THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL SUIT NO. 141 OF 2014

PORTLAND INTERNATIONAL (PTY) LTD ……..…….……. PLAINTIFF

VS

1. **SEMBULE STEEL MILLS LTD**
2. **FRANCIS SEMBUYA**
3. **CHRISTOPHER SEMBUYA ……..… DEFENDANTS**

BEFORE LADY JUSTICE FLAVIA SENOGA ANGLIN

JUDGMENT

BACKGROUND: Sometime in 2010, following negotiations between representatives of the Plaintiffs and the Defendants, the Defendants applied for credit facilities to enable the First Defendant obtain steel products from the Plaintiff. The parties then entered into a credit agreement in those terms. – Refer to Exhibit P_1.

The Second and Third Defendant are Directors and Shareholders of the First Defendant. At the time of the credit agreement, the 2nd and 3rd Defendants signed the terms and conditions of sale incorporating a deed of suretyship and cessation – Exhibit P_2, wherein they both agreed to bind themselves personally, jointly and severally to be liable for the debt due from the First Defendant. The Deed of Suretyship was signed on the 1st day of October, 2010.

As agreed, the Plaintiff supplied steel products to the Defendants, including: hot dipped galvanized wires, cold rolled galvanized steel wire, prime newly produced hot rolled wire rods and galvanized steel coil. The products were supplied on credit vide commercial invoices and bills of lading – Exhibits $P_{10} – P_{20}$.

It is the contention of the Plaintiff that the Defendants received all the said products valued at US Dollars $847,781.04 but refused to pay for them hence this suit.

The Plaintiff prayed for judgment against the Defendants jointly and severally for:-

I) Recovery of US Dollars $847,781.04 as special damages.

II) Interest on the above sum at the rate of 30% per annum from the date of breach until payment in full.

III) General damages.

IV) Interest on general damages at the rate of 30% per annum from the date of judgment until payment in full.

V) Costs of the suit

VI) Any other relief that court deems fit.

The Defendants deny entering into a contract with the Plaintiff. And the 2nd and 3rd Defendants deny being personally liable for the Plaintiff's claim. That the Plaintiff has no cause of action against them.

The Defendants further contended that this court has no jurisdiction to try the suit, and that the suit ought to be tried in South Africa. And that the claim is therefore frivolous and vexatious and prayed the suit to be dismissed with costs.

Both the Plaintiff and the Defendants called one witness each. The written statements of the witnesses were admitted as their evidence in chief. And they are essentially in the terms set out in the background to the case; and referred to the exhibits admitted by both parties.

The issues framed for determination of the court are the following:-

1) **Whether this court has jurisdiction to entertain the suit.**
2) **Whether there was a contract between the parties.**
3) **Whether the Defendants breached the contract.**
4) **Whether the Second and Third Defendants are liable.**
5) **Remedies available to the parties.**

JURISDICTION:

According to the evidence of PW_1, Robert Mulondo- it was agreed that jurisdiction would be in South Africa- Exhibit P_2. That the Defendants also insisted that the Uganda Courts do not have jurisdiction and relied upon Exhibits $P_3 – P_9$.

In his submissions, Counsel for the Plaintiff asserts that this court has jurisdiction under Article 139 of the Constitution and S.15 of the Civil Procedure Act.

The case of **David Kayondo vs. The Cooperative Bank Ltd SCCA 19/91** was cited in support. Plus the case of **Sebaggala & Sons Electric Centre Ltd. vs. Kenya National Shipping Lines HCCS 431/1999.**

Counsel then argued that, while under the contract, Exhibit P_3- the parties consented to the non-exclusive jurisdiction of the Witwatersrand Local Division of the High Court of South

Africa, the term **"non-exclusive"** means that the agreement did not oust the jurisdiction of the High Court of Uganda, considering that the delivery of the steel products was in Uganda at Nalukolongo, the 2nd and 3rd Defendants reside in Uganda and the First Defendant's registered office is in Kampala, Uganda, where the products were delivered.

Counsel for the Defendants insisted that under Exhibit P_2, there terms on jurisdiction are very clear. And that any proceedings arising out of the agreement between the parties were to be tried by the Witwatersrand Local Division of the High Court of South Africa. And that the Plaintiff had not presented any document between the parties setting aside the jurisdiction of the South Africa Court.

In rejoinder, Counsel for the Plaintiff submitted that the jurisdiction of court is both constitutional and statutory and there is no need to bring a document setting aside the jurisdiction of the Court of South Africa.

Looking at the evidence adduced by the parties in this case, it is apparent that PW_1 did not say anything about the jurisdiction of court in his witness statement. But in cross-examination, he testified that under Clause 8.2- Exhibit P_2 regarding the applicable law and jurisdiction, it was agreed that the jurisdiction would be in South Africa.

This was confirmed by DW_1 Francis Sembuya in paragraph 6 of his witness statement where he refers to the Plaintiff's exhibits P_3-P_9 regarding applicable law on jurisdiction in respect of the alleged transaction are the laws of the Republic of South Africa, and as such the Uganda Courts do not have jurisdiction in this case. The witness was not cross examined by the Plaintiff on this point.

Looking at the agreement of the parties in this case Clause 8.1 provided that ***"the purchaser or sureties consent in terms of S.45 of the Magistrates Courts Act No. 32/144 to the jurisdiction of the Magistrates Court having jurisdiction in respect of any action to be instituted against it/him/them by the seller".***

While Clause 8.2 provided that ***"However, and in the event the seller electing to proceed in the High Court, the purchaser and sureties hereby consent to the jurisdiction of the High Court of South Africa (Witwaters rand Local Division)".***

It is clear from the evidence of the parties and the terms of the agreement that the parties consented to the jurisdiction of the High Court of South Africa.

However, Art 139 (1) of the Constitution of Uganda has got to be borne in mind. The article vests ***"the High Court with unlimited original jurisdiction in all matters and such appellate and other jurisdiction as may be conferred upon it by this Constitution of other law".***

And S.14 (1) of the Judicature Act also provides that ***"the High Court shall subject to the Constitution have unlimited original jurisdiction in all matters and such appellate and other jurisdiction as may be conferred on it by the Constitution, or this Act or any other law".***

Further guidance on the matter of jurisdiction can also be gathered form the case of **LARCO Concrete Products Ltd vs. Transair Ltd [1987] HCB 40 [1988-90] HCB 80** – where it was held interalia that ***"the law governing contract is not a decisive factor in determining whether a particular court has or should exercise jurisdiction to entertain disputes arising out of the contract; what matters is whether the parties have unequivocally submitted to the***

jurisdiction of a foreign court and whether it is proper and just for the court where the proceedings are brought to entertain the action".

The court also noted in that case that ***"the High Court jealously guards its jurisdiction and therefore any instrument purporting to oust its jurisdiction must do so in clear and in no uncertain terms. Even where they have conferred exclusive jurisdiction to a foreign court, the High Court has discretion whether or not to order a stay of the action".***

From the provisions of the law referred to above and the authority cited, it is apparent that even where exclusive jurisdiction agreement was entered into by the parties as in the present case, the High Court of Uganda still has jurisdiction to hear and determine the matter brought before it, except where there is justification for it to order a stay of the proceedings.

Steps to be taken include to settle the choice of jurisdiction problems, were set down in the case of **Spiliada Maritime Corp vs. Cansulex Ltd [1987] AC 460** judgment of Lord Golf.

These are:

1) The court seized with the case must decide if has jurisdiction by virtue of the legislation which created it. – refer to the case of **Aratra Potato Co. Ltd & Another vs. Egyptian Navigation Co. (The "ELAMRIA") [1981] 2 LLOyds Rep.119 at P.123.**

Only if court has jurisdiction may it proceed, otherwise it must dismiss the suit out of land.

It was noted however that, ***"a court which may not have jurisdiction on the merits may have jurisdiction by statute to decide a question of stay".*** – House of Lords in the case of **William Glyns vs. Astro Dinamico [1984] ILLoyds Rep. 453 at P.456** – where it was held that ***"court had jurisdiction to entertain an application for a stay; but that, in so doing, it was not deciding whether it had jurisdiction to determine the case on its merits".***

There are two distinct kinds of jurisdiction: 1) ***"to decide the action on its merits"*** and 2) ***"to decide whether the court has jurisdiction of the kind"*** – Refer to **Wilkinson vs. Barking Corporation [1948] I KB 721 at P. 725 (CA).**

2) The court must look to the law which applies to the case before it, to determine if there is a direction in that law as to jurisdiction.

3) The court must decide if the other jurisdiction, to which it is called upon to defer, is appropriate and whether the balance of convenience favours the case being heard there, that is, if it is reasonable.

4) If there is a jurisdiction clause in the contract, the terms and specific wording of that clause must be considered carefully. If the jurisdiction clause if not in the contract, but in some other document, the incorporation by reference and notice of the incorporation must be considered carefully, to verify that such incorporation is complete and valid.

5) The courts consideration will also be affected if the suit has been commenced by an action in rem and an arrest of a slip, which arrest normally gives jurisdiction in the place of arrest.

6) If the new jurisdiction is deemed to be convenient and proper in the circumstances, the court will stay the suit by an order which will preserve the rights of the parties.

Otherwise the court will restrain the suit in its own jurisdiction and will refuse the motion of stay.

In the present case, both the Constitution and the Judicature Act grant the High Court unlimited original jurisdiction over all matters of a civil and criminal nature subject to any law. It may therefore proceed with determination of this case.

The law that applies is the law of contract and the balance of convenience favours that the case be heard in Uganda where the Defendants are based. While the jurisdiction clause is clear, this court has already determined that it does not oust the unlimited jurisdiction of this court.

No proceedings were commenced in the High Court of South Africa and no stay of the current proceedings was applied for. No strong reason have been advanced for stay of the action.

As already indicated the Defendants are residents of Uganda, carry on their business here, have witness and Advocates here. It is therefore appropriate and cost effective to maintain the suit in Uganda.

In any case, the common law general rule is that ***"exercise of jurisdiction depends on service of originating court process, as service can only be effected on those actually present in the jurisdiction or those who submitted voluntarily or by contract to the jurisdiction".*** The parties submitted voluntarily to the jurisdiction of this court. And since the statutory intervention overrides the contractual choice by the parties, jurisdiction will be exercised here as the ends of justice so require.

The High Court of Uganda for all those reasons has jurisdiction to determine the matter on its merits. The submissions of Counsel for the Defendants to the contrary are accordingly overruled.

Validity of Contract between the Parties: The next issue to determine is **whether there was a valid commercial contract between the parties.**

The evidence of the Plaintiff in this respect is set out in the background to this case. The parties entered into a credit agreement to enable the First Defendant obtain steel products from the Plaintiff. – Exhibit P_1.

The 2nd and 3rd Defendants, Directors and Shareholders of the First Defendant bound themselves to personally, jointly and severally be liable for the debt of the First Defendant by deed dated 01.10.16.

The Plaintiff supplied the steel products to the Defendants on credit – Exhibits P_{10} – P_{20} valued at $847,781/04 but the Defendants failed and or refused to pay for them.

The Defendants denied ever entering into the contract with the Plaintiff, and the 2nd and 3rd Defendants deny being personally liable for the Plaintiff 's claim.

However, according to PW_1 – the Second Defendant requested the Plaintiff to discount the debt of $847.781.04 to $200,000 which the Plaintiff rejected. This evidence was not challenged by the Defendants.

Counsel for the Plaintiff submitted that the Second Defendant's request for a discount is proof that there was a contract between the parties. He relied on S.10 of the Contracts Act, 2010 which defines a contract and the case of **K & V Ltd vs. The Registered Trustees of Arya Practinidini Sabha Eastern Africa HCCS 299/2011**. And the case of **Habre International Co. Ltd vs. Ebrahim Maraki Kassam & Others SCCA 04/1999.**

Counsel for the Defendants submitted that the Plaintiff's case is premised on Exhibit P_3 - amended Sales Contract, yet the original contract was not brought to court. Further that, the document is generated by the Plaintiff and does not show any buyer or seller.

Also that Exhibit P_1 purported to be the application for the credit facility and written on the Plaintiff's headed paper was neither signed nor sealed with the Defendants seal and therefore cannot be a genuine document. Counsel argued that, the fact that Exhibit P_1 contains the Defendants details is of no consequence as the details can be got by whoever needs them. He contended that the details are not correct as the Defendant's correct address is Plot 3 Wankulukuku Road.

It was also the assertion of Counsel for the Defendants that S.10 of the Contracts Act and the case of **K & V Ltd (Supra)** and **J.K Patel Vs. Spear Motors Ltd SCCA 04/91** relied upon by Counsel for the Plaintiff are not applicable to the facts of the present case as there is no evidence of offer and acceptance or consideration brought to the court to prove that there was a contract.

And that there is no evidence of the orders made by the Defendants or delivery notes to prove that the goods were delivered to the Defendants. He cited S.101 of the Evidence Act to argue that the burden of proof lay upon the Plaintiff to prove the existence of the orders and deliveries.

In determining **whether there was a valid contract between the parties**, I bear in mind S.10 of the Contracts Act which defines contract to mean ***"an agreement made with the free consent of the parties with the capacity to contract, for a lawful consideration and with a lawful object, with the intention to be bound. The contract may be written or partly oral and partly written or may be implied by conduct of the parties"***. – See **K & V Ltd vs. Registered Trustees of Arya (Supra).**

To determine if there was a valid contract made between the parties, the court has to determine "***if there was an offer to enter into legal relations on definite terms and that offer is accepted".* – JK Patel vs. Spear Motors Ltd (Supra).**

In the present case, there was a credit agreement, alleged to have been signed by the Defendants (2nd and 3rd) where they also guaranteed to be personally liable for the debt.

The Defendants denied executing the Exhibits P_1-P_8. Therefore the law required the Plaintiff to prove that the documents were actually signed by the 2nd – 3rd Defendants. That is, that the signatures were in their handwriting – S.66 of the Evidence Act.

The Plaintiff could have called an expert witness under S.43 of the Evidence Act to identify the disputed signature as that of the Second Defendant. But not calling the expert witness is of no consequence as court can resort to S.72 of the Evidence Act, to compare the disputed handwriting with others admitted or provided.

The section provides that, (1) ***"in order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal admitted or proved to the satisfaction of the court to have been written or made by that person may be compared with the one which is to be proved…."***

In this case, the witness statement of Second Defendant was admitted in evidence. It bears his signature which court compared to the signature on the disputed documents Exhibits P_2 - P_8. The documents were admitted in evidence with the witness statement PW_1.

The comparison of the signature of DW_2 Francis Sembuya on his witness statement with the signatures appearing on Exhibits $P_2 – P_8$ shows that the signatures on the exhibits correspond perfectly with the ordinary and habitual signature of the Second Defendant on the witness statement. The Defendants' claim that the signatures were written by a third party are therefore not accepted.

Secondly, Exhibit P_2 indicates that the Second Defendant, Sembuya was the Executive Director of the First defendant Company at the time the documents were executed. He still held the same position at the time of signing the witness statement. This court finds that the signature on the impugned documents are his.

By denying ever having signed the agreements, the Defendants were insinuating that the signatures on the documents were forged; although they did not specifically plead that the signatures were forged.

Be that as it may, the principle established by decided cases is that ***"an allegation of forgery is quite serious and the party making the allegation should produce evidence to validate it".*** – See the case of **James Sebaggala vs. China Palace (U) Ltd HCCS 1521/15** by Justice Wangutusi.

In the present case, the Defendants did not point out the differences between the normal signature of the Second Defendant and that on his written statement. They accordingly failed to discharge the burden of proving that the signature was forged.

For all those reasons, this court finds that the Plaintiff proved that it entered into a valid contract with the Defendants to supply the steel products which were delivered to the Defendants as per the bill of lading and invoices issued, although the First Defendant refused to pay and the 2nd and 3rd Defendants had agreed to personally indemnify the Plaintiff for the debt incurred by the First Defendant.

The mere denial by the Defendants without any evidence to the contrary, could not suffice to override the evidence of the Plaintiff. The Plaintiff effectively discharged the burden placed upon it.

The agreement between the parties had all the valid attributes of a valid contract set down by the United Nations Convention on contracts for international sale of goods, the Contracts Act of Uganda and the Common Law.

The next issue to determine is **whether the Defendants breached the said contract.**

The evidence of the Plaintiff in this respect was that it was agreed between the parties that the Plaintiff provides steel products to the Defendants on credit and the Defendants' obligations were to pay for the goods as per the credit terms. The Plaintiff performed its part of the contract by delivering the various items of steel to the Defendants, who breached the agreement by failing to pay for the products. By email dated 11.01.12 – Exhibit P_{22}, the Defendants asked for more time within which to pay but to date have not paid the outstanding sum of US Dollars $847,781.04 which the Plaintiff seeks to recover.

The Defendant acknowledged Exhibit P_{21} although the signature and stamp could not be seen. However, the email indicates that it originated from Sembule & Co.

The invoices are the source of the claim, and they were delivered as per the bill of lading, although there was no evidence of delivery of the invoices. The Plaintiff claims that under international trade, when documents are delivered with the bill of lading, the invoices can be posted or emailed as long as the bill of lading shows that the products were availed.

It was asserted that the bills of lading Exhibit P_{10}, P_{12}, P_{14}, P_{16}, P_{18} and P_{20} show details of the actual shipment of the products with full address of the recipient, the Defendant. So they are evidence of delivery since they are given as a form of acknowledgement that the recipient has got the goods. The bills of lading were sent by courier and that the Second Defendant did not deny receiving Exhibit P_{22}, the bills of lading and the invoices.

The Defendants denied Exhibit P_{22}. It was the submission of Counsel for the Plaintiff that the goods were shipped to the Defendants as per Exhibits $P_{10} – P_{20}$ which were received. Under Exhibit P_2 the account statement, the First Defendant partly paid for the goods as indicated in the credit column and the outstanding sum as at 31.05.12 was $847,781.04. By email of 10.01.2012, the Defendants wrote to the Plaintiffs seeking for a revised payment schedule, but to date no payment has been made by the Defendants.

The case of **United Building Services Ltd vs. Yafesi Muzira t/a Quickest Builders & Co. HCCS 154/2005** where Justice Lameck Mukasa held ***that "a breach of contract occurs when one or both parties fail to fulfill the obligations imposed by the terms of the contract",*** *w*as relied upon.

Counsel then submitted that the First Defendant breached the contract entered into with the Plaintiff and the 2nd and 3rd Defendants breached the contract of guarantee when they failed to pay the monies due on the contract.

Counsel for the Defendants submitted that the Plaintiff did not prove delivery of the goods to the Defendants. The Bill of Lading indicated Nairobi as the destination of the goods and yet the Defendants do not have office in Nairobi. Since no goods were delivered, Counsel argued, there was no breach of contract.

Further that, the bill of lading is not proof of delivery, as it is a document issued by the carrier or its agent to the shipper as contract of carriage of goods. And without delivery notes signed by the Defendant acknowledging receipt, there is no proof that the goods were delivered to the First Defendant.

Also that the Bills of Lading were consigned to Standard Chartered Bank of South Africa Ltd and not to the Defendants; and they were not endorsed by the Defendant. And without stamp acknowledging receipt of the goods, there was no delivery and therefore no breach of contract.

A Bill of Lading is ***"a document acknowledging receipt of goods by a carrier or by the shipper's agent and the contract for transportation of those goods. It also acts as a document of title to the goods".*** - **Blacks Law Dictionary, 8th Edition P.176 and Carver on Bills of Lading (1st Edition 2001) P.1.**

The Bill of Lading acts as a symbol of the goods, so that the right to possession of the goods transfers to the transferee with the Bill of Lading. – **Carvers Carriage by Sea (13th Edition 1982) P.1113**.

To determine whether the parties intended that a transfer of the Bill of Lading should also transfer the property in the goods to the buyer is a matter to be determined by the Sale Contract. - See **Sewell vs. Burdick (1884) 10 App. Cas. 74 Lord Bramwell.**
In the present case, the parties agreed that the Plaintiff (Seller) delivers the goods on board the vessel to Mombasa, Kenya (CRF Mombasa, Kenya – under the INCOTERMS of 2010). – See incoterms 2010- by the International Chamber of Commerce (ICC).

The Bills of Lading, Exhibits P_{10}, P_{12}, P_{14}, P_{16}, P_{18} and P_{20} show that the consignee was Standard Chartered Bank South Africa Ltd. The person to be notified was, Sembule Steel Mills Ltd, Head Office, Pot 11, Sembule Road, Nalukolongo, Kampala, Uganda. The Bills of Lading were stamped **"Exchange Provided Standard Chartered Bank".**

Following the incoterms 2010 agreed to by the parties, the Consigner/Supplier supplied the goods to the Consignee who acknowledged receipt of the same on behalf of the buyer as its agent.

Under clause 5.2- Exhibit P2- a signed delivery constituted proof that the goods had been delivered to and received by the purchaser in good condition, whether signed by the purchaser, an employee, an agent or representative or nominated transporter of the purchaser.

The Bill of Lading as a document acknowledging receipt of the goods supplied to the consignee/buyer shows that the buyer exercised its rights of taking delivery of the goods from the carrier. As per Exhibit P_1, the seller was prepared to extend credit to the buyer.

Failure by the buyer to pay the amounts indicated on Exhibits P_9, P_{11}, P_{13}, P_{15}, P_{17}, P_{19} and P_{21}, the invoices, amounted to breach of contract which left no option to the seller but to file this action. S. 48 (I) Sale of Goods Act provides that ***"where under a contract of sale, the property in the goods passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him or her for the price of the goods".***

There was no way the Defendant would have sought for a revised payment schedule in their email of 10.01.12 if the goods had not been received as alleged by them and no part payment would have been made in the first place as indicated by Exhibit P_{21}.

The First Defendant breached the contract by failing to wholly pay for the goods.

Court now proceeds to determine **whether the 2nd and 3rd Defendants are liable under the guarantee in the terms and conditions of the agreement.**

The evidence of the Plaintiff in this respect is that the 2nd and 3rd Defendants signed the terms and conditions of the sale incorporating a deed of suretyship and cessation, where they agreed

to bind themselves personally, jointly and severally to be liable to pay the debt of the First Defendant upon default. The evidence was fortified by the documents attached to the claim.

The 2nd and 3rd Defendants on the other hand denied any liability to the Plaintiff, contending that they never dealt with the company in their personal capacity. They denied signing the Exhibit P_2 and therefore any liability to meet the Plaintiffs claim, although the First Defendants name appears on the top of the document.

However, Counsel for the Plaintiff insisted in his submissions that the 2nd and 3rd Defendants signed the guarantee Exhibit P_2 Clause 4 thereof provides that ***"the parties who have appended their signature hereto on behalf of the purchaser hereby interpose and bind themselves jointly and severally the one paying the other to be absolved as sureties and co-principal debtors in solidus unto and in favour of the seller and its holding companies associated companies, for the money and obligations for which the purchaser may in the past or now or from time to time thereafter owe or be indebted or obliged to fulfill to the seller and or the sellers successors and assigns however so and from any cession or from whatever cause arising; and shall extend to the payment of damages whether there be cancellation or not of any relevant agreement".***

Counsel referred court to S.68 of the Contracts Act, for the definition of a contract of guarantee. He then contended that, the Plaintiff having proved that the 2nd and 3rd Defendants signed the guarantee Exhibit P_2, and the First Defendant Company having defaulted in pay the sum of $847,781.04 owed to the Plaintiff, the 2nd and 3rd Defendants are liable of the debt as guarantors.

Counsel for the Defendants contended that the liability of the 2nd and 3rd Defendants could not arise since they provided that they did not sign the contract. Therefore that, the principal debtor is not liable and it follows that the purported guarantors as secondly debtors cannot be liable in their individual capacities.

This court has already found as earlier indicated in this judgment, that the 2nd and 3rd Defendants signed the terms and conditions of sale incorporating the deed of suretyship and cession; whereby they agreed to indemnify the Plaintiff for any moneys owed by the First Defendant to the Plaintiff. Indeed, the Second Defendant was the Managing Director of the First Defendant Company at that time.

By agreeing to indemnify the Plaintiff, the 2nd and 3rd Defendants gave a guarantee or surety bond. That is, they promised to perform the contract or pay the debt in the event the obligor/principal (in this case the First Defendant) refused or failed to do so. - **Refer to Smith vs. Wood 01929) ICH. 14.**

The term surety and guarantor are synonymous. According to Wikipedia ***"Surety bond or guaranty involves a promise by one party to assume responsibility for the debt or obligation of a borrower if that borrower defaults. The person or company providing this promise is also known as "a surety or as a guarantor".***

The 2nd and 3rd Defendants are therefore liable in the terms and conditions of sale incorporating the deed of suretyship and cession to pay the amount due and owing from the principal debtor (First Defendant) to the Plaintiff – Exhibit P_2.

Remedies available to the Plaintiff: The plaintiff sought recovery of $847,781.04 as special damages, general damages for breach of contract, interest on the two at the rate of 30% per

annum from the date of breach until payment in full and from the date of judgment until payment in full, respectively, costs of the suit and any other remedy court deems fit.

Special Damages:

It was submitted for the Plaintiff that it is entitled to the special damages. The case of **Hadley vs. Baxendale [1854] EWTTC J70** was relied upon for the holding that ***"where two parties have made a contract which one of them has broken, the damage which the other party ought to receive in respect of such breach of contract should be such as may reasonably be considered wither arising naturally, that is according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they contract, as the probable result of the breach of it".***

Also that according to the case of **Roko Construction Co. vs. Attorney General HCCS 517/2008** – "***where payments were indeed delayed and the figure was pleaded and not challenged by the defendant, the plaintiff has proved the claim to the satisfaction of the court".***

Further that, since the Defendant breached the contract and did not challenge the amounts in the account statement – Exhibit P21, they are liable to pay the outstanding contract sum of $847,781.04.

Counsel for the Defendants asserted that the Plaintiff was not entitled to any of the remedies sought and prayed for dismissal of the suit.

Under Article 61 (I) (b) of the United Nations Convention on Contracts for the International Sale of Goods (CISG) 1980, ***"if a buyer fails to perform any of his/its obligations under the contract of this convention, the seller may …..; (b) claim damages as provided by in articles 74-77.***

Article 74 CISG provides that, ***"damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in light of the facts and matters of which he/she/it knew or ought to have known as a possible consequence of the breach of contract".***

While under S.48 of the Sale of Goods Act – (1) the seller may maintain an action against the buyer for the price of the goods (as in this case).

And under S.53 of the Act – ***"nothing in the Act shall affect the right of the buyer or <u>seller</u> to recover interest or <u>special</u> damages in any case where by law interest or <u>special damages</u> may be recoverable or to recover money paid where the consideration for the payment of it has failed".***

"The object of the award of damages is to compensate the plaintiff for the damage, loss… suffered. The law recognized two types of damages, that is, pecuniary and non-pecuniary loss. The former comprises of all financial and material loss incurred, such as loss of business profit, loss of income or expenses. The latter comprises all losses which do not

represent a persons financial or material assets. The former is capable of being calculated while the latter is not.

Further that in cases of pecuniary loss the amount can be proved and if proved it will be awarded as special damages. In this category falls income or earnings lost between the time of injury and the time of trial. But in cases of future financial loss whether it is future loss of earnings or expenses to be incurred in future, assessment is not easy. This prospective loss cannot be claimed as special damages because it has not been sustained at the date of trial. It is awarded as part of general damages". – Refer to **Robert Coussens vs. Attorney General SCCA 08/1999.**

Courts have established that ***"special damages and loss of profit must be specifically pleaded. They must also be proved exactly, that is to say, on the balance of probability".*** – **Haji Asuman Mutekanga vs. Equator Growers (U) Ltd SCCA 07/95.**

In the present case, the Plaintiff under paragraph 4, (g) (I) – (VI) and 5 (I) of the amended plaint, pleaded the particulars of special damages as follows:-

I) Invoice No HY26035 of 08.03.11 of US $53,700.

II) Invoice No. Exp./2011-2012/136 of 14.05.11 US $125,906.65.

III) Invoice No. 25034 of 21.05.11 of US $264,020.

IV) Invoice No HY 23881 of 09.06.11 of US $59,000.

V) Invoice No. 24115 of 08.08.11 of US $202,119.

VI) Invoice No. Exp/2011-2012/322 of US $127,592.86.

Total US **$847,781.04.**

In his evidence PW_1, Robert Mulondo tendered Exhibits P_9, P_{11}, P_{13}, P_{15}, P_{17} and P_{19} totaling to US $847,781.04. The exhibits (invoices) were stated to be the source of the Plaintiff's claim.

As already indicated, the Defendants denied receiving any delivers of commodities from the Plaintiff- claimed in Exhibits P_9, P_{11}, P_{13}, P_{15}, P_{17} and P_{19} and that the statement of account Exhibit P_{21} is inaccurate and untenable. However, as earlier indicated in this judgment, court finds that the Defendants received the goods.

The Plaintiff's exhibits P_9-P_{20} tendered in evidence and supported by oral evidence add up to the total sum of US $832,338.51.

They are:-

(i) Invoice No. 25034 dated 21st May, 2011 marked Exhibit P9 of US$ 264,020 in respect of bill of lading No. MSCU11229930 for goods shipped on 25th May, 2011;

(ii) Invoice No. 25115 dated 8th August, 2011 marked Exhibit P11 of US$ 202,119 in respect of bill of lading No. 862254808 for goods shipped on 9th August, 2011;

(iii) Invoice No. EXP/2011-2012/136 dated 14thMay, 2011 marked Exhibit P13 of US$ 125,906.65 in respect of bill of lading No. EPIRINDCCU103796 for goods shipped on 20thMay, 2011;

(iv) Invoice No. HY23881 dated 9th June, 2011 marked Exhibit P15 of US$ 59,000 in respect of bill of lading No. LTJMBA1101929 for goods shipped on 15th June, 2011;

(v) Invoice No. HY26035 dated 8th March, 2011 marked Exhibit P17 of US$ 53,700 in respect of bill of lading No. RTJMBA1112015 for goods shipped on 16th March, 2011; and

(vi) Invoice No. EXP/2011-2012/322 dated 5th August, 2011 marked Exhibit P19 of US$ 127,592.86 in respect of bill of lading No. 862234682 for goods shipped on 13th August, 2011.

This court therefore finds that the Plaintiff proved that the amount of special damages due and owing from the Defendants is US$832,338.51 and not US $847,781.04.

That is the amount that should be paid by the Defendants to the Plaintiff as special damages.

General Damages:

It was the submission of Counsel for the Plaintiff that general damages are awarded where there is breach of contract and the rule behind san award of general damages is that of restitution integrum, that is, in as much as possible to place an injured party in as good a position in money terms as he/it would have been had the wrong complained of not occurred. The case of **Uganda Commercial Bank vs. Kisozi [2002] IEA 305** was cited for the holding that ***"plaintiff who suffers damage due to the wrongful act of the defendant must be put in a position he/she would have been in had she/he not suffered the wrong".***

He pointed out that in the present case; the Plaintiff had incurred loss due to the Defendants breach of contract. He proposed an award of Sh. 50,000,000/- as being sufficient as general damages.

Counsel for the Defendants only stated that the Plaintiff is not entitled to the remedy.

Under S.61 of the Contracts Act 2010, provides that (I) ***"where there is breach of contract, the party who suffers to breach is entitled to receive from the party who breaches the contract, compensation for any loss or damage caused…".***

This court has already found that the First Defendant was in breach of contract and that the 2nd and 3rd Defendants guaranteed to pay the Plaintiffs any money found to be due and owing to the Plaintiff. The Plaintiff who suffered loss as a result of the breach is entitled to receive general damages from the Defendants.

Decided cases have stated that ***"general damages in breach of contract are what court may award when the court cannot point out any measure by which they are to be assessed, except in the opinion and judgment of a reasonable man".***

The Plaintiff are awarded Shs. 50,000,000/- proposed by Counsel as general damages. The Defendants did not object to the figure proposed by the Plaintiff.

Costs:

The general rule is that ***"costs follow the event and a successful party should not be deprived of costs except for good cause".*** See S.27 (2) of the Civil Procedure Act and **Francis Butagira vs. Deborah Namukasa [1992- 1993] HCB 98.**

Under the above section, ***"costs of and incident to all suits shall be in the discretion of the court, and the court has full power to determine by whom and out of what property and to what extent those costs are to be paid and to give all necessary directions for the purpose aforesaid"***.

The Plaintiff is the successful party in this case and therefore I find no good reason to deprive it of the costs of the suit.

Costs of the suit are, accordingly granted to the Plaintiff.

Interest:

Under S.78 of CISG where a party fails to pay the price or any sum that is in arrears, the other party is entitled to interest on it without prejudice to any claim for damage and coverable under Article 74.1.

And in S.26 (2) of the Civil Procedure Act, court has discretionary powers to award interest on the decretal sum if not agreed upon by the parties.

"Where no interest rate is proved, the rate is fixed at the discretion of court. However, it is recognized that in commercial transactions, the award of interest should reflect the current commercial value of money". **Crescent Transportation Co. Ltd vs. B.M Technical Services Ltd CACA 25/2000.**

In that case, because the Respondent had held the Appellants' money for so long the Court of Appeal enhanced the rate from 4% to 22% which court saw was realistic.

And accordingly to the case of **Nipunnorathan Bhatian vs. Crane Bank Ltd CACA 75/2006** ***"the interest rate applied to the dollar currency is that for borrowing the US dollar and not that of Uganda shillings".***

Counsel for the Plaintiff in the present case proposed interest at the rate of 30% to apply to the decretal sums. Using its discretion and consideration the interest rate applied to the dollar

currency for borrowing US Dollars, the rate of 8% is granted on the special damages from the date of filing the suit until payment in full.

As for general damages, court grants interest at the rate of 12% from the date of judgment until payment in full.

The rates of interest proposed by Counsel is excessive in the circumstances.

Judgment is accordingly entered for the Plaintiff against the Defendants jointly and severally in the following terms:-

1) The Plaintiff is awarded US $832,338.51 as special damages.

2) The Plaintiff is awarded general damages of Shs. 50,000,000/-

3) Interest is awarded on the special damage at the rate 8% from the date of filing the suit until payment in full.

4) Interest is awarded on the general damages at the rate of 12% per annum from the date of judgment until payment in full.

5) Costs of the suit are awarded to the Plaintiff.

Flavia Senoga Anglin
JUDGE
03.10.17