THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

[COMMERCIAL DIVISION]

5 **CIVIL SUIT No. 598 of 2014**

KALULE DEO :: PLAINTIFF

VERSUS

STANBIC [U] LTD :: DEFENDANT

BEFORE: HON. MR. JUSTICE B. KAINAMURA

10 **JUDGEMENT**

The Plaintiff brought this case against the defendants seeking orders for; (a) a declaration that the defendant's actions amounted to breach of contract, (b) recovery of TATA lorry Reg. UAM 504N which was unlawfully and illegally disposed off by the defendant or recovery of its monitory value, (c) special damages for loss of business and daily income from the 4th March, 15 2011 caused by the defendant's wrongful and illegal attachment and sale of the motor vehicle TATA lorry totalling to UGX 232,400,000/= for 42 months inclusive of weekends calculated at a daily income of UGX 200,000/= per day and costs of the suit.

The plaint sets out the facts constituting the cause of action as:-

The plaintiff applied for a car lease from the defendant and the same was offered on the 2nd 20 September 2009 vide a lease offer letter. The leased car was TATA SE TRUCK Reg. No. UAM 504N, Chassis No. MAT 38814291R4993 worth USD 35,000. The Plaintiff paid a deposit sum of USD 5250 leaving an outstanding balance of USD 29750. The lorry was delivered to the plaintiff for use by TATA UGANDA LTD registered in the names of the defendant. The plaintiff did not meet the timelines as per the payment schedules due to some short falls in the plaintiff's 25 projected income but continued to make regular payments for the vehicle asset facility. The

defendant was entitled to charge a penalty calculated daily on the outstanding sums. The lease was to run for a period of 60 months and the instalments were to be paid for a continuous period of 60 months beginning from 30th August 2013. Due to the short falls in the plaintiff's business for the months ending 31st Jan, 2011 and 28th Feb, 2011 which problems were satisfactorily explained to the defendant's loans officer, the plaintiff defaulted in making payments within the time required. On the 2nd March, 2011 the plaintiff paid UGX 1,600,000/= and on the 3rd March 2011, the Plaintiff further paid UGX 260,000/=. On the 3rd, March 2011 the defendant's agents attached the TATA lorry without notice to the plaintiff. Despite the payments made on 2nd and 3rd March 2011, the defendant went on to illegally dispose the lorry off. The defendant was put in a financial crisis and was therefore not able to pay his monthly obligations as per the agreement. The plaintiff thus filed this suit.

The defendant filed a written statement of defence in which it averred that the suit is frivolous and vexatious and does not disclose a cause of action. It further stated that the plaintiff was among others required to duly and punctually make monthly repayments of UGX 1,544,000/= failure of which would entitle the defendant to cancel the lease agreement, take possession of the vehicle and dispose of it in any manner. The defendant further stated that the plaintiff acknowledges to have defaulted thus the consequences that naturally flowed from the default. The plaintiff was served with notice including a further 14 days notice in a newspaper prior to the sale of the leased vehicle. Additionally, the defendant averred that the defendant was entitled to take possession of the vehicle in the event that the plaintiff defaulted on the Lease Agreement. The defendant contended that all the plaintiff's claims and reliefs are disputed but the defendant submits to the jurisdiction. The defendant further made a counter claim in which it stated that;

The counterclaimant/defendant reiterated the contents of paragraphs 2,3,4,5 and 6 of the defence and added that the plaintiff owes it an outstanding Lease Finance Sum of UGX 13,183,726/= and prays for judgement against the plaintiff/counter defendant on the claim for; a) an order for the payment of the outstanding Finance Lease amount of UGX 13,183,726/=, b) agreed default interest of 10% per annum on the amount claimed, c) general damages, d) Interest on general damages and costs of the counterclaim.

In reply to the written statement of defence and counterclaim the plaintiff denied each and every allegation in the counterclaim and averred that;

In specific reply to paragraph 6 of the written statement of defence the plaintiff/counter defendant denies having ever been served with a notice before the leased vehicle was attached and later sold.

In specific reply to paragraph 7 of written statement of defence, the plaintiff/ counter defendant averred that the counterclaimant was only interested in the leased vehicle but not recovery of their money.

The plaintiff denied any indebtedness to the counterclaimant in the tune UGX 13,183,726/= as the lease vehicle was disposed of illegally.

At the commencement of the trial the following issues were framed,

1. Whether the plaintiff defaulted on the Finance Lease Facility

2. Whether the plaintiff was put to notice before the said motor vehicle was attached

3. Whether the defendant lawfully sold the Tata Truck, the subject of the Finance Lease Faculty

4. Whether the plaintiff owes the defendant UGX 13,183,726/= as the outstanding Finance lease sum

5. What remedies are available to the parties

At the hearing Mr. Najibu Mutyaba appeared for the plaintiff while Mr. Kiiza Denis appeared for the defendant.

Issue one: Whether the Plaintiff defaulted on the Finance Lease Facility

The plaintiff testified as PW1. He testified that sometime in 2009 he had two accounts with the defendant bank. He added that he was convinced by the defendant's Manager at the Masaka branch to apply for motor vehicle lease finance which he accepted. On 2nd September, 2009 his application for lease purchase of motor vehicle Tata lorry Reg. No. UAM 504N was accepted. He testified that he paid the first instalments but later on got some challenges which he

communicated to the Branch Manager. He stated that despite his failure to make payments for the loan facility in time, he regularized his payments.

In cross examination, PW1 stated that he only missed the month of August and July and went to the Bank and explained to them the problem he was experiencing at that time.

5 The defence called one witness; Mr. Denis Kiiza who testified as DW1. He testified that the plaintiff's account was unfortunately in default from the day of the first instalment and the default position was however not regularised until 19th November 2009.

Counsel for the plaintiff submitted that the defendant's agent Ampaire Doreen just showed the plaintiff where to sign and misrepresented the Bank by falsely telling the plaintiff that he was 10 meant to pay the 1st instalment in November, 2009 yet he was meant to pay it in October 2009 according to the lease agreement. Counsel further argued that the defendant did not translate the agreement yet the plaintiff is illiterate which violated the **Illiterates Protection Act**. Counsel further submitted that the plaintiff had by the time of sale of the lorry paid UGX 33,640,000/= and the time he failed to pay on time was ratified by the defendant when he deposited more than 15 the required monthly instalment.

Counsel for the defendant submitted that a default on one instalment is a default on the whole loan according to the case of ***Housing Finance Bank Ltd & Anor Vs Edward Musisi S.C.C.A No.22 of 2011***. Counsel further argued that the plaintiff fully understood the transaction and the allegation of illiteracy is unfounded and cannot stand in his way of fulfilling his contractual 20 obligations. Counsel prayed that court finds that the plaintiff defaulted on his repayment as he admitted and that there was no ratification whatsoever.

Issue two: Whether the Plaintiff was put to notice before the said Motor Vehicle was attached

PW1 stated that on 3rd March 2011 the defendant's agents without any notice again attached the 25 Tata lorry yet he had dully paid the monthly installment. He added that on 7th March 2011 he received another letter requiring him to pay UGX 70,441,755.77/= without any explanation.

In cross examination PW1 stated that he received two letters and in the last letter he was told to make payments within 14 days. He stated that it is true that he was warned by the Bank but they first seized the vehicle before giving him the letter.

DW1 stated that when the plaintiff defaulted to make payments, instructions to attach the lorry
5 were issued on 3rd February 2011.

In cross examination, DW1 stated that the plaintiff was not served with any notice before the attachment was done.

Counsel for the plaintiff submitted that the lease agreement provided in paragraph 11 of the Terms and Conditions for a 14 days notice. He argued that on both occasions that the lorry was
10 seized, the 14 days notice was not served. Further that it was admitted in evidence by both witnesses that the plaintiff received no notice. Counsel argued that it is the defendant that came up with the lease agreement and it is the same party that breached the agreement.

Counsel for the defendant submitted that with no postal address provided by the plaintiff, the 14 days' notice became impractical and untenable. Counsel further argued that exhibits P10, P11, P
15 12 and P13 all show that the plaintiff got to know and indeed was aware of or notified of the sale of the truck on account of default on his lease obligations.

Issue three: Whether the defendant lawfully sold the Tata Truck, the subject of the Finance Lease Faculty

PW1 stated that at the time of the attachment and sale of the lorry he was neither notified nor
20 aware of the sale.

DW1 stated that it is noteworthy that between March and May 2011 when the truck was seized and put under sale, Mr. Kalule the plaintiff who had the option to pay the money owed as per the communications he received and which he acknowledges, did not pay any money to redeem the truck.

25 Counsel for the plaintiff submitted that the plaintiff was not served with the 14 days written notice. Counsel added that there was no valuation report done according to the evidence of DW1

and neither was it done on the date appearing in the advertisement. It was Counsel's conclusion that the whole sale was tainted with illegalities and prayed that the court finds it so.

Counsel for the defendant submitted that the plaintiff admitted that he did not make any further payments after March 2011 to possibly redeem the truck. Counsel further argued that the value
5 of the truck was not in contention in the pleadings and cannot be introduced at this stage as was decided in the case of ***Talikuta Feibe L Vs Abdu Nakendo [1979] HCB 275***. Counsel further stated that the place of sale did not prejudice the plaintiff in any way. In conclusion, Counsel argued that the defendant was justified and lawfully sold the leased Tata truck.

Issue four: ***Whether the Plaintiff owes the defendant UGX 13,183,726/= as the***
10 ***outstanding Finance lease sum.***

PW1 stated that he is not indebted to the defendant as claimed.

DW2 stated that after the sale of the truck and application of the sale proceeds, there remained an outstanding balance on the plaintiff's account of UGX 14,222,024/= which was communicated to him on 28th June 2011.

15 Counsel for the plaintiff submitted that a claim for UGX 13,183,726/= as the outstanding Finance lease sum cannot stand simply because it was the defendant that breached the lease agreement when it impounded and sold the Tata lorry without prior 14 days' notice. Counsel further argued that the defendant has not proved how much was owing at the time the motor vehicle was impounded by its agents. Counsel in conclusion submitted that the defendant just
20 assumed any figures and presented it first, to the plaintiff and latter another figure was presented in Court as outstanding arrears whereas not.

Counsel for the defendant submitted that the defendant retains the right to sue for any sum which it wishes especially if it is even lower than what it may actually be entitled to. Counsel added that the figures show the plaintiff's failure to fulfil his lease obligations. In conclusion, Counsel
25 submitted that the defendant's prayer is that the plaintiff is ordered to pay the defendant the sum of UGX 13,183,726/= as well as the costs for the counterclaim.

Issue five: ***What remedies are available to the parties***

Counsel for the plaintiff submitted that the plaintiff is entitled to recovery of a Tata lorry registration number UAM 504N or its monetary value, recovery of special damages totalling to UGX 232,400,000/= for loss of business and daily income from the 4th February 2011 when the Motor vehicle was illegally attached and subsequently sold, recovery of general damages for the
5 inconvenience caused and loss suffered as well as costs of the suit.

Counsel for the defendant submitted that the plaintiff is not entitled to any damages whether special or general as submitted under this issue. Counsel argued further that it is the plaintiff that breached the Lease Agreement and occasioned loss to the defendant. In conclusion, Counsel submitted that the plaintiff is not entitled to any damages and therefore prayed that the suit be
10 dismissed with costs.

Decision of Court

I have considered the pleadings and read the submissions of both Counsel. The facts giving rise to the suit as stated are briefly that the plaintiff and defendant executed a lease finance agreement. The plaintiff received the truck from TATA UGANDA Reg. No.UAM 504N which
15 was registered in the defendant's name as security. The plaintiff had to make monthly payments over a period of 60 months but defaulted along the way. The defendant then ordered for the attachment of the truck which was advertised and sold off to someone else hence this suit.

The issues framed were;

1. *Whether the plaintiff defaulted on the Finance Lease Facility*

20 2. *Whether the plaintiff was put to notice before the said Motor Vehicle was attached*

3. *Whether the defendant lawfully sold the Tata Truck, the subject of the Finance Lease Faculty*

4. *Whether the plaintiff owes the defendant UGX 13,183,726/= as the outstanding*
25 *Finance lease sum*

5. *What remedies are available to the parties*

I will address each issue in the order they were framed.

Regarding whether there was default on the facility, Counsel for the plaintiff submitted that the plaintiff was misled by an official of the defendant that he was to pay the first installment in November instead of October according to the agreement. However it is worth noting that the plaintiff beside claiming of being misled stated in his testimony that he had some challenges in business over a certain period which he explained to an official of the defendant. Accordingly I am satisfied that the plaintiff defaulted in making the necessary payments in time. It does not matter as argued by Counsel for the plaintiff that he later regularized payments or explained the reason for delay. The fact remains that he defaulted to make payments and this was not just once but twice which led to the attachment of the truck which was eventually sold off. I thus resolve this issue in the affirmative.

With regard to the issue whether the plaintiff was put to notice before the said Motor Vehicle was attached, it was the evidence of both witnesses that no notice was served prior to the attachment of the truck despite the requirement in the agreement of 14 days notice. Counsel for the defendant argued that the defendant did not have the postal address of the plaintiff which made it impracticable to serve the notice. DW1 stated that they traced the plaintiff on telephone and the bank had no other address. It is my considered opinion that there was no notice to the plaintiff before the vehicle was attached. As required by the agreement the street address for service of notice provided was Nyendo Masaka. With due respect i am of the view that the bank acted outside the agreement and the breach of agreement fell under clause 11.1.1 of the agreement and as such called for notice under clause 11.2.1.1 of the agreement. In the *premis* issue two is answered in the negative.

Moving on to the third issue whether the defendant lawfully sold the Tata Truck, the subject of the Finance Lease Facility, it is not in dispute that the bank's only security under a lease finance facility was the truck subject of the lease. The truck was registered in the name of the bank, the defendant in this case. Upon default, the defendant seized the truck without prior notice and had it sold to another party through an auction that took place along Salaama road contrary to the advertised place. Accordingly issue three is answered in the negative.

The fourth issue is whether the plaintiff owes the defendant UGX 13,183,726/= as the outstanding Finance lease sum. Counsel for the defendant submitted that the defendant retains

the right to sue for any sum which it wishes especially if it is even lower than what it may actually be entitled to. Counsel for the plaintiff disagreed with this stating that the defendant did not prove how the defendant came about with the figures. The defendant claims that the vehicle was valued by the Auto Mobile Association but did not tender the valuation report in evidence

5 Under **Section 102 of the Evidence Act**, the burden is upon he who seeks court to believe the existence of a certain fact. It is my considered opinion that the defendant failed in this regard to prove that the plaintiff owes the defendant UGX 13,183,726/=. I therefore resolve the fourth issue in the negative.

Lastly, regarding the remedies, Counsel for the plaintiff prayed for recovery of a Tata lorry

10 registration number UAM 504N or its monetary value, recovery of special damages totalling to UGX 232,400,000/= for loss of business and daily income from the 4th February 2011 when the Motor vehicle was illegally attached and subsequently sold and costs of the suit. Counsel for the defendant on the other hand submitted that the plaintiff is not entitled to any of the damages sought since he breached the contract. The plaintiff had made a number of payments which he

15 did not total up but rather claims special damages of UGX 232,400,000/= for lost daily income. It is now trait that special damages must be specifically pleaded and proved. ***(See Nalwadda Vs Uganda AIDS Commission Civil suit No.67 of 2011)***. The plaintiff did not ever attempt to prove the special damages other than merely stating them in the plaint and submissions of Counsel. This claim accordingly fails. However since i have found that the truck was sold illegally, the

20 plaintiff is entitled to recovery of the value of the truck at the time of sale i.e UGX 42,000,000/= (Forty Two Million Shillings only) the plaintiff is also awarded general damages of UGX 2,000,000/= (Shillings Two Million), since as we have seen he was partly to blame for the consequences. The plaintiff is also to recover costs of the suit.

In the result judgment is entered for the plaintiff in the following terms.

25

a) Recovery of value of the Tata lorry of UGX 42,000,000/=.

b) General damages of UGX 2,000,000/=

c) 12% on the award (a) above from the date of filing the suit till payment in full.

d) Interest at court rate on (b) from the date of judgment till payment in full

e) Costs of the suit

B. Kainamura

5 **Judge**

01.09.2016