THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)

CIVIL SUIT NO. 0417 OF 2011

ERIC ALEMA :: **PLAINTIFF**
(SUING THROUGH HIS LAWFUL

ATTORNEY MOSES ANGUNDRU)

VERSUS

1. MAYBACH MOTORS LIMITED
2. ISAAC IRABIIZI
3. WILSON KANYANKOLE :: **DEFENDANTS**

AND

MOSES ESSIMU :: **THIRD PARTY**

(Before: Hon. Lady Justice Patricia Mutesi)

JUDGMENT

Introduction

1. The dispute in this suit arises from an agreement for the sale of Motor Vehicle Rage Rover Sport Station Wagon, Chasis No. SALLSAA2394209443, Model 2009, black in colour, Registration No. UAQ 266Q (hereinafter as "the Vehicle") dated 1st September 2011. The plaintiff brought the suit against the defendants seeking to recover UGX 120,000,000 which is the part payment he made for the purchase of the Vehicle, special damages, general damages, interest and costs. The defendants, claiming a right of indemnity against the 3rd party for any liability that could arise against them, successfully applied to have him added to the suit for that purpose.

Brief facts

2. On 1st September 2011, the plaintiff went to the 1st defendant's bonded warehouse in Kansanga and identified the Vehicle. He negotiated for its

purchase with the 2nd defendant who was, at the time, an employee of the 1st defendant. They reached and signed an agreement for the sale of the Vehicle at a price of UGX 160,000,000 ("the sale agreement"). Of this, UGX 120,000,000 was payable as an initial deposit while the balance of UGX 40,000,000 was to be paid at the end of October 2011. The plaintiff paid the initial deposit of UGX 120,000,000 after which he was given physical possession of the Vehicle.

3. Shortly thereafter, he discovered that the Global Positioning System (GPS) of the Vehicle was missing. He also realised that the Vehicle had only one car key and that he had neither been given the Vehicle's export certificate nor with its registration book from its country of origin. The plaintiff asked the 1st defendant to give him these items and the 3rd defendant (who is the Managing Director of the 1st defendant) undertook to do so, but all in vain. Upon further investigation, the plaintiff discovered that the Vehicle actually belonged to BMW Financial Services (GB) Limited and that it had been stolen from the UK in May 2011.

4. In early October 2011, the plaintiff told the 1st defendant that he was cancelling the entire transaction. The defendants insisted that the plaintiff's deposit could only be refunded less 30% thereof in respect of depreciation costs, after he returned the Vehicle to the bond. However, around the same time, Interpol impounded the Vehicle and contacted the real owner. The plaintiff later bought the Vehicle from that owner for USD 20,000, but the defendants still refused to refund his deposit. When the suit was filed, the defendants contended that, in selling the Vehicle to the plaintiff, they were acting on behalf of the 3rd party. On his part, the 3rd party maintained that the defendants acted on behalf of Jack Richardson who was the registered owner of the Vehicle at the time of the sale.

Issues arising

5. At the scheduling conference, the parties framed and agreed upon 4 issues for the Court's determination. Although the plaintiff pleaded fraud against the defendants and led evidence on those allegations, the parties did not frame any issue on fraud. This Court has the mandate to recast the issues framed for resolution, where it is necessary for the proper determination of the case. (See

Order 15 rules 1(5) and 5(1) of the Civil Procedure Rules and **Mundua Richard V Central Nile Transporters Association, HC Civil Revision No. 0003 of 2017**.)

6. Since the parties had ample opportunity to deal with the fraud allegations in their pleadings and at the trial, the Court deems it fair, necessary and prudent to recast the issues for its determination as follows:

    1. *Whether the plaint discloses a cause of action.*

    2. *Whether the sale agreement was breached.*

    3. *Whether there was fraud in the execution and performance of the sale agreement.*

    4. *Who is liable for the plaintiff's loss.*

    5. *What remedies are available to the parties.*

Representation and hearing

7. This dispute started slightly over 12 years ago. The suit has had a long and protracted history in this Court due to several intervening factors, including a number of interlocutory applications which had to be resolved along with a court-assisted mediation process which did not bear any fruit. When the suit was eventually called on for hearing, the plaintiff was represented by Mr. Emmanuel Wamimbi of M/S E. Wamimbi Advocates & Solicitors while the defendants were represented by Mr. Edwin Tabaro of M/S KTA Advocates. The 3rd party was represented by Mr. Isaac Walukagga of M/S MMAKS Advocates. Mr. Edwin Tabaro informed the Court that, sadly, the 2nd defendant has since passed on before this dispute could be finally settled.

8. The plaintiff testified as PW1 and relied on 14 documents which were all admitted and exhibited as **P.Ex.1 – P.Ex.14**. The defendants adduced 2 witnesses and 30 documents which were also admitted and exhibited as **D.Ex.1 – D.Ex.30**. The 3rd party brought 2 witnesses and 13 documents which were admitted and exhibited as **TP.Ex.1 – TP.Ex.13**.

9. The **plaintiff (PW1)** testified that on 1st September 2011, he bought the Vehicle from the 1st defendant at the price of UGX 160,000,000. He made a down payment of UGX 120,000,000 thereby leaving a balance of UGX 40,000,000

payable at the end of October 2011. After making this initial payment, the 3rd party gave him the Vehicle with its log book in the names of *"Richards Arthur Waswa Jack"*. After 2 days, he scrutinized the logbook and found that the Vehicle was a 2006 model and not a 2009 model as agreed. This prompted him to run a thorough background check on the Vehicle. He soon discovered that the GPS of the Vehicle had been removed. He also learnt that the Vehicle had been stolen from the UK on 3rd May 2011.

10. The plaintiff also revealed that he notified the 3rd defendant about these findings and that, after a bitter verbal exchange, the 3rd defendant assured him that if the Vehicle had indeed been stolen, it would not have been registered in Uganda. The 1st defendant demanded that the plaintiff returns the vehicle so that the matter is settled, but the plaintiff could not do so since the Vehicle was, soon thereafter, impounded by Interpol. The plaintiff later bought the Vehicle again from its actual owner in the UK, M/S BMW Group Financial Services (GB) Ltd, for USD 20,000. The defendants refused to refund his UGX 120,000,000 deposit.

11. The **3rd defendant** testified as **DW1**. He confirmed that he is the managing director of the 1st defendant. He told the Court that 1st defendant runs a customs bonded warehouse in Kansanga. On 15th August 2011, the 1st defendant, through the 2nd defendant who was its employee at the time, received the Vehicle in the names of Jack Richardson from the 3rd party for storage. The 3rd party instructed THE 2nd defendant to find a buyer ready to pay a tax inclusive price of UGX 160,000,000 for the Vehicle. On 1st September 2011, the plaintiff walked into the bond and liked the Vehicle. The 2nd defendant told him about the selling price and he agreed.

12. The 3rd defendant also said that after a few days, the plaintiff notified him that he had wired money for the Vehicle to the 1st defendant's account in Bank of Africa. The 3rd defendant withdrew the money and gave it to the 3rd party. When the plaintiff finished paying UGX 120,000,000, the Vehicle was handed over to him but he later claimed that the Vehicle was a stolen car. The 3rd defendant told the 3rd party about this allegation and filed a police complaint. The 3rd party advised that the plaintiff had to return the Vehicle to the bond so that his deposit is refunded.

13. **DW2** was **Muwanga Joshua**, a police CID detective attached to Lugazi Police Station at the time of the trial. He testified that on 20th October 2011, the 3rd defendant reported a case of a suspected stolen vehicle vide CID HQTS GEF 1698/11. DW2, who was stationed at the CID Headquarters then, was assigned to investigate the complaint to ascertain the circumstances under which the Vehicle, which was suspected have been stolen from the UK, was imported into Uganda, kept at the 1st defendant's bond and sold to the plaintiff. He recorded statements and reviewed the import documents.

14. DW2 told the Court that his investigation revealed that the Vehicle had been imported from the United Arab Emirates (UAE) and later registered by URA in the names of *"Richardson Arthur Wasswa Jack"*. The Vehicle was then parked at the 1st defendant's bond and later sold to the plaintiff by the 2nd defendant who was alleged to have been acting for the said registered owner. The defendants received UGX 120,000,000 from the sale which was handed over to the 3rd party. When the plaintiff's complaint at Interpol became apparent, DW2 submitted his case file to Interpol with a request for assistance in apprehending Richardson Arthur Wasswa Jack.

15. The **3rd party** testified as **TPW1**. He told the Court that in August 2011, Jack Richardson imported and delivered the Vehicle to the 1st defendant's bond. On 1st September 2011, the 2nd defendant, an agent of the 1st defendant, signed an agreement with the plaintiff for the sale of the Vehicle at the price of UGX 160,000,000 part of which was paid to the 1st defendant. The sale agreement did not indicate that the Vehicle in issue belonged to him or that the 2nd defendant was selling it on his behalf. The sale agreement and all the Vehicle's import documents clearly stated that Jack Richardson was the owner of the Vehicle. The 3rd party stated that the defendants and Jack Richardson dealt with the plaintiff on their own.

16. The 3rd party also clarified that Jack Richardson is not ordinarily resident in Uganda and that the 1st defendant could not trace him after the sale. For that reason, the 1st defendant called the 3rd party to receive some of the proceeds of the sale on Jack Richardson's behalf. The 3rd party later delivered the money he received from the 1st defendant to Jack Richardson.

17. **TPW2** was **Sebuwufu Elisa**, a Senior Superintended of Police (SSP) who was called as a handwriting expert working in the Forensics Lab at the Police's Directorate of Forensics. He told the Court that he holds a Master of Science degree in Document Analysis from the University of Central Lancashire, UK (2012) and a Bachelor of Science degree in Quantitative Economics from Makerere University, Kampala (2000). He also confirmed that he has working experience of 15 years in document analysis.

18. TPW2 testified that on 29th April 2021, the Police Forensics Lab received a request from MMAKS Advocates to examine certain documents under Lab Ref. No. DFS/QD/CIV/059/2021. He examined the documents and prepared a Laboratory report dated 18th May 2021 which was signed by him and countersigned by Sylvia Chelangat, another forensic document examiner. This report which was exhibited as **TP.Ex.13**, relates to acknowledgments said to have been authored by the 3rd party in receipt of the entire deposit of UGX 120,000,000 from the 1st defendant.

19. At the conclusion of the trial, all the parties' counsel filed written submissions arguing their respective cases. I have fully considered all the materials on record, the submissions filed and the laws and authorities cited.

Resolution of Issues

20. Before delving into the resolution of the issues, I am mindful that Section 101(1) of the Evidence Act Cap 6 provides that whoever desires a court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist. Additionally, Section 103 of the Evidence Act provides that the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

21. In civil cases of this nature, the burden lies on the plaintiff to prove the existence of his or her rights and the liability of the defendant for breach of those rights on a balance of probabilities. In **Miller V Minister of Pensions [1947]2 All ER 372**, Lord Denning expounded on the meaning of the phrase *"balance of probabilities"* when he stated that:

"... The degree is well settled. It must carry a reasonable degree of probability but not too high as is required in a criminal case. If evidence is such that the tribunal can say, we think it more probable than not, the burden of proof is discharged, but if the probabilities are equal, it is not."
Emphasis mine.

22. However, allegations of fraud, though civil in nature, are more serious than most other civil claims. For this reason, they have to be specifically pleaded and strictly proven. It is now generally settled that fraud must be proved strictly and to the satisfaction of the court, the burden being heavier and the standard being higher than a mere balance of probabilities ordinarily applied by courts in civil matters (See **Kampala Bottlers Ltd v Damanico (U) Ltd, SCCA No. 22 of 1992**). I will be guided by these principles on burden and standard of proof in evaluating the evidence adduced in this case.

Issue 1: Whether the plaint discloses a cause of action.

23. My first observation after reading the submissions on this issue is that the scope of the Court's inquiry and analysis in determining whether a plaint discloses a cause of action has been misunderstood. It is trite law that whether or not a plaint discloses a cause of action against a defendant is a matter of law and not a matter of evidence. With or without a trial, the Court can determine whether or not a plaint before it discloses a cause of action against a defendant.

24. A cause of action means every fact which, if traversed, would be necessary for the plaintiff to prove in order to support his right to a judgment of the court. In other words, it is a bundle of facts which, taken with the law applicable to them, gives the plaintiff a right to relief against the defendant. (See **Attorney General V Maj. Gen. David Tinyefuza, SC Const. Appeal No. 1 of 1997**.) In the *locus classicus* decision of the East African Court of Appeal in **Auto Garage v Motokov (1973) EA 392**, it was held that a plaint discloses a cause of action if it shows that the plaintiff enjoyed a right, that the right has been violated and that the defendant is responsible for that violation.

25. It is also necessary to clarify on the range of materials that the Court can consider when deciding whether or not a plaint discloses a cause of action. I reiterate that this question is not to be determined basing on the evidence

adduced by parties at trial. In **Uganda Telecom v ZTE Corporation, CACA No. 0197 of 2015**, the Court of Appeal had this to say:

> *"... in determining whether or not a plaint discloses a cause of action under Order 7 Rule 11 of the Civil Procedure Rules, one need not go beyond that plaint and its annexures. One only has to look at those documents to determine whether a cause of action arises or not ..."*
> Underlining mine for emphasis.

26. In arguing that the plaintiff lacks a cause of action against the defendants, counsel for the defendants made several references to the evidence adduced at the trial in a bid to show that it is the 3rd party who is liable under the sale agreement and not the defendants. In view of the afore-cited authorities on this issue, it is evident that this is a wrong premise for contending that there is no cause of action. In determining whether a plaint discloses a cause of action or not against a defendant, the Court must not travel beyond the plaint and its annexures.

27. In the instant case, the plaint was amended twice before scheduling. I will resolve the present issue basing on the last version of the amended plaint filed on 14th May 2015 along with its 11 annexures. In their submissions, counsel for the defendant admitted that the plaintiff had rights under the sale agreement and that these rights were breached since the Vehicle sold to him turned out to have been stolen.

28. It is the responsibility for that breach that is strongly contested. Paragraph 7 of the amended plaint asserts that the plaintiff signed the sale agreement with the 2nd defendant who was, at the time, acting in the usual course of his employment in the 1st defendant. It states that that the plaintiff paid his deposit through the 1st defendant's bank account in Bank of Africa and the 3rd defendant's personal bank account in Standard Chartered Bank. It states that when the plaintiff discovered the defendants' defect in title, he got in touch with the 1st defendant and the 3rd defendant assured him that the matter would be resolved as soon as the Vehicle was returned to the bond.

29. In my considered view, the amended plaint clearly discloses that it is the defendants who are responsible for selling a stolen vehicle to the plaintiff and

for taking his money. Having found that the amended plaint satisfies all the 3 elements of a cause of action, the Court finds that the plaint discloses a cause of action.

Issue 2: Whether the sale agreement was breached.

30. 'Breach of contract' means *'the breaking of an obligation that a contract imposes which confers a right of action for damages on the injured party'* (See **Mogas Uganda Limited v Benzina Uganda Ltd, HCCS No. 88 of 2013).** Breach of contract occurs when one or both of the parties fail to fulfill the obligations imposed on them by the contract (see **Mwesigye Warren v Kiiza Ben, HCCS No. 320 of 2015**).

31. The plaintiff claim is that the defendants did not give him good title to the Vehicle. Apart from naming the 2nd defendant as the seller who was acting on behalf of the owner, Jack Richardson, the sale agreement **(P.Ex.1, D.Ex.2, TP.Ex.4 and TP.Ex.9)** did not explicitly give any assurance to the plaintiff that he was getting good title to the Vehicle.

32. Nevertheless, at the time when the sale agreement was signed, the **Sale of Goods Act Cap 82** was still in force. **Section 13** thereof provided that, in every contract of sale of goods, there is an implied condition that the seller has a right to sell the goods. The provision also stipulated that, in every contract of sale of goods, there are implied warranties that the buyer shall enjoy quiet possession of the goods and that the goods shall be free from any charge or encumbrance in favour of a 3rd party not declared or known to the buyer before or at the time when the contract is made. These implied terms were maintained in Section 13 of the Sale of Goods and Supply of Services Act, 2017 which repealed the Sale of Goods Act Cap 82.

33. Section 13 of the Sale of Goods Act Cap 82 aptly encapsulated the age-old common law principle of *nemo dat quod non habet*. This principle posits that a transferor cannot give a better title to property than the one he or she possesses (See **Were Fred V Kaga Limited, HCCS No. 530 of 2004**). In actualization of the *nemo dat* principle, Section 22 of the Sale of Goods Act Cap 82 provided (and Section 29 of the Sale of Goods and Supply of Services Act, 2017 now provides) that where goods are sold by a person who is not their

owner or a person who does not have authority or consent from their owner to sell them, the buyer acquires no better title than the seller had. In such a case, the buyer would not acquire good title to the goods.

34. The sale agreement was a contract of sale of goods to which the above provisions of law apply. In the sale agreement, the plaintiff bought the Vehicle from the 1st defendant's bond and made part payment of the purchase price. At the time of the sale, the Vehicle had been reported stolen in the UK and that its actual owner was M/S BMW Group Financial Services (GB) Ltd and not Jack Richardson.

35. This implies that in signing the sale agreement on behalf of Jack Richardson, the 2nd defendant was acting for a person who did not have good title to the Vehicle. It is therefore evident that this was in breach of the implied condition in the sale agreement as to good title of the seller. For these reasons, the Court finds that the sale agreement was breached.

Issue 3: Whether there was fraud in the execution and performance of the sale agreement.

36. "Fraud" means an intentional perversion of the truth for the purpose of inducing another, in reliance upon that perversion, to part with some valuable thing belonging to him or her, or to surrender some legal right. It is an intentional false representation of a matter of fact, whether by words or conduct, by false or misleading allegations or by concealment of that which deceives. (See **Fredrick J. K. Zaabwe V Orient Bank Ltd & 5 Ors, SCCA No. 04 of 2006**.)

37. In paragraph 10 of the amended plaint, the plaintiff pleaded 7 particulars of fraud against the defendants. The plaintiff averred that the defendants actively participated in the sale of the Vehicle to him yet it had been stolen from the UK. He stated that the 1st defendant received his deposit yet it later claimed that it had been retained to offer storage services only. He also stated that the defendants paid part of the purchase price to the 3rd party yet he was not a party to the sale agreement. I have noticed that the defendants admitted that they participated in the sale but they only retort that they did so on behalf of the 3rd party.

38. To discover whether an action or omission was made fraudulently or not, courts often focus on determining if the person behind the that act or omission had notice of the falsity of his or her representation. To this end, the law recognises that notice may be actual, constructive or imputed. In this case, I am convinced that the 1st defendant and the 3rd party had constructive notice of Jack Richardson's defect in title by the time they performed the sale agreement by handing over the Vehicle to the plaintiff.

39. Constructive notice is the knowledge which the courts impute to a person upon a presumption so strong of the existence of the knowledge that it cannot be rebutted, either from his knowing something which ought to have put him on further inquiry or from wilfully abstaining from inquiry to avoid actual notice. (See the dictum of Farwel, J. in **Hunt v Luck (1901) 1 Ch. 45**.) In simple terms, constructive notice is a legal presumption that one ought to have known certain information basing on what one could have discovered upon a reasonably investigation into a matter.

40. In the present case, the 1st defendant's and the 3rd party's constructive notice of Jack Richardson's defect in title can be read from the glaring disparity between the Vehicle's customs entries sheet of 15th September 2011 (D.Ex.9) and its logbook of 22nd September 2011 (D.Ex.10). While D.Ex.9 (in Item 16 thereof at pages 10, 12 and 14 of the defendant's trial bundle) showed that the country of origin for the Vehicle was United Arab Emirates (UAE), D.Ex.10 showed that its country of origin was the UK.

41. Rules of Origin are a prominent feature of international commerce. They deal with the principles which govern the determination of the country from which a good in the international markets is said to have originated. States, as the citizens of the international community, often carefully negotiate and jealously guard their Rules of Origin. Indeed, this topic is common in international economic blocs because Rules of Origin form the bedrock of trade privileges which members of certain economic blocs may be entitled to. (See for example the **East African Community Customs Union (Rules of Origin) Rules, 2015**.)

42. The golden thread which runs through most, if not all, Rules of Origin is that a good cannot have more than one Country Of Origin ("COO"). The very basis of

economic blocs, which are often international groupings of states for purposes of commerce, would be frustrated if goods could be said to have originated from more than one country. In my considered view, this is a position which should have been obvious to the 1st defendant who runs a licensed customs bonded warehouse, to the 3rd defendant who is the 1st defendant's managing director and to the 3rd party who testified that he deals in the buying and selling of motor vehicles, among other goods.

43. The sight of 2 different countries of origin for the Vehicle in D.Ex.9 and D.Ex.10 was enough to arouse their suspicions and to alert them that one of the 2 documents was a forgery or, at least, that one of the 2 documents was based off a forgery of some sort. This ought to have put the 1st defendant and the 3rd party to inquiry so that they find out the true country of origin of the Vehicle. Had they made that inquiry, they would easily have discovered that the Vehicle had originated from the UK from where it had been stolen and routed through UAE before arriving in Uganda. They would also have discovered that Jack Richardson, who had claimed to own it and to have imported it from UAE, did not have good title to it.

44. The plaintiff testified unchallenged that it took him a simple internet search and inquiries to Interpol and the Hampshire Constabulary to discover the Vehicle's stolen status. A similar inquiry by the 1st defendant and the 3rd party before giving the Vehicle and its log book to the plaintiff would have averted this entire dispute altogether since it would have revealed to them Jack Richardson's defect in title beforehand.

45. Both the customs declaration sheet and the log book were relied on by all the defendants at the trial. This implies that none of the defendants, including the 1st defendant, can claim not to have known about them. Without any explanation to the contrary, relying on a document at a trial entitles the Court to believe that the party producing it was aware of all its contents at the date when it is said to have been authored. Additionally, as will be elucidated further in Issue 4, it is very clear to the Court that the 3rd party used and worked with all the defendants, utilising their resources in the process, in the execution and performance of the sale agreement.

46. Nonetheless, the 3rd defendant testified that he was not in the country on the day when the Vehicle and the log book where handed to the plaintiff. This was not specifically contested in cross examination. There was also no specific evidence brought to prove that the 2nd defendant was present during the handover. These 2 facts relieve the 2nd and 3rd defendants of the constructive notice since it appears that they never got to know of the contents of the log book which was issued soon before it was handed over to the plaintiff. However, the said facts do not relieve the 1st defendant from constructive notice as its agents had allowed the 3rd party onto its premises on the day of the hand over to process the log book and to then give it to the plaintiff along with the Vehicle.

47. Again, as will be clarified in Issue 4, the 3rd party's role in the execution and performance of the sale agreement is unmistakable. I am persuaded by the plaintiff's testimony in paragraph 7 of his witness statement that it is the 3rd party who handed him the Vehicle on 22nd September 2011. I also believe it to be true, as the plaintiff testified, that when he took physical possession of the vehicle, it is the 3rd party who then also gave him the logbook. The 3rd party ought to have seen the contents of the log book before handing it over. At that point, he should have realised the said disparity after recalling the contents of the customs declaration sheet.

48. My reconstruction of the fraud leading up to the sale agreement is that the Vehicle actually originated from the UK. It was stolen from there in early May 2011. Jack Richardson was, or became, aware of the theft and he decided to benefit from it. To disguise the theft, he routed the Vehicle through UAE and obtained false documents showing that its country of origin was UAE. He then brought the Vehicle into Uganda using those false documents. What he forgot to do, which has now exposed his fraudulent scheme, was to ensure that when the Vehicle is registered with URA, its log book also reflects that its country of origin was UAE and not the UK.

49. Surely, any reasonable business person dealing in the buying and selling of motor vehicles would have been triggered by the sight of a customs declaration sheet stating one country of origin for a vehicle while its URA logbook is stating another country of origin. The omission to inquire into this obvious anomaly

saddles the 1st defendant and the 3rd party with constructive notice of whatever was discoverable upon such an inquiry. Unfortunately, the plaintiff did not specifically plead fraud against the 3rd party. Therefore, since there was constructive notice on the part of the 1st defendant in the performance of the sale agreement, the Court finds that, as the plaintiff pleaded in paragraph 7 of the plaint, the 1st defendant actively participated in the fraudulent sale of the Vehicle to him.

Issue 4: Who is liable for the plaintiff's loss.

50. A large part of the controversy in the suit surrounds the true identity of the person who the defendants acted for when in the sale. A finding on who that person was would go a long way in answering the present issue. It was an undisputed fact at the trial that Jack Richardson was the registered owner of the Vehicle at the time of the sale. However, the sale agreement, at page 1 thereof, stated in relevant part:

> *"THIS AGREEMENT is made the 1st day of Sept 2011 between IRABIIZI ISAAC P.O. Box 1262 (selling on behalf of JACK RICHARDSON the owner of the car) and OR MOSES ESIMU (MOMO) of P.O. Box 9006 KLA ..."* Emphasis mine.

51. By 1st September 2011 when the sale agreement was executed, the Vehicle had been in the 1st defendant's bond for 15 days. On 15th August 2011 when it was delivered to the bond, one of the 1st defendant's agents had prepared an inspection checklist. This checklist was exhibited as **DEx.1** and **TP.Ex.1** at the trial. In the document, the owner of the Vehicle was stated to be *"JACK RICHARDSON ARTHUR C/O MOSES ESIMU (MOMO)"*.

52. Evidently, the sale agreement and the inspection checklist use a similar phrase to describe the owner of the Vehicle before its sale to the plaintiff. In cases involving ambiguous contractual language, the Court is bound to construe the contract with a businesslike or commonsense mindset. This is based on the premise that the ultimate aim of interpreting a contract, especially a commercial contract, is to determine what the parties meant by the language they used. Basically, the Court ought to ascertain what a reasonable person

would have understood the parties to have meant by that language. (See **Andrew Akol Jacha v Noah Doka Onzivua, HCCA No. 1 of 2014.**)

53. One of the most crucial pieces of evidence adduced at the trial which has been helpful in decoding what the parties actually meant by the phrase *"JACK RICHARDSON the owner of the car and OR MOSES ESIMU (MOMO)"* in the sale agreement, was the 3rd party's own police statement dated 26th October 2011. This was exhibited at trial as **TP.Ex.12.** Although the 3rd party claimed that this statement was forged, it is not one of the documents which his lawyers forwarded to TPW2 for expert examination so that the forgery can be conclusively confirmed.

54. In any case, during his cross examination, the 3rd party confirmed that the signature on the first page of that police statement was actually his and that it was genuine. This implied that while the contents of the other pages of the statement could have been forged, the contents of the first page were true and accurate. In relevant part, page 1 of the statement reads:

> ***"... I am of the above mentioned particulars and address. I have a friend of mine in the United Kingdom (UK) called JACK RICHARDSON WASSWA. He is a Ugandan and imported the Vehicle Range Rover Black in colour. It is parked in the Bond at Kansanga known as Maybach. When he was going to the UK he left me with the documents of the vehicle and instructed me to sell it for him ..."***

This excerpt clearly disproves the 3rd party's claim that he did not play any part in the sale at all. It confirms that Jack Richardson expressly instructed the 3rd party to sell the Vehicle and left him with all the relevant documents to enable him execute those instructions.

55. On a balance of probabilities, the above admissions by the 3rd party in the part of his police statement which he does not contest make it more probable than not that it is the 3rd party who had delivered the Vehicle to the 1st defendant's bond and instructed the defendants to find him a buyer. I also noticed that at the bottom of the inspection checklist, the words "FOR SALE" bear a tick against them, implying that the eventual goal of delivering the Motor Vehicle to the bond was to sell it off to someone else. This is all corroborated by the 3rd

defendant's testimony that the 3rd party brought the Vehicle to the bond and instructed the 2nd defendant to get him a buyer willing to pay UGX 160,000,000 for it.

56. Applying a businesslike mindset to the above-cited evidence and the full factual context in which the sale took place, the impression I have is that while Jack Richardson was the registered owner of the Vehicle, it was the 3rd party who directly dealt with the defendants. The 3rd party was Jack Richardson's *"enforcer"* who had been tasked to oversee the sale. He is the one that the defendants knew and this explains why he is the one they called to receive the proceeds from the sale.

57. I am mindful of the 3rd party's evidence that there were different versions of the sale agreement exhibited at the trial. **P.Ex.1, D.Ex.2** and **TP.Ex.4** were identical while **TP.Ex.9** was slightly different. The 1st version bore the names of Jack Richardson as the owner of the Motor Vehicle *"and or Moses Esimu (Momo)"*. The 2nd version bore the names of Jack Richardson only as the owner of the Motor Vehicle. In his cross examination, the plaintiff admitted that the original version of the sale agreement did not contain the phrase *"and or Moses Esimu (Momo)"*. The 3rd party argued that the defendants maliciously inserted his name in later versions of the sale agreement in order to implicate him in the sale yet he was not involved in the same at all.

58. In my considered view, this is a minor contradiction which does not affect the general body of evidence adduced regarding the 3rd party's role in the transaction in a significant way. Whether or not the third party's name was inserted into the sale agreement before or after it was signed, it still does not explain why the same phrase was set out in the inspection report **(D.Ex.1)** which was written 15 days earlier and which he did not similarly contest at the trial. It also does not change the fact that at page 1 of his police statement, he admitted to having received instructions to sell the Vehicle from Jack Richardson along with the necessary documents to assist him in that purpose.

59. It is trite law that the authority of an agent may be express or implied (See **Section 122(2) of the Contracts Act, 2010**). The authority of an agent is express if it is explicitly prescribed by the principal to the agent. On the other hand, the

authority of an agent is implied where it is to be inferred from the circumstances of the case. In the case of **Freeman v Buckhurst Park Properties (Mangal) Ltd [1964]2 QB 480**, it was held that since an agent is allowed to conduct the business of his or her principal with other persons who will often not be aware of the actual limits of his or her real authority, the law will imply and extend the agency to all acts of the agent which can reasonably be said to be within his or her apparent authority.

60. I am satisfied that there were agency relationships at law between the 3rd party and Jack Richardson, between the defendants and Jack Richardson and between the defendants and the 3rd party. The agency between the 3rd defendant and Jack Richardson is informed by **TP.Ex.12** in which the 3rd party admits to receiving express instructions from Jack Richardson to sell the Vehicle. The agency between the defendants and Jack Richardson can be seen from the sale agreement itself which clearly names him as the person they were acting for in the sale. It can also be seen from the fact that they collected money for him and transmitted it to him through the 3rd party. The agency between the 3rd party and the defendants can be inferred from his delivery of the Vehicle to the 1st defendant's bond, his instructions to the 2nd defendant to find him a buyer and his collection of the proceeds of the sale from the 1st defendant's office.

61. However, as counsel for the defendants submitted, at common law, an agent is not liable for the contracts he or she enters on behalf of the principal. This argument is rooted in the *qui facit alium facit per se* principle which posits that all contracts entered into by an agent on behalf of his or her principal are the contracts of the principal and the agent cannot suffer any liabilities from them. It should be noted that the statutory restatement of the said principle in **Section 162 of the Contracts Act, 2010** recognises some exceptional situations in which an agent is personally bound by the contracts he or she enters on behalf of the principal. The provision states:

> ***"162. Agent not to enforce or be bound by contracts on behalf of principal.***

In the absence of any contract to the contrary, an agent shall not enforce a contract entered into by him or her on behalf of a principal and shall not be bound by the contract, except where –

(a) the contract is made by the agent for the sale or purchase of goods for a merchant resident abroad;
(b) the agent does not disclose the name of the principal; or
(c) *although the name of the principal is disclosed, the principal cannot be sued.".*

62. After analyzing all the exceptions in Section 162 of the Contracts Act, 2010, the Court does not believe that any of them apply in the instant case. In the 1st exception, although the 3rd party revealed at trial that Jack Richardson is ordinarily resident in the UK, there is no evidence on record proving that he is a "merchant". The Contracts Act does not define the word "merchant" but the **Black's Law Dictionary, 9th edition at page 1065** defines it to mean "one whose business is the buying and selling of goods". Thus, for this 1st exception to apply, there must have been proof that Jack Richardson was not only resident in the UK but that he is ordinarily involved in the buying and selling of motor vehicles on a regular basis.

63. Similarly, the 2nd and 3rd exceptions do not apply. The sale agreement clearly disclosed who the principal was by mentioning that Jack Richardson was the owner of the Vehicle on whose behalf the 2nd Defendant signed the sale agreement. I have also found no legal bar against suing Jack Richardson for the breach of the sale agreement. His residence outside Uganda and the fact that, for most of the time, he could not be found does not legally bar a suit against him.

64. In my considered opinion, Jack Richardson was the proper defendant for the plaintiff's breach of contract claim. Both the plaintiff and the 3rd defendant testified that Jack Richardson was arrested by the Police in 2018 and that he paid USD 10,000 to the plaintiff in order to settle the criminal complaints. This was corroborated by a Police Exhibit slip (**D.Ex.22**) which showed that the said sum had been duly paid to the plaintiff on 23rd January 2018. Since the scheduling of this case was not conducted until sometime in 2021, the plaintiff

had ample time to amend his plaint in order to introduce Jack Richardson as a defendant so that this Court can hold him accountable. Therefore, as far as the breach of contract claim is concerned, the Court is unable to find the defendants and the 3rd party, who acted only as agents of Jack Richardson in the sale, liable to the plaintiff pursuant to Section 162 of the Contracts Act, 2010.

65. Nonetheless, basing on my findings in Issue 3 above, both the 1st defendant and the 3rd party had constructive notice of Jack Richardson's defect in title when they performed the contract by handing over the Vehicle along with its logbook to the plaintiff on 22nd September 2011. The plaintiff did not do justice to his case when he omitted to specifically plead fraud against the 3rd party. For that reason, I did not make any findings of fraud against the 3rd party personally in Issue 3 above, although it is clear that he was at the centre of the constructive fraud.

66. The Court finds that the 1st defendant actively participated in the fraudulent sale of the Vehicle to the plaintiff. First, the 1st defendant allowed its premises to be used to store, market and sell the Vehicle. Second, the 1st defendant allowed its bank account to be used for the collection of proceeds from the sale. Third, the 1st defendant's officers kept in touch with the 3rd party regarding the sale and gave him updates about the plaintiff's installment payments. Fourth, the Court believes it to be more probable than not that the 1st defendant's officers, employees and agents allowed the 3rd party to come onto its premises to finally process the Vehicle's false paperwork and to complete performance of the sale agreement by handing over the Vehicle and its paperwork to the plaintiff.

67. Finally, it is not disputed that the 1st defendant allowed its officers and employees, like the 2nd and 3rd defendants, to work closely with the 3rd party in order to complete the sale. Even though no specific evidence was led to place them at the scene of the handover, the Court is convinced that they were aware of the 3rd party's presence on their premises on that day and of the fact that he was processing paperwork for the Vehicle which they ought to have crosschecked releasing it to the plaintiff. For all these reasons, the 1st defendant is saddled with constructive fraud and is liable for the plaintiff's loss. The 1st

defendant can always pursue an appropriate action for indemnity and, or, contribution against the 3rd party and, or, Jack Richardson himself.

Issue 5: What remedies are available to the parties.

Declaratory order

68. In view of the findings on Issues 3 and 4, the Court shall issue a declaratory order to the effect that the 1st defendant participated in the fraudulent sale of the Vehicle to the plaintiff.

Refund of UGX 120,000,000

69. The plaintiff is, in principle, entitled to a refund of the UGX 120,000,000 which he paid to the defendants for the Vehicle. However, in their written statement of defence, the defendants made a case for a number of set offs in respect of this sum. Firstly, they averred that since the plaintiff has sold off the Vehicle to another person for USD 30,000, the plaintiff is no longer aggrieved. I find this argument to be meritless. Although the plaintiff resold the Vehicle in 2012 and received been USD 30,000, he had had to pay USD 20,000 to its actual owner in the UK in order to secure the Vehicle after it was impounded by Interpol. The payment of USD 20,000 and UGX 120,000,000 for the purchase of the same Vehicle means that the plaintiff paid twice for the Vehicle. Therefore, the Court rejects the claim for a set off arising from the resale of the Vehicle.

70. The defendants also averred that the 3rd party paid UGX 40,000,000 in taxes to URA to secure the release of the Vehicle from the bonded warehouse and that this sum should be offset from the plaintiff's UGX 120,000,000. This averment is also meritless. The sale agreement clearly indicates that the agreed purchase price of the Vehicle was tax inclusive, implying that the plaintiff's duty was to pay the agreed consideration only. Since it was the seller's duty in the sale agreement to pay the taxes for the Vehicle, no set off can arise from the said tax payment.

71. The only averment for a set off which holds some water is the one relating to the USD 10,000 which the plaintiff received from Jack Richardson on 23rd January 2018. This payment was to settle the plaintiff's criminal complaint and claim for the refund of his deposit. It is fair and just that this sum is taken into

consideration before the Court orders a refund of the plaintiff's deposit. According to the BOU Average Exchange Rates Archive found at https://archive.bou.or.ug/bou/collateral/interbank_forms, on 23rd January 2018 when the plaintiff received the USD 10,000 from Jack Richardson, $1 was buying UGX 3,625.96. This means the plaintiff was paid an equivalent of UGX 36,259,600 on that day, leaving a balance of UGX 83,740,400.

72. Consequently, the Court shall award the plaintiff UGX 83,740,400 being the balance of the deposit he paid for the purchase of the Vehicle.

Special damages

73. The plaintiff pleaded special damages of UGX 4,700,000 and particularised them in paragraph 13 of the plaint. This money was in respect of 4 airport taxi pickups and drops at Entebbe International Airport in the course of the plaintiff's travels to follow up the case abroad, special hire taxi during his movements around Kampala in following up the case, accommodation and feeding during those trips, his children's travel to and from school from the time the Motor Vehicle was impounded until the date of filing the suit and telephone expenses for follow ups made in the case.

74. In the case of **Stanbic Bank (U) Ltd v Hajji Yahaya Sekalega t/a Sekalega Enterprises, HCCS No. 185 of 2009**, this Court restated the law on the award of special damages to an aggrieved plaintiff. The Court reiterated that special damages must be specifically pleaded and proved, but that strict proof does not mean that that proof must always be documentary evidence. The plaintiff did not adduce any documentary evidence to prove any of the alleged sums. His witness statement also omitted to explain and give further details about the claimed sums.

75. While proof of special damages need not always be documentary, the sums in respect of which the award of special damages is sought in this case, like accommodation, meals, special hire and airport taxi fees, are those in respect of which receipts are ordinarily expected to be provided to the customers. Without any oral or documentary evidence of this expenditure, the Court finds that the plaintiff failed to specifically prove his claim for general damages. Accordingly, the claim fails.

General damages

76. The plaintiff prayed for an award of general damages. The Court recalls that general damages are what the law presumes to be the direct, natural or probable result of the defendant's breach of contract (See **Opia Moses v Chukia Lumago Roselyn & 5 Ors, HCCS No. 0022 of 2013**). The law on general damages is that they are awarded at the discretion of the Court. (See **Hadley v Baxendale (1894) 9 Exc. 341**.)

77. In assessing general damages, the Court should be guided by the value of the subject matter, the economic inconvenience that the plaintiff may have been put through and the nature and extent of the injury suffered. See **Uganda Commercial Bank v Kigozi [2002]1 EA 305**. The Court should look into the future so as to forecast what would have been likely to happen if the contract had not been entered into or it had not been breached. See **Bank of Uganda v Fred William Masaba & 5 Ors, SCCA No. 3 of 1998**.

78. In the instant case, Court has found that the 1st defendant actively participated in the fraudulent sale of the Vehicle to the plaintiff. After getting physical possession of the Vehicle from the 1st defendant's bond, the plaintiff soon got the shock of his life when he learnt that Interpol was looking for the Vehicle because it had been stolen from the UK a few months before he bought it. Soon thereafter, the Vehicle was, impounded by Interpol and the resultant police investigations went on for years. The defendants tossed him around for his refund until he had to come to this Court where he has unfortunately spent the last 12 years seeking justice.

79. The plaintiff testified that he suffered inconvenience because he never got to use the vehicle after buying it and never got his deposit back either. For any victim of such a fraudulent transaction, this would indeed be the natural and probable consequence. In my considered opinion, car bonds need to do more to ensure that the cars they sell, whether for themselves or for other persons, have good title. It is truly shocking that any reputable car bond like the 1st defendant can store, market and sell stolen cars, all to the detriment of the unsuspecting public.

80. Counsel for the plaintiff prayed for an award of UGX 50,000,000 in general damages. Having considered all the circumstances of this case and in view of the grave and exceptional inconvenience that the plaintiff has endured for all these years, the Court deems it fair and just to award him general damages of UGX 40,000,000.

Interest

81. Under Section 26 of the Civil Procedure Act, the Court has power to award interest on damages. Interest is often awarded to compensate the plaintiff for the time he has spent and, or, the time he is likely to spend without his or her money. Ordinarily, a successful plaintiff is entitled to interest at a rate which would not neglect the prevailing economic value of money but which would also insulate him or her against further economic vagaries, like inflation and depreciation of the currency, in the event that the money ordered to be recovered is not paid promptly. (See **Mohanlal Kakubhai Radia v Warid Telecom Uganda Ltd, HCCS No. 0224 of 2011**.)

82. Basing on the above principles, the Court shall award interest on the refundable sum of UGX 83,740,400 at the rate of 16% p.a. from 22nd September 2011 when the plaintiff completed the UGX 120,000,00 deposit, until full payment. The Court shall also award interest on the general damages at the rate of 13% p.a. from the date of judgment until payment in full.

Costs

83. The general rule is that costs follow the event. This means that an award of costs will generally flow with the result of litigation. A successful party is entitled to costs, unless the Court, for good reasons, orders otherwise (see **Kwizera Eddie v Attorney General, SC Constitutional Appeal No. 01 of 2008**). In this case, I have not found any reason to deny the plaintiff costs of this suit. Accordingly, I award the costs of the suit to the plaintiff.

The case against the 2nd defendant

84. As I noted earlier, counsel for the defendants notified the Court that the 2nd defendant passed on before the trial. Pursuant to Order 24 rule 4 of the Civil Procedure Rules, S.I. 71-1, the Court concludes that the plaintiff's suit against

the 2nd defendant abated upon the latter's death. In any case, the Court has not found that the 2nd defendant was liable for the plaintiff's loss. The orders herein would not have affected him personally anyway.

Reliefs

85. Consequently, I make the following orders:

i. A declaration that the 1st defendant participated in the fraudulent sale of the Vehicle to the plaintiff doth issue.

ii. The 1st defendant shall pay to the plaintiff **UGX 83,740,400 (Uganda Shillings Eighty three million, Seven hundred and fourty thousand, Four hundred)** being the balance of his deposit on the purchase price for the Vehicle, plus interest thereon at the rate of 16% p.a. from 22nd September 2011 until full payment.

iii. The 1st defendant shall pay to the plaintiff general damages of **UGX 40,000,000/= (Uganda Shillings Fourty million)** plus interest thereon at the rate of 13% p.a. from the date of this judgment until full payment.

iv. Costs of the suit are awarded to the plaintiff.

Patricia Mutesi

Patricia Mutesi

JUDGE

(01/03/2024)