

**THE REPUBLIC OF UGANDA,**

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

**(COMMERCIAL DIVISION)**

**CIVIL SUIT NO 223 OF 2013**

**BAGUMA AUGUSTINE}.....PLAINTIFF**

**VS**

**NAMATOVU SUSAN}.....DEFENDANT**

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

**JUDGMENT**

The Plaintiff commenced this action against the Defendant for recovery of a Foden Tractor Head, the equivalent of a trailer, a 40 feet container, general damages for breach of contract, inconveniences and costs of the suit. The Defendant is the owner of a motor vehicle tractor head UAM 763V Foden. The Plaintiff's case is that it bought the truck from the Defendant and this was on the 8<sup>th</sup> of October 2011. It is averred that the parties agreed to have the vehicle sold to the Plaintiff at Uganda shillings 90,000,000/= whereupon the Plaintiff immediately paid Uganda shillings 28,000,000/= to the Defendant.

The Defendant in the written statement of defence denies liability and avers that she has never at any one time entered into a sale agreement for her Foden truck at 90,000,000/= Uganda shillings. She asserts that the Defendant hired the truck particulars of which are given the written statement of defence for a period of three months running from 8 October 2011 8 January 2012 for a consideration of Uganda shillings 45,000,000/=. It was further agreed between the parties that after three months, the Defendant would sell the truck to the Plaintiff. The Defendant prepared the sale agreement and called upon the Plaintiff to sign but in vain. The Plaintiff paid only Uganda shillings 48,880,000/=. Out of which 45,000,000/= was for hiring the Defendant truck and Uganda shillings 3,880,000/= was part payment for the anticipated sale.

The Defendant filed a counterclaim for general damages, special damages and an order that the Plaintiff returns motor vehicle chassis number SNFS 106T 01F 903473, engine number 3503243 when a body description of tractor head the red/yellow and a year of manufacture 2001 which the Plaintiff took to the Sudan and costs of the suit. The claim is that the Plaintiff hired her truck on 8 October 2011 at the consideration of Uganda shillings 45,000,000/= for three months which were to expire on 8 January 2012. Thereafter the Plaintiff bought the truck at US\$36,000 which when converted into Uganda shillings in the year 2011 and the month of October would amount to Uganda shillings 100,880,000/=. The Plaintiff only paid Uganda shillings 48,880,000/=. In March 2011 the Plaintiff called the Defendant and informed her that the truck that the Defendant had hired out to him was impounded by one Yel Deng Bol and sold by court order and a warrant of arrest had been issued against her. The Defendant claimed the truck back but the Plaintiff has refused to return the vehicle. In the premises she claims special damages for loss of income of Uganda shillings 24,000,000/= per month from 8 January 2012 until the vehicle is handed over to her. Secondly she prays for an order for the respondent to return the truck to her with interest at 25% per annum from 8 January 2012 until payment in full as well as general damages and costs of the suit.

In reply to the counterclaim the Plaintiff denies the claim and asserts that he purchased tractor head registration number UAM 763V chassis number SFNS 106T01F 903473 and engine number 3503 2423 model SFN 106T01 with a year of manufacture in 2001. The photocopy of the logbook was handed over to the Plaintiff at the time of the purchase. Furthermore acknowledgement of part payment was made by the Defendant. However the tractor head was together with the trailer auctioned off in the Republic of South Sudan in a civil suit the particulars of which are in the pleadings. Furthermore he asserts that the counterclaimant was a party to the court proceedings in the Republic of South Sudan and was aware of the execution proceedings. Furthermore the Plaintiff asserts that he paid Uganda shillings 55,000,000/= but the Defendant total dishonesty handed over to the Plaintiff's driver a different tractor head interchanging its number plates. He prayed that the counterclaim is dismissed with costs.

The Plaintiff is represented by Counsel Peter Kibilango of Messrs RM Ruhinda Advocates while the Defendant is represented by Counsel Mugabi Silas Kahima of Messrs Mwebesa & Co. Advocates.

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In the written joint scheduling memorandum some facts were agreed to by Counsels as follows:

A Foden tractor head was parked at Nakawa High Court and bears the number plate UAM 761V on the basis of a court order. Secondly the Defendant/counterclaim acknowledged receipt of only Uganda shillings 48,880,000/=. One Yel Deng filed a suit against the Defendant and one Byansi Ahamada in HCCS 478 of 2011 which was dismissed on 12 December 2012. The Plaintiff called two witnesses and the Defendant called three witnesses whereupon the court was addressed in written submissions. The basic facts can be discerned from the written submissions and a summary of evidence is contained in the resolution of factual controversies.

The Plaintiff's Counsel submitted that the Plaintiff's case and defence to the counterclaim are as contained in the joint scheduling memorandum dated 16<sup>th</sup> of September 2014 and filed in the registry on 17 September 2014. He adopted the facts in the joint scheduling memorandum which were in dispute and asserts that they are proven.

On the question of fact the Plaintiff's Counsel asserts that the tractor head which is white in colour and model SFNS 106T01F manufactured in 2001 was found at the Defendant's home as admitted in paragraph 16 of the amended written statement of defence and counterclaim.

On a preliminary point, a scrutiny of the Defendant's original written statement of defence compared with the amended written statement of defence discloses that the amended written statement of defence substantially changed the Defendant's pleadings in essential matters. Counsel relied on the case of **Eastern Bakery versus Castelino (1958) EA 461** for the holding that the court has no power to enable one distinct cause of action to be substituted for another or change by means of amendment, the subject matter of the suit. He further urged the court to consider principles for amendment of pleadings in the case of **Hilton versus Sutton Steam Laundry (1946) 1 KB 65 at pages 71 – 72**. He contended that the Plaintiff's Counsel originally conceded to the amendment on condition that the pleadings do not depart from the averment of the Defendant in the original written statement of defence that there was a sale and not a hire of the motor vehicle in question. Consequently Counsel objects to the amended written statement of defence because in paragraph 4 of the original written statement of defence, it is clear that the transaction between the Plaintiff and the Defendant was for the sale of the subject matter of the suit and the Defendant admitted part payment of Uganda shillings 48,880,000/=. In the amended

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written statement of defence the Defendant asserts that Uganda shillings 45,000,000/= was for hire and Uganda shillings 3,880,000/= was part payment for an anticipated sale. This is incompatible with her earlier pleadings on the court record. In the premises he prayed that all parts of the Defendant's pleadings which are essentially different in character from her earlier pleadings be expunged from the court record.

Furthermore the Plaintiff's Counsel submitted that this was intended to defeat the ends of justice. He relied on the authority of **Uganda Breweries Ltd versus Uganda Railways Corporation SCCA Number 6 of 2001** as well as the case of **Interfreight Forwarders (U) Ltd versus East African Development Bank (1990 – 1994) EA 117**. The above cases were quoted with approval by the Constitutional Court in **Busingye Fred Police versus Attorney General And Another (Constitutional Court Petition Number 24 of 2012)** at pages 9 and 10 of the judgment where Justice Oder JSC dwelt at length on the importance of pleading in every judicial system and evidence must be led to prove the issues averred in the pleadings.

As far as paragraph 16 of the Defendant's amended written statement of defence and counterclaim is concerned, the motor vehicle which was found at the Defendant's home is UAM 763V according to the particulars averred in the written statement of defence. However the witnesses of the Defendant alleged that there were four trucks she owned which were packed at a parking yard at Nalukulongo including vehicle number UAN 782 F which at that time was parked at Nakawa Uganda Revenue Authority premises for breach of customs laws. This was outside the pleadings and being a departure from centuries of principles on pleadings, it would whittle down the system of administration of justice if allowed.

Because the Plaintiff's Counsel raises a preliminary issue, I will first consider it and reference has first to be made to the Defendant's response to the preliminary point. Pleadings are fundamental to the way the judgment should further advance and preliminary matter of pleadings ought to be resolved first.

In reply to the submissions on the preliminary point, the Defendants Counsel submitted on the matter of departure in paragraph 16 of the amended written statement of defence. He submitted that there was a belated prayer for expunging from the record parts of the Defendant's pleadings which are essentially different in character from her earlier pleadings according to the Plaintiff's

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Counsel who has submitted that the amended plaintiff offends principles of pleadings. The Defendant's Counsels reply is that paragraph 16 of the amended written statement of defence should be read together with paragraph 15 and 17 thereof and in specific reply to paragraph 4 (f) of the plaintiff which is to the effect that investigations by Uganda police discovered that the Defendant exchanged number plates and the truck bought was parked at the Defendants home but vandalised with missing parts. From the evidence adduced, it can be discerned that there was a search conducted at the Defendants home by the police on or about 16 January 2013 whereupon truck engine number 9NS20196 and chassis number SFNA106T – 01F 903502, white in colour was seized from the Defendants home but this is not the truck the Plaintiff took to the Sudan and this truck was at the time bearing registration number UAM 761V. The Defendant denies interchanging the number plates and vandalising the truck.

It is further averred that upon the Plaintiff being requested to return the truck which was red/yellow in colour, with engine number 350 3423, chassis number SFNS106T01F903473 that was taken to the Sudan with wrong number plates of UAM 763V, and instead the police came to seize one of the trucks at the Defendants home that has never been taken on the road pursuant to a search warrant. This is an order not to be mistaken, to imply or relate to the Plaintiff's allegations of the truck being at the Defendants home as at either the time of inspection, alleged purchase or collecting of the same as Counsel for the Plaintiff is trying to insinuate. The proposition is misleading and untenable.

Notwithstanding the alleged admission does not in any way support the Plaintiff's claim that he purchased truck registration number UAM 763V or any other truck described in Plaintiff exhibit P1 which is the logbook for the motor vehicle registration number UAM 763V.

The submission that Counsel for the Defendant did not quote the particulars accurately is absurd and a pure assumption of the role of both Counsels. At the time of seizure by the police in January 2013, the truck had registration number UAM 761V and the Plaintiff claims that he was given a photocopy of the logbook exhibit P1 on the purchase whereas it was given on hire of the truck he took to the Sudan.

Counsel further submitted that the general principles laid out in the case of **Weinberger versus Inglis (1916 – 17) All ER Rep 843** in the judgment of Ashbury J that the court never orders the

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Defendant to give particulars of facts and matters which the Plaintiff has to prove in order to succeed and this is especially the case where a Defendant has confined himself to putting the Plaintiff to prove of the allegations in the statement of claim and the onus of establishing of which lies upon him. The prayer to expunge from the record parts of the Defendant's pleadings which are essentially different in character from her earlier pleadings is belated and misconceived. The record shows that at the time of granting leave to the Defendant to amend her WSD and counterclaim in HCMA Number 1073 of 2013, the Plaintiff's Counsel did not only consent to the amendments but chose to argue technicalities rather than the merits. On 14th of July 2014, the Defendant's written statement of defence and counterclaim was duly and properly filed in court to which the Plaintiff filed a reply on 13 August 2014.

As was observed in **Darcy vs. Jones [1959] EA 121**, the Plaintiffs remedy would have been to apply to strike out the offending parts of the Defendant's written statement of defence and counterclaim under Order 6 rules 18 of the Civil Procedure Rules either before or at the hearing. If a party omits to make the objection preliminarily, he cannot subsequently contend that the court ought not to have determined an issue which was open for decision on the pleadings as they stood.

The Defendant's Counsel further supported his submissions when the Kenyan case of **National Bank of Kenya Ltd versus Wilson Ndolo Ayah [2009] KLR** wherein was cited with approval the case of **Eastern Radio versus Patel [1962] EA 818** where Gould JA relied on an earlier decision of Collins MR to the effect that the writ as amended becomes for that purpose the original commencement of an action notwithstanding the fact that the writ originating claimed another sum. Upon amendment being allowed the writ as amended becomes the origin of the action and the claim thereon endorsed is substituted for the claim originally endorsed.

In the premises the Defendant's Counsel submitted that the prayers of the Plaintiff's Counsel should be rejected having been overtaken by events.

On the further submission of the Plaintiff's Counsel about departure of the defence by leading evidence not pleaded, the record is clear that the issue of motor vehicle registration number UAN 782F short landing sugar is not part of the Defendant's pleadings or. All the evidence of the Defendant's witnesses DW1, DW2 and DW3 are in line with the pleadings in regard to the

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questions raised by the Plaintiff's claims and therefore assertions of departure are misconceived and the authorities cited are inapplicable to the situation. The Plaintiff's Counsel has not demonstrated which part of the witness testimonies offends the rules or departs from the pleadings. Paragraph 16 of the written several defence complained about cannot be read in reservations and ought to be read together with paragraphs 15 and 17 because they are in reply to paragraph 4 (f) of the plaint and specifically to allegations of vandalism, findings of interchange of number plates, seizure by the police of the White truck that has never been on the road.

The evidence of DW1 is unchallenged and shows that the vehicle alleged to have been bought by the Plaintiff has never been on the road and it was at all material times parked at Nalukulongo up to the end of 2012. The piece of evidence is corroborated by the unchallenged evidence of DW2. It is also supported by the evidence of DW3.

Furthermore the Defendant's Counsel contends that the evidence of the Defendants is admissible evidence based on the holding of the Supreme Court in **JK Patel versus Spear Motors [1993] 1 KALR 40**. The holding is to the effect that a defence not pleaded but adduced in evidence and not cross examined upon is impliedly admitted and it is too late at this stage to raise an objection as to admissibility.

The Defendant's Counsel contended that the Plaintiff's Counsel ought to have objected to the defence before adducing any evidence in the matter but there was no objection instead the evidence of DW1 and DW2 on the matter was subjected to cross examination.

In rejoinder on the question of pleadings the Plaintiff's Counsel submitted that the application for amendment of the written statement of defence was dismissed with costs. This was in HCMA Number 1003 of 2013. Subsequently the Plaintiff's Counsel did not object to the amendment of the written statement of defence provided the essential character of the defence was not changed. For that reason the authorities cited by the Defendants Counsel (the Kenyan authorities) are foreign authorities and not binding on this court. They are not persuasive authorities on the requirement to plead facts and causes of action before the proof.

Secondly the authorities of **Uganda Breweries Ltd versus Uganda Railways Corporation; Interfreight forwarders (U) Ltd versus East African Development bank** and that of

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**Busingye Fred Police versus Attorney General** were not distinguished by the Defendant's Counsel. Consequently the relevant principles of law to be applied are in the above authorities. Furthermore the Plaintiff's Counsel submitted that every judicial system in the world is premised on pleadings whose object can be discerned from various authorities some of which were supplied to this court. Counsel reiterated submissions on that point. The Defendant relied on the Supreme Court authority in **JK Patel versus Spear Motors (1993) EA 40** that a defence not pleaded but adduced in evidence and not cross examined upon is impliedly admitted by the Plaintiff. The decision was reached per incuriam and has not much jurisprudential value. There was no requisite quorum of three justices as required in hearing and determining appeals by the Supreme Court. Counsel further reiterated that the language the Defendant used in testifying that the tractor head costs US\$50,000 but they let it go for US\$36,000 is plain. The motor vehicle which was the subject of the money lending agreement between the Plaintiff and a Chinese moneylender and later on the subject of the transaction between the Plaintiff and the Defendant is undisputedly UAM 763 V.

#### **Resolution of preliminary point on pleadings**

I have carefully considered the previous written statement of defence of the Defendant as well as the amended written statement of defence. The starting point for analysis is an examination of what was amended. The amendment of the written statement of defence of the Defendant proceeded by consent of Counsel on 7 July 2014. The record shows that there were discussions between Counsel and the court presided over the discussion whereupon the Plaintiff's Counsel agreed that the written statement of defence of the Defendant is amended to the extent conceded to in the letter of the Plaintiff's Counsel dated 2<sup>nd</sup> of July 2014 and which had been filed on the court record the previous day. It was recognised that the Plaintiff would have an opportunity to file a reply to the amended written statement of defence. The letter of the Plaintiff's Counsel was filed on court record on 3 July 2014 and writes inter alia as far as a concession to the amendment is concerned as follows:

"... Our client does not object to the insertion of the payment of Uganda shillings 48,880,000/=. He however, maintains that it was for purchase not hire and is not hereby prejudiced from proving that he paid to your client Uganda shillings 55,000,000/= only.



As regards the partial particulars of the motor vehicle reflected in paragraph 5 of the Defendant's intended written statement of defence and counterclaim, our client would not object to the insertion of those particulars in your client's pleadings only, without any reference to allegations of hiring. He maintains that those particulars were neither availed to him nor his driver at the time of receipt of the said Tractor Head.

Our client would not object to the insertion of the fact that the Defendant was shown a copy of the warrant of arrest against her, as reflected in paragraph 12 of the Defendant intended written statement of defence and counterclaim.

You can therefore have it incorporated in your client's pleadings. We seek your timely cooperation bearing in mind that the subject matter is depreciating every moment that passes by, the possible disappearance of some of the parts of the motor vehicle whose registration number is UAM 763V, Engine Number No. 9NS20196, Chassis No. SFN 106T – 01F903502 Model 2001, currently being preserved at the High Court premises at Nakawa.

In a nutshell save for that which is herein expressly conceded to, the Plaintiff objects to the amendment of the rest of the pleadings."

There was a compromise in which part of the amended written statement of defence was conceded to whereas the rest was objected to. I have looked for a copy of the amended written statement of defence pursuant to the order of the court allowing the amendment to the extent conceded to by the Plaintiff's Counsel. I have found no amendment subsequent to the application itself filed on court record. What is on record it is a reply to a purported amended written statement of defence filed by the Plaintiff's Counsel on 13 August 2014. The order of the court had explicitly given the Defendant seven days within which to file an amended written statement of defence. I have carefully perused the record and there is no amended written statement of defence filed pursuant to the order of the court. What is on the court record is an intended amendment of the defence and counterclaim pursuant to a letter of the Defendant's Counsel a copy of which was filed on the court record on 17 June 2014. In that letter addressed to the Plaintiff's Counsel, the Defendant's Counsel attached the intended amended written statement of defence and counterclaim dated and endorsed on 16 December 2013 by the Defendant's Counsel.

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That notwithstanding the Plaintiff replied to the proposed amended written statement of defence and counterclaim on record and I see no prejudice to either party as the suit proceeded on the premises that the defence and counterclaim had been amended by consent of the parties.

The crux of the Plaintiff's objection to the Defendant's defence is the averment that the motor vehicle was the subject of a hire agreement and not that of a sales agreement. Paragraph 5 of the amended written statement of defence avers as follows:

"That in reply to paragraph 4 (a) of the plaint the Defendant has never at any time entered into any sale agreement or sale of her Foden truck at 90,000,000/= as alleged by the Plaintiff. The Defendant just hired her truck of particulars chassis number ..... model 2001 to the Plaintiff for a period of three months running from 8 October 2011 to 8<sup>th</sup> of January 2012 for a consideration of Uganda shillings 45,000,000/=. A copy of the logbook is attached and marked "A".

Whereas the Plaintiff's Counsel never objected to the amended paragraph 5 by inclusion of particulars of the truck the subject matter of the transaction between the parties, he objected to any allegation of hiring of the vehicle and there was no permission or leave of the court to amend the written statement of defence by including facts which were contrary to the previous written statement of defence. Going back to the original written statement of defence and counterclaim and particularly paragraph 4 thereof, the Defendant in the written statement of defence filed on court record on the 20<sup>th</sup> of May 2013 averred as follows:

"In reply to paragraph 4 the Defendant denies each and every allegation and only states that the gist of the matter emanated from the nature of the transaction both parties entered in. The Plaintiff was supposed to pay the tractor in issue in periodic terms and on rental basis of which he failed. Parties verbally agreed that the Plaintiff guarantees to the seller that since he was already a transporter cross borders who would take away the same tractor on every carriage and the money would be constituted into as part payment on total consideration of the tractor and deductions will be made until the total consideration is fully paid and the Defendant would in turn execute an agreement with the Plaintiff and hand over the logbook and signed transfer forms but everything came at a standstill when the Plaintiff totally failed and had only remitted 48,000,000/= to the Defendant. The

Defendant shall aver that on the last route the Plaintiff took the said tractor and up to now he has never returned it neither completed the payment."

Notwithstanding the above state of pleading of the Defendant's written statement of defence, the facts in support of the written statement of defence are very explicit. In the summary of facts it is asserted that the Plaintiff took the vehicle no UAM 761 and out of the total consideration of 108,000,000/- he only paid 48,000,000/=.

I have carefully considered the Plaintiff's preliminary objection based on the state of pleadings. Counsel for the Plaintiff contended inter alia that the Plaintiff conceded to the amended written statement of defence on the ground that they should not mention the word "hire". He insisted that in the original written statement of defence, the original transaction admitted by the Defendant was that it was a sale. I do not agree. The original transaction admitted to rentals and payment in instalments and an agreement of sale which was supposed to be executed by the parties. Secondly in the summary of facts it is asserted that evidence would be led to show that the Plaintiff took the vehicle and only paid 48 million for UAM 761V. It was merely a question of drafting by the Defendant's Counsel which ought not to prejudice the Defendant from asserting that the transaction was one of hire. Apart from the identity and description of the vehicle, it was very much in contention whether the transaction between the parties is one of hire or purchase of the subject matter of the suit. This controversy arises from the original written statement of defence. Specifically Order 6 rule 2 of the Civil Procedure Rules provides that "every pleading shall be accompanied by a brief summary of the evidence to be adduced, a list of witnesses, and a list of documents and a list of authorities to be relied on". The evidence to be led has to be consistent with the pleading. The written statement of defence averred that payment would be paid in instalments over a period of time. It is after all deductions are paid that an agreement would be executed. The use of the work hire is more like that of hire purchase. This coupled with reference to rentals in paragraph 4 of the written statement of defence gives a reasonable inference and conclusion from the pleadings that the question of whether the transaction in question was one of hire or purchase of the vehicle, the subject matter of the suit, is in controversy. On that basis the preliminary objection of the Defendant's Counsel is not tenable. In any case under section 57 of the Evidence Act Cap 6 laws of Uganda, where there is an admission of facts, the court can order that the facts be proved otherwise than in such admission.

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Obviously the Defendant having proposed to adduce evidence of failure to pay the agreed amount cannot be said to have unequivocally admitted that the Plaintiff entered into a transaction of sale of her vehicle. She did assert that the nature of the transaction generated the problem. The wording of the written statement of defence leaves a lot to be desired and this is purely a problem with the Defendant's Counsel's who have since withdrawn from the conduct of the Defendants defence. Thereafter the Defendant got other lawyers who also withdrew from the conduct of the Defendant's defence. The record shows that several attempts had been made by the second Defendant's Counsel to have the written statement of defence and counterclaim amended. The preliminary objections of the Plaintiff's Counsel are accordingly overruled. The court will proceed to determine the nature of the transaction from the evidence adduced in court and not through a purported admission that does not unequivocally admit that there was a sale of the subject matter of the suit. The matter in issue is highly contentious and shall be considered from the evidence.

This suit originally proceeded ex parte when the Defendant and her Counsel did not turn up and the Plaintiff called one witness PW1 Mr Baguma Augustine. Submissions were to be in writing and the suit was fixed for delivery of judgment. In Miscellaneous Application Number 1146 of 2014, the Defendant applied for an order to set aside the ex parte proceeding. The application succeeded and the suit was fixed for cross examination of the Plaintiffs witness as well as opening of the defence. The court reserved the reasons for granting the application for the main judgment and these are the reasons. The main ground for reopening the suit was that the Defendant had appeared on several occasions with the intention of proceeding with her defence but had problems with previous Counsel in the conduct of her defence. In any case the matter proceeded ex parte and she subsequently appeared to conduct her defence. In the case of **Kanyabwera v Tumwebaze [2005] 2 EA 86** (SCU) the Supreme Court held that Order 9, rule 17(1) (a) (which is the revised Order 9 rule 20 (1) (a)) which permits a Plaintiff to proceed ex parte in the absence of a Defendant when the suit is called for hearing was not intended to allow a party to have indefinite ex parte hearings without making the other party aware. In other words the law is that when the suit proceeds ex parte due to the absence of the Defendant, the Defendant is entitled to notice of any further and subsequent hearings. In this case I directed that the Plaintiff serves the Defendant with the written submissions. However the Defendant applied

to set aside the ex parte proceeding after instructing new Counsels. Furthermore the hearing proceeded by way of written witness testimony of the Plaintiff when the Plaintiff closed its case and the matter proceeded to the stage of the Plaintiff filing of written submissions in the absence of the Defendant. I saw no prejudice to the Plaintiff if the Plaintiff's case was reopened as I ordered for purposes of cross examination of the sole witness of the Plaintiff and giving the Defendant a chance to present her defence which she has all along been trying to do. A Defendant who has interest in defending the suit should not be shut out from the seat of justice. The Plaintiff can be compensated by an award of costs for the extension of time to permit the Defendant present her defence.

Consequently the hearing progressed with the Defendant's participation and the Plaintiff called two witnesses namely the Plaintiff himself and Mr Tumanye Julius as PW2. Both witnesses were cross examined while the Defendant called three witnesses namely the Defendant herself, Mr David Kayongo DW2 and DW3 Mr Andrew Kostrowski, husband of the Plaintiff.

Two issues were agreed for resolution of the dispute namely:

1. Whether there was a contract for the hire or sale of motor vehicles registration number UAM 763V tractor head Foden or UAM 761 V?
2. Remedies available to the parties?

**Whether there was a contract for the hire or sale of motor vehicle registration number UAM 763V tractor head Foden or UAM 761 V?**

There are two controversies which are locked up in the first issue and this is whether there was a sale or hire of the subject matter of the suit. Secondly there is an issue of the identity of the subject matter of the suit as to whether it is motor vehicle registration number UAM 761 V or UAM 763V. The controversies disclosed mixed questions of fact and law. There are questions of fact in relation to the documents of the transaction and the testimonies concerning the nature of the transaction as well as the identity of the subject matter of the transaction between the parties. The matters of law relates to interpretation of the facts and documents.

Controversies for trial must be based on the rules of pleadings and arise from the pleadings of the parties and are determined as directed by Order 15 rule 1 of the Civil Procedure Rules. An issue

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or controversy is a material proposition of fact or law asserted by one party and denied by the other. The Plaintiff's action is for recovery of a tractor head whose particulars have been given, the equivalent of a trailer which is 40 ft, a container and general damages for breach of contract and inconvenience and costs of the suit. The facts asserted by the Plaintiff in the plaint are that on 8 October 2014 he agreed with the Defendant to purchase the suit vehicle. By June 2012 he had paid to the Defendant Uganda shillings 55,000,000/= leaving a balance of Uganda shillings 35,000,000/= out of a total of Uganda shillings 90,000,000/= comprising the total consideration. The Plaintiff further averred that the Plaintiff's driver collected another truck when he sent him to collect the vehicle after they had reached a deal with the Defendant. The truck had number plates of a white truck which he had bought. He prayed inter alia for surrender of the motor vehicle.

On the other hand the Defendant accepted that the Plaintiff hired a truck for three months at a consideration of Uganda shillings 45,000,000/= with effect from 8 October 2011 up to 8 January 2012. The Plaintiff paid Uganda shillings 48,880,000/= and only part paid Uganda shillings 3,880,000/= over and above Uganda shillings 45,000,000/= which catered for the hire of the vehicle for three months and the Uganda shillings 3,880,000/= was payment towards the purchase of the vehicle.

I have carefully considered the controversy relating to the identity of the subject matter of the suit in terms of its registration numbers. I will duly consider the evidence and in the meantime some basic conclusions can be reached on the nature of the transaction. The first conclusion is that the Plaintiff had a transaction in relation to a particular vehicle irrespective of its registration numbers which numbers have become controversial.

The second conclusion is that the Plaintiff took possession of a particular truck but claims that he was given a wrong truck. This particular truck is said to have been impounded in South Sudan while in the custody of the Plaintiff and subsequently sold off.

Controversy has arisen as to what the parties agreed to in terms of the registration number of the tractor head the subject matter of the transaction as well as the colour of the truck.

I have duly considered the written submissions of Counsels on issue number 1 and the conclusion is that the issue as far as matters of fact are concerned can be resolved from the

evidence. The submissions are on record and I need not refer to them in evaluation of evidence on factual controversies. The issue is whether there was a contract for the purchase or hire of motor vehicle registration number UAM 763V or UAM 761V tractor head Foden and I will proceed to resolve the matter from the evidence assessed from the testimony of the witnesses and documentary exhibits.

Exhibit P3 is an acknowledgement of Uganda shillings 28,000,000/= dated 8<sup>th</sup> of October 2011 wherein the Defendant acknowledges receipt of Uganda shillings 28,000,000/= from the Plaintiff. The wording of the acknowledgement is that it is a deposit for a contract to be finalised on 10 October 2011 for a Foden truck. The only controversy is whether the particulars of the truck were given in the acknowledgement. Exhibit P3 has a handwritten registration number written next to the signature of the Plaintiff for truck registration number UAM 763V at the bottom of the acknowledgement. On the other hand the Defendant adduced in evidence exhibit D1 which does not have the particulars of the vehicle as reflected above. There is no proof that the particulars of the vehicle were written at the time and date of the acknowledgement. The evidence adduced is consistent with the fact that the particulars of the vehicle were inserted afterwards and in a different handwriting from that of the person who wrote the acknowledgement. The acknowledgement was admittedly written by the Defendant's husband Mr. Andrew Kostrowski.

That notwithstanding the acknowledgement of Uganda shillings 28,000,000/= also includes a writing that the deposit is for a contract to be finalised in two days time. From 8 October 2011 two days time would be 10 October 2011. The nature of the contract is not indicated in the acknowledgement.

The second question for investigation is which vehicle was handed over or taken by the Plaintiff? Secondly was the contract mentioned in exhibit P3 ever consummated? What was the nature of the contract?

PW1 who is the Plaintiff testified in writing and was also cross examined on his written testimony. In paragraph 5 of the testimony he testified that the vehicle was parked at Bunga in early September 2011. By 29 October 2011 he had paid Uganda shillings 31,500,000/=. Finally by 30 June 2012 he had paid Uganda shillings 55,790,000/=. His testimony in chief is that he

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sent his driver to pick the truck in early February 2012. The tractor head was subsequently impounded at the border in the Southern Sudan. The number plate on the tractor head which he had taken was UAM 763V which was not the number plate of the truck. He among other things advised the Defendants to travel to Sudan to sort out the problem. A default decree was issued against the Defendant and the vehicle had been impounded in the Sudan. He demanded the handover of the vehicle whose number plate is UAM 763V which could be UAM 761V due to an interchange of numbers.

PW1 was cross examined and testified that he met the Defendant for the first time in late September 2011 and he inspected the subject matter of the suit in early October 2011. It was white in colour. The engine was sound/good. He was given a photocopy of the logbook when he made the payment. He picked the truck that was impounded later in January 2012. His driver who picked the car was given a different vehicle but with the same number plates. The vehicle was hired from him by one Michael Mathiag and the contract thereof is dated 15<sup>th</sup> of February 2012. The contract exhibited indicates that it was for vehicle number UAM 763V/RL0376. PW1 was cross examined about the colours of the vehicle that he bought or hired from the Defendants. He testified that the colours were eventually yellow. The contract dated 15<sup>th</sup> of February 2012 by which he hired the vehicle out to another person is exhibit D1. The vehicle was impounded in March 2012 while in the Sudan and the driver was also put in custody and released after four or five days. The last payment made to the Defendants was in June 2013. He further testified that he did not look at the colours of the truck when his driver took the vehicle to the Sudan. He identified the truck by numbers plates. The impounded vehicle had registration number UAM 763V in the logbook particulars thereof.

PW2 one Julius Tumanye, a broker testified inter alia that he works as a broker and he connected the Plaintiff and the Defendant after the Defendant and her fiancée approached him for purposes of getting a market for their truck. He arranged a meeting at Bunga and witnessed the purchase of the vehicle. He signed the acknowledgement of receipt of money exhibit P3 or exhibit D1 and it was for motor vehicle UAM 761V red/yellow in colour with a year of manufacture as 2001.

PW2 was cross examined whereupon he testified that the Defendant was a resident of Bunga. The truck was a Foden Truck registration number UAM 763V white in colour. The Defendant



has since left her place of residence in the Bunga and at the time of the testimony he did not know her residence. He did not know whether the contract which was to be finalised according to exhibit P3 and dated 8<sup>th</sup> of October 2011 was actually consummated or finalised. He further testified that the truck of the Plaintiff UAM 763V was hired to a Sudanese national and he witnessed the agreement dated 15<sup>th</sup> of February 2012.

On the other hand DW1 who is the Defendant testified that in October 2011 the vehicles were parked at Bunga. Furthermore Julius Tumanye with Andrew Kostrowski (her husband) secured a parking lot for the trucks at Nalukulongo. Tractor head registration number UAM 761 V white in colour could not start because it had the problem with its computer system pursuant to steam washing and was towed to Nalukulongo parking yard. According to him the Plaintiff hired the truck which was the red/yellow in colour for a period of three months at Uganda shillings 45,000,000/=. On 8 October 2011 they went to Kitgum house to certain Chinese moneylenders and the Plaintiff was handed over the truck the same day. The Plaintiff had agreed to purchase the truck after some time at a sum of US\$36,000. However he later came and informed the Defendant that the truck had been impounded in the Sudan. The Plaintiff hired UAM 761V red/yellow in colour. She did not have the facts or circumstances where the number plates of the vehicles could have been switched with that of another tractor head. On cross examination she testified that she got to learn that the vehicle had wrong number plates in March 2012 after being informed by the Plaintiff. The car mortgaged to the moneylenders was UAM 761V red/yellow in colour. She handed over the logbook to the lender but does not remember the numbers. On further cross examination she recalled that the number on the red/yellow truck was UAM 763V. She handed over the vehicle to the moneylender. The vehicle had been parked with the Chinese moneylenders. The actual vehicle whose number plate was UAM 763V was packed at Nalukulongo. On further examination she testified that there was a contract for hire. The Foden white in colour had the registration number UAM 763V, secondly the vehicle with the Chinese moneylenders was supposed to be having the registration number of UAM 761 V red/yellow in colour. She had taken the Plaintiff at the Chinese parking yard to inspect the white vehicle before. The cost of the vehicle was US\$50,000 and they let it go to the Plaintiff at US\$36,000.

DW2 Mr David Kayongo, an employee of Broadway's company Ltd, a company engaging in the business of parking yard and mechanical services was in charge of the parking yard at

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Nalukulongo. He testified that four trucks were parked by Andrew Kostrowski. One vehicle was red/yellow in colour. Another was white in colour and another blue/white in colour. Three trucks were driven to the parking yard while another one was towed by breakdown. Spare parts were removed from it. Furthermore Andrew Kostrowski removed spare parts from the broken down vehicle. He hired one Julius Tumanye to fix them back and that is when the number plates were switched by Julius Tumanye. He remembered that the truck with the switched number plates UAM 763V was driven away together with two other trucks.

Lastly DW3 Mr Andrew Kostrowski who is also the husband of the Defendant testified that he imported five trucks of the same make as the subject matter of the suit with a ton of new and used spare parts. The trucks were registered in the names of his wife, the Defendant and initially parked at their home in the Munyonyo before they shifted to Bunga. He introduced the Plaintiff to his wife. He contacted Julius who got him the parking yard in Nalukulongo where he eventually parked all the 4 trucks. Three of the trucks were operational while a motor vehicle number UAM 763V, white in colour was not operational. The number plates were interchanged with the one which was towed to Nalukulongo. That vehicle was damaged and cannot move. He dismantled it and all the tyres were removed. He dealt with the Plaintiff around September 2011 after his Leyland truck broke down on a trip to Kenya and Tanzania. The Plaintiff developed a liking for the red/yellow Foden truck registration number UAM 761V before the number plates were interchanged. In October 2011 the Plaintiff wanted to hire the truck and go to Malawi. He re-sprayed the bumpers. In the course of which number plates were interchanged. Thereafter the truck was driven to Soya in Makindye. He all along believed that the car had the right number plates. The Plaintiff wanted to hire the red/yellow truck at 45,000,000/= for a period of three months. On 8 October he paid 28,000,000/= to certain Chinese moneylenders where he had parked the vehicle. It was agreed that a formal document would be executed on 10 October 2011. However the Plaintiff took the truck to South Sudan instead of Malawi. It was not until January 2012 that he saw the truck parked at Bugolobi. He discovered that the truck was not insured comprehensively and only had third-party insurance. The truck was in a bad condition with a leaking radiator and faulty electrical system. The airbag system was also faulty and the springs broken. The initial three months period expired and the Plaintiff kept on paying in small instalments. The truck was impounded at the end of March 2012 three months after the truck had

been found at Bugolobi. The truck had been impounded by one Sudanese national by the names Yel Deng. The Plaintiff went to South Sudan several times to obtain a release of the truck. Another civil suit HCCS number 478 of 2011 Yel Deng vs. another Defendant and Namatovu Susan was filed in the High Court and was dismissed. The Plaintiff claims to have purchased UAM 763V white in colour but this is untrue.

Upon his cross examination he confirmed that the vehicle that had been mortgaged to the Chinese moneylenders was orange in colour. He wrote the acknowledgement exhibit P3. The contract was never finalised and he still had the draft copy of the contract in his computer. The main reason for impounding the vehicle was not the number plates. He gave the Plaintiff Uganda shillings 5,000,000/= to follow up the case in the Sudan. Furthermore the Defendant gave lawyers powers of attorney to follow up the matter. The vehicle which the Plaintiff took was orange. The power of attorney had numbers of the truck which numbers were on the truck.

I have carefully considered the testimonies and documentary evidence on the first issue and have come to the following conclusions on matters of fact. The logbook for motor vehicle UAM 761V shows that the tractor head it relates to is red/yellow in colour. It is registered in the names of the Defendant. All the testimonies are consistent with the fact that this red/yellow tractor head was the truck the Plaintiff took custody of pursuant to the acknowledgement exhibit P3 in which the Plaintiff paid Uganda shillings 28,000,000/= on the 8<sup>th</sup> of October 2011. The logbook of the said vehicle is exhibit P2. Instead of having its correct number plates, it had fixed on it the number plates of the tractor head registered as UAM 761V which according to its logbook exhibit P1 is lawfully registered as UAM 763 V and is white in colour. The Plaintiff took to the Sudan a truck which is red/yellow in colour.

Secondly according to the transport agreement exhibit D1 and dated 15<sup>th</sup> of February 2012, the Plaintiff hired out to one Mitchel Mathiag of Free South for Free Trade and Investment Company Ltd a vehicle registration number UAM 763V/RL0376 21 to transport mixed goods weighing 50 tons from Kampala to South Sudan at the cost of Uganda shillings 27,000,000/=. The clearance of the goods was supposed to be done by the Plaintiff. The conclusion is that the truck the Plaintiff had possession of had false number plates UAM 763V and the actual physical colour of the truck the number plates were imposed on is red/yellow.

The above conclusion on matters of fact from the evidence is further consistent with the Plaintiff's testimony that the vehicle which he took to the Sudan had wrong number plates. However, the Plaintiff took a physical vehicle and not number plates as such. He took a vehicle bearing false number plates. He testified that he did not inspect the vehicle before he took possession of it and it went into the Sudan. This evidence is contradicted by the testimony of Andrew Kostrowski the owner of the vehicle who testified that he saw the truck in question at Bugolobi in Kampala. Secondly the Plaintiff testified that he did not take the vehicle until February 2012. The rest of the witnesses testified that the vehicle was handed over to the Plaintiff after he paid Uganda shillings 28,000,000/=. The Plaintiff had inspected the vehicle. I believe this testimony because the Plaintiff took a vehicle which was a red/yellow in colour whose number plates are supposed to be UAM761 V. I do not believe the testimony that the vehicle was supposed to be white in colour. It is incredible to pay for a vehicle which is white in colour and take to another country a vehicle which is red/yellow in colour. Furthermore it is incredible for the Plaintiff to take possession of a truck and then hire it out without knowing its colours. I believe the testimony that the number plates of the vehicle were only switched. Without dwelling into the legalities of switching of number plates, the Plaintiff's transaction related to a tractor head vehicle red/yellow in colour engine number 3503 2423 with a chassis number SFNS106T01F 903473 which he knew about by the time he hired it for business.

Secondly the agreement of the parties was in respect of the truck without reference to the number plates. In fact exhibit P3 which is the acknowledgement of receipt of Uganda shillings 28,000,000/= by the Defendant and her husband purports to have motor vehicle registration number UAM 763V. However the evidence has revealed that it is such a vehicle registration number plate which was put on a truck which was taken to South Sudan. The evidence is also consistent with the fact that those number plates belonged to a separate vehicle and not the vehicle taken to South Sudan. In other words the vehicle that went to South Sudan was a red/yellow in colour and had number plates of a vehicle which according to the logbook is supposed to be white in colour. However the Plaintiff dealt in a vehicle with red/yellow colours and not the one which was white in colour. He took possession of the vehicle that he had agreed to with the Defendant's husband. I do not believe that the Plaintiff could have entered into a transaction to hire out a vehicle which he describes in exhibit D1 as his vehicle without knowing

the colours of the vehicle. His dealing with the Defendant's husband is concerned with a vehicle which bears red/yellow colours. For emphasis he knew that he took possession of a vehicle bearing red/yellow colours and he also hired it out to a Sudanese national with full knowledge of the colours. Having taken the vehicle he had a deal with from the Defendant he cannot turn round and claim that he actually had a transaction relating to a different tractor head than the one he took possession of. Moreover number plates of a vehicle are only identity tags for a vehicle. An invalid identity tag might have been used. That does not change the nature or particulars of the physical vehicle which are described among other things by the engine and chassis numbers and the colour of the vehicle. Such particulars cannot be changed without permission of Uganda Revenue Authority or the licensing officer.

Moreover even ownership of a vehicle is not necessarily determined by possession of the log book. The log book is merely prima facie evidence of the particulars of the truck. When dealing, a dealer checks the actual physical vehicle and the number plates are just a smaller detail. The particulars of the vehicle are checked on the vehicle itself. A vehicle can be re-registered and is described by the make, chassis number model, colours etc. For illustrative purposes and in the case of **Matayo Musoke v Alibhai Garage Limited [1960] 1 EA 31** it was held that even the log book of a vehicle is not a document of title following the decision of the Court of Appeal of England in **Central Newbury Car Auction Ltd. v. Unity Finance Ltd. and Another (Mercury Motors third parties) [1956] 3 All ER 905**. In Uganda and under section 9 of the Traffic and Road Safety Act Cap 361, a certified copy of an entry in a register is prima facie evidence of the facts contained in it. The evidence can be led to show it is a different vehicle. The log book for UAM 763V did not have the particulars of the red/yellow tractor head.

In this particular case the Plaintiff ought to have relied on the particulars of the vehicle itself. He could not have taken the number plates per se but he took possession of a vehicle which he knew. In any case the driver who picked the vehicle acted as his agent and he is bound by the acts of the driver. The driver picked a red/yellow truck on behalf of the Plaintiff. The Plaintiff went ahead to hire the truck out and never raised the question of its colours until the vehicle was impounded. By June 2012 after the vehicle was impounded he kept on paying the Defendant. There is no written agreement anywhere indicating which description of truck in a log book the parties agreed to. In the premises it is not necessary to conclude on which number plates the

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Plaintiff dealt in. The court can validly conclude which vehicle the Plaintiff dealt in with the Defendant by the description of its physical attributes such as the colour. The conclusion is that it was a red/yellow tractor head Foden make whose real registration is supposed to be UAM 761 V.

The second factual controversy about whether the transaction was one of hire or purchase? On this issue there is no documentary evidence by way of an agreement. I agree that exhibit P3 is to the effect that by 8<sup>th</sup> October 2011, the parties were supposed to execute a contract two days later. The nature of the contract is not in writing. From circumstantial evidence the Plaintiff continued to pay money in piecemeal. To make the matter more complex DW1 conceded that the Plaintiff intended to purchase the vehicle at the cost of US\$36,000. The question therefore is whether this was a transaction of sale or hire. The Defendant's case is that it is both a hire and an intended purchase situation. There is only one legal term in such an arrangement and it is called hire purchase. The purchaser does not get title until after payment of the last instalment. On the other hand the Plaintiff claims to have entered into a contract of purchase. There is no written agreement to this effect.

I have carefully considered the issue and its effect and conclude that I need to deal with a more fundamental question first and this is as to what result can be achieved in light of the conclusion of the court that the vehicle that was driven to Sudan was impounded. For the moment, none of the parties have possession of the vehicle and there is no evidence that the Plaintiff or Defendant has control over the vehicle.

It is not a controversial fact that the vehicle that the Plaintiff took to the Sudan was impounded and the question is whether it was subsequently sold. If the court holds that there was a contract of hire of the vehicle for a period of time, after February 2012, that contract was frustrated because the vehicle was impounded and allegedly sold to other third parties. If there was a contract to purchase the vehicle, again that contract was frustrated by third parties because the purchase price was not completed and there is no written contract as to when the right of possession or transfer of title would occur. To make the situation more complex the Plaintiff does not claim the vehicle which he took to the Sudan but claims another vehicle according to the plaint. The Plaintiff is for recovery of MV UAM 763V Foden white in colour. I have already

ruled that the parties deal in MV 761 V Foden which proceeded to South Sudan and was impounded by third parties.

There is no evidence that the Plaintiff deliberately caused the impounding of the vehicle and its subsequent sale and the testimony of DW3, the husband of the Defendant that the Plaintiff is involved in the impounding and sale of the truck is pure conjecture and not supported by any evidence. In the premises there is no need to refer to the extensive submissions of both Counsels on this question. The vehicle which the parties dealt in was impounded in South Sudan and none of the parties to this suit has managed to retrieve it. To make it even more complex, there is no evidence that the vehicle was in the custody of the Government of Sothern Sudan or any Government corporation on the ground that it bore false registration number plates.

It was suggested that the vehicle was impounded and sold through court action. I find no evidence that it is either the fault of the Plaintiff or Defendant. The power of attorney exhibit P4 which is dated 8<sup>th</sup> of May 2012 explicitly indicates that even the Defendant made efforts to retrieve the vehicle. In her power of attorney she indicates that the vehicle had been hijacked and the lawyer one Ahmed Elmukhtar Ibrahim was appointed as an agent to retrieve the vehicle and institute all necessary steps either civil or criminal to recover it. DW3 Andrew Kostrowski also testified that he gave the Plaintiff money to facilitate him travel to South Sudan and in an effort to retrieve the vehicle. The vehicle the subject matter of the transaction is not available to either party despite the concerted effort of both parties to retrieve it.

Remedies:

The Plaintiffs action in the plaint is for recovery of a white vehicle. From the evidence above this suit for recovery of the motor vehicle cannot be granted because the actual motor vehicle the parties dealt in was impounded and sold in South Sudan.

Furthermore the Plaintiff's Counsel submitted on entitlement to a refund of Uganda shillings 55,000,000/= in the event the court does not grant an order for specific performance of the contract in relation to tractor head registration number UAM 763V with a purchase price of Uganda shillings 90,000,000/= then equivalent to US\$36,000. Secondly the Plaintiff seeks payment of Uganda shillings 50,000,000/= being the market value of trailer registration number

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RL03676. He submitted that the existence of the trailer is admitted by the Defendant in the powers of attorney adduced in evidence as exhibit P4. Counsel submitted that the Plaintiff demonstrated that he tried his level best to recover his trailer and container in southern Sudan but failed. The Plaintiff ought to be restored to the position he was in before the acts complained about. Counsel relied on several authorities for the award of general damages. He also submitted that the market value of the container is Uganda shillings 20,000,000/= which ought to be paid to the Plaintiff.

The counterclaim is for general damages and return of the tractor head and costs of the suit. As far as the counterclaim is concerned, the Plaintiff's Counsel submitted that the counterclaimant failed to demonstrate to the required standard of proof that the Plaintiff sold the tractor head registration number UAM 761 V in southern Sudan and neither did she prove any document executed between herself and the Plaintiff bearing the said registration numbers. The Defendant/counterclaimant did not discharge the burden of proof. He further invited the court to find that the counterclaim is frivolous and vexatious because the Defendant knew that the tractor head registration number UAM 761V was impounded in South Sudan but went ahead to file an action by way of counterclaim. He further prayed that the balance on the purchase price be written off.

In reply the Defendant's Counsel prayed that the court dismisses the Plaintiffs suit on the basis of his submission that there was a hire agreement in which the Plaintiff took the motor vehicle registration number UAM 761V red/yellow in colour but bearing registration number UAM 763V which was allegedly impounded in South Sudan while the vehicle was in custody of the Plaintiff. On the other hand the counterclaimant Counsel submitted that judgment ought to be entered in the counterclaim with costs.

I have critically considered the submissions on the basis of documents which were to be identified but not exhibited. I have in the premises not taken into account documents not exhibited in court since they are not evidence in my decision though I make brief references to a default decree from South Sudan originally pleaded in the plaint.

Because the vehicle is not available to either party due to actions of third parties who are not before this court, the contract between the parties has been frustrated from further performance.

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In the case of **Krell vs. Henry [1903] 2 K.B, Page 740** there was an appeal from the decision of Darling J who had dismissed the Plaintiff's action for enforcement of a contract to rent a room. The court found that the foundation of the contract was that the Defendant wanted to watch the Coronation procession which had been fixed for a particular date. However, the Coronation was postponed and the Defendant refused to pay for the room on that ground. The Defendant had paid a deposit but did not take up the room. The judge held that the Plaintiff was not entitled to recover the balance of the rent fixed by the contract and he relied on the case of **Taylor versus Caldwell (1863) 3 B. &S 826**. On appeal to the Court of Appeal 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."

The question is whether the performance of the contract was prevented and it is a matter of fact that the Plaintiff failed to get the vehicle back and the Defendant also failed to get the vehicle back.

I have considered the assertion that there could have been a suit in Southern Sudan against the Defendant which proceeded ex parte. The admissible evidence on court record is that there was a suit in Uganda at the High Court Commercial Division **HCCS No 478 of 2011 YEL DENG BONG VS BYANSI AHAMADA AND NAMATOVU SUSAN**. This suit was dismissed with costs to the second Defendant and who is the Defendant in this court on the 12<sup>th</sup> of November 2012 by Hon Justice Wilson Masalu Musene. A decree was issued by the registrar on the 12<sup>th</sup> of December 2012 though it shows that the Hon Judge dismissed the suit on the 12<sup>th</sup> of November 2012.

Documents reflecting proceedings in respect of a suit between the same parties in Southern Sudan were not admissible in evidence because they were not proved and I do not need to consider the purported default decree against the Defendant in Southern Sudan. In case I am wrong and were to consider it, there are some matters that would be of interest in not taking it into account in arriving at a decision in this suit. Firstly the vehicle was supposed to have been impounded around March 2012. The Plaintiff had paid for the vehicle on the 28<sup>th</sup> of October 2011 and was supposed to have executed a contract thereafter and two days later. According to DW3 no contract was ever executed between the parties. The Plaintiff kept on advancing monies to the Defendant. This included payments acknowledged by the Defendant on the 7<sup>th</sup> of November 2011; 24<sup>th</sup> of November 2011, 3<sup>rd</sup> of December 2011, 10<sup>th</sup> of December 2011, 11<sup>th</sup> Dec 2011, 13<sup>th</sup> December 2011, 17<sup>th</sup> December 2011, 20<sup>th</sup> December 2011, 23<sup>rd</sup> December 2011 etc. These payments proceeded in like manner up to 7<sup>th</sup> May 2012. By December 2011, the Plaintiff testified that he had paid 37,670,000/= Uganda shillings. The payments are consistent with the Plaintiff having taken possession of the truck immediately after 28<sup>th</sup> of October 2011 accordingly to the testimonies of DW1, DW2 and DW3. The question is where the vehicle was all the time up to 15<sup>th</sup> of February 2015 when the defence produced exhibit D1 showing that the Plaintiff hired the vehicle to a Sudanese on that date? The vehicle was hired by Dashi Ways Ltd which is described therein as the owner of the truck and in which the Plaintiff was a shareholder though he testified that he has since sold his shares in the company. In the plaint the Plaintiff pleaded and attached a default decree dated 13<sup>th</sup> of March 2013 in a Yei County Court of South Sudan. In the default decree it is written that the Defendants namely Byani Ahamada and Namatovu Susan (the Defendant herein) were to pay 371,388,400 or its equivalent in South Sudanese Pounds. The decree does not mention the currency of the above figures. The current suit was filed in this court on the 2<sup>nd</sup> of May 2013, two months after the said decree. However the same Plaintiff through Counsel also purported to produce another decree by letter dated 7<sup>th</sup> of April 2015 and attached thereto. I have perused the attachment and it is the same default decree but dated 16<sup>th</sup> of October 2012. Other documents purport to show that the vehicle was sold in February 2013 in execution of the decree. Yet in this court a suit by the same Plaintiff Yel Deng against the same Defendants which includes Susan Namatovu had been dismissed on the 21<sup>st</sup> of November 2012. On the basis of the first pleadings in this court and attaching a decree dated 13<sup>th</sup> of March 2013 I cannot entertain a decree purporting to finally determine the rights of the parties from a foreign court

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after Hon Justice Wilson Masalu Musene finally resolved a dispute between the same parties on the 21<sup>st</sup> of November 2012. The Plaintiff Yel Deng who had submitted to the Ugandan jurisdiction is barred by Ugandan Law and particularly section 7 of the Civil Procedure Act from obtaining another decree subsequently in a foreign court after his claim in Uganda was dismissed. The subsequent backdated decree is in any case inadmissible and as I have held, I cannot recognise proceedings of the foreign court where no certified proceedings were even produced in evidence. The court documents are in any case not admissible.

The conclusion is that the vehicle the subject matter of the suit has been taken away from the parties by supervening events and the Defendant/counterclaimant has adduced no evidence to link the loss of the vehicle to the Plaintiff.

Either a sale of the tractor head or hire thereof were frustrated. In **Chandler versus Webster [1904] 1 KB 493** it was held that the rule of common law is that in cases of frustration loss lies where it falls. Where the contract is discharged because of a supervening impossibility of performance such as the loss of the subject matter of the contract by the act of third parties, previous legal rights remain undisturbed but the parties are relieved from further liability to perform the contract. In this suit the subject matter of the Plaintiff's suit and of the counterclaim of the Defendant was lost through the act of third parties who are not before this court.

In this case neither the Plaintiff nor the Defendant has the vehicle. Their joint efforts to recover the vehicle failed. In the premises the Plaintiff used the vehicle to do some business and that is all. Secondly the Defendant also got some money out of the deal. Both parties lost out due to some supervening event discussed above.

I cannot without concrete evidence fault either party for loss of the vehicle. There is not credible evidence that the vehicle was released by the Defendant's husband Andrew Kostrowski for the sole purpose of transporting goods to Malawi. I therefore find this evidence incredible and I disregard it. Neither is it true to say that the loss of vehicle occurred as a result of the Defendant's act of having wrong number plates on the truck.

There is no evidence that it is an authority in South Sudan which took the vehicle and it became forfeit to the state whereupon it was auctioned by the state or department concerned.

The loss of the vehicle was on account of the action of third parties and not government authorities in South Sudan. In the premises each party should bear his or her own loss.

In the premises the Plaintiff's suit is dismissed with each party to bear its own costs of the suit.

The Defendants counterclaim stands dismissed with each party to bear its own costs.

Judgment delivered on the 28<sup>th</sup> of January 2016 in open court

**Christopher Madrama Izama**

**Judge**

**Judgment** delivered in the presence of:

Counsel Peter Kibilango, Counsel for the Plaintiff

Counsel Mugabe Silas Kahima Counsel for the Defendant

Both parties are in court.

Charles Okuni: Court Clerk

**Christopher Madrama Izama**

**Judge**

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