

**THE REPUBLIC OF UGANDA,  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
(COMMERCIAL DIVISION)**

**HCCS NO 089 OF 2011**

**JAMES MUNDELE SUNDAY}.....PLAINTIFF**

**VS**

**PEARL OF AFRICA TOURS AND TRAVEL}.....DEFENDANT**

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

The Plaintiff filed this action for unconditional return of his motor vehicle Toyota Hiace registration number UAE 330N in a sound mechanical condition, or its value then, special and general damages for negligence, interest and costs of the suit.

The Plaintiff alleged in the Complaint that at all material times he is the owner of Toyota Hiace registration number UAE 330N. On 18 July 2006 he hired out the car to the Defendant on a self drive arrangement at the cost of Uganda shillings 100,000/= per day. At the commencement of the agreement the Defendant advanced the Plaintiff Uganda shillings 200,000/= and the Plaintiff handed over the vehicle to the Defendant in a sound mechanical condition. The Plaintiff alleged that due to the negligence of the Defendant's agents or servants, the vehicle broke down on its return from Murchison Falls National Park while in the possession and control of the Defendant's servants or agents. Secondly the Defendant neglected or refused to hand over the motor vehicle to the Plaintiff despite repeated reminders or to settle daily rental fees of Uganda shillings 100,000/=. In complete disregard of the agreement between the Defendant and the Plaintiff, the Defendant has been keeping the vehicle with its mechanics since 2006 and is unjustifiably demanding Uganda shillings 2,560,000/= as a precondition for the release of the motor vehicle to the Plaintiff. The Plaintiff further averred that because of the exposure of his vehicle to harsh weather conditions for a long time, the vehicle can no longer be used on the road unless it is overhauled.

The Plaintiff claims that he has suffered and continues to suffer great loss and damage for which he claims special damages as well as the general damages for loss of business, loss of profits, loss of use and inconvenience. Special damages is for loss of income at Uganda shillings 100,000/= per day being the rental fees from the 20<sup>th</sup> day of July 2006 to the date his motor vehicle will be returned by the Defendant. The Plaintiff further averred that the breakdown of the motor vehicle and damages occurred due to the negligence or breach of duty of the Defendant's

servants. This is because they failed to check the water level in the radiator leading to damage of the cylinder head and gasket. The Plaintiff further averred that the Defendant left the radiator cap open when they knew or ought to have known that the radiator water would evaporate. They failed to regularly check the cooling system of the engine of the motor vehicle and failed to take all reasonable and necessary measures to avoid damage to the cylinder head and gasket. In the premises the Plaintiff claims general damages for negligence and claims that the motor vehicle was a sole source of income to him.

The Defendant's defence in the written statement of defence is that the claim is denied in total. The Defendant denied having entered into any agreement with the Plaintiff for the hire of the motor vehicle as alleged. Secondly the vehicle was not in the hands of the Defendant and instead the Plaintiff knows where his vehicle is but seeks to unjust enrichment by filing this action. Thirdly the Defendant raised a defence of statute bar on the ground that the suit was finally disposed of by the magistrate's court of Mengo and the Plaintiff chose not to appeal.

At the hearing the Plaintiff was represented by Counsel Richard Omongole of Messieurs Omongole and Company Advocates. Prior to Counsel Richard Omongole taking over conduct of the Plaintiff's case, the Plaintiff had been represented by Messieurs Birungye, Barata and Associates. On the other hand the Defendant is represented by Counsel David Kaggwa of Messieurs Kaggwa and Kaggwa Advocates.

In the joint scheduling memorandum endorsed by both Counsels it is agreed that the Plaintiff is the owner of the motor vehicle the subject matter of the suit. It remained in the controversy whether on 18 July 2006 there was an agreement for the hire of the Plaintiff's vehicle on a self drive arrangement at a consideration of Uganda shillings 100,000/= per day. Secondly whether at the commencement of the contract the Defendant paid the Plaintiff Uganda shillings 200,000/= for two days. All other matters alleged by the Plaintiff are in dispute. The Plaintiff testified in person as PW1 and closed his case while the Defendant called one witness Ms Kelly Mac Tavish, the Executive Director of the Defendant Company.

The Defendant's Counsel initially objected to the action on the ground that it is time barred under section 3 (d) of the Limitation Act Cap 80 laws of Uganda and the objection was overruled on the ground that the action was filed within the limitation period of 6 years. Secondly on the issue of whether there was another action which had been earlier filed in another court, it was established by Counsels that Civil Suit Number 227 of 2007 between the same parties had been dismissed by the High Court Civil Division under Order 5 rule 3 of the Civil Procedure Rules for failure to serve summons within 21 days from the date of issue. This suit had been stayed by consent of the parties pending resolution of HCCS 227 of 2007 between the same parties and on the same subject matter. A dismissal under Order 5 rule 3 of the Civil Procedure Rules is not on the merits of the suit but for failure to serve summons on the Defendant within the prescribed time of 21 days. Where summons have not been served on the opposite side, the summons expire

and there is no action. The rule commands dismissal of the suit for want of service unless time for service of summons is extended within the limitation period provided for extension. Upon establishing that the suit had not been determined on merits this suit then proceeded for hearing on the merits.

I have duly considered the evidence. PW1 who is the Plaintiff testified that on 18 July 2006 he entered into a car hire agreement with the Defendant on a self drive arrangement and the cost of hire per day was Uganda shillings 100,000/=. At the commencement of the agreement, the Defendant made an advance payment of Uganda shillings 400,000/= and he handed over his motor vehicle to the Defendant for use when it was still in a sound mechanical condition. However due to the negligence of the Defendant's agents, the motor vehicle broke down on its second trip from Murchison Falls National Park. Up to the date of the written testimony the Defendant had ignored/neglected or refused to hand over the motor vehicle to him or pay outstanding arrears. He further testified that the Defendant retained possession of the motor vehicle and demanded monies amounting to Uganda shillings 2,560,000/= from him as a precondition before she could release the motor vehicle. Because the motor vehicle was left exposed in open and harsh weather conditions for a long time, the motor vehicle could not be used on the road unless it is overhauled. He further testified that despite several demands made on the Defendant, the Defendant refused to release the motor vehicle or pay his outstanding arrears.

The Plaintiff was cross examined extensively and claims to have bought the vehicle for approximately Uganda shillings 14,000,000/=. He admitted that he bought the vehicle in December 2002 that is when it was registered in Uganda for the first time. He agreed that by the time he hired the vehicle to the Defendant in the year 2006, it was 15 years old. He further admitted that the agreement they had was a gentleman's agreement which was usual in the circumstances. He did not know how the vehicle 'got spoilt'. He further admitted that the voucher exhibit P1 covering a sum of Uganda shillings 200,000/= was for two days and the vehicle had been used for two days. He further admitted that the payment voucher was for the 18th and 19th of July 2006 but he was paid on 27 July 2006. Furthermore it was most likely that the vehicle had been spoilt on 19 July 2006. He did not know how the vehicle got spoilt or damaged. Furthermore on 22 July 2006 which is three days later he was paid and the question was whether he was aware that the vehicle had been damaged? He was told that the vehicle broke down from Murchison Falls National Park. He was not present and he based his testimony on probabilities that the radiator cap was not on leading to heating and loss of water and damage to the cylinder head.

In the re-examination he testified that the vehicle was in the good working condition and he used to service it regularly. It was the responsibility of the Plaintiff to service the vehicle and he agreed that between the 18th and 19th of July 2006 the vehicle had been properly serviced. He reported that a mechanic said that the vehicle had been driven to Kampala. The mechanics name

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was Joseph but he was not called to testify. The witness was further referred to an invoice from Kamwokya United Garage exhibit P2. He doubted whether the vehicle had been towed to Kampala using a break down vehicle. He further admitted based on the quotations from the garage exhibit P3 that the motor vehicle head gasket and the cylinder head had not been replaced since the vehicle was acquired by him. Among the quotations the cylinder head was to be repaired for Uganda shillings 1,200,000/= while the head gasket was to be repaired for Uganda shillings 80,000/=. As to whose responsibility it was to repair the motor vehicle he was of opinion was that it was the Defendant. It was only his responsibility to repair the vehicle before it was hired. His conclusion as a driver of many years standing was that when the cylinder head has a fault, it means that there was no water for cooling the engine. It was therefore negligent to drive the vehicle without water in the radiator. The vehicle had been driven by a driver of the Defendant.

On re-examination he testified that the vehicle had been used several times by the Defendant on self drive basis. The Defendant also used its own driver on those instances. He was informed on the 21st or 22nd of July 2006 about what had happened to the vehicle. On 22 July 2016 he was informed by the Defendant where the vehicle was and when he went to check, he found that it had been dismantled without his consent. The vehicle had been driven by one Joseph, a mechanic of the Defendant. He confirmed that there a problem with the cylinder head, and head gasket and it meant that there was no water in the radiator to cool the engine. He demanded for the vehicle but produced no document of the demand. Lastly it was his opinion that usually a problem with the cylinder head is caused by lack of water. This conclusion is based on his experience as a driver since 1980.

On the other hand DW1 Ms Kelly Mac Tavish, the Executive Director of the Defendant Company testified that the Plaintiff's car was hired for a specific return trip from Kampala to Murchison Falls National Park. The Plaintiff misrepresented to the Defendant that his vehicle was fit for the purpose of transporting tourists when it was not. The Plaintiff's car was in a very poor mechanical condition and was therefore not fit for the purpose. When the Plaintiff's car broke down due to its poor roadworthiness, the Defendant incurred extra expenses to hire another car to transport its clients with the resultant embarrassment and loss of reputation. The Defendant was not negligent and instead the Plaintiff's vehicle was not roadworthy and that explains why the Plaintiff abandoned it in the garage and has never paid for its storage and for breakdown services. The Defendant never refused to hand over the vehicle to the Plaintiff since he knows where it is and he refused to collect it with the intention of unjustly enriching himself through litigation. The Defendant never placed a precondition for money before releasing the vehicle and the car is not in the Defendant's possession or power and the Plaintiff has always been free to pick it from the garage. The Plaintiff will not be entitled to the special damages for hire on a daily basis because he knows that since his car broke down on account of its poor mechanical condition, the Defendant has not used it and the claim for special damages is

speculative. DW1 further clarified that the garage in question belongs to a gentleman called Joseph and the vehicle was kept there for safe custody.

DW1 testified in cross examination that the Defendant organises tours for expatriates and tourists to see tourist sites in Uganda. She did not remember how many times the Defendant had hired the Plaintiff's vehicle. She confirmed that because she hires many vehicles, she knows the Plaintiff's vehicle was not fit because it travelled for less than 300 km and started to overheat. She admitted that occasionally vehicles hired get mechanical problems and the Defendant bears the costs. The Defendant employs its own drivers to drive the tourists and even provides the fuel. She confirmed that it is the owner of the vehicle who services the vehicle. However the Plaintiff's vehicle had not been checked prior to the hire and it was assumed that it was okay. The witness could not remember whether payment was for two days or for three days and she assumed that the Plaintiff's vehicle had been hired for a three-day trip. When the vehicle broke down, the Defendant sent a replacement for the vehicle and her late husband brought a breakdown, towed the Plaintiff's vehicle to a safe and secure place so that the Plaintiff could get his vehicle. The Plaintiff was informed that the vehicle was in the garage and he went to the garage. The Plaintiff was called on the phone very many times and had threatened to sue the Defendant. DW1 further confirmed that the arrangement between the Plaintiff and the Defendant was a gentleman's agreement. Despite being informed the Plaintiff did not take his vehicle from the garage and attempted to sort out his problem with the late husband of DW1. She admitted that some repairs were made on the vehicle to make it move. She further confirmed that it came back to Kampala while it was moving. The question was why there was a billing for breakdown services according to exhibit P2? Secondly exhibit P3? According to DW1 the exhibits were not generated by the Defendant. The witness had not checked the condition of the car prior to the hire or afterwards. The Defendant's executive director further admitted that the rate of hire was Uganda shillings 100,000/= per day for use of the vehicle for Safari purposes. Finally she testified that the Defendant did not owe a duty to the Plaintiff to repair his vehicle after it developed mechanical problems.

The court was addressed in written submissions and the issues on which Counsels submitted are:

1. Whether the Plaintiff entered into a contract with the Defendant?
2. If so, whether the Defendant breached the contract?
3. What are the remedies available to the parties?

### **Whether the Plaintiff entered into a contract with the Defendant?**

I have carefully considered the submissions of the Plaintiff's Counsel on the ground that there was a legal relationship between the parties. The Plaintiff's Counsel relied on section 10 (1) of the Contract Act 2010 which defines a contract as an agreement made with the free consent of the parties with capacity to contract for a lawful consideration and with a lawful object with the

intention to be legally bound. He relied on the testimony of the Plaintiff and the Defendant that there was a contract of hiring the Plaintiff's vehicle.

The Defendant's Counsel submitted on the other hand that the law presumes that there was free consent of the parties and no coercion, undue influence, fraud, misrepresentation or mistake at the time of contracting. He agreed that there was offer and acceptance and consideration but there was never free consent of the parties to the contract. He submitted that under section 13 (d) of the Contracts Act 2010, consent of parties to a contract is taken to be free where it is not caused by misrepresentation. He submitted that there was a material misrepresentation about the status of the motor vehicle hired in terms of its inherent capacity to do the work. He submitted that the Plaintiff misrepresented to the Defendant's officials that the vehicle was fit for the purpose of transporting tourists whereas not. He relied on the **Dictionary of Law, Third Edition, and Oxford University Press 1994 at page 254** which defines misrepresentation as an untrue statement of fact made by one party to the other in the course of negotiating a contract that induces the other party to enter into the contract. A false statement of law, opinion or intention does not constitute a misrepresentation nor does a statement of facts known by the representee to be untrue. Secondly he relied on **Black's Law Dictionary, Seventh Edition page 1016** for the definition of material misrepresentation as a false statement that is likely to induce a reasonable person to assent or that they maker knows is likely to induce the recipient to assent.

Furthermore the vehicle was manufactured in 1991 and was 15 years old at the time of the hire. The Plaintiff had no proof that the motor vehicle was serviced before handing it over to the Defendant.

### **Resolution of issue number 1**

I have carefully considered the submissions of Counsel. In paragraph 3 of the written statement of defence, the Defendant inter alia averred that it denied having entered into an agreement with the Plaintiff for the hire of the suit vehicle as alleged. Secondly the Defendant denied any liability. The submission by the Defendant's Counsel that the Plaintiff misrepresented that the vehicle was fit for the purpose was not pleaded as a defence and offends the rule and purpose of pleadings as notice to the opposite party. Order 6 rule 6 of the Civil Procedure Rules provides that the Plaintiff or the Defendant as the case may be:

"... shall raise by his or her pleadings all matters which show the action or counterclaim not to be maintainable or that the transaction is either void or voidable in point of law and all such grounds of defence or reply as the case may be, if not raised would be likely to take the opposite party by surprise or would raise issues of fact not arising out of the preceding pleadings, as, for instance, fraud, Limitation Act, release, payment, performance, or facts, showing illegality either by statute or common law."

To constitute a defence to the action, misrepresentation had to be pleaded. Moreover it is trite law and provided for by Order 6 rule 3 of the Civil Procedure Rules that particulars of misrepresentation shall be pleaded. The said rule 3 provides as follows:

"In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default or undue influence, and in all other cases in which particulars may be necessary, the particulars with dates shall be stated in the pleadings."

The Defendant in the written statement of defence did not raise the issue of misrepresentation as a defence contrary to Order 6 rule 6 of the Civil Procedure Rules. Furthermore order 6 rule 3 of the Civil Procedure Rules clearly applies to both the plaint and the written statement of defence and requires any pleading of misrepresentation either in the plaint or in the defence to have particulars spelt out. In other words misrepresentation must be pleaded and particulars thereof stated in the pleadings and the rule is mandatory. The Supreme Court has applied Order 6 rule 3 on pleadings relating to fraud and held as far as an allegation of fraud is concerned that fraud must not only be pleaded but must also be strictly proved. They applied Order 6 rule 3 of the Civil Procedure Rules which gives the rules for pleading misrepresentation, fraud, and breach of trust, wilful default or undue influence. They held that particulars thereof shall be pleaded for there to be a cause of action. In the case of **Kampala Bottlers Ltd versus Damanico (U) Ltd Civil Appeal No. 22 of 1992** the Supreme Court held that fraud must be pleaded and strictly proved. By analogy the case of **Kampala Bottlers Ltd versus Damanico** (supra) applies with equal force to the Defendant's defence of misrepresentation and the Defendant cannot be availed the defence of misrepresentation under section 13 of the Contracts Act 2010. In any case the Contracts Act 2010 was not the law in operation at the time of the contract of the parties in July 2006 though it codifies the common law which has the same doctrines. The Contracts Act was assented to on the 22<sup>nd</sup> of April 2010 and commenced on a date to be appointed by the Minister thereafter. Counsel had a duty to quote the applicable law since a statute is not deemed to have retrospective force unless it says so expressly. In **Re: Athlumney Ex Parte Wilson, (1898) 2 QB 547**, it was held by Lord Wright at pages 552 to 553 that "... no rule of construction is more firmly established than this – that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, or otherwise than as regards matter of procedure...". Furthermore in **Re: School Board Election for the Parish of Pulborough (1894) 1 QB 725** Lopes L.J. held at 737 that it is a "... well established principle in the construction of statutes that they operate only on cases and facts which come into existence after the statutes were passed, unless a retrospective effect is clearly intended." Finally in **Henshall vs. Porter [1923] 2 K.B. 193** it was held by McCardie J at page 197 on a similar issue whether a retrospective effect should be given to a statute that the statute has to be considered "... in light of the settled, recognised and beneficent rule of law that existing rights are not deemed destroyed by a statute unless there be express words or the plainest implication to that effect.

There was an existing relationship between the parties to this suit which cannot be deemed to be altered by a statute that came into force about 4 years later. That notwithstanding, before the promulgation of the Contracts Act 2010, the law of Contract of Uganda was imported from Britain under the Contract Act Cap 73 Laws of Uganda. Section 2 (1) of the Contract Act Cap 73 applied the common law of England for the time being in force relating to contracts as

modified by the doctrines of equity, the public and general statutes in force in England on the 11<sup>th</sup> of August, 1902 and Acts of Parliament of the United Kingdom mentioned in the Schedule to the Act. As far as the common law is concerned the elements of a legally enforceable contract are captured by **Osborn's Concise Law Dictionary Eleventh Edition** page 113. For there to be a valid contract, there must be a capacity to contract, secondly an intention to contract; thirdly consensus ad idem; fourthly valuable consideration; fifthly legality of purpose and sixthly certainty of terms.

In her testimony DW1 agreed that the Defendant hired the Plaintiff's vehicle at an agreed amount of Uganda shillings 100,000/= daily. The Plaintiff was paid in advance for two days hire and indeed handed over the vehicle on hire terms to the Defendant. Though the number of days for which the vehicle was intended to be hired remained in contention, there was offer and acceptance and consideration as well as performance. The other elements of a valid contract such as capacity to contract, intention to contract, *consensus ad idem*, valuable consideration, legality of purpose and certainty of terms were present. Without going into the issue of whether the contract could have been frustrated by some other vitiating factor or factors, issue number one is answered in the affirmative and I hold that there was a contract between the Plaintiff and the Defendant for the hire of the Plaintiff's vehicle the subject matter of the suit for purposes of the Defendant's business. The contract was valid at the point of contracting it and was partially enforced when the Plaintiff was paid, handed over the vehicle the subject matter of the contract. The Defendant took the vehicle and applied it for a lawful purpose of transporting tourists to Murchison Falls National Park. The vehicle subsequently broke down and the rest of the issues arise from the effect of the breakdown of the hired vehicle and what transpired thereafter on the relationship between the parties.

## 2. **If so, whether the Defendant breached the contract?**

The second issue only can only be considered where the court finds that there was a contract between the parties. The Plaintiff's Counsel relied on the **Law of Contract in Uganda by Prof Bakibinga** where it is written that breach of contract occurs where a party to the contract without lawful excuse fails or refuses to perform the contract or performs defectively or incapacitates himself from performing the contract. He submitted that the Defendant only paid for two days that is the 18th and 19th of July 2006. Furthermore the Defendant incapacitated itself from performing the contract when due to the negligence of its employees/agents the motor vehicle broke down and could not be used on the road and it became impossible to use it for transporting the tourists. He submitted that the Defendant should be held liable for the breach of the contract and losses resulting there from as a result of the breach. Furthermore he contended that the Defendant breached an implied term of the contract to return the vehicle after it failed to return the motor vehicle to the Plaintiff despite several demands from the Plaintiff for its return. He contended that it is an implied term of such a contract of hire as that between the Plaintiff and the Defendant that the hirer (who is the Defendant in this case) will return the chattel to the owner at  
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the end of the contract. He relied on several authorities which I do not need to refer to for the moment until the issue of what happened after the breakdown of the vehicle is considered in terms of its effect on the contractual obligations of the parties.

On the contention that DW1 on several occasions informed the Plaintiff both by telephone and verbally (face to face) to take his vehicle from the garage where it had been kept, the Plaintiff denied that he was requested to do so. The Plaintiff whatever the case did not pick the vehicle from the garage. The contention of the Defendant is that it is not liable in any way for repairs and delay in collecting the vehicle. Counsel for the Plaintiff submitted that the Defendant's option was to join the garage owner to seek a contribution for the delay and this is seen as a way of reducing the Defendant's liability for excessively long hire charges. In the instant case the Defendant did not take out any insurance for such incidents and therefore is solely liable for the delay to return the hired vehicle. The garage the car is placed in is under instructions from the Defendant making the Defendant solely liable.

In reply the Defendant's Counsel submitted by reiterating the first submissions on issue one that there was no contract because of misrepresentation. Without prejudice he submitted that under section **101 (1) of the Evidence Act Cap 6 laws of Uganda**, "Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist". On the submission that there was negligence on the part of the Defendant employees or agents leading to the breakdown of the Plaintiff's vehicle, the Plaintiff never adduced any evidence proving on the balance of probabilities that the Defendant's employees/agents were negligent. The Plaintiff's assertions in the submissions are in total contradiction with what he testified to in cross examination that he does not know how the vehicle got spoilt. The Plaintiff was not there when the vehicle broke down. The Plaintiff's allegations are mere speculation and conjecture that no water was put in the vehicle radiator for (cooling purposes) yet he was not there. No evidence was adduced to prove that there was negligence of the Defendant or its agents leading to the breakdown of the vehicle. Counsel sought to distinguish authorities cited by the Plaintiff's Counsel on the ground that in those authorities it was written that the loss of the vehicle owing to the Defendant's negligence would make the Defendant liable. He submitted that there was no evidence of negligence and therefore the authorities were not applicable.

Furthermore he submitted that the Defendant on several occasions by telephone and verbally told the Plaintiff to pick his vehicle but the Plaintiff refused. The Plaintiff denies ever been told to pick the vehicle however the denial is a total contradiction with the statement that the motor vehicle cannot be used on the road unless overhauled. Furthermore in cross examination he admitted that he was informed where the vehicle is and he went there. He concluded that the Defendant did not breach the contract.

## **Resolution of issue number 2**

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## **Whether the Defendant breached the contract?**

I have carefully considered the evidence which I have set out at the beginning of this judgment. I agreed in issue number one that there was a contract for the hire of the Plaintiff's vehicle by the Defendant.

I have also examined an anomaly in the evidence on the basis of exhibit P2 where it is submitted that the Plaintiff was being charged for towing of the vehicle to Kampala when the vehicle was driven. I have examined exhibit P2 dated 24<sup>th</sup> of July 2006. It is an invoice and charges for water pump fitting and break down from Sambia River Lodge to Kampala. The issue of the bringing of the vehicle to Kampala was handled by Mr. Munga the late husband of DW1 and DW1 was not there. The fact is that the vehicle was brought to Kampala and it is not being alleged that driving the vehicle to Kampala caused it further damage. The vehicle was brought to Kampala by a mechanic and the issue of whether it was towed part of the way or not is not material and will not affect the resolution of this suit. The costs of breakdown is stated to be Uganda shillings 500,000/=.

The Plaintiff's Counsel contends that there was a duty on the Defendant to return the motor vehicle after the hire. I do not need to refer to the authorities before considering the facts. The first consideration has to do with the terms of the contract. Who was supposed to repair the vehicle if it broke down on the road?

There is no evidence as to any contractual term between the parties about what would happen if the vehicle broke down while on hire by the Defendant. Furthermore the extent of damage which may be handled by the Defendant in case of such an occurrence on the road is not in evidence. What should be implied? It is a proven fact from the evidence admitted by both PW1 who is the Plaintiff and DW1 the Executive Officer of the Defendant that the Plaintiff's vehicle was hired. The vehicle was used by the Defendant to transport tourists to Murchison Falls National Park. DW1 testified that hardly had the vehicle travelled 300 km, than it started overheating and broke down. The Defendant brought the vehicle back to Kampala where it was taken to a garage. It is not in dispute that the vehicle broke down and was no longer fit for the purpose unless repaired first. In fact the Plaintiff attributes the breakdown of the hired vehicle to overheating due to having no water in the radiator. The Plaintiff further testified that the cap of the radiator could have fallen off. In other words he impliedly concedes by agreeing that the vehicle broke down that the vehicle could not be used for the purpose of transporting tourists to the Murchison Falls National Park or for any other purpose. The purpose for which the vehicle had been hired was obviously frustrated. DW1 testified that she had to get alternative transport for the tourists and the Defendant suffered loss of reputation and this testimony remained unchallenged and is taken to be admitted and true.

I have carefully considered the averment in paragraph 4 (e) (f) and (g) of the Plaintiff that firstly due to the negligence of the Defendant's agents or servants, the vehicle broke down on its return from Murchison Falls National Park while in possession and under the control of the Defendant or its servants or agents. Secondly the Plaintiff averred that the Defendant ignored or neglected or refused to hand over the motor vehicle to the Plaintiff despite repeated reminders or that the Defendant refused to settle daily rental fees of Uganda shillings 100,000/= per day (while the vehicle remained in its custody). Thirdly the Plaintiff averred that in complete disregard of the agreement between the Defendant and the Plaintiff, the Defendant is keeping the motor vehicle with its mechanics since 2006 and is unjustifiably demanding Uganda shillings 2,560,000/= as a precondition for the release of the motor vehicle to the Plaintiff.

Starting with the assertion in paragraph 7 of the plaintiff, I agree with the Defendant's Counsel that there is no evidence whatsoever that the Defendant's servants were negligent in leaving the radiator cap open when they knew or ought to have known that the radiator water would evaporate. No person at the scene was called to testify about this assertion. No person or witness was called to prove the assertion that the Defendant's agents were driving the vehicle without water in the radiator. No evidence was called to prove the assertion that the Defendant's servants failed to regularly check the cooling system of the engine of the motor vehicle or to take reasonable measures to keep the engine cool. Both the Plaintiff and the Defendant had no evidence showing that the vehicle was checked for any mechanical defect prior to the journey to Murchison Falls National Park or prior to the hire. Secondly the Plaintiff's testimony is based on his experience as a motor vehicle driver since 1980. The testimony however does not demonstrate how the Plaintiff knew that the motor vehicle was spoilt or damaged or broken down on account of there being a problem with the cooling system due to lack of water owing to the negligence of the Defendant's servants. There is no evidence about how or whether water evaporated due to a radiator cap being missing. From the evidence it cannot be concluded that the Plaintiff's allegations or speculation about the cause of the breakdown of the vehicle was the truth or that there was any negligence on the part of the Defendant's servants. No expert witness was called and there is no report as to the cause of the defect in the vehicle. Moreover the evidence in cross examination of the Plaintiff is that the vehicle was a used vehicle which had been in use since 1991 and was in service for 15 years. That notwithstanding the burden of proof on the balance of probabilities was not met by the Plaintiff. There is no evidence as to the state of the radiator or the cooling system prior to the hire of the vehicle. The fact that the vehicle was regularly serviced by itself is not evidence of the mechanical condition of the motor vehicle prior to being hired. The only evidence is that the vehicle broke down after travelling about 300 km and that is when it started overheating.

Secondly after the vehicle broke down the Defendant incurred costs of hiring another vehicle to transport its guests and also incurred costs of bringing the Plaintiff's vehicle back to Kampala. I believe the testimony of DW1, the Chief Executive Officer of the Defendant that the Defendant

called the Plaintiff and requested him to pick the vehicle from the garage. The contentious issue seems to be whether it was the Plaintiff's responsibility to pay for the cost of the garage where the vehicle had been kept. However the additional evidence needed was the term of the contract on repair. The Plaintiff testified that he found that the vehicle had been dismantled without his consent. Was his consent necessary? There is no evidence of negligence on the part of the Defendant and that is no reason why the Defendant who was inconvenienced upon hiring a vehicle that did not do its job should also meet the costs of repairing the vehicle having incurred the additional cost of bringing it to Kampala and informing the Plaintiff of its whereabouts.

In my holding the kind of repair that was necessary was for repairs such as of tyres or minor repairs expected when a vehicle undertakes a journey and which may be charged on the Defendant. The Plaintiff in response to the information of the breakdown and garage where the vehicle had been taken inspected the vehicle but obviously could not pick it on account of some repair costs or costs demanded by the garage owners. The fact that the Defendant took the vehicle to its usual garage is not culpable but reasonable.

The suit is not about who should pay the repair costs or the costs of the garage. In the premises the Defendant is not liable for failure to return the vehicle because it had broken down and was in the garage. It had to first be repaired. There is no evidence whatsoever that the Defendant undertook to insure the vehicle against accident or damage as suggested by the Plaintiff's Counsel. No such duty can be implied on the Defendant. In any case insurance is for the benefit of the one who has the prudence to take out a policy against possible insurable risks.

Finally turning to the claim for daily hire, the contract of hire was frustrated. The vehicle was hired to transport tourists to visit sites in Uganda. The Defendant paid the Plaintiff hire charges for at least two days. The motor vehicle was not used beyond the two days already paid for. I am also satisfied that the Plaintiff knew that the Defendant dealt in the business of transporting tourists in Uganda and facilitating their stay. It is agreed by DW1 that the Plaintiff's vehicle had been used before by the Defendant. To the question in cross-examination put to the Plaintiff as to what he was using the vehicle for, he testified that it was for transporting tourists. To the question as to where it was taking tourists, he testified that it was to national parks. The payment voucher exhibit P1 shows that the vehicle was hired for a safari.

The purpose for which the vehicle was hired was to convey people in it. The Plaintiff pleaded that it was hired on a self drive basis. Whether it was hired on a self drive basis or also to be used to transport tourists in it is not material for purposes of establishing whether the contract remained enforceable or was frustrated.

The doctrine of frustration of a contract was applied in the case of **Krell vs. Henry [1903] 2 K.B 740**. This was an appeal from the decision of Darling J dismissing the Plaintiff's action for enforcement of a contract to rent a room. The trial judge held that the foundation of the contract

was that the Defendant wanted to watch the Coronation procession which had been fixed for a particular date from the vantage point of the rented room. However, the Coronation was postponed and the Defendant refused to pay for the room on that ground. The Defendant had paid a deposit for the room but did not take it up. The trial judge held that the Plaintiff was not entitled to recover the balance of the rent fixed by the contract and relied on the case of **Taylor versus Caldwell (1863) 3 B. & S 826**. On appeal to the Court of Appeal per Vaughan Williams L.J. discussed the principles of law in **Taylor versus Caldwell** when he said at page 748:

"where from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless, when the time of the fulfilment of the contract arrived, some particular specified thing continued to exist, so that when entering into the contract they must have contemplated such continued existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be considered a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor."

I agree to a certain extent that the principle discussed by Vaughan Williams LJ is applicable to this suit. It was in contemplation of the parties that the vehicle hired by the Defendant would be capable of doing its work of being driven from place to place. The essence of the contract was that the vehicle would be used by the Defendant to convey persons in it. When the vehicle broke down the Defendant could not use it for the purpose for which it had been hired. In the absence of negligence on the part of the Defendant's servants in handling the vehicle and in the absence of evidence that the vehicle was inherently defective at the time it was hired, the only hard fact is that the vehicle broke down and the Defendant managed to have it conveyed back to a garage in Kampala. The vehicle became a liability and not an asset. There is no evidence that the mechanical problem of the magnitude the vehicle incurred was supposed to be rectified by the Defendant under the hire arrangement. Simply put the purpose for which the vehicle has been hired was frustrated when it broke down. The vehicle was no longer of any use to the Defendant and the contract of hire was frustrated. According to **Osborn's Concise Law Dictionary Eleventh Edition page 195** under the doctrine of frustration a contract may be discharged if, after its formation, events occur making its performance impossible, illegal or radically different from that which was contemplated at the time it was entered into. D. J. Bakibinga writes in the **Law of Contract in Uganda** at page 172 that the essence of the doctrine of frustration is that the parties to a contract are excused from further performance of their obligation if some unexpected event occurs during the currency of the contract without the fault of either party. It is especially so if performance becomes impossible.

In this case performance became impossible because the hire of the vehicle was frustrated by the breakdown of the vehicle. I have already held that there is no evidence that either party was responsible for the breakdown. The onus is on the Plaintiff who did not discharge the burden to

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prove that the Defendant caused the vehicle to break down. This evidential burden was not discharged to the satisfaction of the court.

It was not in the contemplation of the parties for the Defendant to meet the repair costs of over Uganda shillings 2,560,000/= when the Defendant had only paid shillings 200,000/= for hire of the Plaintiffs vehicle for two days. The Defendant dutifully had the vehicle brought back to Kampala after it broke down. There is no evidence as to how long the hire was supposed to take in terms of days or hours. The parties were discharged from any further obligations under the contract and the Defendant could not hand over the vehicle as claimed but it was the duty of the Plaintiff to repair and take back his vehicle which he did not do.

In the premises the Plaintiff's suit has no merit and is accordingly dismissed with costs to the Defendant.

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

**Christopher Madrama Izama**

**Judge**

Judgment delivered in the presence of:

Priscilla Agoe holding brief for Counsel Richard Omongole Counsel for the Plaintiff

Plaintiff in court

Ogwang Sam Counsel for the Defendant

Defendant's official absent

Charles Okuni: Court Clerk

**Christopher Madrama Izama**

**Judge**

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

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