THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

HCCS NO. 792 OF 2015

AJAIB TRANSPORT LTD::PLAINTIFF

VERSUS

VERMA CO. LTD :::DEFENDANT

BEFORE: THE HON. JUSTICE DAVID WANGUTUSI

J U D G M E N T:

Ajaib Transport Ltd the Plaintiff sued Verma Co. Ltd herein after referred to as the Defendant for breach of contract because of wrongful termination. In the alternative she sued the Defendant for conversion of property.

The Plaintiff is represented by Mr. Bazira Anthony of Byenkya, Kihika & Co Advocates and the Defendant by Mr. Patrick Imanzi Barenzi of Barenzi & Co Advocates.

The background as discerned from the pleadings is that the Defendant hired trucks from the Plaintiff to transport her goods. The same was reduced into a written agreement dated 9th July 2015, **ExhP1**. The Defendant was desirous of hiring transportation services for her products or goods both locally and internationally. She agreed that she would provide her own personnel to accompany the goods to all destinations. Furthermore, she also agreed that she would be responsible for ensuring that the said trucks were sent during daylight hours.

The Plaintiff agreed that she would ensure that the goods/products were handed over to the designated officer of the Defendant. Delivery was to be acknowledged by both parties

The Plaintiff avers that one of the trucks that she put at the Defendant's disposal belonged to M/s Ismail Bashir Transporters Limited with whom she had an understanding by way of a subcontract.

The Plaintiff also claimed that the Defendant illegally repudiated the contract thus exposed her to an obligation to pay M/s Ismail Bashir Transporters Limited even where the truck was no longer transporting the goods of the Defendant.

The Plaintiff contends that they agreed that each truck would behired out to the Defendant at a rate of US $ 200 per day and these trucks would be utilized for delivery of the Defendant's goods and merchandise to various destinations around Uganda.She also contended that it was agreed that at the end of each month she would invoice the Defendant for arrears due after deducting the sum of US $ 1800 each month to cater for an advance payment she had received from the Defendant.

The Plaintiff further avers that the Defendant terminated her services without notice, **ExhP4**. She claims she notified the Defendant of the mode of dispute resolution between them but the Defendant opted to advise her to collect her trucks, **Exhibits P7 and D2.** That notwithstanding the Defendant also informed her that the said trucks would not be released without a payment plan for the advance payment which had been made at the commencement of the contract.

The Plaintiff contends that the Defendant ought to be held liable for conversion since she retained her vehicles yet she had repudiated the contract.

Further to the breach complained of, M/s Ismail Bashir Transporter Ltd from whom the Plaintiff had hired one of the vehicles Registration Number UAF 331W/ UBS 996 at the rate of UGX. 300,000/= per day gave notice to the Plaintiff demanding UGX. 28,800,000/= a sum accumulated in 96 days and threatened legal action if it wasn't paid within five days.

For those reasons and also that there was conversion of her trucks as well as money worked for in transport but unpaid the Plaintiff filed this suit seeking special damages for breach of contract, general damages and interest.

In the alternative, the Plaintiff soughtspecial and general damages for conversion, interest and costs of the suit.

The Defendant in her response admitted having entered into a working relationship with the Plaintiff in which the Plaintiff would deliver goods on her behalf. She however denied liability and contended that the understanding was never reduced into a written agreement. She also alleged that the agreement that waspresented toCourt bore a forged signature of the Plaintiff's director.

She stated that on the 26 September 2015 she instructed the Plaintiff to transport goods to Mbarara but the Plaintiff failed to do so. The Defendant said that what was most annoying was that while it was an agreed position that the goods would be delivered without undue delay the Plaintiff's Manager deliberately instructed the driver to stop at

Lukaaya along Masaka-Kampala highway for the night and that if there was any inquiry from the Defendant company as to why the goods had not reached Mbarara, he would claim that the truck was faulty and awaiting repair.

The Defendant who alleged that the truck was not faulty classified this as a fundamental breach of the understanding between them and terminated the arrangement, **ExhP4** dated the 5th of October 2015. The letter of termination in part read;

> *"Your services were of a critical nature to the success and profitability of our clients and as such your services were to be expended professionally. A lot of trust was placed in you.*
>
> *It was therefore very disturbing to learn that you ordered your driver on 26th September 2015 to park the truck he was driving at Lukaaya and then lie to our client that the truck had developed a mechanical fault (see copy of his statement). This caused unnecessary delays and loss on the other part of our client for which it will seek legal redress.*
>
> *For the above reasons your services are hereby terminated with immediate effect."*

It is not in dispute that at the time the Defendant wrote this letter of termination the Plaintiff's vehicles were still parked at her agent's premises and this is clearly shown in the last paragraph of the letter of termination, **ExhP4** wherein the Defendant's advocate wrote;

"Our client shall in the meantime hold onto your vehicles that are currently parked at its agents premises to remove the special containers on the said vehicles which are at its property and secondly for you to refund USD 52,461(United States Dollars Fifty two thousand four hundred sixty one only) that we advanced to you."

By way of Counterclaim, the Counterclaimant/Defendant seeks recovery of a consolidated sum of US $ 31,605, general damages, interest of 25% per annum from date of judgment till payment in full, alternative reliefs and costs.

The Counterclaimant based her claim on money had and received by the Counter-Defendant. She avers that she advanced a sum of US $ 52,461 to assist the Counter-Defendant in her business operations which would be repaid by way of set-off of USD 1,800 whenever the Counter-Defendant presented an invoice in respect of deliveries she made on behalf of the Counterclaimant.

It is the Counterclaimant's aversion that she offset USD 20,856 from the Plaintiff's invoice for the month of September 2015 leaving there an outstanding balance of USD 31,605 which formed the basis of this Counterclaim.

In reply to Counterclaim, the Counter-Defendant contended that the vehicle broke down at Lukaaya and it was not until repairs were done that the cargo was safely delivered the next day. She faulted the police statement, **ExhD1** as a fabrication that was inadmissible. She also faulted the lump-sum setoff of USD 20,856 stating that the recovery of money was to be done over a period of ten years at the rate of USD 1,800

per month. She averred that to claim a refund of the money at the time the Counterclaimant did was premature since the money was not yet due.

The issues as agreed by the parties for trial are;

1) Whether there was a contract for services between the Plaintiff and the Defendant?
2) Whether the Defendant is liable for breach of contract?
3) Whether the parties are entitled to any remedies as contained in the Plaint and the Counterclaim?

As to whether there was a contract for services between the parties, it is the Plaintiff's contention she provided transport services to the Defendant. It is also her contention that the terms of this agreement was reduced into a written agreement, **ExhP1**. The Defendant however denied ever executing this document. She relied on the evidence of DW1 Rajesh Arora who testified that the relationship the parties had was never reduced into a written document.

A scrutiny of **ExhP1** shows that a service agreement was executed by the Defendant as 1st party and the Plaintiff as second party. The Defendant had agreed to hire transport services for its products /goods both locally and internationally. This agreement also illustrates that payment was to be received by the 10th of each month. I believe that **ExhP1** was the agreement the parties had reduced to writing.

What makes me believe that a written agreement existed between the parties is clearly seen from the document itself which bears operational seals of both parties. Clause 1.3 of the agreement provided for duration of the agreement in these words;

"The parties herein agree that the duration of the contract shall be 10 years."

What further confirms that the parties entered into this agreement is the communication attached to **ExhP7** from the Defendant written by her Sanjay Verma part of whose subject was the signing of the contract. Right from the beginning of the email communication Verma states that the contract is signed. He wrote;

"hi, sorry for the delay. Contract will be signed and delivered tomorrow.regarding green truck, it is still on the way from Mbarara, but I have told Henry for the next trip make it ready in the evening and it leaves early morning at 6 the next day. Will let you know the day it leaves"

On 16th July 2015 Sanjay Verma wrote to the Plaintiff acknowledging that he signed the contract, **ExhP7.** He wrote;

"contract signed will give to maninder in the evening."

Contract signed in my view meant that he had endorsed **ExhP1**.The Defendant cannot not therefore turn around and claim that they were not a party to the contract.

A letter dated 22nd October 2015 from the Plaintiff's Advocate Byenkya, Kihika and Co. Advocates to the Defendant's Advocates Barenzi & Co. Advocates makes reference to a letter dated 19th October 2015, **ExhP7**. It also refers to execution of the contract by Sanjay Verma on behalf of the Defendant. It in part reads;

"It is unfortunate that your clients have not been honest with you. Please find enclosed a self-

explanatory email from Mr. Sanjay Verma confirming the signing of the same contract that your clients now deny. You will note that MrVerma himself signed the contract on behalf of your client. Not surprisingly, the authenticity of his signature is not denied. That is all that is required to make it a binding contract..."

In addition to the execution of this contract, the relationship between them also shows that tax invoices were drafted by the Plaintiff and forwarded to the Defendant, **ExhP3**. These invoices in my opinion show that the Defendant's goods were being transported by the Plaintiff at a daily rate of USD 200.

This agreement having been entered into by willing parties, it is only within this agreement that the dispute should be resolved. This Court cannot begin reading into the agreement, provisions that were not intended to be included. This position was well illustrated as early as 1875 in ***Printing & Numerical Registering Co. Sampson (1875) LrEq 462 at 467*** wherein Lord Jessel MR observed;

"If there is one thing more than another which public policy requires, it is that men of full age and competence and understanding shall have the utmost liberty in contracting and their contracts, when entered freely and voluntarily, shall be held enforceable by the Courts of justice."

This was further enunciated in a later case;***Stockloser vs Johnson(1954) 1 All ER 640***where the Court heldthat;

> *"People who freely negotiate and conclude a contract should be held to their 'bargain', rather that the judges should not intervene by substituting each according to his individual sense of fairness, terms which are contrary to those which the parties have agreed upon for themselves."*

From the foregoing it is abundantly clear that there existeda writtencontract between the parties.

Turning to whether the Defendant is liable for breach of contract the Plaintiff alleges that the Defendant committed breach by; terminating her services without notice, failing to pay her services at time of termination and retaining her trucks having terminated her services.

In ***Nakana Trading Co. Ltd vs Coffee Marketing Board Civil Suit No. 137 of 1991*** Court defined breach of contract as a situation where one or both parties fails to fulfill the obligations imposed by the terms of contract. I shall first delve with the issue of termination. Clause 1.4 of the contract provides for termination in these words;

> *"This agreement shall be terminated upon either party intending to terminate it giving a 3 (three months) notice prior to termination."*

The Defendant in a letter dated 5th October 2015, **ExhP4** terminated the Plaintiff's services as follows;

> *"The above matter refers;*

We act for and on behalf of M/s Verma Company Limited, our client on whose instructions we address you as hereunder

Further reference is made to the working relationship you have with our client where you were offering transportation services for our client's goods, the further and better particulars of which you are well aware of.

Your services were of critical nature to the success and profitability of our clients and as such your services were expected to be expended professionally. A lot of trust was placed in you.

It was therefore very disturbing to learn that you ordered your driver on the 26th September 2015 to park the truck he was driving at Lukaaya and then lie to our client that the truck had developed a mechanical fault (see copy of statement). This caused unnecessary delays and loss on the other part of our client for which it shall seek legal redress.

For the above reasons your services are hereby terminated with immediate effect.

Our client shall in the meantime hold onto your vehicles that are currently parked at its agents premises to remove the special containers on the said vehicles which are its property and secondly,

for you to refund USD 52,461 (United States Dollars Fifty Two Thousand Four Hundred Sixty One Only) that was advanced to you."

According to the above termination notice the Defendant alleges that the Plaintiff ordered her driver on the 26thof September 2015 to park the truck he was driving at Lukaaya and deceive her client that the truck had developed a mechanical fault.

PW1 Singh Harmohan the Plaintiff's Managing Directortestified that the driver Sanyu Musoke called him and informed him that the truck had gear issues. He also testified that he did not send mechanics to attend to that problem. He stated that the driver told him that the truck could only move in low gears. PW1 stated that being a mechanic he was aware that driving in low gears would only bring more issues to the truck. He said;

"I told him I would get back to him after consultation with my mechanic. After some while, after discussing with the mechanic I called him and told him to check for a fuse in the cabin of the truck which is related to the gear box. He asked me to give him some time to check for the location of the fuse and after a few minutes he called and told me he had found the fuse and that it was burnt. I told him to remove the fuse and try to look around if he can find it somewhere so that we replace the burnt one."

Hesaid he told the driver to go and find the fuse if he could get it in Lukaaya. That after two or three hours the driver called him and informed him that he had got the fuse. PW1 also said he instructed the

driver to fix and test the truck. He testified that after the fixing the driver told him the truck was okay.

The Defendant alleged that the driver Mr. Musoke made a police statement stating that the Plaintiff called him and told him to park the car and that there was no mechanical fault. She relied on **ExhD1** a statement dated 27th September 2015allegedly by the Plaintiff's driver at Lukaaya Police station. In this statement the driver is said to have stated;

> *"I drove up to Lukaaya at about 0930 hours completed weigh bridge business and called him for further instructions. He told me after calling him back that I should drive the truck UAW 852M/ 853M to Lukaaya public parking yard which I did. He told me that in case I am asked by anybody from Verma Co. I should say that the truck has mechanical problem."*

What makes it hard to believe that this was a genuine witness statement or police reportis discerned from the evidence of DW2 Albinious Twesigomwe an Operations Manager with Securex (U) Ltd. Asked where he had recorded this report he answered;

> *"I recorded it from Lukaaya; actually at the parking yard near the police."*

Asked about the ranks of these police officers, he said that the highest ranking officer was Sergeant.Further asked if these officers had made this report he said they did not.**ExhD1** does not convince Courtthat this

was a valid statement made by the Plaintiff's driver to the Police nor a confession.

Section 23 of the Evidence Act provides for confessions to police officers and power of Minister to make rules. In respect of confessions to police officers it stipulates;

> *"(1) No confession made by any person while he or she is in the custody of a police officer shall be proved against any such person unless it is made in the immediate presence of-*
>
> *(a) a police officer of or above the rank of assistant inspector; or*
> *(b) a magistrate.. ."*

A reading of this provision of the law illustrates that a confession can only be proved against a person if it is made in the immediate presence of a police officer of or above the rank of Assistant Inspector or a Magistrate.

The Defendant also relied on the evidence of DW3 Eric Mukwaya who was working with the Defendant Company as an escort. In paragraphs 3, 4, 5, 6 and 7 of his witness statement he explained his duty to accompany the goods to all destinations. He stated;

> *"3. That sometime in September, 2015 I was instructed by my employer to monitor 60 motorcycles that were going to be transported to the Mbarara office.*
>
> *4. That I met with Musoke the driver and we set off for Mbarara.*

5. That I had had six encounters with Musoke the driver and on six occasions he had driven the truck with Verma's goods to the Mbarara office while I sat in the co-driver's seat.

6. That while in Lwera the driver got a call and after the call he told me that his bosses had directed him to park the truck at Lukaaya public yard until he receives further instructions.

7. That he further told me that he had been instructed to tell my bosses that the truck has a mechanical failure and that I should tell my bosses the same thing."

During cross examination DW3 testified that he speaks lusoga and ludama. He told Court that the driver was using Kiswahili to communicate with his boss however between themselves they used lusoga to communicate.During re-examination he explained that the truck had actually parked at Lukaaya and that he did not see anyone or the driver fix the vehicle.

The Plaintiff did not call the said driver to testify in regard to this mechanical breakdown but common sense begs for answers to these questions. Firstly, the Plaintiff was a business entity whose income was derived from working motor vehicles, transporting cargo up and down. He would therefore not park the vehicle without reason. Secondly, it costs money to park in the parking yard at Lukaaya. Why then would he park and be charged? Thirdly, it was still early at the time the driver finished with the weigh bridge. It was therefore to his advantage if the vehicle traveled to Mbarara.

Fourthly, DW3 does not tell court that he kept his eyes throughout on the activities and actions of the driver. There is nothing to show that he did not move away from the vehicle. In any case, a fuse is but a small object where you do not need to change into overalls and spanners to replace. There is therefore no evidence to show that the fuse was not changed and that by the time it was got it was late to travel as it would involve driving after day light in breach of the agreement.

That being the case, there is no reason to disbelieve the testimony of PW1. As a business man it would never make sense for him to park his vehicle at a fee when he had all the time to continue with the journey.

As for the issue of reasonable time, the Defendant averred that the actions of the Plaintiff amounted to fundamental breach of the contract. The contract between the parties provides for time under Clause 1.2 (b) as follows;

> *"The 2nd Party shall ensure that the goods are delivered within a reasonable time and that no such an unreasonable delays shall be occasioned."*

The contract however did not indicate what was implied by reasonable time was. A stipulation that time is of essence in respect to a particular contractual term denotes that timely performance is a condition of the contract. It follows that where a promisor fails to give timely performance of an obligation in respect of which time is expressly stated to be of essence, the injured party may elect to terminate and recover damages in respect of the promisor's outstanding obligations, without regard to the magnitude of the breach; ***Lombard North Central vs Butterworth [1987] 1 QB 527; [1987] 1 ALLER 267; [1987] 2 WLR 7.***

The same result will follow if the contract contains a clause to the effect that any breach of such a clause will entitle the innocent party to terminate or rescind the agreement. The injured party is relieved of any obligation that remains unperformed on his part.

In addition the injured party may claim for damages on the basis that upon termination of the contract the obligations of both parties which remain unperformed are brought to an end.If what is done or not done in breach of a contractual obligation does not make the performance totally different from that intended by the parties or render the contract completely frustrated, then it is not so fundamental as to undermine the whole contract, it will only constitute a breach of warranty which is remedied by damages; ***HongKong Fir Shipping Co. vs Kawasaki Kisen Kaisha Ltd, [1962] 2 QB 26, [1962] 1 ALL ER 474.***

In this case Clause 1.2 (b) shows that the goods were to be delivered within a reasonable time and that no such unreasonable delays would be occasioned. It does not state the exact time. This clause in my view does not specify or fix the precise time within which failure to comply would amount to breach. Under Clause 1.2 (a) it refers to the Defendant being responsible for ensuring that the trucks are sent during daylight hours. Clause 1.2 (b) refers to a reasonable time.

It is trite that where time is not of essence in the performance of the contract, a breach of contract cannot occur unless the innocent party issues a notice to the other, making time of the essence. This was ably observed in the decision in ***United Scientific Holdings vs Burnley Borough Council [1978] AC 904*** in these words;

"In the absence of time being made of essence (performance had or has) to be within a reasonable time. What is reasonable time is a question of fact to be determined in the light of all the circumstances. After the lapse of a reasonable time for performance the promisee could and can give notice fixing a time for performance. This must be reasonable, notwithstanding that ex hypothesis a reasonable time for performance has already elapsed in the view of the promisee. The notice operates as evidence that the promisee considers that a reasonable time for performance has elapsed by the date of the notice and evidence of the date by which the promisee now considers it reasonable for the contractual obligation to be performed. The promisor is put on notice of these matters. It is only in this sense that time is made of the essence of a contract in which it was previously non-essential. The promisee is really saying unless you perform by such –and-such a date;I shalltreat your failure as a repudiation of the contract."

Clause 1.2 (c) ofthe contract provided for handing over of goods to the designated officer as follows;

"The 2nd party shall ensure that the goods/products are officially handed over to the designated officer of the 1st party and delivery shall be acknowledged

by both parties and their agents signing a delivery deed."

In determining whether a breach is fundamental one may consider the following:-

Firstly, nature of contractual obligation which arises where the parties have agreed that in case of breach of the provision, the other party may terminate the contract. Deviation from the obligation would amount to fundamental breach. A good example is where time of delivery has been agreed and the parties have agreed the exact time from which the importance of timely performance would flow.

In such a case the parties must consider whether the goods are of a fashionable or seasonable character, or fluctuation of prices, in determining whether the late delivery constitutes a fundamental breach.Of course if the goods are perishable in nature or where they cannot be stored a fundamental breach would most likely be committed by late delivery.The reason here is because the goods may lose value or perish totally. But where there is no detriment to the goods, the right of avoidance would not occur.

In the instant case it's pertinent to ask, did one day's delay occasion detriment to the goods that the Plaintiff's truck transported? Did the price fall causing loss to the Defendant?DW1Rajesh Arora the General Manager of the Defendant did not in any way state what loss the late delivery had caused. He claimed that when the truck did not arrive, he sent their security service to secure the truck. The necessity of this is not clear because the truck had travelled with the Defendant's employee whose duty was to look after the goods.

There was no fixed or exact time of delivery. In this case where the goods were to be delivered "within a reasonable time and without unreasonable delay" one day's delay, which has not caused loss to the owner or detriment to the goods cannot be classified as a fundamental breach.

PW1 clearly testified that the fuse had to be replaced. That the driver looked for it and found it later in the day. By then time had gone and in keeping with the agreement that the goods were to be transported only during daylight, the goods spending a night at Lukaaya was the only alternative.

In my view the conduct of the Plaintiff was geared towards the security of the goods.

Secondly what was the gravity of the consequence of the breach? Did failure to deliver the goods on the same day they left Kampala deprive the aggrieved party, in this case the Defendant's expectations and render the contract avoidable? Was the contract overall value and its monetary benefits affected? As I have said above where no detriment has been occasioned or is likely to be caused by the breach, a fundamental breach is remote.

The Defendant did not state that because of the 24 hour delay, he had failed to resell the goods. The Defendant did not even state the monetary harm occasioned by the delay or that the breach interfered with his other activities. It is needless to say that the extent of damages is relevant in determining fundamental breach.

In the present case, the contract was for delivery of motorcycles. They were delivered. The purpose of the contract was therefore achieved. Thirdly a fundamental breach would arise where the supplier of services would totally fail to deliver. In this case non-performance would be considered a fundamental breach.

In the instant case the Plaintiff was capable of delivery and did so.

Fourthly a fundamental breach would be where the supplier refused or was unwilling to deliver. In this case there is evidence that the Plaintiff was always willing to deliver.

Considering all the circumstances of this case the conduct of the Plaintiff depicts a willing supplier of transport services whose reason for parking the truck within the safety of a parking yard was because he wanted to ensure safe delivery. The main issue was to deliver. The delivery was to be within reasonable time and travel only during the day. Reasonable time was not defined by any of the parties. Reasonable time is however a question of fact to determine in light of the facts of each case. It is to be construed from the facts that existed at the time of contract.

From the foregoing one can define reasonable time as;

> *"that amount of time which is fairly necessary, conveniently to do what the contract requires to be done as soon as circumstances permit."*

In the instant case, the burden to prove that the time within which the Plaintiff had to transport goods had expired was upon the Defendant. The available time to the Plaintiff to transport the goods was during day light.

Considering that the motor vehicle fuse took time to find in Lukaaya the only time "fairly necessary, convenient" for the Plaintiff to do what the contract required was the next day.

The sum total is that the Plaintiff did not commit any fundamental breach.

That being the case termination of the agreement based on that ground was without foundation and the Defendant is liable for any damages arising from it.

The Plaintiff also claimed that the Defendant's act of detaining her vehicles after repudiating the contract without the Plaintiff's consent amounted to conversion of her property.

Conversion implies the wrongful interference with the goods of another, such as taking, using or destroying those goods in a manner inconsistent with the owner's right of possession; ***Daimler Chrysler Inc vs Associated Bailiffs & Co. Ltd 2005 Can LII 24234 (ON SC.)***

The crux of the tort of conversion is grounded on a Defendant committing a wrongful act with respect to the property therefore evidence must show or permit an inference to be drawn that a Defendant acted in such a way as to deny a Plaintiff title or possessory right; **Simpson**

v. Gowers (1981), *1981 Can LII 1884 (ON CA), 32 OR (2d) 385 (C.A.) at 387.*

It follows that conversion is a strict liability tort wherein it is no defence that the wrong committed resulted from contributory negligence or some fault from the Plaintiff. Diplock L.J observed this principle in***Marfani& Co. vs Midland Bank [1968] 2 ALL ER 573 at 577-78*** in these words;

> *"the moral concept of fault in the sense of either knowledge by the doer of an act that is likely to cause injury, loss or damage to another, or lack of reasonable care to avoid causing injury, loss or damage to another plays no part."*

In this case the Defendant terminated the Plaintiff's services on 5th October 2015. As shown in **ExhP4** the Defendant held onto the Plaintiff's vehicles in these words;

> *"Our client shall in the meantime hold onto your vehicles that are currently parked at its agents premises to remove the special containers on the said vehicles which are its property and secondly, for you to refund USD 52,461.00 (United State Dollars Fifty Two Thousand Four Hundred Sixty One Only) that was advanced to you."*

When the Plaintiff objected to the termination and detention of the trucks, the Defendant justified her actions in a letter dated 19th October 2015, **ExhP6**. She wrote;

"Our client reiterates that it is yours that is in breach of the relationship they had and that it is yours that currently owes our clients in the sum of USD 31,605.00 (United States Dollars Thirty One Thousand Six Hundred Five)

As communicated to yours earlier, our client held onto your client's trucks to remove the specialized carriage containers which it has successfully completed over the weekend.

Our client also informed yours to settle an outstanding amount of USD 52,461.00 (United State Dollars Fifty Two Thousand Four Hundred Sixty One) that had been extended to you during the time your client offered its services of transportation as an advance.

Upon receipt of your clients invoice for the month of September 2015 sent on 13th October by email in the sum of USD 20,856.00 (United States Dollars Twenty Thousand Eight Hundred Fifty Six) our client has offset the same from the sum advanced which now places the amount outstanding in USD 31,605.00 (United States Dollars Thirty One Thousand Six Hundred Five) that remains due and owing.."

A month after the termination of the contract the Defendant still held onto the Plaintiff's vehicles. On the 5th day of November2015theDefendant's Advocate Barenzi & Co. Advocates wrote to

M/s Byenkya Kihika & Co. Advocates stating that she would not return the Plaintiff's vehicles, **ExhP8**. They wrote;

> *"Our client cannot and shall not return the vehicles at its expenses. Its yours that delivered them to the premises and has the keys to these trucks; secondly the contract you refer to in which you suggest they terminate to its terms is unknown to our client. In the premises your refusal to collect the said trucks amounts to self-infliction of injury that yours shall be solely responsible for.*
>
> *As your client is well aware, the premises they are parked at belong to an agent of our client who wishes to utilize its premises to its optimum."*

Record shows that a number of motor vehicles were later released. In an agreement dated 22nd December 2015 a representative of the Defendant released the trucks, **ExhP16.** He wrote;

> *"AGREEMENTFORRELEASE OF MOTOR VEHICLE TRUCKS; UAW852M, UAW997Y, UAW315SAND UAF331W. IN THE MATTER OF AJAIB TRANSPORTER LIMITED VS VERMA CO.LIMITED (CIVIL SUIT NO.792 OF 2015)*
>
> *I, DAXESH PAREKH OF Verma Co. Limited, P.O.BOX 33733, Kampala consent to the release of the Trucks in our CLIENT NISH AUTO's premises and further confirm that the above have been delivered to MANINDERGIT SINGH telephone*

+25684473024 of AJAIB TRANSPORT LIMITED in the condition that they were parked, in the presence of his lawyer ANTHONY BAZIRA of BYENKYA, KIHIKA & CO. ADVOCATES P.O.BOX 16401, KAMPALA..."

The Defendant justified her action of holding onto the vehicles on grounds that she needed to remove special containers from the trucks. She also argued that the Plaintiff owed her a sum of money which been advanced to her at the commencement of the agreement.

The period within which the Plaintiff claims conversion is the same in which she claims **Payment In Lieu of Notice of Termination** (PILON). For her to get PILON it means the contract was still substituting and therefore the Defendant had every right to continue using the vehicles. Under those circumstances the claim for conversion cannot stand because for PILON to exist the Defendant had to wrongfully retain use of the vehicles.

The vehicles having been released before the expiration of the PILON period the Defendant cannot be held liable in conversion.

Turning to the Counterclaim, the Counterclaimant avers that the Counter-Defendant/Plaintiff is indebted to her to a tune of USD 31,605. Asked whether the Plaintiff owed any money to the Defendant, PW1 said they did not owe any money.When he was asked if the Plaintiff wrote to the Defendant denying liability, PW1 stated that they did but he did not have any documentation to corroborate his assertion.

Evidence is abundant to show that the Counter-Defendant/Plaintiff was indeed indebted to the Counterclaimant. What is clear is that at the time

when the Plaintiff's contract was terminated she owed the Defendant USD 52,461.00, **ExhP4**. Subsequently the Counterclaimant acknowledged receipt of USD 20,856 as a set off that was presented by the Plaintiff/Counter-Defendant leaving there a balance USD 31,605.

DW1 Rajesh Arora in paragraph 20 of his witness statement clearly stated that a total sum of USD 31,605 remained outstanding as of September 2015 after making the agreed deductions by the Counterclaimant. This claim was not challenged and the Court finds the Plaintiff/Counter-Defendant liable to pay the Counterclaimant USD 31,605 which was a balance on money advanced to the Plaintiff/Counter-Defendant to facilitate her transport business.

Turning to the remedies available to the parties the Plaintiffprayed for special damages of unpaid invoices for the months of August 2015 amounting to USD 22,744 and September 2015 to a tune of USD 20,856.

It is settled law that where special damages are claimed, they must be pleaded with sufficient specificity and strictly proved; ***Uganda Telecom vs Tanzanite Corporation [2005] EA 351.***

By this I am fortified by the decision of the Learned Justices in ***Haji Asuman Mutekanga vs Equator Growers (U) Ltd SCCA No. 7/1995*** citing the learned author in ***MC Gregor onDamages 4th Edition page 1028*** observed as follows;

> *"the evidence in special damages must show the same particularity as is necessary from its pleading. It should therefore, normally consist of evidence of particular losses such as the loss of specific customers*

or specific contracts. However with the proof as with pleadings, the Courts are realistic and accept that the particularity must be tailored to the facts."

To prove her claim for unpaid invoices the Plaintiff called PW1 who testified that by the 5th of October 2015 when the Contract was terminated the Plaintiff was owed an accumulated sum covering the month of August 2015 and September 2015 amounting to USD 22,744 and USD 20,856 respectively.

To support his claim he relied on **ExhP11**which detailed the vehicles that were used, the number of days they worked and the total amount that the Defendant was expected to pay. This evidence remained undisturbed and the only attempt to transverse it by the Defendant is in DW1's witness statement paragraph 15 where he refers to the claim as a speculation because the sums claimed were not agreed upon by the parties.

With due respect, I disagree with DW1 because indeed the sums were agreed upon by the parties. As to how much a truck would cost per day is clearly shown in the tax invoices which were endorsed by Sanjay a director in the Defendant Company.The invoices clearly indicate that the daily payment for each truck was USD 200, **ExhP3**.

The Plaintiff's evidence therefore remains undisturbed and I believe PW1 that indeed they supplied transport services for the months of August and September 2015 and therefore rightly demanded for USD 22,744 and USD 20,856 respectively which I hereby award.

As for the Plaintiff'sclaim in October 2015 it is fully covered in the PILON and to give them any more would be unjust enrichment.

The Plaintiff asked for loss of earnings from time of termination of contract up to the time when the trucks were released and also payment in lieu of notice of termination (PILON). The notice was provided for in clause 1.4 of **ExhP1** as follows;

> *"This agreement shall be terminated upon either party intending to terminate it giving a 3 (three) months' notice prior to termination."*

It follows that where a party suddenly terminated the contract, he or she would be liable to pay the other party the equivalent of what he/she would have earned in the period prescribed. In many contracts it is not easy because the sums to be earned are not easily ascertainable but in this case it was clear that the Plaintiff would earn USD 200 per truck per day.

When the Defendant on 5th October 2015 terminated the contract and retained the trucks, the 3 months' notice provision came into play and would remain in place up to 4th January 2016.

A calculation of the period shows that PILON was to end on 4th January 2016 which was 91 days. It was also clear from the evidence that the trucks did not work Sundays and Public holidays. Again simple calculation shows that there were 17 Sundays and Public holidays in that period from 5th October 2015 to 4th January 2016.Subtracting 17from 91 days leaves 74 days. The Plaintiff was therefore entitled to;

USD 200 X 74 DAYS X 4 Trucks=USD 59,200

For those reasons the Defendant is liable to pay the Plaintiff the sum of USD 59,200 as PILON.

The Plaintiff also prayed for loss of income at the rate of USD 800 per day till the trucks were released to her. I am afraid this prayer must be rejected in as much as the trucks could only bring USD 800 per day in the continuance of the contract. The Plaintiff would not have utilized them anywhere else if the Defendant had not terminated the contract. In any case the Plaintiff has already been awarded the USD 800 in PILON.

Having obtained the sum above there was no loss because what would have been earned is already awarded.

The prayer for lost income is therefore refused.

As for the liability allegedly imposed on the Plaintiff by Ismail Bashir Transporters arising from the use of atruck that the Plaintiff had hired from them, the claim cannot be awarded for the following two reasons. Firstly, that the Defendant was not privy to the contract between the Plaintiff and Ismail Bashir Transporters. Secondly, the remuneration for the use of the truck has been included in the PILON it would therefore be unjust to award an extra sum.

The Plaintiff prayed for general damages for breach of contract and conversion. Since Court has found that there was no conversion committed by the Defendant, I shall proceed to consider the Plaintiff's claim on the basis of breach of contract.

The fundamental rationale for the award of general damages is illustrated by the Court of Appeal in ***Dharamshi vs Karsan [1974]1 EA 41*** that general damages are awarded to fulfill the common law remedy of *restitutio in integrum* which means that the Plaintiff has to be restored as nearly as possible to a position he or she would have been had the injury complained of not occurred.

This means that general damages are compensatory in nature and are intended to make good to the aggrieved party as far as money can do forthe losses he or she suffered as the natural result of the wrong done to him/her; ***Okello James vs Attorney General HCCS No. 574 of 2003.***

In this case the Plaintiff's contract was unlawfully terminated in as much as this was a ten year contract the grounds for termination were flimsy and unsupported by any stretch of imagination. The sudden change of circumstances must have rattled the Plaintiff who was now faced with looking for other markets to service. There is nothing to show that these markets were readily available and in the premises she suffered damage.

The Plaintiff was also inconvenienced by the premature demand for refund for advance which money she could only get on being paid by the Defendant who was unwilling to do so.

Having considered all the circumstances of this case, I find an award of UGX. 50,000,000/= appropriate as general damages. It is so awarded.

The Plaintiff also prayed for interest. An award of interest is discretionary; the basis of such an award is that the Defendant has kept the Plaintiff out of his money and the Defendant has had use of it so the Plaintiff ought to be compensated accordingly; ***Harbutt's Plasticine Ltd vs Wyne Tank & Pump Co. Ltd [1970] 1 Ch 447.***

Considering that the Plaintiff is a business entity keeping her out of her money caused loss in as much as she could not re-plough her money back into her economic activities. In awarding interest Court will look at the prevailing economic value of money considering the fact that this

money might not be promptly paid; ***Kinfera vs The Management Committee of Laroo Boarding Primary School HCCS 099/2013.***

As to when the interest will accrue I find comfort in the decision of the Learned Judge, Justice Odoki as he then was, in ***Omunyokol Akol Johnson vs Attorney General SCCA no. 6 of 2012*** wherein he wrote;

> *"It is well settled that the award of interest is in the discretion of the Court. The determination of the rate of interest is also in the discretion of* the Court. *I think it is also trite law that for special damages the interest is awarded from the date of the loss, and interest on general damages is to be awarded from the date of judgment..."*

The Plaintiff asked for 25% per annum from date of filing but did not give sufficient justification for this high rate of interest. Considering the circumstances of this case I find a rate of 20% per annum from date of filing till payment in full appropriate. As for the general damages they are awarded an interest rate of 6% per annum from date judgment till payment in full.

Turning to the Counterclaimant who also sought for general damages it is this Court's finding that she was the source of the problem having failed to avail the Plaintiff with the requisite notice and unlawfully terminating the Plaintiff's contract. I find that she suffered no damage therefore her claim for general damages is denied.

As for interest on the decretal sum of the Counter claim I find a similar interest rate of 20% per annum appropriate, only that in this case, it will

accrue from date of judgment which the Counterclaimant prayed for till payment in full.

As to costs, section 27(2) of the Civil Procedure Act provides that costs are awarded at the discretion of court and follow the event unless for some good reasons the court directs otherwise.

Taking into consideration the fact that the Plaintiff would not have filed this suit if the Defendant had availed her with the stipulated notice in accordance with the contract,I find that the Plaintiff should pay ¼ of the costs and the Defendant pay ¾ of the costs. *It* is so ordered.

In conclusion judgment is entered in favour of the Plaintiff against the Defendant in the following terms;

a) Defendant to pay special damages of US $ 22,744 and US $ 20,856 being unpaid invoices for the months of August 2015 and September 2015 respectively to the Plaintiff ;
b) Defendant to pay special damages of US $ 59,200 as payment in lieu of notice of termination to the Plaintiff;
c) Defendant to pay general damages of UGX. 50,000,000/= to the Plaintiff.
d) Interest on a) and b) at 20% per annum from date of filing being 1st December 2015 till payment in full.
e) Defendant to pay ¾ of the Plaintiff's costs.

On the Counterclaim;

Judgment is entered in favour of the Counterclaimant/Defendant against the Counter-Defendant/Plaintiff in the following terms;

a) Counter-Defendant to pay special damages of US $ 31,605 to the Counterclaimant;

b) Interest on a) at 20% per annum from date of judgment till payment in full;

c) Counter-Defendant to pay ¼ of the Counterclaimant's costs.

Dated at Kampala this.....9th.....day of.....March.....2020

HON. JUSTICE DAVID WANGUTUSI

JUDGE