

**THE REPUBLIC OF UGANDA,
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
CIVIL SUIT NO 282 OF 2014**

HEXAGON AGENCIES LIMITED}.....PLAINTIFF

VERSUS

MOGAS INTERNATIONAL (U) LTD}.....DEFENDANT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

JUDGMENT

The Plaintiff's claim is for a sum of **US\$ 70,036.00** being transportation charges it claims was illegally debited from its account by the Defendant. The Plaintiff's claim as disclosed in the plaint is that sometime in early 2008, as a leading transporter and the Defendant as a petroleum importing company started a business of transporting the Defendant's petroleum products from Kenya to the Defendant's authorized depot or places as instructed. The Plaintiff alleged that from the commencement of business the parties agreed that the risk in the goods remained with the Defendant. The Plaintiff was always paid on time until mid 2009 when payments became irregular and on consultation with the Defendant, the Defendant provided a statement of account showing a massive debit of **US\$ 62,665.92** as recovery from the Plaintiff's account which recovery is contested. The Plaintiff established that it was deducted by reason of a claim for loss of goods due to motor vehicle accident involving the Plaintiff's truck where the goods were lost but the cause for the accident was never determined. The Plaintiff's efforts to get paid were in vain and therefore the Plaintiff alleges that the Defendant's conduct and failure to pay for the services rendered within the prescribed time has caused the Plaintiff great financial loss and the Plaintiff's claims relate to transportation charges of **US\$70,036.06**. The Plaintiff also claims, general damages, interest on special damages at 20% from 30th June, 2012 till payment in full, interest on general damages at court rate from the date of judgment till payment in full, any other relief that the honourable court may deem fit to grant together with costs of the suit.

The Defendant denied the claims and averred that the plaint does not disclose a cause of action against it. The Defendant admits that the Plaintiff obtained a statement of accounts from it showing a debit of **US\$ 62,665.92** but avers that the debit was agreed to by the Plaintiff through its managing director. Secondly that the Plaintiff's entire suit is frivolous and the Plaintiff is not entitled to any of the reliefs sought. The Defendant seeks for an order that the suit be dismissed with costs.

The Defendant filed a counterclaim for recovery of **US\$ 67,000** together with interest at commercial bank rate, general damages for breach of contract and costs of the suit. It averred that sometime in June 2009, the Plaintiff was instructed to deliver petroleum products to Uganda from Kenya but the fuel was not delivered to its destination and this caused the counterclaimant/Defendant enormous financial loss amounting to **US\$ 67,000**. The Plaintiff failed to rectify the said breach within time to prevent financial loss to the counterclaimant and this caused the counterclaimant great loss, stress, injustice, inconvenience and anguish.

In reply to the written statement of defence and counterclaim, the Plaintiff contends that the goods were delivered to the Defendant or authorized agents with the knowledge of the Defendants and that the Plaintiff has a cause of action against the Defendant. The Plaintiff maintains that it never consented to any debit of **US\$ 62,665.92**. Secondly, it is not responsible for financial loss of **US\$ 67,000** because the risk always remained with the Defendant and the Plaintiff was never remunerated for all the services rendered to the Defendant. Risk was never intended to pass to the Plaintiff in case goods were damaged while on transit to their final destinations.

Finally, and in reply to the counterclaim, the Plaintiff reiterates averments that the counterclaimant never paid it and it was aware that at all material times, the risk in the goods never passed to the Plaintiff and the Plaintiff is not liable to the counterclaimants for the alleged financial loss. The Plaintiff further relies on an exemption clause. The Plaintiff is represented by Counsel Okong Innocent assisted by Counsel Okwenye Tonny of Messieurs Kob Advocates & Solicitors and the Defendant is represented by Counsel Ronald Tusingwire assisted by Counsel Samuel Kakande of Messieurs ENSafrica Advocates.

In the joint scheduling memorandum executed by both Counsels the following issues are agreed for trial namely:

- 1. Whether the counter-claim is time barred?**
- 2. Whether the debit of USD 70.036 was justified?**
- 3. Whether the Plaintiff is entitled to the remedies sought?**
- 4. Whether the counter-Defendant breached the transportation agreement executed with the counter-claimant?**
- 5. Whether the counter-claimant is entitled to the remedies sought?**

The Plaintiff called one witness Mr. Mahendra Shah (PW1) and the Defendant called one witness Mr. Joseph Mubiru (DW1). The court was addressed finally in written briefs of Counsel.

The Plaintiffs Counsel addressed issues 2 and 4 together. These are: (2) whether the debit of USD 70.036 was justified? (4) Whether the counter-Defendant breached the transportation agreement executed with the counter-claimant together?

The Plaintiff's Counsel relies on the testimony of PW1 in paragraphs 5-9 of his witness statement. The testimony is that terms of transportation contract between the Plaintiff and the Defendant was always embodied in the consignment notes that were always signed by the agents of the Plaintiff and the Defendant and this was the acceptable mode of dealing between the parties according to Exhibit P1. Exhibit P1 are consignment notes and admitted in evidence from pages 8 – 208 of the trial bundle.

Secondly, the transport consignment notes had the words "ALL GOODS CARRIED AT OWNER'S RISK". The clause was always read and understood by the Defendant who as required understood it and its agents always signed on the part which required the signature of the sender before the goods were transported.

Thirdly, the Plaintiff's Counsel submitted that the Plaintiff and the Defendant were always bound by the only terms contained in the consignment notes as no other contract was entered into between the Plaintiff and the Defendant to either negative, add, subtract, vary or modify the existing contract between the parties. The normal course of business would only involve execution of the contract through signing of the consignment notes, loading of the Defendant's cargo, delivering the same to the agreed destination and signing of the delivery notes. No other duties or liabilities would accrue unless they were expressly agreed upon between the Plaintiff and the Defendant.

Fourthly, PW1 testified that as a director of the Plaintiff he made a proposal to the Defendant on how the Plaintiff was going to compensate the Defendant for their loss and indeed the Defendant went ahead and deducted **Uganda shillings 6,210,017/=** and the Plaintiff expected to be given the balance which balance was never paid.

Fifthly, the Plaintiff under the contract had no liability to indemnify the Defendant for the loss as was the oral agreement between the parties and the practice was that the Defendant like any other customer had to insure their products and the insurance cover according to the Plaintiff had always been in place and the Defendant only came to inform the Plaintiff that they had, without the Plaintiff's knowledge, stopped paying insurance by April 2007 evidenced by email dated 28th from Sekitto Edmond to Mahendra Shah the Plaintiff. The Plaintiff was only notified about the Defendant's withdrawal of insurance cover for its products on the 28th April, 2008 after the accident had occurred and it was the Plaintiff's evidence that had they been informed of the withdrawal of the insurance cover in April 2007 they would not have continued to transact business with the Defendant as doing so would be contrary to their agreed mode of conduct of business.

It is the Plaintiff's case that it advised the Defendant to lodge a claim with their insurers but discovered that the Defendant had ceased insuring the goods.

Sixthly, the Defendant after deducting the 20% as agreed did not pay the balance, the Plaintiff decided to demand the full amount of **US\$ 70,036.06** which sum is inclusive of the 20% earlier deducted by the Defendant and other transportation charges in evidence. Counsel submitted that during cross examination of DW1 it became clear that at all times the witness was not an employee of the company as at the time of the accident he was with Deloitte and Touche. His evidence was hearsay contrary to the rule against hearsay found under section 59 of the Evidence Act and should be expunged from the court record.

On whether consignment notes formed the basis of the contract between the Plaintiff and the Defendant and with reference to the case of **Kamagara Charles vs. Uganda Railway Corporation HCCS No. 846 of 2005 and judgment of** Hon Mr. Justice Remmy Kasule, a consignment note is written confirmation of a contract of carriage between the carrier and the owner of the cargo, the subject of transportation. It is also prima facie evidence of the making of a contract of carriage, the conditions of the contract and the receipt of the cargo by the carrier. With reference to **Chitty on Contracts at pages 500-501 paragraphs 35-141 and 35-142 and section 91 of the Evidence Act**, the consignment notes, exhibits P4, P5 and P6 are admissible as documents constituting the contract of carriage of the goods as between the Plaintiff and the Defendant to the exclusion of any other evidence adduced as proof of the terms of the contract. There is no evidence whatsoever to prove that the terms of the consignment notes were ever varied and the consignment notes ought to be held as constituting the terms of contract upon which both parties are bound.

On whether the exclusion clause on the consignment notes was valid and enforceable and if so what its effect is, the Plaintiff's Counsel submitted that according to the **Contract Act, 2010**, the parties to the contract are free to exclude liability and the consignment notes prove the nature of the contract between the Plaintiff and the Defendant which included an exclusion clause. In the case of **L'estrang vs. Gracoub Ltd (1934) 2 KB 394**, Scrutton LJ held that an exclusion clause formed part of the contract and that it was immaterial that the Plaintiff had not read the clause. The fact that she signed the contract meant that she was bound by it and is deemed to have read and agreed to the terms thereof (See **Akerib v Booth & Others Ltd [1961] 1 All ER 380**).

Furthermore the Plaintiff's Counsel submitted that there was no actual report on the quantity of fuel lost as there is no police report to confirm it which leaves the court to speculate whether there was any loss at all and the counter-claim ought to be dismissed with costs.

In reply to the issue whether the debit of US\$ 70.036 was justified, the Defendant's Counsel submitted that the Defendant did not debit **US\$ 70,036** from the Plaintiff's account but rather the Defendant debited **US\$ 67,985.37** from the Plaintiff's account as per Exhibit P2 which statement was accepted in evidence and that the transportation contract that was executed by the parties was not availed to the court and what is relied on to prove the contractual relationship are consignment notes that were used by the Plaintiff during the delivery of the Defendant's consignment and the terms therein are binding on the Defendant. The Plaintiff seeks to recover

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US\$ 70,036 as special damages without specifically proving them contrary to the holding of **Byamugisha J.A in Eladam Enterprises Ltd vs. S.G.S (U) Ltd & others Civil Appeal No. 20 of 2002.**

Furthermore, that DW1 testified that the sum of **US\$ 67,985.37** is constituted by **US\$ 62,083.42** being the value of the Defendant's products lost as a result of the accident and **US\$ 5,901.95** in associated costs and this was rightly deducted from the Plaintiff's account statement with the Defendant as evidenced in Exhibit P2. The evidence was not contested at trial.

The Plaintiff testified that they had not consented to the above written deductions and the issue of indemnification was a gratuitous act proposed on email and since there is no agreement to prove the 20% deductions, no agreement existed. That PW1 testified that he had given the offer for deduction under duress though this was not pleaded or proved and therefore the assertion that the debiting of US\$ 67,985.37 by the Plaintiff is unjustified should not be considered. Counsel submitted that DW1's evidence is not hearsay as the Defendant is a corporate entity duly incorporated under the laws of Uganda and any officer of the company who is competent can give evidence for and on behalf of it. DW1 confirmed that the evidence he adduced was got from his predecessors and he is a competent witness because that evidence was based on emails and documents which were not disputed by the Plaintiff. The deduction from the Plaintiff's account of US\$ 67,985.37 was justified and in the absence of any evidence to prove that US\$ 70,036 was ever debited, the said issue should be resolved by a finding that US\$ 67,985.37 was rightly deducted from the Plaintiff's account.

In reply to whether the counter-Defendant breached the transportation agreement executed with the counter-claimant, Counsel submitted that PW1 in cross examination agreed to the proposition that the said consignment note was a standard document drafted and issued by the Plaintiff to all its customers and in the absence of any written contract, the consignment note is directive and evidence of taking the cargo and receipt of cargo. The Plaintiff was mandated to deliver the cargo to its final destination but this did not happen because on 26th April, 2008 the Plaintiff's truck that was carrying the said cargo got involved in an accident which led to loss of the cargo valued at US\$ 62,083.42. The loss was in total breach of contract by the Plaintiff as the consignment was not delivered to its destination.

The Defendant's Counsel submitted that breach of contract is breaking of the obligation which a contract imposes and it confers a right of action for damages on the injured party (See **Dada Cycles Ltd vs. Sofitra S.P.R.L Ltd HCCS No. 656 of 2005** also citing **Ronald Kasibante vs. Shell Uganda Ltd HCCS No. 542 of 2006**).

In this case the Plaintiff breached the obligation owed to the Defendant to deliver the consignment as consigned to its destination. The Plaintiff was negligent through actions of its driver who caused the accident wherein some of the petroleum products were lost. Furthermore,

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in cross examination the Plaintiff failed to show any evidence of delivery of the consigned goods. Despite the Plaintiffs contention that there is no actual report of fuel lost or loss suffered by the Defendant, during cross examination of PW1, he acknowledged that he was notified of the accident by Exhibit P3. Thereafter he went ahead and proposed terms of settlement to the Defendant for the loss that had been incurred by the Defendant. Failure to deliver was a fundamental breach of the Plaintiffs undertaking and the Plaintiff breached the transportation agreement.

Furthermore, the case of **L'estrange vs. Gracoub Ltd (1934) 2 KB 394** is distinguishable because in this case the Defendant did not sign any document with the Plaintiff as alleged for the cargo that was not delivered yet it is not in dispute that it was consigned. The Defendant signed different consignment notes for different deliveries.

It was further in the Plaintiff's knowledge that the Defendant had to maintain carriers' insurance for the consigned goods according to an email dated the 28th April, 2008 and PW1 in his email dated 29th April, 2008 had taken up the matter with her insurers who at the time were in the process of issuing a new policy. The Defendant's Counsel further submitted that in the absence of any written contract to confer the obligation onto the Defendant to insure the goods a person who agreed to follow up and was in the process of renewing the insurance policy is barred by the doctrine of estoppels from saying that it was the duty of the Defendant to insure the goods.

On the preliminary point of law that the counter-claim is time barred. It was submitted for the Plaintiff that the only witness of the counter-claimant testified that the accident of the Plaintiff's truck carrying the Defendant's fuel occurred on 26th April, 2008 as a result of which the company lost 43,083.1 litres worth US\$ 62,083.42 which was also confirmed by the email sent by Sekitto Edmond Kasule the then managing director of the Defendant sent on the same day to the Plaintiff company confirming the accident. The Plaintiff's Counsel relied on **Section 3 (1) (a) of the Limitation Act** which provides that actions founded on contract and tort cannot be instituted after the expiry of 6 years from the date the cause of action arose. He also relied on **Order 7 Rule 11 (d) of the CPR** and the case of **Madhvani Group Limited vs. Simbwa & Others, HCCS No. 615 of 2012** for the proposition that a Plaint commencing a suit barred by statute ought to be rejected.

The cause of action arose on 26th April, 2008 and the six years expired on the 25th April, 2014 before the counterclaim was lodged in court the same having been filed on 14th May, 2014 which is way over the 6 years. On the above ground the counter-claim should be dismissed for being time barred.

In reply Counsel for the Defendant relied on **ZTE Corporation vs. Uganda Telecom C.S No. 169 of 2013 and the case of NAS Airport Services Limited vs. The Attorney General of Kenya(1959)1EA 53 at page 58** cited therein where Windham JA held that Order 6 rule 28 of the Civil Procedure Rules permits a point of law to be set down for hearing preliminarily but that

point of law must be one which can be decided fairly and squarely, one way or the other on facts agreed or not in issue on the pleadings and not one which will not arise if some fact or facts in issue should be proved. He contended that where the facts are not averred in the plaint, the facts must either be admitted or should not be in dispute. It is not in dispute that on 26th April, 2008, a truck carrying the Defendant's consignment was involved in an accident and the total sum of the consignment lost was USD 62,083.42 and that in the cross examination of PW1 he confirmed that he authorized the deduction of the sums of the petroleum products lost from her account held with the Defendant on 21st May, 2006. The counterclaim is not time barred but is proper before this court because the Plaintiff himself testified that he authorized the deductions from his account which they state was wrongly removed from their account and he testified that he noticed this in mid 2009 and as such that is the time the Plaintiff's cause of action arose against the Defendant. Counsel further submitted that since Plaintiff alleges that deduction was wrong, then the Defendant is entitled to recover the sum of the consignment lost and any other associated costs as spelt out in the counterclaim. The counterclaim was not time barred.

In rejoinder, Counsel for the Plaintiff agreed with decision of **ZTE Corporation vs. Uganda Telecom C.S No. 169 of 2013** as quoted by the Defendant and also relied on the email exchanges marked as Exhibit P4 and P5 and submitted that there was authorization and therefore time did not begin to run on the 26th April, 2008. Counsel quoted **Section 23 of the Limitation Act Cap. 80** and submitted that without any formal agreement acknowledging the debt and consenting to the deductions, computation of time is deemed to have begun on 26th April, 2008 when the wrongful act occurred. Counsel cited the case of **National Council of Sports vs. Peter Grace Seruwagi Misc. Application No. 305/2003** where Justice Katutsi on page 2 and 8 of the ruling citing with approval the case of **Cartledge & Others vs. E. Jobling & Sons Ltd (1963) A.C 756** where it was held that a cause of action must be considered to have accrued as soon as the Plaintiff has suffered any damage which is more than minimal. The burden of proof in general is on the Defendant who has to plead limitation and then it is for the Plaintiff to show that his action is in time. The cause of action accrues as soon as the wrongful act occurred and in the premises the Plaintiffs Counsel submitted that the counterclaim ought to be dismissed with costs.

Issues 3 and 5 on whether the Plaintiff is entitled to the remedies sought and whether the counter-claimant is entitled to the remedies sought?

The Plaintiff's Counsel submitted that according to the pleadings the remedies sought for by the Plaintiff is recovery of US\$ 70,036.06, general damages, interest on both principal and the general damages till payment in full and costs for the suit. The Plaintiff did not breach the contract and is entitled to recover the said amount being transportation costs and money wrongly debited and the 20% which was recovered but the balance not paid.

In **Clovergem Fish and Foods Ltd (in receivership) vs. John Verje and another, CACA No. 20 of 2001** the Court of Appeal held that a party is entitled to payment of the sums of money they were claiming after proof. In **Suresh Chandra. A. Ghelani vs. Chandrakant Patel CACA No. 56 of 2004**, it was held by the Court of Appeal that the essence of a restitutionary remedy is to restore to the Plaintiff the value of the thing, the thing itself or its substitute which the Plaintiff had lost. Where the Defendant has obtained a benefit at the expense of the Plaintiff, the law demands that this should be restored to the Plaintiff. In the case before the court the Plaintiff after reconciling its accounts properly demands from the Defendant US\$ 70,036.06 which the Defendant has not disputed. In **Gameca & Another vs. Steel Rolling Limited HCCS No. 228 of 2006** it was held that a party who sues for breach of contract is entitled to recover the amount of loss sustained for such breach and that the Defendant is liable to make good such loss. The sum of US\$ 70,036.06 had been sufficiently proved both by oral and documentary evidence and should be granted as prayed.

With regard to the claim for general damages, the Plaintiffs Counsel relies on **Kampala District Land Board and George Mitala vs. Venansio Babweyana, Civil Appeal No. 2 of 2007**, for the proposition that damages can be awarded for inconvenience and loss. On the interest to be awarded in respect of the specific and General damages, Counsel relied on **Gameca and Another vs. Steel Rolling Mills Ltd (supra)** and prayed that it be awarded interest at commercial rate of 25% from the date of filing the suit till payment in full in respect to specific damages and interest at court rate from the date of judgment till payment in full in respect of general damages.

In regard to costs, the Plaintiff's Counsel submitted that the Defendant refused to fulfil its obligations under the contract leaving the Plaintiff no option but to institute this suit and the Plaintiff is entitled to costs.

In reply to the issues on whether the Plaintiff and counterclaimant are entitled to the remedies sought, Counsel for the Defendant submitted that since the sum of **US\$ 70,036** was not a liquidated amount, the same had to be proved or established by the Plaintiff which test was not satisfied by the Plaintiff as he did not show how he arrived at the sum and is therefore not entitled to the refund. Secondly the Plaintiff agreed to a deduction of **US\$ 67,985.37** and this amount should not be paid to the Plaintiff. As far as the claim for general damages are concerned the Plaintiff agreed to the deductions from her account and cannot claim that he suffered any inconvenience or loss for which the Defendant should be responsible and if the court is inclined to award those damages, it should award a minimal sum of **UGX 5,000,000/=** as the true compensation of any inconvenience or loss alleged to have been suffered by the Plaintiff. As for interest the claim should be disregarded and if court is inclined to award, it should be awarded at court rate on both special and general damages. In the premises the Plaintiff's suit should be dismissed with costs to the Defendant.

With regard to the remedies sought by the counterclaimant, Counsel for the Defendant submitted that the Defendant is entitled to special and general; damages, interest and costs as claimed as they specifically pleaded and proved its claim of **US\$ 67,985.37** which was not challenged by the Plaintiff with a slight variation in the pleadings of **US\$ 67,000** and which should not be used as a bar to deprive the Defendant of its lawful claim against the Plaintiff. As far as the claim for general damages is concerned the Defendant's Counsel relied on **Hajji Asuman Mutekanga vs. Equator Growers Limited**, and submitted that a sum of **Uganda shillings 55,000,000** would be sufficient and reasonable to compensate the Defendant for the said loss as the Defendant did not in any way unjustly enrich themselves and prayed that the sum is awarded with interest at court rate on general damages from the date of judgment until payment in full. Costs should be awarded following the event and the Plaintiffs suit should be dismissed with costs.

In rejoinder, the Plaintiff's Counsel agreed with the decision of **Hajji Asuman Mutekanga vs. Equator Growers (U) Ltd, SCCA No. 7 of 1995** as relied on by the Defendant's Counsel and for the proposition that general damages are awarded at the discretion of court and disagreed with the Defendant's prayer that the Plaintiff is awarded only Uganda shillings **5,000,000/=**.

Judgment

I have duly considered the pleadings as well as the agreed facts and documents in the joint scheduling memorandum signed by both Counsels. As far as the pleadings are concerned, parties are bound by their pleadings and cannot present a case or defence which is not averred in the pleading. I would therefore briefly state what the claim in the plaint and counterclaim is as well as the various defences.

As far as the plaint is concerned, the Plaintiffs claim is for recovery of US\$70,036 from the Defendant. In the facts in support of the claim, the Plaintiff averred that upon reconciliation of accounts, it had a claim against the Defendants of US\$70,036 however it discovered a massive debit of US\$62,665.92 by the Defendant as recovery which was not agreed to by the Plaintiff. Secondly it is the Plaintiff's case that the recovery was allegedly due to loss incurred by the Defendant because petroleum products were lost on account of an accident when the Plaintiff was transporting the Defendant's goods. The Plaintiff's case is that the risk in the goods never passed to the Plaintiff but remained with the Defendant. Consequently, the Plaintiff is entitled to fees for transportation of the Defendant's goods and US\$70,036.06 together with general damages, interests and costs.

In reply the Defendant admits that it debited the Plaintiffs account to the tune of US\$62,665.92 and the debit was with consent of the Plaintiff through its managing director. In support of the debit, the Defendant averred that sometime in June 2009 the Plaintiff was instructed to deliver petroleum products to Uganda from Kenya but the cargo was not delivered to its destination causing the Defendant enormous financial loss of US\$67,000. Secondly the Plaintiff was paid for

all the services rendered to the Defendant and there is no amount of money due and owing to the Plaintiff. Thirdly, the act of the Defendant of non delivery of petroleum products amounted to breach of contract wherein the Defendant holds the Plaintiff accountable therefore. Accordingly the Defendant by counterclaim claims recovery of a total of US\$67,000. In support of the counterclaim, the same facts are pleaded in that in June 2009 the Defendant instructed the Plaintiff to deliver petroleum products to Uganda from Kenya but the cargo was not delivered at its destination. This amounted to breach of contract and the Plaintiff refused to rectify the breach to pay the financial loss occasioned to the counterclaimant.

In reply to the counterclaim and the defence, the Plaintiff denies consenting to any debit of US\$62,665.92. Secondly it denies liability for the financial loss of US\$67,000. The Plaintiff reiterated the averments that the risk in the goods it transported remained in the Defendant and the Plaintiff assumed no risk.

Finally in the joint scheduling memorandum executed by both Counsels of the parties in fulfilment of Order 12 rule 1 of the Civil Procedure Rules, certain facts are agreed and some documentary evidence was also agreed to by the parties.

The agreed facts are as follows:

- (1) The Plaintiff was a transporter of the Defendant's petroleum products.
- (2) Sometime in early 2008, the Plaintiff, a leading transporter and the Defendant a petroleum importing company started a business where the Plaintiff was responsible for transporting the petroleum products of the Defendant from Kenya to the Defendant's authorised depot or other places as instructed by the Defendant.
- (3) The counter Defendant/Plaintiff was obliged to transport and deliver petroleum products on the Defendant's behalf to various customers of the counterclaimant/Defendant.
- (4) The business relationship was carried on from 2008 as the Plaintiff always transported the Defendant's petroleum products as instructed and the Plaintiff always invoiced the Defendant for its services and it was always paid.
- (5) The Plaintiff was always paid on time save for the period close to the middle of the year 2009 when the Plaintiff noticed that payments were becoming irregular and upon consultation with the Defendant, it was asked to provide a statement from the Plaintiff's accounts which was diligently done as per the statement of account dated 31st of October, 2013 and the same reflected US\$70,036.06.
- (6) The Defendant in turn did provide the statement of accounts showing a debit of US\$62,665.92 as recovery from the Plaintiff's account.

I have further considered the points of disagreement of the parties in the joint scheduling memorandum and I can quickly conclude that as far as the Plaintiff is concerned, what is in controversy is whether all the goods carried by the Plaintiff were carried at the risk of the

Defendant in case of loss or damages to the goods. Secondly, the Defendant was supposed to and always provided insurance cover for its products.

The Defendant on the other hand does not dispute charging the Plaintiff for the loss of petroleum products relating to the consignment of 26th April, 2008 and the accident involving the goods. The same question is whether the loss suffered by the Defendant should be borne by the Plaintiff. The Defendant claims that the loss is US\$67,000. On the other hand the Plaintiff's claim is for transportation costs for the same consignment. In the points of disagreement the Defendant further admits that 9 metric cubes of petroleum products were salvaged out of 50 metric cubes when the accident occurred.

The first factual controversy is whether the Plaintiff was paid for all its transportation services. Apparently this is partially answered by the admission of the Defendant that it charged the Plaintiff's account with US\$62,665.92 as recovery for loss of products. An additional controversy has been introduced by the Defendant counterclaiming for US\$67,000 being the value of the petroleum products lost in an accident. The fact of the accident was not an agreed fact in the joint scheduling memorandum. However the lingering and implied issue remains as to whether the Plaintiff was paid for all the services and whether the claim of US\$67,000 in the counterclaim is in addition to the debit of US\$62,665.92.

From the facts and pleadings and agreed documents I am able to conclude without further trial of fact that the debit of US\$62,665.92 is supposed to be an offset from the Plaintiffs account by reason of loss of petroleum products due to the accident. In other words the Defendant would not claim for US\$ 67,000 if it had already offset the loss from dues to the Plaintiff. What does the claim mean in real terms? Either the loss was offset from what is due to the Plaintiff or not and the court should not try this matter of fact which is admitted or it was not offset. Nonetheless, I have gone ahead to preliminarily examine the admitted documents just to establish the connection between the contested debits which is supposed to cover loss of petroleum products as well as the claim for US\$67,000 for loss of petroleum products.

Exhibit P1 is the Plaintiff's invoice. Secondly exhibit P2 is the account statement of the Defendant. These are agreed documents. The account statement of the Defendant shows that on 30th June, 2009 there was recovery from the Plaintiff of US\$62,665.92. The Defendant admits that it debited the Plaintiff's account in paragraph 7 of the written statement of defence. This was confirmed in cross examination of DW1 Mr. Joseph Jabs Mubiru MD of the Defendant who testified that the amount deducted was for loss of 43,158.1 litres of fuel. As a matter of fact thereof the issue for trial is narrower. It is partly whether the debit was lawful.

I have duly considered the issues set out in the joint scheduling memorandum. Issues numbers 2 and 4 deal with the alleged loss of petroleum products and who should bear the loss. Handling this issue will dispose of the Plaintiffs claim and counterclaim save for the question of quantum

and issue number 1 as to whether the counterclaim is time barred? Lastly the issues of remedies will be handled last as it would arise from resolution of issues 1, 2 and 4 in the joint scheduling memo. I will refer to the issues without their reference numbers to avoid confusion.

Issues resolved first are: **Whether the debit of US\$ 70,036 was justified? Whether the counter-Defendant breached the transportation agreement executed with the counter-claimant?**

The question of whether the debit of US\$70,036 was justified imports in it an agreed fact regarding debit of US\$62,665.92. Because this is an agreed fact, it is possible to try the issue about the debit in relation to the loss of petroleum products pursuant to transportation of cargo. It is related to the debit in the agreed fact of US\$62,665.92. In other words the question here is whether as a matter of fact the Plaintiff agreed to the debit. If not, the issue relates to whether the loss should be borne by the Defendant and not the Plaintiff. The latter issue is a matter of law and depends on the resolution of the question of fact as to whether the Plaintiff consented to the debit of the entire amount. First of all, the Plaintiff concedes through PW1 Mr Mahendra Shah that the Plaintiff agreed that the Defendant would deduct 20% of the amount of money due to the Plaintiff every time the Plaintiff transported cargo for the Defendant. PW1 relied on several correspondences by e-mail on that matter. I have carefully considered the email correspondence between the parties found at pages 211 – 224 of the trial bundle. What can be gleaned from these emails are as follows:

1. The Plaintiff raised the issue of insurance following up with its own insurers in an email dated 29th April 2008 and the Defendant by email dated 28th of April 2008 had confirmed that they did not have insurance cover for the goods on transit when some fuel was spilt/lost on transit. The Defendant noted that transporters were supposed to have carriers insurance in place to protect goods in transit.
2. The question of whether the Defendant was to insure its product remained a matter of discussion between the parties. The fact is there was no insurance cover taken out by either party.
3. By email dated 11th Sep 2008 the Plaintiff proposed 20% retention of their invoices towards payment on account of transportation transactions.
4. By email dated 12th September 2008 the Defendant counter proposed 30% deduction because 20% deduction would complete recovery after 64 trips.
5. By email dated 15th September 2008 the Plaintiff proposed a deduction of 20% for recovery of the Defendant's loss and further requested the Defendant to send for signature a signed agreement. The Plaintiff wrote to the Defendant that other companies for whom they transport petrol take out insurance policies for the risk in the transportation.

6. Subsequently in December 2008 there is correspondence about the state of accounts between the parties. The Defendant by email wrote to the Plaintiff to confirm that repayment was complete on the subject of transporters payment.
7. On the 6th of February 2009 the Defendant wrote the total amount recovered and the balance due after recoveries.
8. By emails at pages 227 – 238 it is apparent that a dispute erupted between the parties. The Plaintiff contended that the risk was to be borne by the Defendant and that there was no written contract between the parties.

Between 16th August 2013 and 16th October 2013 the gist of the dispute between the parties is captured in the following emails which I will reproduce for ease of reference namely:

On the 16th of August Director Mahendra Shah of Hexagon Agencies Ltd wrote to Okello Francis Oscar of MOGAS International (U) Ltd as follows:

“Dear Francis

We have severally written to you regarding our outstanding balance. Kindly respond to this outstanding issue. ...”

In response Okello Francis wrote:

“Dear Shah

Am still looking into your issue.

Please note that I also have other issues to attend too. Backlog issues are handled with care especially if it is in contention.

Thanks & regards

Okello Francis Oscar

Quote: “Men occasionally stumble over the truth, but most of them pick themselves up and hurry off as if nothing ever happened: Sir Winston Churchill (1874 – 1965).”

On 30th of August 2013 Hexagon Agencies through Shah wrote at 11.22 AM:

“Dear Francis,

Refer to our telephone conversation, as discussed I will be in Kampala from Thursday to Saturday and I would like to come to your office to discuss these matters of our overdue amounts.”

On the 30th of August 2013 one Francis Okello wrote to his colleagues at 2.58 PM outlining issues as follows:

“Dear Agarwal

We have a claim from Hexagon Agencies Ltd regarding the amount recovered towards loss of product as a result of an accident in earlier 2009 there about.

We did the reconciliation regarding the same and also had a meeting with him on Thursday the 5th September, 2013.

We could not conclude as neither Ghosh or myself has the facts surrounding the matter apart from relying on accounting data as per attached.

- He claims he did not have any signed contract with MGS international (U) Ltd...
- He also contends that his documents – Transport Consignee Notes states that "Goods Are Carried on Owners Risk"
- That we must have claimed from our insurance company – we have no records of the same.
- With therefore seek your intervention and ask if you have any information on the same.

Francis..."

The e-mail correspondences are admitted documents exhibited as exhibit P3 – P7. They are found between pages 211 – 238. I have particularly noted the e-mail dated 30 August 2013 at 2:58 PM from Francis: to Hexagon Agencies Limited attention of Mr Shah and on the subject of overdue outstanding amounts US\$70,036.06 where he wrote as follows:

"Dear Shah

I have personally tried to dig up the data and we seem to have paid all the invoices save for those retained and deducted on account of the accident truck.

See attached reconstructed and reconciled with documents forwarded to us.

We shall wait for you as your mail below.

Francis..."

It is quite clear from the e-mail correspondence save for some small difference in the quantum that the Defendant deducted what it claimed from the Plaintiff on account of the loss due to an accident that happened in 2008. Secondly the parties continued doing business and it seemed to be a conditional business after the accident wherein the Defendant would deduct 20% of the

invoices for the transportation of its cargo by the Plaintiff. The deductions ended and there was an attempt to reconcile the accounts to establish what was due and outstanding. That is the bone of contention. The Plaintiff does not agree with the deductions. The deductions amount to US\$62,665.92.

I will start with the issue of insurance. It is quite clear that there was no written agreement between the parties providing for who should take out an insurance cover. Taking out insurance against the risk of loss or any risk is business prudence. It is therefore immaterial whether the Defendant took up an insurance cover for the business or the Plaintiff took out an insurance cover for the business. Each contract of insurance is independent and is meant to be for the benefit of the insured. One looks at the contract of insurance to establish the beneficiary and whether the loss insured occurred. In any case there is no contract of insurance that is in evidence and the question is not material to the contractual relationship, if any, between the Plaintiff and the Defendant. As far as authorities are concerned in the case of **Parry v Cleaver [1967] 2 All ER 1168** (Court of Appeal Lord Denning held at page 1171 that the insurance payments are based on contract “wholly independent of the relation between the Plaintiff and the Defendant which gave the Plaintiff this advantage.”) Consequently, it is no defence to the claim which is based either on breach of contract or tort that the Plaintiff was insured. Neither can the Plaintiff claim on the basis of insurance of the Defendant. It is either the Plaintiff or the Defendant who prudently insured against certain losses upon the occurrence of the insurable risk. On appeal Lord Morris of BORTH-Y-GEST in **Parry v Cleaver [1969] 1 All ER 555** at page 573 was of the opinion that the insurance of the Plaintiff was of no concern to the Defendant. In other words liability is based on the cause of action and proof of loss.

The first question therefore is whether the Plaintiff agreed to the deductions. From the correspondence, it is quite clear that no written contract was referred to though one was requested for by the Plaintiff. Nonetheless the deductions were made and according to the evidence on 30th June, 2009 US\$62,665.92 was debited from the Plaintiffs account from transportation dues to the Plaintiff. Subsequently, a dispute arose between August and September 2013 about four years later. Was there an agreement to deduct between the parties?

According to PW1 there was no written agreement. In his written witness statement paragraph 6 thereof by 31st of October 2013 the Defendant owed the Plaintiff US\$70,036.06 which was an aggregate amount. He however noticed that the Defendant had debited the Plaintiffs account to the tune of US\$62,665.92. In the written testimony Mr Shah makes no reference to the correspondence on the 20%. I have considered his evidence in cross examination and he admitted that there was an accident involving the Plaintiff's truck pursuant to which the Defendant's cargo was lost. Some of the petroleum products were salvaged by the Defendant. He admitted that there was correspondence between the parties thereafter. He agreed that there was an offer of payment of 20% towards the loss. However he stated that there was no conclusion of the matter. However he also testified that there was no written agreement which was supposed to

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be signed. The parties continued doing business. He agreed to the 20% deduction to enable the Plaintiff continue transporting the Defendants products.

I have duly considered the correspondence between the parties and I agree with the Plaintiff's submissions that there was no written agreement and the correspondence was inconclusive because the Plaintiff requested the Defendant to send a written agreement duly signed for the Plaintiff to endorse. Such an agreement was never signed. Furthermore the parties envisaged and in the minimum the Plaintiff envisaged a written contract. In the absence of a written contract, the parties continued doing business. Had the Plaintiff not requested for a written contract, it could be concluded that the Plaintiff conceded to the arrangement. The Plaintiff explicitly requested for a written contract and the matter was never concluded. I cannot therefore reach the conclusion that there was a contract between the parties in which the Plaintiff agreed that a 20% deduction of its transport invoices would be deducted. There was an intention to conclude such an agreement but it was never concluded. In the premises, the Plaintiff is not bound by the proposals to deduct 20% of its invoices for transporting the Defendant's cargo. The Defendant sat on its rights. Moreover the Defendant according to the correspondence which has been reproduced above counter offered a 30% deduction. The counter offer cancelled the previous offer of the Plaintiff. Thereafter, the Plaintiff again offered 20% deduction subject to the signing of a written agreement. Because no written agreement was ever signed, no contract to make a deduction can be inferred from the e-mail correspondence. Subsequent conduct of the Plaintiff shows that the matter remained contentious and the Plaintiff is within its rights to avoid any deduction. The Plaintiff did not admit liability for the loss.

The question therefore is whether the Plaintiff is liable for the loss?

Before answering this question, the Plaintiff raised an objection to the Defendants counterclaim for US\$67,000, being a claim for loss of petroleum products. I had earlier observed that the Defendant cannot claim for loss of petroleum products, if it agreed that it had made a deduction for the loss from the Plaintiff's account. The claim itself demonstrates that the deduction was of no consequence. Having claim for loss of petroleum products on account of the Plaintiffs transportation of the cargo, the Defendant cannot in the same breath claim that it deducted funds from the Plaintiffs account to offset the loss. Furthermore, as I have noted earlier, each party is bound by its pleadings. While the Defendant admitted making a deduction, it did not expressly indicate what the deduction was for. This came out of the evidence that the deduction was for the loss on account of an accident involving the Plaintiff's vehicle transporting the Defendant's cargo.

According to the facts pleaded in the counterclaim, sometime in June 2009, the Plaintiff was instructed by the Defendant to deliver petroleum products to Uganda from Kenya but the petroleum products were not delivered to their destination causing the counterclaimant financial loss of US\$67,000. The plaint was filed on the 14th of May 2014. When did the accident occur?

Before resolving the question, as far as the pleading is concerned, the counterclaim was filed on the 14th of May 2014 and the cause of action arose in June 2009. That would be about five years from the date the cause of action arose. As far as the counterclaim is concerned, the action was filed within five years and is not caught by the law of limitation. Section 3 of the Limitation Act Cap 80 laws of Uganda provides that actions founded on contract or tort shall not be brought after the expiration of six years from the date on which the cause of action arose. As far as the counterclaim pleading is concerned, the action is not caught by the law of limitation.

I have also considered the evidence. PW1 testified in paragraph 10 of the written testimony that the accident occurred on 26 April 2008. This was confirmed by DW1 in paragraph 11 of his written testimony. He testified that on or about 26 April 2008, the Plaintiffs truck carrying about 50,000 L of fuel belonging to the Defendant was involved in an accident. As a result 43,159.1 L was lost. The value of the lost petroleum products was US\$62,083.42. The cause of action therefore arose around April 2008. Six years from April 2008 would be around March 2014. The counterclaim was therefore filed about two months late. The counterclaimant did not pray for exemption as prescribed by Order 7 rules 6 of the Civil Procedure Rules which provides as follows:

"Where the suit is instituted after the expiration of the period prescribed by the law of limitation, the plaintiff shall show the grounds upon which exemption from the law is claimed."

The Defendant's Counsel proposed another date for the cause of action and contended that it arose when the Plaintiff refused to pay. I do not agree because there was no contract between the parties according to my holding above. The Plaintiff requested for a written contract which never materialised and therefore the court cannot hold that there was a contract to deduct the loss from the Plaintiffs account. Last but not least, the suit of the counterclaim cannot be rejected under Order 7 rule 11 (d) of the Civil Procedure Rules. The rule provides that the suit shall be rejected where it appears from the statement in the plaint to be barred by any law. The statement of claim does not show that the counterclaim is barred by any law. It is only the evidence which shows when the cause of action arose and the counterclaim will be dismissed under the provisions of section 3 (1) (a) of the Limitation Act Cap 80 laws of Uganda. The counterclaim was filed after 6 years from the date the cause of action arose and is barred by the provisions of the Limitation Act quoted above. The dismissal is with costs.

The question is whether, the Defendant has a defence against deduction of the Plaintiff's money. I do not agree with the Defendant's submissions that the Plaintiff needed to prove special damages and because they are not proved, the action should fail. The amount of US\$62,665.92 deducted by the Defendant was admitted by the Defendant and does not need to be proved. Secondly, it is the Plaintiffs account dated 31st of October 2013 which reflected an outstanding

sum of US\$70,036.06 owed by the Defendant. In the premises, the question will be decided on the merits.

The Plaintiff relies on an exemption clause which provides that "ALL GOODS CARRIED AT OWNERS OWN RISK." These words are written on all "transport consignment notes" issued by the Plaintiff. The transport consignment notes are signed by the Defendant's agents for the transportation of all cargo of the Defendant. Each consignment is covered by a consignment note. Each consignment note is also signed by the Plaintiff's agent namely the driver and the turn boy. It is signed by the sender of the goods and the sender of the goods is the Defendant's official. The Defendant's Counsel submitted that the consignment notes are evidence of the contract of carriage. The problem is that the exemption clause that the goods are carried at the owners risk is written in capital letters and appears on all consignment notes. Does this exempt the Plaintiff?

According to Halsbury's laws of England fourth edition volume 9 page 242 paragraph 367 courts have where appropriate, applied general rules of the law of contract in order to control the possibilities of abuse inherent in complete freedom of contract. A party seeking to rely on an exclusion clause must show that it was incorporated as a term of the contract, which usually involves the taking of reasonable steps to bring it to the notice of the other party. Secondly, an exclusion clause is to be construed strictly against the party who introduces it and seeks to rely on it under the *contra proferentem* rule. Exclusion notes as general rule must be incorporated in the contract at the time when the contract is made. In **Olley v Marlborough Court Ltd [1949] 1 All ER 127** it was held that it must be shown that the exempting words form part of the contract between the parties and that they are so clear that they must be understood by the parties in the circumstances as absolving the Defendants from the results of their own negligence. The general principles applied to exemption clauses are set out in **Halsbury's laws of England Fourth Edition Volume 9 paragraph 369 at page 244.**

- (1) If the party against whom the clause operates has actual knowledge of the clause at the time when the contract is concluded he is inevitably bound by it.
- (2) When there is no actual knowledge, the party against, the clause operates will not be bound if he has no reason to believe that the document containing the clause contained contractual terms.
- (3) If the party against whom the clause operates has reason to believe that a document given to him contains contractual terms it may be borne by those terms, including any exclusion clause, even though he does not choose to read the document; if the document contains what is reasonably necessary to bring the terms to the attention of the reader, the recipient will be bound but he will not be bound if he does not do so."

Applying those principles to the facts and circumstances of this case, the Defendant admits that the consignment notes are evidence of receipt of the goods by the Plaintiff. They are in my view also evidence of the terms on which the Plaintiff received the goods. Last but not least the Defendants counterclaim was time barred and there was no effort to prove that the accident occurred on account of the Plaintiffs negligence. In other words there is no evidence that the Plaintiff was at fault. PW1 testified that the accident occurred as a result of the negligence of the

servant of Kakira Sugar Works Ltd. He testified that the driver of Kakira Sugar Works Ltd caused the accident. Secondly the tractor in issue was negligently parked on the road and the cause of the accident was investigated and liability was imputed on Kakira Sugar Works Ltd because it was not in a proper mechanical condition, the tractor was without reflectors and lights and was also packed in the middle of the road at the time of the accident. This evidence was not challenged. PW1 further testified that the Plaintiff advised the Defendant to lodge a claim which Kakira Sugar Works Ltd because the accident occurred due to their sole negligence. It is therefore my additional finding that before the exemption clause can be invoked, it must be shown that the Plaintiff was liable to the Defendant for the accident. It cannot be a case of strict liability. The Plaintiff has suggested through evidence that there was a third party involved which was liable.

In the premises issues number two and four are resolved in favour of the Plaintiff. The deductions made by the Defendant from the Plaintiffs account were wrongfully deducted and the Plaintiff is entitled to the sums of money deducted for services rendered to the Defendant.

Remedies:

As far as remedies are concerned, the Defendant's counterclaim is dismissed with costs for being barred by statute.

The Plaintiff is entitled to the sum of US\$70,036 which is proved by the Plaintiffs account and which includes the amount deducted by the Defendant and which is admitted. In other words in addition to the sum of US\$62,665.92, the Plaintiff has proved US\$7,370.75 against the Defendant bringing the total amount outstanding to US\$70,036 which is hereby awarded to the Plaintiff.

General damages

I have considered the written submissions on the issue and my conclusion is as follows. The Plaintiff was deprived of money for some time and this action is for recovery of money withheld by the Defendant which money was earned by the Plaintiff for the transportation of the Defendants Cargo to Uganda and other sums in addition. Part of the cargo was salvaged by the Defendant. The Defendant wrongly deducted US\$62,665.92 from the Plaintiff in addition owed the Plaintiff US\$7370.75 which it withheld. General damages are awarded to fulfil the common law remedy of *restitutio in integrum* which means that the Plaintiff has to be restored as nearly as possible to a position he or she would have been had the injury complained of not occurred (See **Dharamshi vs. Karsan [1974] 1 EA 41**). General damages are presumed to be the natural or probable consequence of the wrong complained of and the Plaintiff may only assert that such damage has been suffered (See **Halsbury's laws of England 4th Edition Reissue Volume 12** (1) paragraph 812). The quantum of general damages reflects the same principle (See **Johnson and another v Agnew [1979] 1 All ER 883** per Lord Wilberforce at page 896 that the innocent party

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is to be placed, so far as money can do so, in the same position as if the contract had been performed.) Last but not least an award of interest on money withheld fulfils the principle of compensation and *restitutio in integrum* (**Riches v Westminster Bank Ltd [1947] 1 All ER 469 HL at page 472** Lord Wright held that essence of interest is that it is a payment which becomes due because the creditor has not had his money at the due date. 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.)

In the premises the Plaintiff will be awarded interest for deprivation of the money as compensation for deprivation of what was due.

The Plaintiff is awarded interest on the sum of US\$62,665.92 at the rate of 10% per annum from July 2012 till date of judgment.

Secondly the Plaintiff is awarded interest at 10% per annum on the sum of US\$7,370.75 from the date of filing the suit on 28th April 2014 till date of judgment.

Finally interest is awarded on the aggregate amount or the decreed amount at the time of judgment at the rate of 10% per annum till payment in full.

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

Judgment Delivered in open Court on the 16th of December 2016

Christopher Madrama Izama

Judge

Judgment delivered in the presence of:

Tony Okwenye Counsel for the Plaintiff

Samuel Kakande Counsel for the Defendant

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

16th December 2016

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