

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA**

**(COMMERCIAL COURT DIVISION)**

**CIVIL SUIT NO. 416 OF 2009.**

**SAMUEL BLACK**

**T/A SB COACHES:.....PLAINTIFF/DEFENDANT TO COUNTERCLAIM**

**VERSUS**

**DFCU LTD:.....DEFENDANT/PLAINTIFF BY COUNTERCLAIM**

**BEFORE: HON. LADY JUSTICE HELLEN OBURA**

**JUDGMENT**

The plaintiff, Samuel Black t/a SB Coaches brought this suit against DFCU Ltd (hereinafter referred to as the Defendant) for breach of contract. He sought for the following remedies:-

- a) a declaration that he is not indebted to the defendant for the loss of the four (4) destroyed leased buses;
- b) an order to the defendant to deliver the statement of accounts from 1998 to date showing the lease rentals paid by the plaintiff;
- c) an order for the refund to the plaintiff of all sums received, less lease rentals for the running leases of the motor vehicles, other than the said four (4) destroyed buses;
- d) a permanent injunction restraining the defendant from attaching the plaintiff's property both leased and mortgaged or otherwise;
- e) general damages for breach of contract;
- f) costs of the suit, and;
- g) interest at Court rate on (c)(sic) and (d) above from the date of judgment till payment in full.

The defendant in its written statement of defence (WSD) denied the allegations in the plaint and contended that the plaintiff was obliged to pay the defendant the termination sum which was defined under the lease agreement to include all arrears of rental for the buses, the aggregate sum of all rentals payable under the agreement for the full term of the lease periods and all expenses payable under the lease agreement. The defendant contended that the plaintiff breached his obligation to pay the termination sum for the destroyed buses. The defendant further averred that it was the duty of the plaintiff to pay insurance for the leased buses and all the risk to the buses during the lease term lay on the plaintiff. The defendant also averred that the plaintiff sought extension of time within which to pay and sought a restructure of the lease facilities. Furthermore, that the facilities were restructured into a term loan and a lease however the plaintiff did not comply with the terms of the restructure. It was stated that the defendant sought to recover the sums due by repossessing and advertising for sale two of the leased vehicles to wit; UAB O65S and UAD 892B and pursuing sale of the plaintiff's land comprised in LRV 1061 Folio 23, Plot 27 Margherita Road Kasese. The defendant further claims that the indebtedness of the plaintiff to the defendant stood at UGX 713,833,752/= as at the time of the repossession of the buses and advertisement of the land and the buses for sale.

By way of counter claim, the defendant sought judgment to be entered for UGX 713,883,752/=, damages for breach of contract, interest on the decretal sum from the judgment date till payment in full, a declaration that the defendant is entitled to repossess the leased buses and enforce the security it holds and costs of the counterclaim.

### **Agreed Facts.**

The agreed facts that gave rise to the suit as contained in the joint scheduling memorandum filed on 14<sup>th</sup> December, 2010, are that the plaintiff and Uganda Leasing Company Ltd (the defendant's assignor) executed a Master Vehicle Lease Agreement No. UL/LP/028 on 3<sup>rd</sup>/04/1998 wherein the defendant agreed to lease buses to the plaintiff for his transportation business. Following the said agreement, the defendant leased several buses to the plaintiff over a period of several years between 1998 and 2003 under several vehicle lease schedules. The buses leased included Reg. Nos. UEE 649, UEE 650, UAB 062S and UAA 227C. The lease financing was secured by a legal mortgage dated 15<sup>th</sup> October 1999 over land comprised in LRV 1061 Folio 23 Plot 27 Margherita Road Kasese and two further charges dated 22<sup>nd</sup> January 2003 and 18<sup>th</sup> August 2003

respectively over the same land. The lease facilities were also secured by a chattel's mortgage over the buses Reg. Nos. UAA 424C and UAA 069D.

On different occasions in 1998, 2002 and 2003, the plaintiff reported to the defendant that the four leased buses described herein were burnt and totally destroyed in Kasese by unknown armed people. After the reported destruction of the buses, the plaintiff paid some of the lease rentals. According to the statement of account, the plaintiff owed the defendant Ushs.713,883,752/=(Uganda Shillings Seven Hundred Thirteen Million Eight Hundred Eighty Three Thousand Seven Hundred Fifty Two) as at 10<sup>th</sup> November 2009.

At the scheduling conference the joint scheduling memorandum signed by both counsel and filed in court on 14<sup>th</sup> December 2010, was adopted subject to the variations that were made in respect of the issues. The agreed issues therefore were;

1. Whether the risk of loss, theft, damage or destruction of the buses was covered under the lease agreement.
2. If so, whether the risk was to be borne by the plaintiff or the defendant.
3. Whether the plaintiff owes the defendant UGX 713,883,752/=(Seven hundred thirteen million eight hundred eighty three thousand seven hundred and fifty two Uganda shillings)

At the scheduling conference the parties agreed that a joint expert be appointed to reconcile the accounts and a report be filed in Court before the hearing. Consequently, the parties appointed BMR Associates Certified Public Accountants to review the accounts. The said firm filed a report in Court on 27<sup>th</sup> June 2011 and the same was formally tendered in Court as an exhibit by a representative of BMR Associates, Mr. Yason Muhereza, on 24<sup>th</sup> May 2012 and referred to as ***“The Auditors’ Report”***.

## **Representations**

At the scheduling and hearing of the case, the plaintiff was represented by Mr. Geoffrey Nangumya of M/s Geoffrey Nangumya and Co. Advocates and the defendant was represented by Mr. Mathias Nalyanya of M/S Lex Uganda Advocates and Solicitors.

## **Evidence**

The parties relied on documentary evidence contained in their respective Trial Bundles which were marked as exhibits. In addition, the parties called witnesses to give evidence in the matter. The plaintiff called two witnesses namely; Mr. Neriah Rugarama (PW1) and Mr. Samuel Black (PW2) and the defendant also called two witnesses namely; Mr. Michael Mayanja (DW1) and Mr. Alex Bwayo (DW2).

**Issue1. Whether the risk of loss, theft, damage or destruction of the buses was covered under the lease agreement.**

It is the submission of the plaintiff's counsel that the buses were placed under insurance cover by the defendant. It is also his submission that the loss by acts of war in this case was never covered by the insurance policy. Counsel further submitted that the lease agreement did not cover this kind of loss which would not be compensated under the insurance cover. He argued that insurance cover was a precondition for the lease and parties envisaged to secure themselves with insurance for any anticipated loss and since loss by act of war was never covered, equitable justice should apply.

Counsel for the defendant on the other hand submitted that the risk of loss, theft, damage or destruction of the buses was envisioned and covered under the lease agreement.

I have reviewed the evidence of the parties, and the submissions of both counsels on this issue. This was a contractual arrangement whose terms are contained in the Master Vehicle Lease Agreement, Ex. P1 and the various lease schedules executed by the parties. The Master Vehicle Lease Agreement provided for the general terms that would govern the parties' relationship during the terms of the lease facilities. The lease schedules on the other hand provided for specific details in respect of each leased vehicle namely; the description of the vehicle, the cost, the lease term for the particular vehicle in that schedule, the rentals payable, the facility fee, security deposit, pre-delivery interest costs, option to purchase and completion details. The lease schedules referred to the Master Vehicle Lease Agreement as the main document and its terms were incorporated into each lease schedule to apply to each bus leased. The terms of the contract therefore shall guide this court on the rights and obligations of the parties.

Indeed, as observed **Hon. Justice Christopher Madrama** in the case of **Gladys Nyangire Karumu & 2 Others v DFCU Leasing Company Ltd HCCS Nos.106,150 and 788 of 2007**, there is no statutory law in Uganda governing finance leasing. Nonetheless, finance leasing is recognized in Uganda under section 3 of the Financial Institutions Act, section 4 of the VAT Act and section 59 of the Income Tax Act. Consequently, finance leasing is governed by the principles of common law which are invoked under section 14 (2)(b)(i) of the Judicature Act. The Hon. Justice noted that in determining leasing disputes, reference is made to the agreed terms of the contract between the parties.

I will therefore review the relevant clause of the Master Vehicle Lease Agreement executed by the parties and admitted in evidence as Ex.P1.

Clause 5 (B) (ii) of Ex. P1 provides that;

*“From the time risk in the vehicles passes from the supplier to the lessor, as between the lessor and the lessee, it will be in every respect at the sole risk of the lessee who will bear all risks of loss, theft, damage or destruction to the vehicles or any part from any cause whatsoever.”*

This clause in essence envisioned all kinds of risks of loss by theft, damage or destruction. By the above terms, the plaintiff agreed to bear all risks of loss, theft, damage or destruction to the vehicles. The parties as seen from the above terms listed the risks without specifying their causes. To my mind, it was their intention that the risks of loss, theft, damage or destruction to the vehicles or any part would be covered under the lease agreement irrespective of their causes and that is why they used the words, *“from any cause whatsoever”*. I so find.

**Issue 2: Whether under the lease agreement the risk of loss, theft, damage or destruction of the buses was to be borne by the plaintiff or the defendant.**

It was the submission of the plaintiff’s counsel that the answer to this issue is found in clause 2 (c) of the Master Vehicle Lease Agreement which provides that, *“Ownership of the vehicles shall at all times during the lease term remain in the lessor”*.

Counsel also submitted that under clause 6 (D) of the Master Vehicle Lease Agreement, the defendant was supposed to terminate the agreement upon destruction of the said buses and that the failure to terminate the lease contract and denial of insurance compensation as well as transfer of liability by way of restructuring in 2005 negates the agreed provisions of risk being borne by the lessee solely under Clause 5 (B) (ii).

On the other hand, counsel for the defendant submitted that looking at clause 5 (B) (ii) of the Master Vehicle Lease Agreement, the plaintiff assumed and solely bore all the risks to the vehicles.

As I deal with this issue, I must observe from the onset that it is a matter of interpretation of the relevant provisions of the Master Vehicle Lease Agreement. In that regard, I wish to point out that clause 2 (c) thereof relied upon by counsel for the plaintiff is not one of such provisions. I therefore do not agree with counsel's argument that because the lease agreement provides that ownership of the vehicles shall at all times during the lease remain in the lessor, this means that the lessor bears risk for the vehicle. That argument would be contrary to the established position of the law as well as the specific provisions of the Master Vehicle Lease Agreement on this matter.

In ***Nassolo Farida vs DFCU Leasing Company Ltd HCCS No.536/2006, Hon. Justice Lameck Mukasa*** quoted ***Chitty on Contracts, 27<sup>th</sup> Edition Vol.7*** with approval where finance leasing was defined as follows;

*“Finance Leasing- a form of long term finance has developed known as finance leasing. In a finance lease, the lessee selects the equipment to be supplied by a manufacturer or dealer but the lessor (a finance company) provides funds, acquires title to the equipment and allows the lessee to use it for all (or most) of its expected useful life. During the lease period, the usual risks and rewards of ownership are transferred to the lessee, who bears the risk of loss, destructions and depreciation of the leased equipment (fair wear and tear only expected) and of its obsolescence or malfunctions. The lessee also bears the costs of maintenance, repairs and insurance. The regular rental payments during the rental period are calculated to enable the lessor amortise its capital outlay and*

*to make a profit from its finance charges. At the end of the primary leasing period, there will frequently be a secondary leasing period during which the lessee may opt to continue to lease at a nominal rental or the equipment may be sold and a proportion of the sale proceeds returned to the lessee as a rebate of rentals. The lessee thus acquires any residual value in the equipment, after the lessor has recouped its investment and charges. If the lease is terminated prematurely, the lessor is entitled to recoup its capital investment (less the realizable value of the equipment at the time) and its expected finance charges (less an allowance to reflect the accelerated return of capital). The bailment which underlines finance leasing is therefore only a device to provide the finance company with a security interest (reversionary right)”.*

It is clear from the above passage that much as the ownership of the leased vehicle remains with the lessor by acquisition of its title, the usual risks and rewards of ownership are transferred to the lessee, who bears the risk of loss, destructions and depreciation of the leased equipment. It is also clear that the ownership of the leased vehicle by the lessor is meant to secure the lessor's interest to ensure that the lessor recovers its capital investment and profit thereto.

The Master Vehicle Lease Agreement in the instant case did take into account the above position of the law when it expressly provided for risks and who bore them.

**Clause 5 (B) (ii) provides thus,**

*“From the time risk in the vehicles passes from the supplier to the lessor, as between the lessor and the lessee, it will be in every respect at the sole risk of the lessee who will bear all risks of loss, theft, damage or destruction to the vehicles or any part from any cause whatsoever”.*

It is not in dispute that the Master Vehicle Lease Agreement was the operating document governing the relationship between the plaintiff and the defendant. Indeed the above provision thereof is very clear on who bears the loss. In addition, clause 6 (A) & (B) also state as follows;

**Clause 6**

- A** *“Unless the lessor at any time specifies that it will effect appropriate insurance in its own name but at the cost of the lessee, then from the time risk in the vehicles passes from the supplier to the lessor under the Acquisition Documents and throughout the lease term the lessee shall be responsible for effecting and maintaining insurance cover for the vehicles in accordance with this clause.”*
- B** *“The lessee shall effect full insurance cover satisfactorily to the lessor with a reputable insurance company approved by the lessor against loss or damage from such risks as the lessor may determine from time to time and covering all liability whatsoever to any third party whomsoever including but not limited to any employee, agent or sub-contractor of the lessor or the lessee who may suffer damage to or loss of property or death or personal injury whether arising directly or indirectly from the vehicles or the use thereof.”*

From the above clauses, it is clear to me that the plaintiff bore the risk of loss, theft, damage and destruction of the buses because it was expressly stated so in the agreement and it was responsible for taking and maintaining insurance cover against those risks, except where the lessor specified that it would effect appropriate insurance in its own name but at the cost of the lessee. Furthermore, it was the lessee responsible for taking out insurance against loss arising directly or indirectly from the vehicles thereof. This is so despite the fact that the defendant also had insurable interest in the buses. The defendant in my opinion only had reversionary interest.

This position is also supported by the testimony of DW 2 who testified that *“although under Clause 2 (c) of the agreement ownership of the buses remained vested in the defendant during the finance lease term, under clause 5 (B) (ii) thereof the buses were operated at the sole risk of the plaintiff who alone would bear the risks for their loss, theft, damage or destruction”*. DW2 further testified in cross examination that it was the plaintiff and not the defendant who took the buses to Nairobi and repaired them after they got burnt. In light of the clear provisions of the Master Vehicle Lease Agreement and the testimony of DW 2, I find that the plaintiff bore the risk.

As was stated by **LS Sealy & RJA Hooley** in their book, **TEXT AND MATERIALS IN COMMERCIAL LAW, Butterworth's, pages 14-15:-**



*“.....there is only one principle of construction so far as commercial documents are concerned and that is to make, so far as possible, commercial sense of the provision in question, having regard to the words used, the remainder of the document in which they are set, the nature of the transaction, and the legal and factual metrix”.*

The rationale for this approach was stated by **Lord Steyn** in the case of **Mannai Investment Co.v Eagle Star Life Assurance [1997] A.C. 749, HL** (as reported in **Contract Law: Cases and Materials** (supra) at page 344) when he said:-

*“.....The reason for this approach is that a commercial construction is more likely to give effect to the intention of the parties. Words are therefore interpreted in the way in which a reasonable commercial person would construe them...”*

To my mind the interpretation adopted by the defendant, which this court agrees with, makes a lot of commercial sense because it is indeed the plaintiff who was running the buses and getting all the benefits. It therefore follows that any risks associated with running the buses should be borne by the plaintiff. The argument that because the ownership remained with the defendant it should bear the risk is devoid of any commercial sense.

On another note, the plaintiff's counsel submitted that under clause 6 (D) of the Master Vehicle Lease Agreement, the defendant was supposed to terminate the agreement upon destruction of the said buses and that the failure to terminate the lease contract and the denial of insurance compensation by the insurance company, as well as the transfer of liability by way of restructuring in 2005 negates the agreed provisions of risk being borne by the lessee solely under Clause 5 (B) (ii).

I find this submission misdirected because under the rules of interpretation of a contract, words are given their ordinary and common meaning. Further, court looks at the mutual intention of the parties at the time of the contract. I am of the firm view that Clause 6 did not require the lessor to terminate the contract upon destruction of the buses as alleged by counsel for the plaintiff. That clause in my understanding required the lessee to pay the termination sum to the lessor upon total loss occurring and it is only when that sum is paid that the leasing of the vehicles terminates under clause 6 E. In other words, it was not the lessor to terminate the lease but rather it would

be triggered by the lessee's act of paying the termination sum. Furthermore, the requirement under clause 6D that the lessee pays the termination sum to the lessor was not pegged to compensation being received from the insurance company. Therefore the denial of the insurance company to pay compensation does not negate the agreed provisions of risk being borne by the lessee solely under Clause 5 (B) (ii).

In the circumstances, I agree with the submissions of counsel for defendant in regard to the second issue that the risk was to be borne by the plaintiff under the agreement.

**Issue 3: Whether the plaintiff owes the defendant UGX 713,883,752/= (Seven hundred thirteen million eight hundred eighty three thousand seven hundred and fifty two Uganda shillings).**

I have considered the pleadings, evidence of the parties' witnesses and the submissions of both counsels on this issue. It is an agreed fact that four buses UEE 650, UEE 649, UAB 062S & UAA 227C were destroyed on two separate occasions by unknown armed people. As already stated herein above, the relationship between the parties was established and governed by the Master Vehicle Lease Agreement.

Counsel for the plaintiff submitted that upon destruction of the buses, the defendant ought to have terminated the lease and demanded payment of the termination sum as envisaged under clause 6D. Furthermore, that since the monies were written off and the statement indicated zero balance, there is no money payable to the defendant. It is the plaintiff's case that the debt had been settled or written off because the plaintiff continued to pay off leases even when the buses got burnt which amounts to the termination sum. Counsel further submitted that when the buses got burnt, the termination of the lease contract occurred and that the leases for the buses were wrongly continued to run after their destruction. He also submitted that an excess payment of Shs.231,415,595 /= was established by the court Audit and that security deposits totaling to Shs.158,729,500/= were paid and not accounted for. Furthermore, that the plaintiff lost income which he claims to be for the impounded buses from 26/10/2009 to 15/3/2011 when they were sold totaling up to Shs. 515,000,000/=. Counsel therefore prayed that all the monies including the alleged default payments, excess payments and security deposits be paid to the plaintiff.

Conversely, counsel for the defendant submitted that the plaintiff owed the defendant Shs.713,883,752/= as at 10/11/2009 as money owed in installment arrears and interest. He submitted that this was as a result of a restructure of the plaintiff's lease facilities and that the evidence of the restructure is contained in Ex.D5 (a letter dated 12/12/2009 from the defendant to the plaintiff on restructure of the existing facilities). He further submitted that the plaintiff never fully complied with the terms of the restructure letter and as a result his indebtedness rose to the tune of Shs.713,883,752/=. Ex.D9, a summary account statement for the plaintiff, was relied on by the defendant to show how the figure of the plaintiff's indebtedness accrued. Counsel also submitted that the plaintiff was obliged under clause 6D and 10A of the lease agreement to pay the defendant the termination sum which was defined to include all arrears of rental for the buses, the aggregate sum of all rentals payable under the agreement for the full term of the lease periods and all expenses and costs under the agreement.

A review of the relevant clauses of the lease clearly stipulates each party's obligations.

**Clause 6D** provides;

*“If an actual or constructive or arranged total loss(collectively a “total loss”) of the vehicles shall occur, the Lessee shall, on twenty(20) business days after the occurrence giving rise to the total loss, pay the Lessor the termination sums( calculated in accordance with clause 9.A and for this purpose references therein to the termination payment date shall be construed as references to the date falling twenty(20) business days after the date of the occurrence giving rise to the total loss. For avoidance of doubt, the Lessee shall continue to pay any rental or other amounts due hereunder during such twenty (20) business days period. On receipt by the Lessor of the Termination sum, the Lessor shall pay to the Lessee any sums received from the insurers or underwriters under the aforesaid policies up to a maximum amount equal to the aggregate of all rentals paid hereunder including the termination sum.”*

**Clause 6E** provides;

*“Following a total loss, the leasing of the vehicles shall be terminated upon the fulfillment by the lessee of its obligations under clause 6D without prejudice to*

*any claims then outstanding between the lessor and the lessee. For avoidance of doubt, the lessor shall not be liable to supply any vehicles in lieu of the vehicles are or become unavailable to or unfit for use by the lessee from whatever cause”*

As already stated earlier above under the 2<sup>nd</sup> issue, my interpretation of the above clauses is that when there is total loss, the lessee initiates the process of terminating the lease by making the termination sum stated therein. It is upon fulfilling the payment obligations that the lease is terminated.

PW2 in his testimony stated that he did not pay the termination payment upon destruction of the buses. Instead, the leasing relationship continued and the plaintiff stated that some of the vehicles were repaired, rebuilt and put back on the road. DW2 stated that the plaintiff took the damaged buses to Nairobi for repair as it was only one (1) bus that was totally destroyed. Therefore, from the conduct of the parties, the termination of the lease did not occur upon the burning of the buses by unknown armed men since the plaintiff did not pay the termination sum in accordance with clause 6D & E . Further, it is discernable from the evidence of PW2 and DW2 that the parties agreed to have the buses repaired and put back on the road. This therefore meant that the lease was still running.

From the evidence on record, the lease facilities were restructured under Ex.D5. DW1 and DW2 stated that the plaintiff did not comply with the terms of the restructure upon which the defendant terminated the relationship and sought to enforce against the plaintiff. While the plaintiff claimed to have been tricked into entering the restructure, the evidence on record show that he made some payments following the restructure. This indicates that he agreed to the new arrangement. The plaintiff’s subsequent conduct of making proposals for payment and seeking more time also confirms that he was aware of his obligations

Clause 10 of the Master Vehicle Lease Agreement clearly spells out the termination payments. It states as follows;

*10 A) “If termination of the leasing of the vehicles occurs by reason of a fundamental breach or repudiation of this agreement by the lessee pursuant to the provisions of Clause 8 or by reason of an agreed terminating event (being any of the events set out in Clause 8 (i) to (xii) inclusive, the lessee shall pay to*

*the lessor on the date of termination of the leasing of the vehicles (the “termination payment date”) an amount (the “termination sum”) for the period in which the termination payment date occurs equal to the aggregate of:-*

- i. All arrears of rental due up to and including the termination payment date and any other moneys due to the lessor under this agreement up to and including the termination payment date together with interest on any overdue sum in accordance with clause 3. E;*
- ii. An amount equal to the aggregate of all payments of rentals which would but for such termination have been payable under this agreement during the period from and including the day following the termination payment date to the end of the lessee term.*
- iii. All costs and expenses incurred by the lessor or on its behalf, whether before or after such termination, in connection with the repossession, refurbishment, storage, insurance and / or sale of the Vehicles and;*
- iv. All losses, costs, charges and expenses incurred or payable by the lessor arising out of the premature termination of any funding commitments in connection with this agreement.*

*Any such termination sum shall be subject to adjustment pursuant to clause 3c.*

*B) The termination sum shall, in the case of fundamental breach or repudiation by the lessee, be recoverable as liquidated damages and, in the case of termination consequent upon a termination event shall be recoverable as a debt or liquidated damages.”*

The above mentioned clause is the basis of any payments that are supposed to be made in the event of termination of the contract. It is clear that the relationship between the parties broke down when the defendant terminated the lease, repossessed some of the leased buses and sought the sale of the buses and the mortgaged land. According to DW1 and DW2, the defendant’s actions were prompted by the plaintiff’s failure to comply with the terms of the restructure. I am

inclined to believe this as the reason for the termination. Consequently, the defendant would be entitled to the monies that were due from the plaintiff as at the time of the termination within the terms of the lease. It is true as submitted by the defendant's counsel that the plaintiff was obliged under clauses 6D and 10A of the lease agreement to pay the defendant a termination sum. It is not in dispute that the plaintiff did not pay. The question left to this court is whether or not the plaintiff owes any money to the defendant and if so, how much?

As stated earlier, the parties agreed to appoint a joint expert to review the accounts. An independent Auditor BMR Associates Certified Accountants was appointed by both parties to analyse and reconcile the position as at 10/11/2009. The Auditors were tasked to;

- a) Establish the amount of money due to DFCU at the date of the alleged destruction of the three buses.
- b) Establish how much money, including interest, compound interest, penalties and any other payments that were made by SB Coaches since the commencement of the lease up to 10/11/2009.
- c) Establish how much money was due and owing to DFCU, if any, as at 10/11/2009
- d) Establish whether SB Coaches paid any money in excess of the actual amounts to DFCU as at the dates of the alleged destruction of the three buses.

Those were the terms of reference of the Audit Report. The Auditors verified the financial records availed to them by both parties as per the work requirements in respect of lease transactions for the period between 1998 up to 10/11/2009. The findings were;

- a) The amount of money due to DFCU bank at the date of the alleged destruction of the four buses was Shs.314,099,069/=.
- b) The money including interest, compound interest, penalties and any other payments that were made by SB Coaches since the commencement of the lease term up to 10/11/2009 was Shs.2,325,198,088/=.
- c) The money due and owing to DFCU as at 2009 was Shs.435,567,636/=.
- d) The money paid in excess of the actual amounts to DFCU as at the dates of the alleged destruction of the three buses was shs.231,415,595/=.

From the above findings it is clear that the plaintiff owed the defendant Shs.435,567,636/= as at 10/11/2009. It should be noted that to come to this figure, the Auditors summed up the amount due to DFCU on the 1st, 2nd and 3rd restructure and offset the excess paid on the destroyed buses, the amount not captured in the payment schedules and the amount realized from the disposal of the buses which was deposited in court.

I therefore agree with the finding that the plaintiff is indebted to the defendant in the sum of **Ushs.435,567,636/=(Uganda Shillings Four Hundred Thirty Five Million Five Hundred Sixty Seven Thousand Six Hundred Thirty Six)** and not the amount claimed by the defendant in the counterclaim.

Regarding the submission of counsel for the plaintiff that the amounts were written off and therefore not recoverable, the joint expert was examined in court and he clarified that such write off was for purposes of balancing the defendant's books in the balance sheet but did not mean forgiving the debt. DW2 also explained further that write off did not mean that the debt was forgiven and therefore not recoverable but the balance was merely taken off the lease ledger to be managed from an excel spread sheet. It was the evidence of PW2 that the loans were written off because the buses had got burnt. This evidence is contrary to what the parties had agreed on as contained in Clauses 6D & 6E quoted above. There was no such provision for writing off the debt and so I find this piece of evidence unconvincing.

PW2 also testified in chief that out of the four buses that got burnt two were completely destroyed but two were repaired using a further loan that the bank gave him for that purpose and brought back on the road. However, in cross-examination he said it was the bank that repaired three of the buses that got burnt in Nairobi, returned them to him and he continued operating. He stated that two of the buses repaired were given new number plates.

In view of the above facts, the question that comes to mind is, why would the defendant forgive all the debts on account of the said loss when three of the buses were repaired and the plaintiff continued to operate them? Could it have been an act of charity by the leasing company or was this a business transaction expected to generate profit?

As I pondered these questions, I also reviewed the **Financial Institutions Credit Capitalization and Provisioning Regulations, 2005**. Under regulation 6, Financial Institutions are required to

classify a facility as non-performing if such a facility has a pre-established repayment schedule but the principal or interest due is unpaid for a period of ninety (90) days. By regulation 11 of the aforesaid regulations, financial institutions are required to provision for non-performing facilities periodically and write off the same after ninety (90) days if the same is not regularized. By provisioning, the Financial Institution applies its own funds to offset the debt and write it off in its balance sheet. However, the Financial Institution is expected to pursue recovery of the debt from the borrower and reimburse itself.

This is discerned from **regulation 14 (2)** which provides that the Financial Institution shall initiate procedures to realise any security or collateral once the credit facility becomes non-performing. The rationale for requiring Financial Institutions to provision is to ensure that the depositors' money that they apply to extend credit to borrowers is not tied down and unavailable to the depositors when needed due to defaults by borrowers. The Financial Institution is nonetheless expected to recover the money and reimburse itself for the money it applied to provision the non performing credit facility.

It cannot therefore be said that by writing off a debt the borrower is discharged from liability to pay as wrongly argued for the plaintiff. If that were the position then there would be many deliberate loan defaulters with a view of benefitting from the write off. That would be contrary to the banking laws, customs and practices and a disincentive for banks to lend money and in my view it could not have been the intention of the makers of the **Financial Institutions Credit Capitalization and Provisioning Regulations 2005**.

Counsel for the plaintiff in his submission also sought to recover lost income from the impounded buses and security deposits. The defendant's counsel submitted in reply that these claims were not mentioned in the plaint and that no court fees were paid for them. He also submitted that there was no evidence adduced by the plaintiff on the matter. The plaintiff's counsel in rejoinder contended that lost income was alluded to in the witness statement of PW2 and security deposits is included in the refund the plaintiff said it is entitled to in paragraph 8 of the plaint.

First of all, I wish to point out that the witness statement of PW2 was expunged from the records when it turned out that he is illiterate and yet the statement was written in English without



compliance with the provisions of the Illiterates Protection Act. PW2 then gave oral evidence in chief. It was therefore misleading for counsel for the plaintiff, who should have known better, to again rely on that expunged witness statement. In any event, a witness statement is evidence to prove the case as pleaded so it cannot substitute the pleadings.

Secondly, the general rule being that he who alleges must prove, I agree with the defendant's counsel that evidence should have been led to prove the claims since they fall under special damages which must not only be specifically pleaded but must be strictly proved. For instance on the issue of income lost, the plaintiff was supposed to adduce evidence of the income he was making from those buses before they were impounded to prove that he actually lost Shs.1,000,000/= per day when the buses were impounded. There was no such evidence presented before this court. In the premises, there is no basis upon which this court can award the claim for lost income. Therefore the claim is dismissed for lack of evidence to prove the same.

Similarly, the claim for security deposits was not specifically pleaded. Be that as it may, it was the testimony of DW2 that the cash guarantees were used up altogether to offset the outstanding arrears. I have evaluated his evidence against the documents adduced as proof and I am satisfied the security deposits were indeed applied to reduce the plaintiff's indebtedness so there is no money on the cash deposit accounts as alleged by the plaintiff.

On the whole, I do not find any merit in the plaintiff's claim and all his prayers. Consequently, I would dismiss the suit with costs and turn to consider the prayers in the counterclaim.

On the defendant/counterclaimant's claim for Shs.713,883,752/=, I have already made a finding that the amount due is Shs. 435,567,636/=. Therefore, I find that it is that amount it is entitled to recover from the plaintiff.

The defendant/counterclaimant prayed for general damages for breach of contract. It is true that the plaintiff by failing to pay the installments under the restructure term loans breached the contract. However, I have taken into account the failure by the defendant to capture some payments made by the plaintiff as reflected in the Audit Report and I am inclined not to award general damages because of the embarrassment and inconveniences the plaintiff also suffered as a result of that failure/omission. In the premises, the claim for general damages is denied.

The defendant/counterclaimant in its counterclaim also prayed for interest at the decretal sum from the date of judgment till payment in full. The award of interest is a matter of discretion of the court. In **Harbutt's Flastirine Ltd V Wayne Tank & Pump Co. Ltd [1970] 1 ChB 447**, Lord Denning stated;

*“An award of interest is discretionary. It seems to me that the basis of an award of interest is that the Defendant has kept the Plaintiff out of his money and the Defendant has had the use of it himself. So he ought to compensate the Plaintiff accordingly.”*

In the instant case, the defendant/counterclaimant was deprived of its money from 10/11/2009 up to date. I therefore award interest on the decretal sum at the rate of 21% per annum from the date of judgment till payment in full.

The defendant/counterclaimant prayed for a declaration that it is entitled to repossess the leased buses and enforce the security it holds. It is an agreed fact that the lease financing was secured by a legal mortgage dated 15<sup>th</sup> October 1999 over land comprised in LRV 1061 Folio 23 Plot 27 Margherita Road Kasese and two further charges dated 22<sup>nd</sup> January 2003 and 18<sup>th</sup> August 2003 respectively over the same land. The lease facilities were also secured by a chattel's mortgage over the buses Reg. Nos. UAA 424C and UAA 069D.

It is my considered view that upon failure by the plaintiff to pay as agreed the defendant/counterclaimant would be entitled to enforce the security spelt out in the mortgage deeds and I so declare.

Finally, the defendant/counterclaimant also prayed for costs of the counterclaim. Following the principal that costs follow the events I find no reason to deny the defendant/counterclaimant as the successful party costs and I so award.

In light of the foregoing, the plaintiff's suit is dismissed and instead judgment is entered in favour of the defendant/counterclaimant against the plaintiff with the following orders:-

- a) That the plaintiff pays the defendant/counterclaimant Ushs. 435,567,636/= being the monies that were due as at 10/11/2009 when the lease was terminated.
- b) Interest at 21% per annum from the date of filing the counterclaim till payment in full.

- c) The defendant/counterclaimant is entitled to enforce the security spelt out in the mortgage deeds signed by the parties.
- d) Costs are awarded to the defendant.

I so order.

Dated 27<sup>th</sup> August 2015

Hellen Obura

**JUDGE**

Judgment delivered in chambers at 3.00 pm in the presence of Ms. Nakawooya Sarah h/b for Mr. Geoffrey Nangumya for the plaintiff who was in court and Mr. Matthias Nalyanya for the defendant whose officials were absent.

**JUDGE**

20/08/15