**THE REPUBLIC OF UGANDA**

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

**(COMMERCIAL DIVISION)**

**CIVIL APPEAL NO. 35 OF 2015**

**(ARISING FROM MENGO CIVIL SUIT NO. 1882 OF 2014)**

**KARIM MODING:::::::::::::::::::::::::::::::::::::::::::::::::::::::::: APPELLANT**

**VERSUS**

**SULAIMAN KABANDA:::::::::::::::::::::::::::::::::::::::::::::::::::: RESPONDENT**

**BEFORE: THE HON. JUSTICE DAVID WANGUTUSI**

**J U D G M E N T:**

This is an Appeal by Karim Moding herein after to be referred to as the Appellant, against Sulaiman Kabanda to be referred to as the Respondent.

The facts of the case are not in contention. The Respondent was the owner of Motor Vehicle UAK 691Q and desired to sell it. The Appellant and the Respondent entered into an agreement of sale on the 15th February 2012 wherein the Respondent sold the said motor vehicle to the Appellant at UGX 11,500,000/=. The Appellant made payment of UGX. 8,000,000/= leaving a balance of UGX 3, 5000 000/=.

The Respondent handed over the Motor Vehicle minus the Logbook. It was agreed that the Logbook would be released to the Appellant after the balance was paid. It is also clear from the proceedings that the Appellant then put up the vehicle for sale before paying the balance.

The Respondent impounded the vehicle; it ended in the police but was released to the Respondent because the police viewed the matter as a civil matter not serious enough for criminal prosecution. The Respondent kept the motor vehicle.

The Respondent then filed a suit and prayed for;

a) UGX. 3,500,000/= (balance for the sale)
b) General damages
c) Interest on (b)
d) Costs of the suit.

The Appellant filed a defence and Counterclaim. In the Counterclaim he sought;

a) Recovery of money UGX 8,000,000/= paid to the Respondent.
b) UGX. 1,615,000/=( money spent on repair of the vehicle)
c) General damages
d) Interest on (a) and (b) at a rate of 30% per annum from date of filing till payment in full.
e) Costs.

By his defence the Appellant denied liability and justified the rescission of the contract on the ground that the contract was breached when the Respondent impounded the motor vehicle.

Three issues were framed as here under;

1) Whether there was a breach of contract by the Defendant?
2) Whether the Plaintiff is in possession of the suit vehicle?
3) What remedies were available?

At the end of the case the Learned Magistrate found for Respondent and made the following orders;

1) The Defendant pays to the Plaintiff the sum of UXG.3,500,000/=
2) The Defendant pays UGX. 1,790,000/= to the Plaintiff as security and parking fees for the period of December 2012 - May 2015.
3) The Defendant pays the tax costs of the suit and Counterclaim.

The Appellant being aggrieved has appealed. He has eight grounds of appeal many of which are but replicas of each other.

When the Appeal came up for hearing, the Appellant's Advocate made submissions which I reduced to the following;

1) That the trial Magistrate made a finding and awarded parking and security fees of the vehicle when it was not pleaded in the plaint.
2) That the trial Magistrate converted an acknowledgment of payment into a sale agreement.
3) That while there was evidence that the Respondent was actually using the motor vehicle, the trial magistrate did not consider it.
4) That the trial Magistrate erred when he failed to find the Respondent in breach when he impounded the motor vehicle.
5) The Magistrate did not make a finding on the Counterclaim.

On the first ground that the Magistrate found for the Respondent, on the issue of parking fees, the Appellant's Advocate submitted that the vehicle was in fact not parked at a pay security post. That it was with the Respondent who was using it. That it was seen by many people who included DW3.

DW3 told court that after the vehicle was impounded the Respondent drove it and took it to his house.

The Learned Magistrate wrote;

> *"Since release of the suit vehicle to the Plaintiff, he parked the suit vehicle at Mengo garage at the Defendant/ Counterclaimant's costs at the daily rate of UGX. 2,000/=."*

This finding is not supported by anyone from the garage where it was allegedly parked.

Furthermore, there was no proof of payment by way of receipt, or any document. The Learned trial Magistrate did not give any reason why he believed the Respondent, yet since he had contended that he had parked at a garage at a fee, it was him to prove it.

Interestingly, the finding of the learned trial Magistrate was vitiated by finding that the issue of who possessed the vehicle was "redundant." He wrote;

> *"Against that background Court ordered the Plaintiff to produce the suit vehicle and park it at the Court. This therefore makes issue 2 a redundant issue and the Defendant/Counterclaimant is at liberty to take his vehicle as the Plaintiff was only entitled to the balance."*

Having held that the Plaintiff was only entitled to the balance, the trial learned Magistrate proceeded to award parking fees of UGX. 2,000/= per day moreover the payment for security were never proved. Lastly, the parking fees were never pleaded.

I had a thorough perusal of the plaint and found no claim for parking fees. It was an error for the learned trial Magistrate to award the parking fees.

On the same issue, the learned trial Magistrate should have taken off some time to evaluate the evidence of DW3 who told court that after the Respondent had impounded the motor vehicle, he saw him driving it and it was parked at the house of the Respondent.

This evidence was ignored by the trial Magistrate which in my view was erroneous on his part.

Both the parties were clear that there was no written agreement of sale. That what they had were simply acknowledgments of payments. In my view the learned trial Magistrate erred in treating acknowledgments of payments as the agreement of sale.

The learned trial Magistrate while dealing with the remedies wrote;

> *"The Defendant unjustifiably and willfully withheld payment of the balance of UGX. 3,500,000/= which is evidence of breach of contract on the Defendant's part."*

The learned Magistrate did not state on what he based the finding of the "unjustifiably and willful" refusal to pay. The Respondent himself told Court that the reason he impounded the motor vehicle was because the Appellant was planning to sell it. I have found no basis for the learned Magistrate holding.

On whether the Respondent impounded the vehicle rightly, Court was not told whether the Respondent was exercising his right of lien. It would seem he treated the Appellant as a person about to commit a crime by selling what was his.

The issue of lien is provided for in Paragraph V of the sale of Goods Act which provides for rights of an unpaid seller against goods.

Section 38 defines unpaid seller in these words;

"The *seller of goods is deemed to be an "unpaid seller" within the meaning of the Act-*

*When the whole of the price has not been paid or tendered."*

In the instant case there was a balance of UGX.3, 500,000/=. It is therefore my finding that the Respondent was an unpaid seller. What then would be his rights. Section 39 of the Sale of Goods Act provides that he would have a;

> *"Lien on the goods or right to retain them for the price while he or she is in possession of them."*

It means that he could only exercise the lien if he was still in possession. That lien could still exist where the goods are already with the buyer provided the seller specifically provided for the lien in the agreement of sale. Where such provisions exist, the seller can repossess the goods.

The seller however loses the lien when he or she delivers the goods to the buyer. Section 42 provides for termination of lien in these words;

> "*The unpaid seller of goods loses his lien or her lien or right of retention on the good*
>
> - *When the buyer or his agent lawfully obtains possession of the goods,"*

In the instant case, the Respondent released the goods to the Appellant when he received the first payment. In doing so he lost his right to retention. There was no agreement written and as such there was nothing to preserve his lien. The only solution for him was to sue for the balance.

The Respondent said he impounded the motor vehicle through Court order by obtaining a Court warrant. This warrant was not produced in court. There is therefore nothing to justify the impounding of the motor vehicle. It is my finding that the motor vehicle was wrongly impounded. That being the case the Respondent could not even be paid for its storage.

The Appellant's other criticism of the Magistrate's Court, is its failure to grant his prayers in the Counterclaim.

The first thing is the Appellant rescinded the contract as a result of the manner he was treated by the Respondent. From the findings of the court herein above, I find that the Appellant had every reason to rescind the contract. The vehicle was impounded wrongly in the first place. It has been away from him since July 2012 and its state is unknown.

The Appellant sought refund of UGX. 8,000,000/= be deposited with the Respondent. There is no doubt that he deposited the sum stated. The Respondent did not dispute.

I find the Respondent liable to the Appellant in UGX.8, 000,000/= which should be paid.

The Appellant had also prayed for refund of UGX.1, 615,000/= which he spent on the repair of the vehicle. He supported the claim with **Exh P2**which were acknowledgments of payments made by the Appellant to Lola Enterprises Garage.

The above was reinforced with evidence of DW2 Luswata Andrew who told court that the Appellant paid him UGX.1,615,000/= for the replacement of injector pump, overhaul of engine and replacement of clutch and pressure plate. This evidence was not disturbed by cross examination and I have no reason to disbelieve it. Court is satisfied that he incurred the expense. UGX.1, 615,000/= is awarded to the Appellant as special damages.

The Appellant also claimed general damages. An award of general damages is in the discretion of court as is always the law will presume it to be a natural and probable consequence of the Defendant's act or omission; **James Fredrick Nsubuga vs Attorney General HCCS No.13/98.**

I must add that damages are in their fundamental character compensatory, not punishment and their primary function is to place the aggrieved party in as good a position as he would have been had the breach complained of not occurred, to the extent that money can do.

The Appellant's claim was based on the fact that he paid his money to the Respondent and yet the motor vehicle was impounded by the Respondent. He therefore lost the use of his money UGX.8, 000,000/= in all. The other thing is that the conduct of the Respondent was unlawful and put the Appellant in bad light.

Taking all these circumstances into consideration, I find a sum of UGX 3,000,000/= (three million) an appropriate award of general damages.

The Appellant had also prayed for interest on the special and general damages of 30% per annum. An award of interest is at the discretion of the court , but like all discretions it must be exercised judiciously taking into account all circumstances of the case; **Uganda Revenue Authority vs Stephen Mabosi SCCA No. 1 of 1996.**

The basis of the award is that a party has been kept out of the use of the money while the other has had use of it so the injured party ought to be compensated accordingly; **Harbutts Plasticine Ltd vs Wyne Tank & Pump Co. Ltd [1970] 1Ch 447.**

In the instant Appeal, the Respondent clearly kept the Appellant out of the use of his money when he impounded the vehicle.

Taking into consideration the time he has inflicted this deprivation on the Appellant, I find 18% per annum as interest on the special damages from 27th September 2013 which is the date of filing the suit, till payment in full appropriate.

I also award interest of 6% per annum on general damages from date of judgment till payment in full.

The Respondent is also to pay costs of the case in this court and the one bellow.

Considering this matter in its entirety, I am of the view that the learned Magistrate erred when he failed to address the Counterclaim, and that if he had done so he would have found in favour of the Appellant.

In the result I would allow the Appeal and set aside the Judgment of the Magistrates Court and substitute therefore Judgment for the Appellant and order as follows;

a) The Appellant rightly rescind the contract.
b) The Respondent's impounding of the motor vehicle was illegal
c) The Respondent was not entitled to parking fees.
d) The Respondent to pay the Appellant UGX. 8,000,000/= as money deposited
e) The Respondent to pay the Appellant UGX, 1,615,000/= as special damages.
f) The Respondent to pay UGX. 3, 000, 000/= as general damages.
g) Interest on (d) and (e) from 27th September 2013 till payment in full at 18% per annum.
h) Interest on (f) from date of Judgment till payment in full.

i) Defendant also to pay costs here and bellow

j) The Registration book on file be returned to the Respondent.

**Dated at Kampala this 2nd day of November 2017.**

**HON. JUSTICE DAVID WANGUTUSI**

**JUDGE**