.

## **Judgment**

I have carefully considered the pleadings of the parties, the agreed facts, the evidence adduced by PW1 and DW1 as well as the submissions of Counsel and the law. Pursuant to a scheduling conference conducted in accordance with Order 12 rule 1 of the Civil Procedure Rules which prescribes setting out the points of agreement and contention of the Plaintiff and Defendant and to explore the possibility of settlement or ADR, Counsels for the Plaintiff and the second Defendant filed a joint scheduling memorandum in which the following are the agreed facts:

1. On or about 17 December 2012, the Plaintiff granted credit facilities to the first Defendant of Uganda shillings 166,873,500/=.
2. The first Defendant secured the credit facility by her personal guarantee as well as a chattels mortgage over motor vehicle registration number UAM 863 J.
3. On or about 17 December 2012 the Plaintiff executed a collateral management contract with the first and second Defendants.
4. By reason of the collateral agreement so executed the first Defendant pledged/pawned her stock as further collateral to the credit facility that she had obtained.
5. The first Defendant did access the goods/chattels and diverted them in a manner inconsistent with the collateral management agreement.

According to PW1 Mr Raphael E Ruva, the stock which was also considered collateral to the credit facility was obtained on 15 March 2012 by the first Defendant and held in a warehouse managed by the collateral managers who are the second Defendant. The stock was to be locked and held under dual control of both the client and the collateral managers. The first Defendant continuously breached the terms of the facility and on 8 December 2011 one Kivumbi Wasswa Amos of Steady Auctioneers was appointed to auction the collateralised stock. The officials of the second Defendant did not cooperate with the auctioneer and started pleading in favour of the first Defendant. On 15 December 2011 when he went to Coronet Consult (the second Defendant) he was requested to give them official communication on the same and fixed an appointment to

do so. He demanded a stock position report and was given a photocopy of the report dated 24th of May 2011. The stock position report has a value of Uganda shillings 376,500,000/=. Upon calling the first Defendant, she confessed to having opened the warehouse and removed the goods which she sold off in anticipation of generating more capital and repaying the bank after having made profit. He testified that the unlawful diversion of the pledged goods was done solely as a result of the negligence of the second Defendant by failure to keep custody and control of the release of the pledged goods in accordance with the written instructions of the Plaintiff and failure to maintain a continuous and exclusive possession of the goods pledged to the Plaintiff and held in the storage facilities. They also failed to supervise the discharge of the consignment from the storage facilities.

PW1 was extensively cross examined about his written testimony. The crux of the testimony in cross examination is that the second Defendant's officials were supposed to hold some of the keys as well as did officials of customs. The first Defendant could not open the facilities on her own. It was established that the goods were fabrics. On whether the goods were ceramic tiles he admitted that they were not. He further testified that there was no exclusive custody of the goods because the second Defendant had his own set of keys for different locks while the first Defendant had another set of keys for other locks. He admitted that the first Defendant conducted business on instructions of the Plaintiff. He further admitted that the borrower/first Defendant stole the goods. The Plaintiff bank did not have direct control of the goods and it contracted the collateral manager to do so its behalf.

By the 28th of February 2012 the outstanding amount on the loan was Uganda shillings 162,166,130/=. By the time of the testimony owing to penalties and interest the total amount owed to the bank is Uganda shillings 288,772,761/= which the bank intends to recover from the second Defendant.

The second Defendants witness Mr Christian Baine DW1 is one of the directors of the second Defendant. He agrees that on 17 December 2010 they executed a collateral management agreement in respect of the loan facility agreement between the Plaintiff and the first Defendant. Their role as collateral managers was to manage stock pledged to the bank and ensure that release is allowed on instructions from the bank subject to insurance against burglary, theft, fire,

security and regular stock checks. The stock involved in the agreement belonged to the first Defendant and it was agreed to maintain a dual locking system of the premises where the stock was kept. Consequently the stock could not be released without clearance from the Plaintiff and in the presence of the first and second Defendants. In the year 2011 the first Defendant had refused them access to the warehouse to carry out a stock clarification exercise and they wrote to the Plaintiff informing the Plaintiff about the situation on 7 March 2011. The Plaintiff did not take any remedial measures such as directing a re-location of the stock or directing the presence of the first Defendant to be available for the stock audit. Subsequently however he did carry out a stock verification and the report is submitted in a letter dated 24th of May 2011. The first Defendant did not renew the insurance policy to cover the goods and also notified the Plaintiff to follow up the matter with the first Defendant. He admitted that the Plaintiff wrote on 15 December 2011 informing the second Defendant that it had opted to dispose of the stock by way of a sale thereof. In December 2011 the goods the subject matter of the collateral agreement was stolen by the first Defendant from the premises and the second Defendant informed the Plaintiff in a letter dated 16th of December 2011. The second Defendant helped the Plaintiff to have the first Defendant arrested and detained at the police station where she confessed to having stolen the stock. Thereafter it was agreed that the second Defendant would help the bank recover monies and to have impounded the first Defendants motor vehicle for sale. In the year 2012 the first Defendant was unable to make any payments on the loan and requested the bank to vary the terms of the loan agreement. In the premises the second Defendant was not negligent in the execution of its duties as a collateral manager.

In cross examination DW1, he admitted that there was a security guard who was paid by the owner of the goods/the first Defendant. From time to time the second Defendant deployed its staff to check on the goods. There was no possibility of collusion. He further emphasised that the owner of the goods confessed to having stolen the goods. One staff of the Defendant Mr Herbert made a statement to the police which led to the arrest of the first Defendant. Secondly the second Defendant had a motor vehicle Toyota Prado of the first Defendant impounded and packed at the premises of the Plaintiff. Subsequently efforts were made to obtain a police statement made by the first Defendant. After several adjournments and efforts of Counsel to trace the police statement, the police wrote a letter on 14 April 2015 about the whereabouts of the police

statements of Herbert and Ndibazza Naima to the second Defendant. The letter writes that the police had failed to trace the statements they only had a record to show that one John Mugarura reported a case of theft of fabrics valued at Uganda shillings 375,500,000/= by the first Defendant.

I have also considered the agreed issues starting with issue number 1.

### **1. Whether the first Defendant breached the contract with the Plaintiff?**

On the first issue the suit proceeded in default of filing a defence against the first Defendant. Interlocutory judgment was entered against the first Defendant on 24th of April 2012 and the suit was set for formal proof under Order 9 rule 11 (2) of the Civil Procedure Rules. The meaning of a default judgment was considered in the case of **Sengendo versus Attorney General [1972] EA 140** by Phadke J held when the Attorney General's Counsel sought to cross examine the Plaintiff's witness, that he was not entitled because the Attorney General had not filed a defence. He said:

“I drew his attention to the decision of the Court of Appeal in *Kanji Devji v. Damodar Jinabhai & Co.* (1934) 1 E.A.C.A. 87 where it was held that a Defendant who fails to file a defence puts himself out of court and no longer has any locus standi and cannot be heard.”

The learned judge distinguished between judgment entered in default for a claim for pecuniary damages and a judgment made without having heard the Defendant after a hearing of the case.

On the basis of facts of this case however the Plaintiffs witness and the second Defendants witness adduced unchallenged evidence that the first Defendant owed the Plaintiff bank certain sums of money. The question for determination is how much? This is an unusual case which could have been filed as a summary suit entitling the Plaintiff to judgment in default as against the first Defendant. A judgment in default could have been entered against the first Defendant for the liquidated claim in the plaint without further proof and this is based on two rules. The first rule is Order 9 rule 6 of the Civil Procedure Rules which provides as follows:

"Judgment upon a liquidated demand



Where the plaint is drawn claiming a liquidated demand and the Defendant fails to file a defence, the court may, subject to rule 5 of this Order, pass judgment for any sum not exceeding the sum claimed in the plaint together with interest at the rate specified, if any, or if no rate is specified, at the rate of 8% per year to the date of judgment and costs."

When this rule is read in conjunction with Order 8 rule 3 of the Civil Procedure Rules which provides that:

"Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be so admitted in the pleading of the opposite party, shall be taken to be admitted, except as against a person under disability, but the court may in its discretion require any facts so admitted to be proved otherwise than by that admission."

In the circumstances of the suit against the first Defendant, the Plaintiff claims that it filed a suit for recovery of Uganda shillings 156,438,241/= from the Defendants. In the facts in support of the claim, it is averred that the Plaintiff granted credit facilities to the first Defendant of Uganda shillings 166,873,500/=. It is further averred that in one instance the first Defendant undertook to deposit with the Plaintiff US\$60,000 upon sale of stock which she did not do and according to the letter she wrote to that effect attached to the plaint as annexure "G". The letter admitted liability or indebtedness to the Plaintiff. It is further averred that the Defendant failed or refused to clear her indebtedness to the Plaintiff thereafter and by the time of filing this suit. In this suit therefore what is sought is to make the second Defendant jointly liable for the debt. Nonetheless, the primary liability for the loan is that of the first Defendant and her indebtedness is proved by the testimony of PW1 and the documentary evidence adduced. Exhibit P1 is a temporary overdraft facility wherein the Plaintiff extended the credit of Uganda shillings 166,873,500/= to the first Defendant. Exhibit P2 is the bank statement, the first Defendant showing an indebtedness in excess of Uganda shillings 156,438,241/=. This was by 19 November 2010. The Plaintiff also adduced exhibit P10 which is the current bank statement which proves indebtedness of Uganda shillings 288,772,761/= as against the first Defendant. Because the suit was not defended by the first Defendant, the only claim that is provable against the first Defendant is the claim in the plaint. To that extent the Plaintiff has proved as against the first

Defendant amounts in excess of the claimed amount of Uganda shillings 156,438,241/=. The court cannot award any additional amounts in the absence of an amendment to the pleadings.

That notwithstanding it is abundantly clear that the first Defendant defaulted in her loan repayment obligations and therefore the first issue of whether the first Defendant breached her contractual obligations to the Plaintiff on the basis of the credit facility agreement is answered in the affirmative. The first Defendant breached the contract with the Plaintiff in which she undertook to repay the credit facilities she had been extended. This is proved by exhibit P1, P2 and P10. As far as the third issue is concerned as to what remedy is available to the parties, as far as the Plaintiffs claim against the first Defendant is concerned, the Plaintiff is entitled to the remedies claimed in the plaint as far as the claim for Uganda shillings 156,438,241/= is concerned. I will subsequently deal with the other claims of commercial interest at prevailing rate, general damages and costs of the suit when dealing with the third agreed issue.

## **2. Whether the second Defendant acted negligently?**

The second issue is whether the second Defendant acted negligently in the matter of the collateral management contract. The facts in support of the claim of negligence are found in paragraph 8 of the plaint. It is averred therein that that the second Defendant failed to keep custody or control of the release of the pledged goods in accordance with the written instructions of the Plaintiff. Secondly it is averred that the second Defendant failed to maintain continuous and exclusive possession of the goods pledged to the Plaintiff and kept in the storage facilities. Thirdly it is alleged that the second Defendant failed to supervise the discharge of consignments from the storage facilities. Lastly that as a result thereof or as a result of the second Defendant's negligence, the Plaintiff has suffered loss and damage.

Before considering the written submissions of the Counsels and the evidence of what transpired the commencement point is to appreciate the contractual relationships the parties had.

Exhibit P1 is the temporary overdraft facility for Uganda shillings 166,873,500/= and is dated 17th of December 2010 addressed to the first Defendant Ms Ndibazza Naima. At the end of the letter the first Defendant in writing accepted the banking arrangements and terms and conditions mentioned in exhibit P1. The parties to the contract are the Plaintiff and the first Defendant. The purpose of the facility was sanctioned solely for the payment to supplier's balance. As far as

operation is concerned, collateral managers acceptable to the bank were to be appointed by the borrower and a collateral management agreement executed by both parties. The borrower was required to execute a pledge of goods in favour of the bank. The goods were to be released to the collateral manager for storage in their store. The collateral manager was required to issue a warehouse receipt to the lender detailing the type, quality and value of the goods. Goods equivalent to Uganda shillings 334,000,000/= were to be held by the collateral manager. The bank was required to release the goods for each instalment paid and would hold goods worth 200% of the outstanding overdraft at any one time. Upon receipt of all payment from the borrower, the bank would issue a release order for goods under custody and return the warehouse receipt to the collateral manager. The facility was available until cancelled in writing by the bank for a period of six months from the date of disbursement.

Secondly under exhibit P3 the first Defendant executed a chattels mortgage pledging her vehicle Toyota Land Cruiser Prado UAM 863 J.

In exhibit P4 the first Defendant signed a credit agreement with the Plaintiff for Uganda shillings 166,873,500/= and the facility was sanctioned for the payment of the balance to suppliers.

Thirdly the Plaintiff, the first Defendant and the second Defendant in exhibit P5 executed a collateral management agreement. In the recital "C" it is written that the borrower and the bank hereby appoint Coronet Consult Ltd and who agreed to provide warehousing, collateral management services, documentation handling and other logistics related to services described in the annex. It is further expressly stipulated that the borrower is subject to the security interests of the bank (pledged by) the owner of the hardware materials referred to as the "goods". Secondly the term "the goods" shall mean (full description of type of quantities) which are or shall be deposited upon execution of the agreement and which the borrower pledged in favour of the bank.

As a matter of fact the definition of goods is wide enough to include any other kind of goods which are deposited upon execution of the agreement and which the borrower pledges in favour of the bank. For that reason the insistence of the second Defendant's Counsel and the witness of the second Defendant that the agreement only related to ceramic tiles are not borne out by the definition of "the goods" under clause 1.3.11 of the collateral management agreement. In the

premises therefore the arguments based on the contention that the collateral management agreement adduced in evidence did not relate to the goods in question which goods are textile fabric materials and not ceramic tiles is misplaced. The relationship between the parties catered for any goods including textile fabrics deposited under this collateral management arrangement between the three parties to this suit.

The obligation of the collateral manager under clause 7 of the agreement was to exercise all reasonable care and skill and act faithfully on behalf of the bank particularly to conduct both an external and internal inspection of the warehouse and issue a statement in respect thereof stating whether or not the warehouse is approved by the collateral manager for the storage of goods. The collateral manager was required not to grant any access to the storage facilities to any person unless authorised in writing by the bank save for authorised personnel, contractors or agents of the collateral manager and of the borrower who shall have unrestricted access to the goods. The collateral manager was required to supervise the intake of consignments into storage and the discharge of consignments from the storage facility. The collateral manager is not responsible for the weight and quality of the goods and would only issue a warehouse receipt at intake of the goods. It was the obligation of the bank to accept or reject the goods. Last but not least the collateral manager was required not allow the release of any goods unless it has received written instructions from the bank naming the person to whom to release the goods and the receipt and or issuance of a document against which the goods shall be released. The second Defendant was required to act on the bank's instructions punctually and not later than 24 hours upon receipt of such instructions.

On the other hand the obligations of the borrower are provided for under clause 8. The borrower agreed there under that the goods covered by the warehouse receipts issued by the collateral manager where upon the issuance of such warehouse receipts pledged to the bank and the goods were not to be released from the storage facilities unless and until such release is authorised by the bank under written instructions given to the collateral manager. Most importantly it was the duty of the borrower to provide all-round security for all the storage facilities by a reputable security company at its own expense. The borrower was required to allow the collateral manager to place their name, logos or banners on the warehouses and take any other such measures as the collateral manager may in its sole discretion or opinion deem useful or necessary in order to

place third parties on notice as to its control over the warehouse. The borrower agreed to assign to the collateral manager's employment such employees as is requested and required by the collateral manager to operate the storage facilities and all such employees are to comply with instructions only from the collateral manager with regard to the receipt, storage and release of goods. The borrower was required to take such measures and pay all costs necessary and appropriate under the local law to ensure that the collateral manager's right of access to and control over the goods in the warehouse cannot be contested by third parties. The borrower was required to designate one or more warehouses which will be placed at the disposition of the collateral manager for the duration of the agreement for the purpose of performing its obligations. The collateral manager was required to be provided with complete and uninterrupted access to and control over the warehouses.

From the contractual clauses above it is apparent that the borrower had unrestricted access to the goods. Secondly it was the intention of the parties namely the Plaintiff, the first Defendant who is the borrower and the second Defendant who is the collateral manager to allow the collateral manager access and control over warehouses of the first Defendant or designated by the first Defendant. Thirdly the first Defendant as the borrower was supposed to provide security for the safety of the goods. To cut the long story short, it is admitted by the Plaintiffs witness and the second Defendant's witness that the borrower had unauthorised access to the goods. The surprising term which was used by both witnesses is that the borrower who is the first Defendant stole the goods.

I have carefully considered the submissions that the second Defendant was negligent. However it is admitted that the goods were stolen. If the goods were stolen, it presupposes that it was done without the knowledge or consent of the second Defendant. What is important and what I have concluded from the evidence of the Plaintiffs sole witness, is that he was neither competent nor did he know what actually happened. The Plaintiff bases his case on the contractual obligations of the second Defendant to ensure that the goods are only released on the written authority and instructions of the Plaintiff bank. The first primary question for determination is what actually happened for the first Defendant to gain unauthorised access to the goods? Can that question be determined from circumstantial evidence or inferences flowing from contractual provisions?

The borrower admitted having taken the goods. The borrower subsequently undertook in Annexure "G" which is dated 22nd of December 2011 presumably after the incident of gaining control over the goods without the consent of the Plaintiff and second Defendant to pay some money amounting to US\$60,000 to the Plaintiff bank in fulfilment of her obligations to the bank. The question of fact is when did the loss of goods (loss of control to the goods) occur?

The agreement paragraph 5 thereof of Counsels as to the relevant facts of the case does not disclose when the first Defendant accessed the goods and diverted them in a manner inconsistent with the collateral management agreement. PW1 testified that on 15 December 2011 he went to find out after appointment of certain auctioneers to auction the goods why the auctioneer had not been given access to the goods for eventual sale. In fact on 8 December 2011 auctioneers had been appointed by the Plaintiff to auction the goods in the warehouse. Upon proceeding to the warehouse with an official of the second Defendant they found no trace of the collateral goods. He further testified that the security department of the bank was alerted and the first Defendant was arrested and taken to a Kampala police station and detained until 16 December 2011. She was released on police bond. Thereafter attempts to restructure the account to help pay over longer periods were made but she always failed to pay. Instead she reacted by asking for rescheduling of payment of her debt.

In other words the Plaintiff does not know how the first Defendant accessed the goods. The testimony of DW1 on the other hand gives the evidence. The second Defendant was denied access to the warehouse for a stock verification exercise and they wrote to the Plaintiff informing the Plaintiff in exhibit D14. Exhibit D14 is dated 7th of March 2011. It is addressed to the Trade Finance Officer DFCU bank (Uganda) Ltd. It requested the Plaintiff to prevail upon the client to allow the second Defendant access to the store and have the stocks held therein verified.

It is my judgment that it is a question of fact that is not contentious that neither the first Defendant nor the second Defendant could alone and without the other access the collateral goods.

DW1 testified that the Plaintiff did not take any measures after that notification to enable it to have access to the goods. However on the 24<sup>th</sup> of May 2011 in exhibit D16 it is evident that a

verification exercise did take place and the Plaintiff was informed that there was a stock valued at Uganda shillings 376,500,000/= at the agreed store for purposes of the credit facilities.

Apparently the crisis of loss of control to the goods came about in December 2011. DW1 testified about exhibit P7 which is a letter dated 16<sup>th</sup> of December 2011 addressed to the Plaintiff bank in which he wrote that an unfortunate incident had happened in which the fabric housed in the warehouse had been stolen. The letter indicates among other things that they had expressed their worries about the safety of the goods to the Plaintiff. They had been denied access to the goods. Furthermore that the client/borrower admitted breaking into the warehouse and stealing the goods. Consequently by 16 December 2011 the Plaintiff knew that the goods had been diverted or stolen. Secondly the theft or diversion was at that time attributed to the first Defendant. It is also apparent that subsequently the first Defendant undertook to pay the bank US\$60,000 in the proposed settlement of her indebtedness. That notwithstanding the first Defendant's motor vehicle was impounded and sold to offset some of her loan obligations which fact has been admitted.

Thereafter the Plaintiff did not take any action against the first Defendant. There is some correspondence between the parties going up to December 2012. By 5 December 2012 lawyers of the first Defendant had written to the Plaintiff bank alleging that the goods were stolen from the collateral manager and this fact was known to the Plaintiff bank. That notwithstanding the said lawyers made a proposal for the first Defendant to pay Uganda shillings 100,000,000/= within a period of seven years from the date of signing a variation deed. It is however not clear whether a variation agreement was ever signed. In a letter dated 10<sup>th</sup> of December 2012 by the second Defendant's director, the Head Legal DFCU Bank was informed about a meeting between the Plaintiff and the second Defendant. In that letter reference is made to a variation deed of 8 November 2012 brought to the attention of the second Defendant by the first Defendant in which it is expressed that the bank would be willing to restructure the facility. (All this was after loss of control over the goods). It is pursuant to that that the lawyers of the first Defendant wrote to the bank giving the terms of the proposed variation deed with the bank. In a letter dated 18<sup>th</sup> of January 2013 the Plaintiff proposed settlement with the first Defendant and proposed that the first Defendant should pay Uganda shillings 120,000,000/= repayable within a period of five

years at a nominal interest rate of 10% per annum. The suit had been filed by the Plaintiff on 1 March 2012.

Negligence as against the second Defendant has to be proved. It cannot be proved without facts in support thereof. The only matter in evidence is that the first Defendant stole the goods. The evidence of DW1 on the other hand confirms that there was a dual control arrangement in which they kept some of the locks keys while the first Defendant also had her own locks and keys thereto. His unchallenged testimony is that the first Defendant gained access to the premises through another access point. Can the second Defendant be faulted for the state of the warehouse? In fact it is a contractual provision that it is the first Defendant who had the responsibility for providing security for the warehouse. The person responsible for providing security is the one alleged to have taken the goods using another access point. From a reading of the contractual provisions, it was the duty of the first Defendant to maintain proper security and to allow the second Defendant access and control to the goods. The second Defendant did not have exclusive access and control to the goods. The first Defendant had access and control as well. None of these provisions took into account a situation where the borrower would resort to self-help. It was the duty of the borrower to designate certain warehouses for the purpose of the collateral management agreement.

Arguments of the Plaintiff's Counsel based on the contractual obligation of the second Defendant to conduct an external and internal inspection of the designated warehouse would in my view fail because the suitability of the premises is not backed by any evidence. There is no evidence as to how the access was gained in specifics and whether the premises were unsuitable for the purposes. It is presumptuous to assume that the access gained by the first Defendant was with the complicity or collusion of the second Defendant's officials or agents.

I have carefully considered the submissions on the dual control system of maintaining control over the collateral goods by the collateral manager and I reject the submissions of the Plaintiff because the evidence points not to the inadequacy of the joint control system but to a criminal access to the goods without the knowledge of the collateral manager. The collateral manager was not responsible for keeping security on the premises. They just secured the premises with the requisite locks. Another access point was used and the matter was referred to the police. On the



particular of negligence or failure to keep custody or control, that was overtaken by a criminal act. Even the failure to maintain continuous and exclusive possession of the goods pledged to the Plaintiff cannot be proved because the collateral manager's officials were not always on the premises. The only had access when they jointly went up to the premises with the first Defendant and used their keys for all to have entry. It was the first Defendant who had the responsibility to maintain security. In the premises the second Defendant was not negligent. If anything the second Defendant informed the Plaintiff about earlier incidents in which they had been refused access to the goods for purposes of stock taking. They could not gain access without the participation of the first Defendant who had another set of locks. In fact neither the first Defendant nor the second Defendant under the joint control arrangement could obtain sole access to the premises to access the goods. The goods were criminally accessed and the question is whether the second Defendant is liable for that. Last but not least is the glaring fact that the theft to the goods was by the owner of the goods. Under clause 1.2.11 the goods are goods pledged by the borrower to the Plaintiff. The Plaintiff could only retain 200% value in stock of the outstanding amount of the loan at any one time.

What therefore happened is that the bank lost the security pledged for repayment of the loan and the first Defendant remained liable and admittedly so to clear the outstanding amounts on the loan.

I have lastly considered arguments on whether the second Defendant was a bailee. My holding is that the second Defendant was a bailee with a contractual access to goods for purposes of securing the interest of the bank.

In **Gilchrist Watt & Sanderson Pty Ltd v York Products Pty Ltd [1970] 3 All ER 825 PC** Lord Pearson held at page 831 that the common element in contracts of bailment is:

“But there is a common element, because both in an ordinary bailment and in a ‘bailment by finding’ the obligation arises because the taking of possession in the circumstances involves an assumption of responsibility for the safe keeping of the goods.”

The second Defendant had the responsibility for safe keeping and there is no need to belabour the issue. Its responsibility was to ensure that they kept an account of the goods and only had it released on instructions of the Plaintiff. A bailment, is the delivery of personal chattels on trust,

usually on a contract, express or implied, that the trust shall be duly executed, and the chattels redelivered in either their original or an altered form, as soon as the time or use for, or condition on, which they were bailed shall have elapsed or been performed.

Secondly it is not necessary to classify the right of action as that based on breach of a duty of care imposed by the duty of care. The contract is relevant to assess the standard of care. The nature of action against a bailee was considered in **Building and Civil Engineering Holidays Scheme Management Ltd v Post Office [1965] 1 All ER 163 by the Court of Appeal at page 167 by Lord Denning MR** when he held that:

“At common law, bailment is often associated with a contract, but this is not always the case; see *R v McDonald* ([1881–85] All ER Rep 1063 at p 1064; (1885), 15 QBD 323 at p 326), *Meux v Great Eastern Ry Co*. An action against a bailee can often be put, not as an action in contract, nor in tort, but as an action on its own, *sui generis*, arising out of the possession had by the bailee of the goods;”

An ordinary degree of care and skill is usually required where both benefit from the transaction and the standard of care required is the standard demanded by the circumstances of the case (See *Houghland v R.R. Low (Luxury Coaches) Ltd* [1962] 2 ALL E.R. 159 at 161). According to Omerod LJ in ***Houghland v R R Low (Luxury Coaches), Ltd* [1962] 2 All ER 159** Decision of Court of Appeal at page 161:

“I have always found some difficulty in understanding just what was “gross negligence”, because it appears to me that the standard of care required in a case of bailment, or any other type of case, is the standard demanded by the circumstances of that particular case. It seems to me that to try to put a bailment, for instance, into a watertight compartment—such as gratuitous bailment on the one hand, and bailment for reward on the other—is to overlook the fact that there might well be an infinite variety of cases which might come into one or the other category. The question that we have to consider in a case of this kind (if it is necessary to consider negligence) is whether in the circumstances of this particular case a sufficient standard of care has been observed by the Defendants or their servants”

In the case of **Morris v C.W. Martin and Sons Ltd [1956] 2 ALL ER 725** it was held that a sub bailee may be answerable for the theft of a servant. In other words a bailee is answerable for the manner in which the servant or agent carries out his or her duties.

In this case however there was dual control of access and secondly the goods were taken by a party to the contract. In the absence of evidence of collusion between the first Defendant and the second Defendant, the second Defendant cannot be held liable for the loss of access.

Last but not least I have considered the burden of proof. In **Morris v C.W. Martin and Sons Ltd [1956] 2 ALL ER 725** it was held that the burden is on the bailee to prove that the loss or damage to the chattel occurred without any neglect or misconduct on his part or that of his servants to whom he has delegated the duty. In **Brookes Wharf and Bull Wharf Ltd v Goodman Bros [1936] 3 ALL E.R. 696 at 701, 702 CA** it was held that the onus of proof is on the custodian of the chattel entrusted by the Plaintiff to show that the damage did not happen in consequence of his own neglect to use such care and diligence as a prudent and careful man would exercise in relation to his own property.

As I have held above in the Plaintiff's suit it has been established by the Defendant that:

1. The chattels were taken by the owner who pledged them and who had contractual obligations to maintain security on the premises.
2. The Plaintiff did not take action after being warned of the failure to access the goods by the second Defendant.
3. The Plaintiff was warned of police action and there is no evidence as to what happened to the goods even when they had reasonable information that the first Defendant took them.
4. The suit was filed after nothing came out of the first Defendant after extensive negotiations.
5. The first Defendant admitted liability
6. Last but not least the second Defendant discharged the onus to show that it was not negligent but had given timely information to the Plaintiff.

In the premises the Plaintiff has not proved negligence on the part of the Defendant and the Plaintiff's suit as against the second Defendant stands dismissed with costs.

### 3. What remedies are available to the parties?

I duly determined that the first Defendant is liable to pay the Plaintiff the above held sum of Uganda shillings 156,438,241/= based on the amount claimed in the suit.

As far as the claim for damages and interest is concerned, the Plaintiff is entitled to an award of interests under the principle of *restitutio in integrum* for money due from the first Defendant on the following grounds. In the usual suit a claim for damages flows under the doctrine established in East Africa in the East African Court of Appeal case of **Dharamshi vs. Karsan [1974] 1 EA 41** that general damages are awarded to fulfil the common law remedy of *restitutio in integrum*. The Plaintiff has to be restored as nearly as possible and as money can do to a position he or she would have been in had the breach complained of not occurred. This principle is well laid out in **Halsbury's laws of England fourth edition reissue volume 12** (1) paragraph 812 that general damages are those losses, usually but not exclusively non-pecuniary, which are not capable of precise quantification in monetary terms. They are presumed to be the natural or probable consequence of the wrong complained of with the result that the Plaintiff is required only to assert that such damage has been suffered. In **Johnson and another v Agnew [1979] 1 All ER 883** Lord Wilberforce held that the award of general damages is compensatory:

“ i.e. that the innocent party is to be placed, so far as money can do so, in the same position as if the contract had been performed.”

Because the award of interest on money of which the Plaintiff has been deprived is compensatory, when interest is awarded it fulfils the same purpose as an award of general damages which is to put the innocent party as far as possible in a position ‘as if the contract had been performed’.

Where money is due and owing to another but withheld and made unavailable to the Plaintiff and award of interest compensates the deprivation. Interest may be awarded as compensation for keeping the Plaintiff out of his money at the discretion of the court under section 26 (2) of the Civil Procedure Act which provides that:

“Where the 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.” (Emphasis added).

What is a reasonable rate of interest has been considered in **Riches v Westminster Bank Ltd [1947] 1 All ER 469 HL at page 472** Lord Wright explains the essence of an interest award in the following words:

“...It may be regarded either as representing the profit he might have made if he had had the use of the money, or, conversely, the loss he suffered because he had not that use. The general idea is that he is entitled to compensation for the deprivation....”

What is the quantum for deprivation for non use of the money? The award proceeds from an assumption that the Plaintiff would have borrowed to replace that which had been deprived by the Defendant. According to **Halsbury's laws of England fourth edition reissue volume 12** (1) paragraph 850:

"it is assumed that the Plaintiff would have borrowed to replace the assets of which he has been deprived..."

An award of interest falls under the doctrine of *restitutio in integrum* and is meant to reflect the rate at which the Plaintiff would have had to borrow what was withheld. This is the holding of Forbes J in **Tate & Lyle Food and Distribution Ltd v Greater London Council and another [1981] 3 All ER 716** at page 722:

“I think the principle now recognised is that it is all part of the attempt to achieve *restitutio in integrum*. ... I feel satisfied that in commercial cases the interest is intended to reflect the rate at which the Plaintiff would have had to borrow money to supply the place of that which was withheld.”

In the premises the Plaintiff will be awarded reasonable interest based on the contract of 19% per annum from the time of Default in December 2011 to the filing of the suit in March 2012.

Secondly the Plaintiff is awarded further interest at the rate of 20% per annum from the April 2012 till the date of judgment. Thirdly additional interest is awarded to the Plaintiff on the aggregate sums due under this judgment at the date of judgment at the rate of 14% per annum from the date of this judgment till payment in full.

Under section 27 of the Civil Procedure Act, costs follow the event unless the judge for good reason orders otherwise. I see no good reason to deny the Plaintiff the costs of the suit as against the first Defendant. The Plaintiff's suit succeeds with costs as against the first Defendant. As against the second Defendant, the Plaintiff's suit is dismissed with costs.

Judgment delivered in open court on the 11<sup>th</sup> of January 2016

**Christopher Madrama Izama**

**Judge**

**Judgment** delivered in the presence of:

Counsel Edwin Tabaro Counsel for the plaintiff

Counsel Amos Musheija Counsel holding brief for Sarah Naigaga Counsel for the Second Defendant

Charles Okuni: Court Clerk

**Christopher Madrama Izama**

**Judge**

**11<sup>th</sup> January 2016**