THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL SUIT No. 0962 OF 2019

NABUKENYA SARAH …… PLAINTIFF

VERSUS

NOOR AUTO PARTS LIMITED …… DEFENDANT

Before: Hon Justice Stephen Mubiru.

JUDGMENT

a. The plaintiffs' claim;

The plaintiff sued the defendant for the recovery of general and special damages for breach of a contract of sale of a motor vehicle, interest and costs. The plaintiff's claim is that by a written contract dated 24th July, 2015 she purchased from the defendant, a 2003 model, white Toyota Hiace motor vehicle registration No. UAX 365 Q at the price of shs. 44,000,000/= It was agreed that the plaintiff was to make a non-refundable deposit of shs. 20,000,000/= at the signing of the agreement, and thereafter pay monthly instalments of shs. 6,000,000/= until payment in full, not exceeding a period of four (4) months from the date of execution of the agreement. Upon payment of the deposit, the plaintiff took possession of the vehicle and commenced payment of the outstanding sum. The plaintiff further undertook repairs and modification of the vehicle. Having failed to meet the deadline, the plaintiff sought and was permitted by the defendant to continue payment beyond the agreed deadline and by 20th July, 2016 she had reduced the outstanding balance to shs. 14,900,000/= only. The defendant filed a suit before the Magistrates' Court at Nakawa intending to recover the outstanding sum (the suit was eventually withdrawn by consent on 24th April, 2019). Without any claim of right whatsoever and in breach of the agreement and before the suit was concluded, the defendant caused the vehicle to be impounded and sold off. As a result the plaintiff lost the value of the vehicle and a daily income therefrom, hence this suit.

b. The defence to the claim;

Although the defendant was duly served with summons to file a defence, the defendant never filed a defence to the suit. When the suit was set down for hearing on 20th November, 2021 still the defendant did not turn up despite having been duly served. Hearing accordingly proceeded ex-parte against the defendant.

c. The issues to be decided;

The court may at any time before passing a decree amend the issues or frame additional issues on such terms as it thinks fit, and all such amendments or additional issues as may be necessary for determining the matters in controversy between the parties shall be so made or framed (see Order 15 rule 5 of *The Civil Procedure Rules*). The following are the issues to be decided by court, namely;

1. Whether the defendant's impounding and sale of the vehicle was lawful.
2. Whether the plaintiff is entitled to the remedies sought.

d. The submissions of counsel for the plaintiffs;

M/s Kasadha and Partners Co. Advocates, counsel for the plaintiff, submitted that the defendant breached the agreement of sale when following the plaintiff's payment of more than two thirds of the purchase price, the defendant caused the vehicle to be impounded and sold off. Out of the agreed purchase price of shs. 44,000,000/= the plaintiff had by 19th July, 2016 paid a total of shs. 29,100,000/= The defendant having accepted an instalment paid on 24th July, 2016 beyond the stipulated date of final payment of 24th November, 2015 time ceased to be of the essence in the performance of the contract. The plaintiff is therefore entitled to a refund of the shs. 29,100,000/= that had been paid by the time the vehicle was impounded. The plaintiff is also entitled to special, general and punitive damages as pleaded and proved. The plaintiff is further entitled to interest and costs.

e. The decision;

In all civil litigation, the burden of proof requires the plaintiff, who is the creditor, to prove to court on a balance of probability, the plaintiff's entitlement to the relief being sought. The plaintiff must prove each element of its claim, or cause of action, in order to recover. In other words, the initial burden of proof is on the plaintiff to show the court why the defendant / debtor owes the money claimed. Generally, a plaintiff must show: (i) the existence of a contract and its essential terms; ii) a breach of a duty imposed by the contract; and (ii) resultant damages.

1st issue; whether the defendant's impounding and sale of the vehicle was lawful.

According to section 10 (5) of *The Contracts Act, 7 of 2010*, a contract the subject matter of which exceeds twenty five currency points (500,000/=) must be in writing. The plaintiff relies on an agreement of purchase dated 24th July, 2015 (exhibit P. Ex.1) and the vehicle's logbook (exhibit P. Ex.5). It was the testimony of P.W.1 Ms. Nabukenya Sarah that on the day of execution of that agreement she paid shs. 20,000,000//= and multiple instalments thereafter, making a total of shs. 29,100,000/= by the time the vehicle was impounded. Some of these payments were made before the agreed deadline of 24th November, 2015 for payment of the outstanding balance in full (exhibits P. Ex.2A – 2H), while other payments were made beyond that date (exhibits P. Ex.3A – 3J). In a bid to recover the amount then outstanding, shs. 14,900,000/= the defendant instituted a suit at the Magistrates' Court of Nakawa which sui suit was eventually withdrawn by consent on 24th April, 2019 (exhibits P. Ex.4A – 4C). Before the suit was concluded, the defendant caused the vehicle to be impounded and sold off.

The answer to the issue raised depends on whether this was a credit sale, a sale by instalment or a hire purchase agreement. It is the duty of the court to look behind the document and to discover the true nature of the transaction called in question. In a credit sale, ownership of the goods passes to the buyer immediately on payment of the first instalment and the buyer has no option to return the goods. A credit sale is final, and ownership of the goods is transferred at the point of sale. There is no lingering interest in the goods from the seller. A seller in the ordinary contract for the sale of goods cannot recover the price unless tide has passed to the buyer. There is no right of repossession

in a contract of this nature. According to section 55 of *The Sale of Goods and Supply of Services Act, 2018* the unpaid seller who has parted with the possession of the goods has the right of stopping and resuming possession of the goods only for as long as they are still in the course of transit, whereupon he or she may retain them until payment or tender of the price. A seller loses the right of lien if possession of the goods is lost. A seller who gives up possession of the goods cannot later exercise a right of lien by regaining possession. A seller can exercise a lien over goods even if only in custody of them as the agent or bailee of the buyer, provided there is no waiver of the right of lien. Section 54 (2) of the Act provides that the lien is terminated when the seller delivers the goods to a carrier for the purposes of transmitting them to the buyer, without reserving a right of disposal; or when the buyer or its agent lawfully gains possession of the goods; or the right of lien or retention is waived.

In a conditional sale or sale by instalment, the property in the goods is not transferred to the buyer on the making of the bargain between the seller and the buyer because that is not the intention of the parties. The property does not pass by virtue of the contract as it would in an ordinary agreement for sale. The seller retains title with a stipulation reciting that a down payment of a certain amount has been made on the purchase, with remainder of the price to be paid in monthly or weekly instalments, usually over an extended period of time. The purchaser can take possession of the property as soon as the agreement is in force, but does not own the property until they have fully paid for it, which is usually done in instalments. The essence of a conditional sales contract is security for the seller while the beneficial use is in the buyer. Conditional sales agreements allow the seller to repossess the property if the buyer defaults on payment.

On the other hand a hire purchase agreement is a contract for the delivery of goods under which the hirer is granted an option to purchase the goods; it only grants the right of possession to the hirer with an option (not an obligation) to purchase. The option to purchase may or may not be exercised when the hirer shows the owner in writing that he or she is ready to complete the remaining balance or terminate the contract. The buyer gets the right to use the asset with an option to purchase the asset by paying all such instalments spread over a period of time (see *Nsaga John v. Kayongo Juma Haji [1979] HCB 138* and *Halsbury's Laws of England*, Vol. 19, 3rd ed., p. 510).

The hire purchase agreement gives the owner the right upon default by the hirer, to repossess the goods.

The main features of a hire purchase agreement are: (i) payment is to be made by the hirer (buyer) to the hiree, usually the vendor, in instalments over a specified period of time; (ii) the possession of the goods is transferred to the buyer immediately; (iii) the property in the goods remains with the vendor (hiree) until the last instalment is paid; (iv) the ownership passes to the buyer (hirer) when he pays all instalments; (v) the hiree or the vendor can repossess the goods in case of default and treat the amount received by way of instalments as hire charges for that period; (vi) the instalments in hire purchase include interest as well as repayments of principal; (vii) usually, the hiree charges interest on flat rate. The hirer who becomes the purchaser is a bailee until he pays the full price of the goods. Thus, the hirer cannot transfer the goods to third parties without consent from the owner. If the hirer doesn't fulfil the payment of the agreed instalments, the owner can reclaim the property.

It is admitted by the plaintiff that at the time the vehicle was impounded, the plaintiff was in default foe nearly a year since the agreed date of final payment as per the contract was four months after execution of the contract, i.e. latest 24th November, 2015. The relevant clauses in the contract provided that;

> A non-refundable payment of shs, 20,000,000/= ….and the remaining amount of Ug. Shs. 24,000,000/= shall be paid within 4 months only from the date of the agreement. All late payments attract a surcharge of 20% per month.
>
> The original registration card will be surrendered to the PURCHASER ONLY after the seller has received the full sum of money due and TRANSEFERED the logbook into the name of the purchaser or his / her nominee(s) at the PURCHSER#S COST.
>
> If the purchaser fails to remit the balance in time, the seller shall be at liberty to impound the vehicle at any time after the default and a daily charge of shs. 25,000/= shall be levied against the purchaser to cover the security and security charges. The company will have a right to RESALE the impounded vehicle if the case is not SETTLED in between. TWO WEEKS.

> Upon impounding the vehicle the purchaser shall be given 14 days within which to pay up the balance of the purchase price together with the cost of impounding, storage and security of the vehicle.

A conditional sale agreement is similar to hire purchase agreement, but the difference is that in the latter the hirer has an option to buy the goods, whereas in a conditional agreement, he has an obligation to buy the goods. In the instant case, since the option to purchase is obligatory, this was not a hire purchase agreement as argued by counsel for the plaintiff. Consequently *The Hire Purchase Act, 2009* cited in counsel for the plaintiff's final submissions is inapplicable. Although the contract itself is entitled "Sales Agreement," it is in essence a conditional sale agreement; the plaintiff as buyer took possession of the vehicle but its title and right of repossession remained with the defendant as the seller until the purchase price is paid in full.

Repossession upon breach of a conditional sale agreement is generally allowed only when; (i) the buyer is in default on a contractual obligation stipulated in the car purchase agreement; (ii) the breach has not been waived by the seller; and (iii) the seller has not elected to sue for the price.

(i) <u>The buyer is in default on a contractual obligation stipulated in the conditional car purchase agreement</u>;

Where the repossession under the repossession provisions of the conditional sales contract is peaceable and otherwise in conformity to, and within, the terms of the contract, it will be held to be valid. If the buyer does not pay what is owing or otherwise remedy the breach of the conditional car sale contract, within the time specified in the contract or the repossession warning notice, the vehicle can be repossessed. The right to repossession may be exercised out of court provided that the taking of possession does not involve a contravention of the criminal law (see *Hemmings v. The Stoke Poges Golf Club Limited [1920] 1 KB 720; North General Wagon & Finance Co. Ltd. v. Graham (1950) 2 K B. 7* and *Ropaigealach v. Barclays Bank plc [2000] QB 263; [1999] 4 All ER 235*).

It was stipulated in the agreement that the plaintiff was to pay the outstanding sum of shs. 24,000,000/= within four (4) months only from the date of the agreement, where after all late

payments attract a surcharge of 20% per month. It is not in dispute that the plaintiff defaulted in payment of the agreed four instalments. By her own admission, the plaintiff did not adhere to the schedule of repayments. On 24th July, 2015 she paid the non-refundable deposit of shs. 20,000,000//= Further payments were made as follows; - shs. 500,000/= on 7th October, 2015 (exhibit P. Ex.2C); shs. 500,000/= on 28th October, 2015 (exhibit P. Ex.2D); shs. 500,000/= on 5th November, 2015 (exhibit P. Ex.2E); shs. 500,000/= on 12th November, 2015 (exhibit P. Ex.2F); shs. 500,000/= on 21st November, 2015 (exhibit P. Ex.2G) and shs. 500,000/= on 24th November, 2015 (exhibit P. Ex.2G) hence a total of shs. 6,000,000/= It turns out that although she endeavoured to make some additional payments before the agreed deadline of 24th November, 2015, by that date a sum of shs. 18,000,000/= remained outstanding. Upon the plaintiff's failure to remit the balance in time, the defendant was at liberty to impound the vehicle at any time after the default. However, although the plaintiff's default occurred on 24th August, 2015 when the first instalment of shs. 6,000,000/= fell due, the defendant did not exercise that power. Instead the defendant filed Civil Suit No. 543 of 2016 at Nakawa Chief Magistrate's Court more than a year later, on 7th October, 2016 seeking to recover shs. 14,400,000/= that was outstanding at the time.

(ii) <u>The breach has not been waived by the seller</u>.

Where time is of the essence, breach of the condition as to the time for performance will entitle the innocent party to consider the breach as a repudiation of the contract (see *Halsbury's Laws of England*, 4th edn. Vol. 4, Para 1179). Where in the express terms of the contract there is power to determine the contract on a failure to complete by the specified date, the stipulation as to time will ordinarily be fundamental.

The issue of waiver arises when one party allows the other party to deviate from the contract; such as accepting payment after observing a problem with the other party's performance. Strict contractual rights, no matter how clearly defined, may be impliedly waived by conduct. By allowing the buyer to make late payments without ever exercising the self-help remedy of repossession, the seller "waived" the default by repeatedly accepting late payments. Waiver is an intentional relinquishment of a known right or advantage, benefit, claim or privilege which except

for such waiver the party would have enjoyed. There should exist an opportunity for choice between the relinquishment and an enforcement of the right in question.

Waiver cannot be inferred from mere inaction, but must be an expression of intent to relinquish the right at issue. Since waiver means forsaking the assertion of a right at the proper opportunity, the greater the delay on the part of the innocent party in asserting the contractual right in issue, the greater the probability of his conduct amounting to waiver. Waiver is a question of conduct and must necessarily be determined on the facts of each case. An implied waiver may arise where a person has pursued a course of conduct as to evidence an intention to waive a right or where his conduct was inconsistent with any other intention than to waive it (see *Andes (EAS) Ltd v. Akoong Mulik Systems and two others, H. C. Civil Suit No. 184 of 2008*). By conduct a party may make a clear and unambiguous promise or representation that it would forbear from standing on its strict contractual rights. When a party acts in a way that is inconsistent with the terms of a contract, the Court can reasonably conclude that a party waived those contractual provisions. Waiver requires a deliberate act but, like election, does not require an intention to being about the act's consequences, but merely that the conduct from which waiver may be inferred is deliberate. Any unequivocal act indicating an intention to forgo the right to rescind will constitute a waiver (see *Green v. Sommerville (1979) 141 CLR 594 at 600; Mehmet v Benson (1965) 113 CLR 29* and *Thornton v. Bassett [1975] VR 40*).

Where on default the agreement gives the seller an option to take possession of vehicle and to terminate the agreement, that option has to be exercised, otherwise the agreement continues in force; until it is exercised the right of the buyer subsists to pay all the purchase-money and acquire the property in the vehicle (see *Belsize Motor Supply Co. v. Cox L.R. (1914) 1 K.B. 244 at 252*). In the instant case, the agreed date for final payment was 24th November, 2015. Beyond that date, the defendant accepted the following payments; - shs. 500,000/= on 1st December, 2015 (exhibit P. Ex.3A); shs. 500,000/= on 16th November, 2015 (exhibit P. Ex.3B); shs. 500,000/= on 23trd December, 2015 (exhibit P. Ex.3C); shs. 700,000/= on 6th January, 2016 (exhibit P. Ex.3D); shs. 500,000/= on 15th January, 2016 (exhibit P. Ex.3E); shs. 600,000/= on 29th January, 2016 (exhibit P. Ex.3F); shs. 700,000/= on 27th February, 2016 (exhibit P. Ex.3G); shs. 800,000/= on 11th April, 2016 (exhibit P. Ex.3H); shs. 600,000/= on 30th May, 2016 (exhibit P. Ex.3"I") and shs. 500,000/=

on 19th July, 2016 (exhibit P. Ex.2J) hence a total of shs. 5,900,000/= It turns out that although she endeavoured to make some additional payments after the agreed deadline of 24th November, 2015, was passed by that date of impounding the vehicle a sum of shs. 12,100,000/= remained outstanding. Waiver occurred when the defendant allowed the plaintiff to continue making payments of instalments for an extended period after the deadline stipulated in the agreement.

In circumstances where the seller repeatedly accepts late payments after expiry of the agreed credit term without exercising its self-help remedy of repossession, the seller must notify the buyer that strict compliance with the contract terms will be required, before the seller can lawfully repossess the article. The letter should specify the amount outstanding, any incurred surcharges, and the newly set expected full payment date. Such notice is intended to make it clear to the buyer that although the seller has accepted late payments from the buyer in the past without repossessing, the seller now requires the buyer to strictly comply with the payment due dates or it may repossess. If the default can be put right, for example, by getting the payments up to date, the notice must set a time limit for you to do this.

Under the general law where time is of the essence (or an essential term) of the contract, each party is bound to perform his or her obligations strictly in accordance with their terms and failure to do so will constitute a breach entitling the other party to rescind the contract at once. If time has not been made of the essence, or has ceased to be of the essence, a breach of contact cannot occur unless the innocent party issues a notice to the other, making time of the essence (see *United Scientific Holdings v. Burnley Borough Council, [1978] AC 904*). The notice operates as evidence that the promisee considers that a reasonable time for performance has elapsed by the date of the notice and as 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 shall treat your failure as a repudiation of the contract."

The other purpose of the notice before taking possession of a vehicle sold on a conditional sale is to enable the buyer, to make a written request to the seller to revive the agreement upon payment

of all outstanding dues together with surcharges, as might have been mutually agreed upon. A notice also draws the attention of the buyer to the alleged breaches of agreement on the part of the buyer, on the basis of which, the seller claims to be entitled to take possession. Such notice gives the buyer an opportunity to show that the buyer has not, in fact, committed any breach of agreement. For example, the buyer might be able to show that the Seller had erroneously omitted to give credit to the buyer for payments made, or had not presented a cheque in its possession for payment, even though there were sufficient funds in the concerned bank account of the buyer, to honour the cheque. Furthermore, many self-employed buyers, operate vehicles taken on conditional purchase, to earn a livelihood. Such vehicles are often run over long distances. A notice ensures that the buyer is not taken by surprise and has time to stop operating the vehicle, so that third persons using the vehicle on payment of charges are not put to sudden inconvenience by reason of re-possession of the vehicle. If the seller fails to send the notice before the repossession is effectuated, he may thus be subject to liability for wrongful repossession.

Without notice making time of the essence having been issued, the yardstick by which the length of delay justifying a rescission is to be measured is when it becomes so prolonged that the breach assumes a character so grave as to go to the root of the contract, in which case the aggrieved party is entitled to rescind (see *Universal Cargo Carriers Corporation v. Citat, [1957] 2 QB 402*). If the buyer commits breaches of the conditions of a conditional purchase agreement which expressly provides for immediate repossession of a vehicle without further notice to the buyer, in case of default in payment of the outstanding instalments repossession would not be vitiated for want of notice. Where a term is incorporated in the agreement that the seller may repossess the goods without notice save as required by any law, the failure to serve such notice would appear to be a breach of the agreement itself and amount to a wrongful repossession under the express terms of the agreement (see *North General Vagon & Firzance Co. Ltd. v. Graham (1950) 2 K.B. 1 at 13*).

In this case, however the duty to give notice to the plaintiff before repossession, arose by reason of the defendant's conduct following the plaintiff's default. In a case where the requirement to serve notice before repossession is necessitated by the conduct of the defendant, non-service of proper notice would tantamount to breach of the conditional purchase agreement giving rise to a claim in damages (see *Otaok Charles v. Equity Bank (U) Ltd H. C. Civil Suit No. 335 of 2010*). If

the seller wrongfully retakes goods which have already been delivered, the seller is in breach of their warranty for quiet possession.

(iii) The seller has not elected to sue for the price.

The conditional seller has a choice of the following remedies: (1) to repossess the conditionally sold property and retain what has been paid; (2) to sue for and to recover a judgment for the purchase price, while, at the same time retaining his seller's lien rights, until fully paid; (3) to foreclose by appropriate action in the courts. One injured by a breach of contract is said to have three remedies: first, rescission and restitution (recovery of the consideration or on a *quantum meruit* basis); secondly, affirmance and specific performance; thirdly, termination and recovery of damage. The usual step where there is default in a conditional sale arrangement in order to accelerate payments is to repossess the goods, rather than to sue for the outstanding balance.

Since the title to the goods does not transfer to the buyer until the completion of the conditions, the seller remains the legal owner throughout the duration of the contract. This makes it easier for the seller to legally repossess or reclaim possession. In a conditional sale agreement, whatever the owner does with the property is of no concern to the buyer. If the owner recovers, from the sale of the goods, an amount more than the debt owed by the buyer, he is not bound to return the balance to the buyer. This is because a buyer who, without lawful excuse, refuses to go forward with his or her contract is not entitled to recover back money paid on account thereof. This forfeiture is justified on the ground that one in default under a contract should not be allowed to enforce any rights under it. After repossession the seller is looked upon as absolute owner of the chattel and entitled to any benefits derived from the resale thereof. If the amount which the owner recovers from the sale is less than the debt, the owner still cannot recover the balance from the hirer.

In the absence of contrary contractual or statutory provisions, repossession constitutes rescission of the contract. If the seller elects to repossess, he is regarded as having rescinded the contract and has no further right to sue the buyer for the unpaid balance, and conversely, if he elects to sue, he is debarred from repossessing the property. Once the vendor elects to file a suit for the price instead of repossessing the goods, he is held to have vested title in the buyer and to have relinquished the

right to retake the goods later (see H*olt Manufacturing Co. v. Ewing, 109 Cal. 353, 42 Pac. 435 (1895)* and *Martin Music Co. v. Robb, 115 Cal. App. 414, 1 P.2d 1000 (1931*). A suit for the price even though dismissed before judgment bars a suit for repossession (see *Galion Iron Works v. Service Coal Co., 264 Mich. 298, 249 N.W. 852 (1933*). Damages and restitution are alternative remedies and an election to pursue one is a bar to invoking the other. A plaintiff cannot have satisfaction under both remedies.

The seller must decide which of two courses he will follow in the event of the buyer's default in paying the instalments of the price; either repossess or sue for the balance, but not both. The seller may either rest on his security interest in the goods, by retaking possession and, in general, reselling them, in which case he must forego any claim against the buyer if the proceeds of sale (or the value of the goods, if not resold) are insufficient to pay off the whole outstanding debt, or he may refrain from exercising his right to repossess, and, instead, sue the buyer for the whole balance of the price, but if the goods in question are taken in execution under a judgment for the price, the seller is in effect reduced to the same position as if he had repossessed the goods in the first place. The doctrine of election rests not on claims of equity, but on the logical impracticability of the contemporaneous assertion of contrary rights.

Since upon default of the buyer, the seller may rescind or affirm the contract but cannot do both, his suit for the selling price constitutes an election to affirm the sale and will bar the assertion of any inconsistent remedy (see *Alfred Fox Piano Co. v. Bennett, 96 Conn. 448, 114 A. 529 (1921*). Once the seller choses either course, he is deemed to have made an election which is final and irrevocable. It is the doctrine of election of remedies that one having the choice of two or more inconsistent remedies for his relief is bound by his selection of the remedy he will pursue, and he cannot thereafter avail himself of the other remedies. Lord Blackburn defined the doctrine of election *in Scarf v. Jardine [1882] 7 AC 345*, thus;

> The principle, I take it, running through all the cases as to what is an election is this, that where a party in his own mind has thought that he would choose one of two remedies, even though he has written it down on a memorandum or has indicated it in some other way, that alone will not bind him; but so soon as he has not only determined to follow one of his remedies but has communicated it to the other side in such a way

> as to lead the opposite party to believe that he has made that choice, he has completed his election and can go no further; and whether he intended it or not, if he has done an unequivocal act – I mean an act which would be justifiable if he had elected one way and would not be justifiable if he had elected the other way -the fact of his having done that unequivocal act to the knowledge of the persons concerned is an election.

Therefore the law will treat the mere filing of a suit for damages for breach, or suit for specific performance as an irrevocable election regardless of whether the suit is prosecuted to judgment or not (see *Stuart v. Hayden, 72 F. 402 (1895*) and *Bigger v. Glass, 226 Ark. 466*). An election to collect the debt or a part thereof constitutes an election to vest title in the purchaser, and the seller is confined to the same remedy as to all subsequent instalment payments.

It is the plaintiff's case that the vehicle was impounded sometime after 7th October, 2016. By that date the defendant had already filed Civil Suit No. 543 of 2016 at Nakawa Chief Magistrate's Court, which suit was still pending. Although default occurred on 24th August, 2015 when the first instalment of shs. 6,000,000/= fell due, the defendant did not exercise the power of repossession. Instead the defendant filed a suit for recovery of the balance outstanding more than a year later, on 7th October, 2016. At the time the defendant filed the suit, the last part-payment received from the plaintiff was more than three months before, on 19th July, 2016 (exhibit P. Ex.2J). This suit for the outstanding balance of the price constituted an election to affirm the sale and barred recovery by way of repossession. By repossessing the vehicle when it had no right or entitlement to do so, the defendant undertook a wrongful act.

2nd issue; <u>whether the plaintiff is entitled to the remedies sought</u>.

A breach of contract is a violation of any of the agreed-upon terms and conditions of a binding contract, and this includes a failure, without legal excuse, to perform any promise that forms all or part of the contract. Under section 64 (1) of *The Contracts Act, 2010* where a party to a contract, is in breach, the other party may obtain an order of court requiring the party in breach to specifically perform his or her promise under the contract. The plaintiff seeks to recover general and special damages for breach of the contract of conditional sale of a motor vehicle, interest and costs.

i. Damages for the wrongful repossession.

Repossession of the vehicle in the circumstances of this case has been found to have ben wrongful on two grounds; by reason of the fact that the defendant did not issue the plaintiff with a notice of repossession, nearly a year after the date of final payment stipulated in the contract had passed. Furthermore, the defendant elected to sue for the price and thereby lost the right to repossess.

Damages are said to be "at large," that is to say the Court, taking all the relevant circumstances into account, will reach an intuitive assessment of the loss which it considers the plaintiff has sustained. The award of general damages is in the discretion of court in respect of what the law presumes to be the natural and probable consequence of the defendant's act or omission (see James *Fredrick Nsubuga v. Attorney General, H.C. Civil Suit No. 13 of 1993* and *Erukana Kuwe v. Isaac Patrick Matovu and another, H.C. Civil Suit No. 177 of 2003*). A plaintiff who suffers damage due to the wrongful act of the defendant must be put in the position he or she would have been if she or he had not suffered the wrong (See *Hadley v. Baxendale (1894) 9 Exch 341*; *Charles Acire v. M. Engola, H. C. Civil Suit No. 143 of 1993* and *Kibimba Rice Ltd v. Umar Salim, S. C. Civil Appeal No. 17 of 1992*).

General damages are the direct natural or probable consequence of the wrongful act complained of and include damages for pain, suffering, inconvenience and anticipated future loss (see *Storms v. Hutchinson [1905] AC 515; Kabona Brothers Agencies v. Uganda Metal Products & Enamelling Co Ltd [1981-1982] HCB 74* and *Kiwanuka Godfrey T/a Tasumi Auto Spares and Class mart v. Arua District Local Government H. C. Civil Suit No. 186 of 2006*). As a general rule, a person who has suffered loss as a result of another's breach of contract is entitled to be restored to the position that the person would have occupied had the breach not occurred. In special circumstances where the loss did not arise from the ordinary course of things, general damages are awarded only for such losses of which the defendant had actual knowledge (see *Hungerfords v. Walker (1989) 171 CLR 125*).

In cases of breach of contract, liquidated damages may be imposed on the party in breach, if the agreement provides for liquidated damages, which is a fixed amount by way of damages. Where

the parties to an agreement have not agreed to liquidated damages, the party in breach of agreement may be directed to pay unliquidated damages which are compensatory. Such compensatory damages are not to punish the party in breach, but to compensate the party not in breach, for losses suffered as a result of the breach. The party in breach may be required to pay to the party not in breach, such damages as would restore the position of the party not in breach, to the position before the breach occurred.

Apart from compensatory damages, Court may impose on the party in breach, punitive damages or nominal damages. Punitive damages are awarded where the party in breach of agreement has behaved in a manner, which is reprehensible and calls for punishment. Punitive damages are not generally awarded in cases of breach of contract unless the act is so reprehensible that it calls for punishment of the party in breach, by imposition of punitive and/or exemplary damages. Nominal damages are awarded where there is no real harm done, by reason of the breach of the contract.

There is no mention in the written statement of defence as to when the vehicle was sold and the amount for which the vehicle was sold, whether such amount was more than or less than the amount due from the plaintiff to the defendant. The Court nevertheless observes that the defendant remained the owner of the vehicle, taken by plaintiff on condition of payment in full of the agreed purchase price. The defendant being the owner of the vehicle, there was no obligation on its part to divulge details of the sale of that vehicle, without being called upon to do so. It was contractually agreed that the deposit of shs. 20,000,000/= was non-refundable. In the circumstances that sum together with the additional total sum of shs. 6,000,000/= paid before the agreed deadline of 24th November, 2015 can be considered compensation for the use, wear and tear and depreciation of the vehicle for the period it was in the plaintiff's possession.

However, depriving a buyer of her possessory interest in the vehicle without notice and after electing to sue her for the balance of the purchase price entitles her to an award of general damages. The damages are measured by demonstrating an ascertainable loss. In the circumstances the portion of the purchase price that had been paid at the time of the repossession is the value of the ascertainable loss. The plaintiff would be entitled to compensatory damages, based on an assessment of the loss caused to her by reason of the omission to give notice. Where there is no

evidence of any loss to the byer by reason of omission to give notice, nominal damages may be awarded. By the defendant's failure to give notice, the plaintiff paid a sum of shs. 5,900,000/= she would not otherwise have paid. That represents her ascertainable loss.

Calculation of the buyer's loss in contract and tort reflect the different purposes which the two regimes pursue. While the main aim of awarding damages in tort is to reverse loss already inflicted by the defendant, the main aim of awarding damages for breach of contract is to compensate the plaintiff for their lost expectation. Damages should therefore attempt to place the plaintiff in the position they would have been in had the contract been performed (see *Robinson v. Harman (1848) 1 Ex 850, 855; 154 ER 363 at 365*). If the contract had been performed then the plaintiff would have kept the vehicle and paid the price. Admittedly, the balance of the purchase price remained unpaid. The plaintiff's loss is therefore the amount she paid after the agreed deadline; a sum of shs. 5,900,000/= In addition thereto the plaintiff is awarded shs. 5,000,000/= as general damages for breach of the implied condition to give notice of repossession, hence a total of shs. 10,900,000/=

ii. <u>Special damages for loss of use</u>.

The law is that not only must special damages be specifically pleaded but they must also be strictly proved (see *Borham-Carter v. Hyde Park Hotel [1948] 64 TLR*; *Masaka Municipal Council v. Semogerere [1998-2000] HCB 23* and *Musoke David v. Departed Asians Property Custodian Board [1990-1994] E.A. 219*). Special damages compensate the plaintiff for quantifiable monetary losses such as; past expenses, lost earnings, out-of-pocket costs incurred directly as the result of the breach. Unlike general damages, calculating special damages is much more straightforward because it is based on actual expenses. It is trite law though that strict proof does not necessarily always require documentary evidence (see *Kyambadde v. Mpigi District Administration, [1983] HCB 44; Haji Asuman Mutekanga v. Equator Growers (U) Ltd, S.C. Civil Appeal No.7 of 1995* and *Gapco (U) Ltd v. A.S. Transporters (U) Ltd C. A. Civil Appeal No. 18 of 2004*).

A buyer who is aggrieved by a seller who has improperly or wrongfully repossessed a vehicle is entitled to recovery of all actual losses or consequential losses associated with a wrongful

repossession. Substantial loss may result by depriving a buyer of the use of a purchased commercial vehicles, and many buyers may experience consequences such as missed work, expenses for alternative transportation, repossession-related fees, detrimental credit reporting, and vehicle damage during the repossession process. Not only did the plaintiff not lead any evidence in this regard, but also where the buyer is in default of the instalment payments, damages cannot extend to a claim for loss of future earnings (see *Otaok Charles v. Equity Bank (U) Ltd H. C. Civil Suit No. 335 of 2010*).

As regards the claim for a sum of shs. 24,000,000/= spent on purchase of a new battery, fitting the vehicle with a first aid box, brand mark painting for use as a public taxi, replacement of tyres, fixing rear reflector plates, fitting the vehicle with a tool box, fixing a top rack bed, fitting the rear and front metal guards, and labour charges, this too can be considered compensation for the use, wear and tear and depreciation of the vehicle for the period it was in the plaintiff's possession. That expenditure is not recoverable.

iii. Interest on the award.

Under section 26 (1) of *The Civil Procedure Act* where interest was not agreed upon by the parties, Court should award interest that is just and reasonable. The plaintiff has only succeeded in her claim for general damages. The award is to carry interest at the rate of 8% per annum from the date of judgment until payment in full.

iv. The costs of the suit.

Under Section 27 of *The Civil Procedure Act*, costs are awarded at the discretion of court. In sub-section (2) thereof, costs follow the event, unless for some reasons court directs otherwise (see *Jennifer Rwanyindo Aurelia and another v. School Outfitters (U) Ltd., C.A. Civil Appeal No.53 of 1999*; *National Pharmacy Ltd. v. Kampala City Council [1979] HCB 25*). It was also held in *Uganda Development Bank v. Muganga Constructions [1981] HCB 35*, that a successful party can only be denied costs if it proved that but for his or her conduct, the litigation could have been avoided, and that costs follow the event only where the party succeeds in the main suit. I have not

found any special reasons that justify a departure from the rule. Therefore in conclusion, judgment is entered for the plaintiff against the defendant, as follows;

a) General damages of shs. 10,900,000/=
b) Interest thereon at the rate of 8% per annum from the date of judgment until payment in full.
c) The costs of the suit.

Delivered electronically this 28th day of July, 2022

……Stephen Mubiru……..
Stephen Mubiru
Judge,
28th July, 2022.