THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

CIVIL SUIT NO. 023 OF 2015

TUUSAH SIMON :: PLAINTIFF

VERSUS

KAMOGA MUHAMMADI :: DEFENDANT

BEFORE: HON. JUSTICE VINCENT WAGONA

JUDGMENT

Introduction:

The plaintiff brought this suit against the defendant under Order 36 of the Civil Procedure Rules for recovery of Uganda Shillings (UGX) 55,000,000/= (Fifty-Five Million Shillings) and costs of the suit.

The Case of the Plaintiff:

It was contended by the plaintiff that by agreement of 9th February 2015, the plaintiff sold to the defendant motor vehicle registration No. UAU 489F Chasis No. FV416J530409, Engine No. 8DC10638421, Green in color at an agreed price of UGX 65,000,000/=. That out of the agreed consideration, the defendant only paid a sum of UGX 5,000,000/= leaving a balance of UGX 6,000,000/= which the defendant undertook to pay by the 27th of February 2015.

That to effect comprehensive insurance of the said motor vehicle, the defendant requested for an advance of UGX 5,000,000/= thereby bringing the total indebtedness to UGX 65,000,000/=. That in breach of the said agreement, the defendant only paid a sum of 10,000,000 leaving a balance of UGX 55,000,000/=

un-paid. It was contended that a demand for payment of the said sum was made by the plaintiff to the defendant, that was ignored and thus the plaintiff prayed for judgment against the defendant.

The Case of the Defendant:

The defendant filed Misc. Application No. 078 of 2015 for leave to appear and defend Civil Suit No. 078 of 2015 and leave was granted on the 19th of November 2015. The defendant later filed a written statement of defense and counter claim in which he contended that the suit against him was frivolous and vexatious and bad in law for failure to disclose a cause of action against him. The defendant further averred that the defendant is not indebted to the plaintiff to the tune claimed in the plaint since the plaintiff had made a substantial payment. That the defendant was prevented from completing payment due to third party claims.

The defendant contended under counter claim that he bought the vehicle in issue at UGX 65,000,000 and he had paid a sum of UGX 48,500,000/= to the plaintiff leaving a balance of only UGX 16,500,000/= which the defendant could not pay due to disputes over ownership of the said motor vehicle. That soon after purchase of the suit motor vehicle, the original owners started intercepting and or impounding it claiming that the plaintiff had not paid the balance on the said motor vehicle.

That the defendant/counter claimant informed the plaintiff of the above state of affairs but the plaintiff did not co-operate to pay the balance due to the original owner. That due to the plaintiff's failure to co-operate, the motor vehicle was impounded and taken by the original owners and it was parked at Trust Dealers Int. Co. Ltd in Kampala. That the plaintiff acted dishonestly and fraudulently when he failed to disclose that he had not completed payment of the said motor vehicle to

the original owners. That as a result of the dishonest conduct on part of the plaintiff and breach of contract, the defendant/counter claimant suffered inconveniences to which he sought to recover general damages. The defendant/counter claimant thus sought to recover general damages, an order of specific performance and in the alternative a refund of a sum of UGX 48,500,000/= so far paid to the plaintiff, interest on the same at a rate of 30% per annum and costs of the suit.

Issues:

During scheduling, the following issues were framed:

1. Whether the defendant is still indebted to the plaintiff under the sale agreement.
2. Whether the plaintiff was fraudulent in selling the vehicle to the defendant.
3. Whether the parties are entitled to the reliefs sought.

Plaintiff's submissions:

1. **Whether the defendant is still indebted to the plaintiff under the sale agreement.**

It was submitted for the plaintiff that it is not in dispute that on the 9th day of February 2015, the plaintiff sold his motor vehicle to the defendant at a consideration of UGX 65,000,000/= and a sum of UGX 5,000,000/= was paid at execution of the agreement leaving a balance of UGX 60,000,000 which was to be paid on 27thFebruary 2015. That later the defendant deposited a sum of UGX 14,000,000/= on his account vide 95010100016032 held in Bank of Baroda on 2nd May and 22nd June 2015. That further in November 2015, the plaintiff received a sum of UGX 23,300,000/= from Trust Dealers International Co. Ltd upon being informed that it was forwarded by the defendant making a total sum of UGX 43,300,000/= inclusive of UGX 5,000,000/= paid at execution of the agreement.

That after the defendant failing to pay, he brought his brother Kasande Mubarak who executed a memorandum of understanding in favour of the plaintiff to pay a sum of UGX 25,230,000/= as the balance. It was contended that this fact was admitted by Kasande Mubarak, DW2 who informed court that the said figures were confirmed by the defendant. That for the deposits on the plaintiff's account, he admitted only a sum of UGX 12,105,000/= and denies the rest including money sent to mobile money line No. 0754156383 in the names of a one Kapere who is not known to the plaintiff.

Counsel further argued that the memorandum of understanding exhibited by DW2 was made on 3rd December basing on information furnished by the defendant and it was inconceivable how the defendant now claims the costs of repair and payments made to Trust Dealer International of UGX 33,500,000/= yet the same did not arise. That if the sum for repairs and that paid to Trust Dealers is added to the 25,230,000/= which was the agreed remaining balance it brings the total to UGX 81,590,000/=. It was contended that it was thus illogical for the plaintiff to rely on such payments contrary to what was agreed upon in the memorandum of understanding.

It was submitted that further clause 1 of the agreement made it clear that money was to be paid to the plaintiff. That section 92 of the Evidence Act excludes admissibility of evidence of oral agreement where the terms of any contract have been provided in writing. Counsel cited the decision of **Golf View Inn (U) Ltd Vs. Barclays Bank (U) Ltd HCT – CC – CS – 358 of 2009** where the Hon. Lady Justice Hellen Obura (High Court Judge, as she then was) held that; "*it is clear that once parties have executed agreements, they are bound by them and evidence of the terms of the agreements should be obtained from the agreement itself and no extrinsic evidence shall be admitted or shall be relied upon to contradict, add to,*

vary or subtract from the terms of the contract". That this renders the sum of UGX 9,250,000/= not received by the plaintiff out of the sum of UGX 33,500,000/= paid by the defendant to Trust Dealers International Ltd. That it equally applied to the sum of UGX 3,860,000/= spent by the defendant on repairs as there is no clause in the agreement that the same had to be offset from the total consideration. That payments received by the plaintiff leave an outstanding sum of UGX 13,125,000/= and a sum of UGX 1,470,000/= due on the insurance policy and thus prayed for the issue to be answered in the affirmative.

2. **Whether the plaintiff was fraudulent in selling the vehicle to the defendant.**

On issue 2, it was submitted for the plaintiff that he was not fraudulent when he failed to disclose to the defendant that he had not completed payment of the motor vehicle to the original owner, Trust Dealers International thus causing the defendant great inconvenience. That according to section 16(2) of the Contracts Act 2010, fraud does not arise where the alleging party to the contract had the means of discovering the truth through ordinary diligence. That in cross examination the defendant admitted that the plaintiff availed him a copy of the registration card of the truck UAU 489F before executing the sales agreement and it was in the names of Trust Dealers International Co. Ltd whose ownership details could be accessed from URA and then after used for due diligence. That therefore, the defendant at all material times had the means of discovering the truth and thus cannot plead fraud. Counsel thus asked court to answer the issue in the negative.

3. **Whether the parties are entitled to the reliefs sought.**

As regard the third issue, it was submitted for the plaintiff that court should be pleased to grant the orders sought in the plaint being recovery of the remaining

balance of UGX 14,595,000/= and costs of the suit. Counsel also contended that the defendant is not entitled to the reliefs claimed in the counter claim. That the claim for a refund of UGX 6,465,000/= is not maintainable since it was not pleaded and thus cannot be granted and this principle was stated in the case of **Interfreight Forwarders (U) Ltd Vs. East African Development Bank (1990-1992) 1 E.A 117 (SC)** that; "***A party is expected and is bound to prove the case as alleged by him and as covered in the issues framed. He will not be allowed to succeed on a case not stated by an amendment of pleadings."***

Counsel also submitted that the defendant's claim for recovery of damages was hinged on the allegation that the truck was impounded on the 23rd day of July 2015 by Trust Dealers International Co. Ltd while in possession of the defendant because of the plaintiff's failure to pay them in full. That clause 6 of the sale agreement provided that: "***That in the event of failure to remit the balance on the agreed date, the vendor shall repose the vehicle without notice to court until full payment".*** That it is not disputed that by 27th February 2015 at 12:00PM, the defendant had not paid the plaintiff the agreed consideration in full which concludes that the defendant was entitled to possession of the truck. That therefore, since the claimed inconveniences were a frolic on his own, he is not entitled to damages. Counsel thus asked court to dismiss the counter claim with costs.

Defendant's Submissions:

1. **Whether the defendant is still indebted to the plaintiff under the sale agreement.**

It was submitted for the defendant in regard to the first issue; that the plaintiff in his witness statement told court that on the 19th of November 2013, the plaintiff purchased motor vehicle Reg No. UAU 489F, Chasis No. FV416J530409, Engine

No. 8DC10638421 Green in color from Trust Dealers International Co. Ltd at a total consideration of UGX 118,000,000/=. That upon payment of UGX 70,000,000/=, the plaintiff was given physical possession as well as a copy of the logbook and he gave the vehicle to his brother to operate. That he used to clear the remaining balance with Trust Dealers International Co. Ltd. That on 9th February 2015, he sold the same vehicle to the defendant at a sum of UGX 65,000,000/= part of which was paid leaving a balance of UGX 16,438,400/=.

That the defendant on the other hand testified that in January 2015, he met the plaintiff and they negotiated and agreed that the defendant purchases his motor vehicle at a sum of UGX 65,000,000/= less the cost of repairs to wit, 2 batteries, 2 tyres, clutch injection pump and other repairs as agreed and an agreement was attached to that effect. That the defendant carried out the said repairs and spent a sum of UGX 3,860,000 which was to be offset from the purchase price and receipts were attached.

That on the 9th of February 2015, the defendant entered into an agreement with the plaintiff to purchase the said motor vehicle at UGX 65,000,000/= and on that day the defendant paid a sum of UGX 5,000,000/= leaving a balance of UGX 60,000,000/= and the repair charges were not offset because the vehicle was still in the garage. It was contended that at the time of negotiations, the plaintiff informed the defendant that he had an original logbook. That before the defendant could make any payments, he learned that the logbook was with Trust Dealers International Co. Ltd and thus asked the defendant to settle his indebtedness with Trust Dealer Intl Co. Ltd. That on the 25thJuly 2015, the owners impounded the vehicle claiming the outstanding balance and thus the defendant paid a sum of UGX 33,500,000/=. That the defendant further paid the plaintiff through his account No. 95010100016032 in Bank of Baroda a sum of UGX 27,105,000/=.

That on the 4th and 5th April 2015, the defendants brother, a one Kasande Mubarak paid the plaintiff a sum of UGX 2,000,000/= through mobile money No. 0754156383 using Tel No. 0755532224 and the plaintiff acknowledged the same. That the defendant made a total payment of UGX 71,465,000 and it is him who paid the insurance fee of UGX 5,734,400/= to Jubilee Insurance and had an original receipt and never requested the plaintiff to pay the same. That the defendant fully paid the sum due to the plaintiff and this was also confirmed by DW2. That Dw2 wrote the memorandum between the parties and confirmed depositing the UGX 2,000,000/= and making deposits on the plaintiff's account. He also confirmed that the defendant is not indebted to the plaintiff. Counsel thus asked court to find that the defendant fully paid the plaintiff and thus not indebted and answer the first issue in favour of the defendant.

2. **Whether the plaintiff was fraudulent in selling the vehicle to the defendant.**

For issue two, Counsel submitted that the defendant testified that during negotiations, the plaintiff informed him that he had an original logbook. That even after he had knowledge that there was an outstanding balance, he asked the plaintiff to settle the same with the original owner and failed. That on 23rd July 2015, the original owner impounded the vehicle yet the plaintiff had made a representation that he had fully paid which was false. Counsel cited the decision ***of Fredrick Zaabwe Vs. Orient Bank & 5 Ors KALR (2007) 220*** where fraud was defined thus; "***an intentional perversion of the truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right."*** That the plaintiff made a representation to the defendant that he had a logbook and later the defendant discovered that the plaintiff did not fully pay the original owner. That the defendant later cleared the

original owner which fact was admitted by the plaintiff and the impounding of the suit motor vehicle. That the fact that payment was not complete and this fact was not disclosed by the plaintiff, that the failure to do so amounted to fraud and counsel asked court to resolve this issue in favour of the defendant.

.**Whether the parties are entitled to the reliefs sought.**

For the third issue, counsel asked to have the plaintiff's suit dismissed with costs and for the counter claim to be allowed with an award of general damages, a refund of UGX 6,465,000 being the excess of the amount paid on top of the purchase price and costs.

Rejoinder by the Plaintiff

In rejoinder, it was submitted for the plaintiff that the alleged cost of repair of UGX 3,860,000/= to be offset from the prices arose from an agreement dated 24th January 2015 which was about borrowing the money and not purchase. That it was admitted by the defendant that the purchase took place in February 2015 and not January and the purchase agreement does not talk about the one of January and thus such expenses were not part of the purchase price.

Counsel also submitted that for the alleged sum of UGX **33,500,000** paid to Trust Dealers International Co. Ltd, the receipts do not indicate the outstanding balance and the same was not done with the consent of the plaintiff; that no person was called from Trust Dealers International Co. Ltd as a witness to confirm the said transaction or facts of receipt of the said sum.

That the plaintiff does not dispute payments made to him save for the UGX 2 million paid to a telephone number belonging to Kapere. That he acknowledged receipt of UGX 5,000,000/= at execution of the agreement, UGX 14,000,000/= deposited in 2015, UGX 23,400,000 received from Trust Dealers International Co.

Ltd and Shs 12.105.000/= deposited on his account in 2016 which brings the total sum to 54,505,000 and not 65,000,000 as contended by the defendant.

It was also submitted for the plaintiff that he was never fraudulent in these dealings since the logbook he presented had clear information as to the person who was reflected as the owner of the vehicle. That Trust Dealers International Co. Ltd did not deliver possession of the suit motor vehicle to the defendant as such they had no capacity to impound the vehicle but could only sue for recovery of the balance of the purchase price and that the defendant's counter claim was devoid of any merit. Counsel prayed that judgment be entered in favour of the plaintiff and the defendant's counter claim to be dismissed with costs.

CONSIDERATION BY COURT:

Issue one: Whether the defendant is still indebted to the plaintiff under the sale agreement

The main issue is whether the defendant completed payment under the sale agreement. An ***agreement*** is defined by ***the Black's Law Dictionary, 8th Edition at page 209*** as a mutual understanding between two or more persons about their relative rights and duties regarding past or future performances. That it is a manifestation of mutual assent by two or more persons or the parties' actual bargain as found in their language or by implication from other circumstances, including course of dealing, usage of trade, and course of performance.

It is admitted by both parties that on the 9th of February 2015, they entered into an agreement for purchase of Motor Vehicle Registration No. UAU 489F Chasis No. FV416J530409, Engine No. 8DC10638421, Green in color (the '***suit motor vehicle'***) at an agreed price of UGX 65,000,000/=. It is also admitted by both parties that the defendant made a part payment of UGX 5,000,000/= at execution

of the agreement and he was to pay the remaining balance of UGX 60,000.000/= by 25th February 2015 at 12:00pm.

With regard to payment of the balance, the defendant claims that it was agreed that he was to do repairs on the vehicle and also pay comprehensive insurance and such sum could be deducted from the agreed consideration. The defendant relied on exhibit DE2 which is an agreement dated 24thJanuary 2015 where it was agreed that the costs of making repairs like 2 batteries, 2 tyres and clutch pump could be offset from the agreed consideration. This is denied by the plaintiff. It thus follows, that there is contestation as to whether the agreement of sale or purchase was a single document or whether it included the contents of the agreement dated 24th January 2015.

Section 91 of the Evidence Act provides the manner of proof of a written document being producing the documents itself and it states the exceptions to the general rule. Section 92 on the other hand excludes adducing oral evidence to add, vary or subtract from a written agreement or document and it lays down the exceptions under which oral evidence may be admitted to prove or add to the contents of a written document and it states that:

> *When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 91, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to or subtracting from its terms; but—*
>
> *(a) any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating*

thereto, such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration or mistake in fact or law;

(b) the existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this paragraph applies, the court shall have regard to the degree of formality of the document;

(c) the existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved;

(d) the existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property may be proved, except in cases in which that contract, grant or disposition of property is by law required to be in writing or has been registered according to the law in force for the time being as to the registration of documents;

(e) any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description may be proved if the annexing of the incident would not be repugnant to, or inconsistent with, the express terms of the contract;

(f) any fact may be proved which shows in what manner the language of a document is related to existing facts.

As cited for the plaintiff in **Golf View Inn (U) Ltd Vs. Barclays Bank (U) Ltd, High Court Civil Suit No. 358 of 2009,** Lady Justice Hellen Obura (High Court Judge as she then was) observed at page 10 and 11 thus:

> "*From the above legal principles, it is clear that once parties have executed agreements, they are bound by them and evidence of the terms of the agreement should be obtained from the agreement itself and no extrinsic evidence shall be admitted or if admitted, shall be relied upon to contradict, add to, vary or subtract from the terms of the contract except where there is fraud, duress, illegality lack of consideration, lack of capacity to execute the contract"*

In **Sine pay (u) Ltd Vs. Sarah Kagoro & Anor, Civil Suit No, 0548 of 2004, *Bamwine J*** (as he then was) observed that:

> "*The parol evidence rule is to the effect that evidence cannot be admitted (or even if admitted, it cannot be used) to add to, vary or contradict a written instrument. In relation to contracts, it means that where a contract has been reduced to writing, neither party can rely on evidence of terms alleged to have been agreed, which is extrinsic document, that is, not contained in it."*

I agree with counsel for the plaintiff that once the parties have agreed and reduced their understanding in writing, then neither party should be permitted to adduce evidence to contradict it, add to, or subtract the contents thereof. Such agreement represents a full and unequivocal understanding between the parties in relation to the subject matter of the contract; subject to the exceptions provided for under Section 92 of the Evidence Act.

In this case, the plaintiff in his evidence in chief under paragraph 11 he stated that: "***the defendant demanded that I drive the vehicle to Makerere***

where the person he claimed had the money was operating from. The truck was driven to a garage at Makerere where the defendant suggested that he was going to service the vehicle and also purchase two tyres at a cost of Ushs 5,000,000 (Five Million Shillings) which money was to be offset from the purchase price. I agreed to his suggestion." In cross examination the plaintiff was asked a question thus; "***Did u make an agreement with the defendant on 24th January 2015 before making the one of 9th February 2015 and he answered yes" He also added in cross examination that the defendant informed him of the repairs and that he spent 5m. He further confirmed that it is the defendant who did the repairs and the same were done at Makerere'.***

I find that under Section 92(b)&(c) of the Evidence Act, the agreement of 9th February 2015 is relevant to the one of 24th January 2015 and both agreements are relevant to the transactions relating to the purchase of the motor vehicle in issue, including the cost of repairs and the same being liable to be offset from the total consideration. The testing and repair was a condition precedent to the sale and costs of the same had to be offset from the agreed consideration. The plaintiff admits that the defendant made a proposal to him that he had to make repairs and the costs thereof was **UGX 5.000.000/=**.

Evidence of payment:

The plaintiff sued seeking to recover a sum of UGX 55,000,000/=. He claimed only UGX 10.000.000/= had been paid out of the total consideration of UGX 65,000,000 thus leaving the amount claimed.

During hearing, the plaintiff stated in his evidence in chief that on 9th February 2015, an agreement was prepared and signed at the offices of Musoke & Co.

Advocates which indicated that **UGX 5,000,000** used to do repairs and service was already paid to him. That after persistent demands, an additional sum of **UGX 15,000,000/=** was deposited on his account in Bank of Baroda vide 95010100016032.That around November 2015, he received an additional sum of **UGX 24,300,000/=** from Trust Dealers International Co. Ltd which money he was informed was paid by the defendant. That the defendant brought him his brother called Kasande Mubaraka where he committed himself to pay the remaining balance of **UGX 25,230,000/=.** That in 2016, he received an additional sum of **UGX 10,105,000/=** making a total sum of **UGX 54,305,000/=.** He thus claimed the balance of **UGX 10,105,000/=** plus **UGX 5,000,000/=** paid for comprehensive insurance bringing the total to the sum of **UGX 16,438,400/=**

Therefore, the total sums acknowledged by the plaintiffs from his evidence in chief in summary is as follows; **UGX 5,000,000/=** received at contract signing; **UGX 15,000,000/=** deposited on his account in Bank of Baroda**, UGX 24,300,000/=** received in Julyfrom Trust Dealers International Co. Ltd, and **UGX 10,105,000/=**deposited on his account in 2016. The total is **UGX 54,405,000/=** and not **54,305,000/=**as indicated by the plaintiff. The unpaid balance becomes **UGX 16,338,400/=**

In cross examination the plaintiff denied receipt of the sum of UGX 33,000,000/= paid to Trust Dealers Intl Co. Ltd and insisted on what he knew as UGX 24,300,000/=. He maintained that he claimed a sum of UGX 16,438,400 as the outstanding balance.

The defendant on the other hand contended that the agreed consideration was UGX 65,000,000/=. That he paid UGX 5,000,000/= at execution of the agreement though the costs of repairs were not offset. That he further paid a sum of UGX 33,500,000 to Trust Dealers Intel Co. Ltd being the sum due to the plaintiff with

his consent. That he further deposited a sum of UGX 27,105,000 on the plaintiff's account in Bank of Baroda vide 95010100016032. That on the 4th and 6th April 2015, his brother Mubarak paid UGX 2,000,000/= through mobile money telephone No. 0754156383 using Tel No. 0755532224 making a total of UGX 71,465,000/=.

Therefore, the summary of the sum paid by the defendant per his evidence in chief is **UGX 5,000,000/=** at contract signing,**UGX 33,500,000/=** paid to Trust Dealers Intel Ltd, **UGX 27,105,000** paid to his account and **UGX 2,000,000** paid through mobile money bringing a total sum of**UGX 67,000,000/- not UGX 71,465,000/=.**

In my view there seems to be confusion and uncertainty on the amounts paid by the defendant and what was received by the plaintiff. This confusion in my view can be sorted by relying on the memorandum of understanding that the parties signed on 03 December 2015 which was exhibited as part of D.E.7. Both the plaintiff and the defendant indeed acknowledged signing the same. It is my view and finding that at the time they signed the said memorandum, they had reconciled all the monies paid and received by the plaintiff prior. I will thus take the view that by 03 December 2015, the remaining balance out of the agreed consideration was ***UGX 25,230,000.*** This implies that out of the total agreed consideration of UGX 65,000,000/=, the defendant had been paid a sum of ***UGX 39,770,000/=*** *leaving* a balance of UGX 25,230,000/=. I will thus consider and restrict myself to payments made thereafter.

I will start with money deposited on the plaintiff's account. The plaintiff does not dispute the money deposited on his account save for one bank slip which didn't have a stamp of 29th February 2016 of UGX 1, 340,000/=.I have looked at the deposit slip which was admitted as D5H. The same does not bear the stamp of the bank as confirmation that indeed the said money was received by the Bank. In the

absence of any other evidence on record to support the said transaction either in form of a bank statement reflecting the said transaction, I am inclined to agree with the plaintiff that the said deposit is not authentic and the same is hereby rejected.

I will proceed to consider those deposits which are not contested by the plaintiff. On 1st January 2016, a sum of **UGX 2,000,000/-** was deposited by a one Mubaraka on the plaintiff's account. On 5th January 2016 an additional sum of **UGX 1,000,000/=** was deposited on the plaintiff's account. On 22nd April 2016 a sum of **UGX 2,000,000/-** was equally deposited and **UGX 500,000/=**was deposited on 10th February 2016.**UGX 1,300,000**/= was deposited on 1st March 2016 and **UGX 2,000,000/=** on 15th March 2016. **UGX 1,000,000/=**deposited on 22nd January 2016 and **UGX 505,000/=** on 23rd March 2016.**UGX 1,000,000/=**was deposited on 2nd June 2016 and **UGX 800,000** on 28thJuly 2016.

The plaintiff also admitted during cross examination that he knew a one Kapare who was not known to the defendant. The defendant testified in cross examination that he didn't know a one Kapere and he was referred to him by the plaintiff. The defendant's evidence was not discredited during cross examination and I believe he was telling the truth. I thus find that the plaintiff received a sum of **UGX 2,000,000** which was deposited on a phone number belonging to Kapere whom he nominated to the plaintiff. This makes a total sum of **UGX 14,105,000/=.**

The other issue concerns the cost of repairs and insurance. It appears from the evidence of both the plaintiff and defendant that the costs of repair and insurance were never deducted from the agreed consideration. The plaintiff contended that he gave the money to the defendant to pay for the insurance while the defendant on the other hand contended that he is the one who paid the same and had an original receipt for the same.

In relation to my finding above regarding the agreement that relates to payment of repairs, having found that that understanding was part of the agreement, such costs should be deducted from agreed consideration. The defendant led evidence that he spent a total sum of UGX 3,860,000/=. The plaintiff did not lead any evidence to the contrary. To the contrary, the plaintiff contradicted himself in his evidence in chief in paragraph 16 that; "***On 9th February 2015, an agreement was prepared and signed at the offices of Musoke & Co. Advocates which indicated Ug shs 5,000,000/= used to do repairs and service as already paid***". This by implication meant that a sum of UGX 5,000,000/- which was reflected as paid to the plaintiff was used to do repairs but was not paid to the plaintiff. However, in the plaint, he acknowledged that a sum of UGX 5,000,000/= was paid to him in cash leaving the balance of UGX 60,000,000/- un paid. The evidence of the defendant as to the cost of repairs being **UGX 3,860,000/=** also contradicts the plaintiff evidence since a sum of UGX 5,000,000/= that the plaintiff alluded to was not the costs of the repairs.

I find the evidence of the defendant more credible and believable as regards the costs of repairs. I will thus deduct/offset the same from the total agreed consideration per the agreement between the parties.

The other issue is to do with payment for comprehensive insurance. The plaintiff contended that he is the one who paid for the insurance and thus sought to recover UGX 5,000,000/= from the defendant. The defendant on the other claimed he is the one who paid for insurance and had an original receipt to that effect. This controversy can only be resolved by making reference to the transaction documents between the parties which was exhibited as DE1. Under clause 4 of the agreement it was agreed thus; "***That at the execution of this agreement, the purchaser shall***

insure the vehicle comprehensively and documents of insurance shall remain in possession of the vendor until full purchase price has been fully paid."

It is deducible from the said clause that the obligation to insure the suit motor vehicle was for the defendant and from the evidence, it appears he is the one who insured the same and not the plaintiff. It is therefore my finding that the person who paid for insurance is the defendant and not the plaintiff and thus the plaintiff's claim to recover the sum paid as insurance premium which he alleges was added to the outstanding consideration fails. However, I will not deduct the cost of insurance from the agreed consideration because it was not part of the understanding between the parties that the amount would form part of the consideration. All the transaction documents are silent about the same and the defendant did not lead any evidence to the effect that the same had to be deducted from the agreed consideration.

It is therefore my finding that the amount paid to the plaintiff after 3 December 2016 is **UGX 17,965,000/=.**Therefore, subjecting this to the agreed outstanding balance as at 3 December 2015, the sum due and outstanding is **UGX 7,265,000/=.** It is therefore the finding of this court that the sum due and owed to the plaintiff by the defendant is **UGX 7,265,000/=.**

Whether the plaintiff was fraudulent in selling the vehicle to the defendant?

There is considerable jurisprudence as what constitutes fraud. In ***Fredrick Zaabwe Vs. Orient Bank &5others, Supreme Court Civil Appeal No. 04 of 2006*** fraud was defined relying on the definition in the Black's Law Dictionary thus:

> "***An intentional perversion of the truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right. A false representation of a matter of***

fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which deceives and is intended to deceive another so that he shall act upon it to his legal injury."

In ***Derry Vs. Peek (1889) 14 App Cas 337, Lord Herschell*** observed that fraud is proved when it is shown that a false representation has been made knowingly or without belief in its truth or recklessly, not caring whether it be true or false. The standard of prove is above the *balance of probabilities* but below *beyond reasonable doubt*.

In this case the defendant contended that the plaintiff was fraudulent when he made a representation that he had the original logbook for the suit motor vehicle and that the vehicle had no third party claims which was false. That he relied on such false representation and he incurred an injury in which he claimed general damages.

The plaintiff on the other hand contended that he was not fraudulent. That section 16(2) of the Contracts Act 2010 provides that fraud does not arise where the alleging party to the contract had the means of discovering the truth in ordinary diligence. Counsel for the plaintiff submitted that during cross examination, the defendant confirmed that he was given a photocopy of the logbook with ownership details which could be accessed through URA and after use the same for due diligence. That it is thus deducible that the defendant at all material times had the means of discovering the truth and is thus estopped from raising fraud.

Section 15(1) of the Contracts Act provides thus:

"consent is induced by fraud where any of the following acts is committed by a party to a contract or with the connivance of that part or by the agents of that party with the intent of deceiving the other party to the contract or the agent of the other part or to induce the other party to enter into the contract (a) a suggestion to

a fact which is not true, made by a person who does not believe it to be true, (b) the concealment of a fact by a person having knowledge or belief of the fact, (c) a promise made without any intention of performing it, (d) any act intended to deceive the other party or any other person and (e) any act or omission declared fraudulency by any law"

It therefore follows from the above, that where a contract is entered into in the circumstances provided for under section 1(a) to (e), then such contract is deemed to have been entered into fraudulently. However, subsection 2 of section15 gives a qualified exception and provides that; "For the purpose of this Act, mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud unless the circumstances of the case are such that it is the duty of the person keeping silent to speak or unless silence is in itself equivalent to speech.

Section 16 of the Contracts Act is about voidability of agreements without consent. Section 16(1) provides that; "*Where consent to an agreement is obtained by coercion, undue influence, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was obtained by coercion, undue influence, fraud or misrepresentation*" and subsection 2 which counsel for the plaintiff relied upon provides that;"*Where consent is caused by misrepresentation or by silence which is deemed fraudulent within the meaning of section 15, the contract is not voidable, if the party whose consent was obtained had the means of discovering the truth with ordinary diligence"*

Section 16(2) applies where a party seeks to challenge a contract on ground that it was arrived at through fraud. In the present case the defendant does not challenge the validity of the contract but contends that the plaintiff was fraudulent in selling the suit motor vehicle to him. The question which I am tasked to determine

therefore is whether the plaintiff was fraudulent or not when selling the vehicle to the defendant.

Fraud is proved when it is shown that a false representation has been made knowingly or without belief in its truth or recklessly, not caring whether it be true or false. Section 15 of the Contracts Act that describes what amounts to fraud.

The defendant contended that the plaintiff made a false statement that he had the logbook whereas not and because of his conduct this caused delays in payment and caused the defendant to incur costs following up on the impounded vehicle and getting it back and thus sought damages. The defendant on the other hand averred that the failure to complete payment to Trust Dealers Intl Co. Ltd did not vitiate his capacity to sell the suit motor vehicle to the defendant and was thus not fraudulent.

The question as to whether there was a representation made by the plaintiff or not, can be answered by looking at the agreement itself. Under clauses 1, 5 and 7, it was agreed thus:

Clause 1:

"That in consideration of the sum of shillings sixty-five million shillings (60,000,000) only payable by the purchaser to the Vendor as hereinafter provided, the Vendor sells and the purchaser buys the said fuso truck to hold onto the purchaser for all the Vendor's interests therein free of all encumbrances."

Clause 5:

"The Vendor has sold the vehicle with a warrant of good title and in the event the same is found to be void or voidable or defective or in any way subject to a third party claim of interest, the Vendor shall fully indemnify the purchaser of all costs and expenses he shall have incurred"

Clause 7:

"The Vendor shall retain possession of the original logbook, and upon completion of the purchase price, the Vendor shall hand over the original logbook to the purchaser and execute a transfer of the said vehicle into the names of the purchaser or those of his nominees as the case may be. Provides that the costs thereof shall be fully borne by the purchaser"

There was a representation by the plaintiff to the defendant:

Clause 1: that the vehicle the plaintiff was selling to the defendant was free from any encumbrances;

Clause 5: that the plaintiff had a good title to the suit motor vehicle and there were no third party claims.

In examination in chief, the plaintiff confirmed by himself that he bought the suit motor vehicle from Trust Dealers Intel Co. Ltd at a sum of UGX 118,000,000/=. That he paid a sum of UGX 70,000,000/=. That he gave the truck to his brother Mulinda Martin to operate transportation business and he used the profits made to clear the outstanding on the truck with Trust Dealers Intel Co, Ltd. In cross examination he confirmed that he had not cleared the balance due to Trust Dealers Intel Co. Ltd and was aware that the same was impounded by Trust Dealers Intel Co. Ltd to recover the balance.

In my view the statement by plaintiff that the vehicle was free from any encumbrances and that he had proper title to suit motor vehicle without any third party claim was a false representation and it amounted to fraud. The plaintiff was fully aware that he had not cleared the balance due to Trust Dealers Intel. Co. Ltd and that Trust dealers had a claim over the vehicle for unpaid balance. This in my view amounted to fraud since he made a representation which he well knew was

false and the same was acted upon by the defendant to enter into the contract of sale.

In addition to the above, under clause 7, the plaintiff made a representation which by implication meant that he had an original logbook and he was to keep custody of the same until full payment. The plaintiff knew that he did not have an original logbook since he had not cleared the balance due to Trust Dealer Intel. Co. Ltd. The duty was on the plaintiff to disclose this fact to the defendant as to whether he had an original logbook to the Vehicle or not.

The search at URA would not confirm as to who had the original logbook or whether the vehicle had third party claims. It would only confirm the person registered in the logbook as the owner. Thus the plaintiff made a false representation with full knowledge that it was false and thus in my view amounted to fraud.

It is therefore my finding that the plaintiff acted fraudulently in selling the suit motor vehicle to the defendant. However, the nature of fraud did not invalidate the contract executed and none of the parties has pleaded that the agreement is a contract voidable. I will therefore resolve this issue in the affirmative.

Whether the parties are entitled to the reliefs sought?

The plaintiff asked court for recovery of UGX 14,595,000 being the outstanding balance and costs. He also contended that an order for recovery of the excess paid by the defendant should be denied since it was not pleaded. He also prayed that court should not award damages to the defendant since the allegations that the truck was impounded on 23rd July 2015 by Trust Builders International Co. Ltd in his possession was as a result of his failure to pay the money in full and in any case since he failed to pay the money on the due date of 27th February 2015 at 12:00pm,

he was not entitled to possession of the suit motor vehicle and thus asked court to dismiss the counter claim with costs.

The defendant on the other hand asked court to dismiss the plaintiff's suit with costs and order for payment of the excess paid being UGX 6,465,000/=, general damages and for the counter claim to be allowed.

Since I found in issue one that the defendant owes the plaintiff a sum of **UGX 7,265,000/=,** the same is hereby awarded to the plaintiff and the claim for excess of the sum paid fails as I have found that there was no excess paid.

General Damages:

Having found that the plaintiff acted fraudulently and as a result of his conduct the defendant incurred expenses including redeeming the suit motor vehicle which had been impounded, he is entitled to recover such costs. It was also agreed upon by the plaintiff and the defendant under clause 5 of their agreement that in case of a third party claim of interest, the Vendor shall fully indemnify the purchaser of all costs and expenses he shall have incurred. I believe the impounding of the suit motor vehicle by Trust Dealers Intel. Co. Ltd was a third party claim which was not known to the defendant and such claim has been acknowledged by the plaintiff. Therefore, the costs and expenses incurred by the defendant must be paid by the plaintiff.

The defendant did not plead the sum incurred but contended that he was subjected to costs and inconveniences which he sought to recover inform of general damages. **In Luzinda v. Ssekamatte & 3 Ors (Civil suit -2017/366 [2020] UGHCCD 20 (13 March 2020),** it was observed that as far as damages are concerned, it is trite law that an award of general damages is at the discretion of court. Damages are awarded to compensate the aggrieved, fairly for the

inconveniences accrued as a result of the actions of the defendant or plaintiff. It is the duty of the claimant to plead and prove that there were damages, losses or injuries suffered as a result of the defendant's/plaintiff's actions. I wish to add that there is no standard scale that courts must apply in awarding damages. Court must do an independent assessment from the facts of the case as to what is fair, reasonable and appropriate in the circumstances of a given case.

The defendant contended under paragraph 3 of the counter claim, that as a result of the plaintiff/counter defendant's dishonest and fraudulent acts, he was greatly inconvenienced, suffered loss and anguish as such he sought an award of general damages. He did not clearly bring out this in the evidence though he sought to recover damages for the inconveniences suffered. I am inclined to award general damages to the defendant/counter defendant for the inconveniences suffered and for the fraudulent acts of the plaintiff. I consider a sum of UGX 8,000,000/= (Eight Million Shillings) commensurate and appropriate in the circumstances and the same is awarded to the defendant/counter defendant as general damages.

Costs:

It is trite law that costs follow the event and a successful party should not be deprived of costs except for good reasons. In this case, I am inclined not to grant costs to the plaintiff for this claim should have been filed in the Chief Magistrate's Court if he was honest and disclosed the proper amounts he claimed. Secondly, the plaintiff was not honest and it is his dishonesty that partly led to delay in payment. I will thus order that each party bears own costs of the suit.

For the counter claim, the same partially succeeds with no order as to costs. The defendant/counter claimant defaulted on his obligation to pay the agreed sum in

time. If he had paid the money in time, it is anticipated that this case would not have arisen. I thus also order that each party bears own costs of the counter claim.

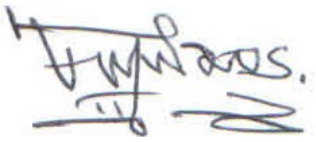
In the final results I made the following orders:

(a) That the Defendant KAMOGA MUHAMMADI shall pay to the Plaintiff TUUSAH SIMON a sum of UGX 7, 265, 000/= (Seven Million Two Hundred and Sixty-Five Thousand Shillings) being the outstanding balance on the contract of sale of Motor Vehicle Reg, No. UAU 489F, Chasis No. FV416J530409, Engine No. 8DC10638421, Green in color.

(b) That the Plaintiff / Counter Defendant TUUSAH SIMON shall pay general damages of UGX 8, 000, 000/= (Eight Million Shillings) to the Defendant / Counter Defendant KAMOGA MUHAMMADI.

(c) Each party shall bear their own costs of the suit as well as the counter-claim.

I so order.



Vincent Wagona
High Court Judge
FORT-PORTAL
23.01.2023