

6. What are the remedies of the parties available to the parties?

At the beginning of his submissions Counsel applied to court for leave to argue another issue which was as to whether the plaintiff was a tenant of the 3rd defendant in respect of the suit premises. Counsel played and argued the said issue first, then argued issue 1 and 2 jointly, 3 and 4 was argued under remedies available to the 3rd defendant and the 6th issue was argued under remedies available to the 2nd defendant.

He argued the remedies available to the plaintiff separately. Counsel for defendants also followed the same format and this court will also adopt the same order of arguments.

1. THE LAW AND STANDARD OF PROOF

The plaintiff has the burden of proof on the main suit while the defendants have the burden of proof on the counter claim. This burden is the burden on the balance of probabilities; as stated in *Miller vs. Minister of Pensions [1947] 2 ALLER 372-373-4*.

2. THE EVIDENCE ADDUCED

The plaintiff led evidence through PW.1 Edirisa Karenget Musiwa, PW.2 Ali Mafuko, PW.3 Hussein Kabawo and also relied on a set of exhibited documents from exhibit number one to exhibit number 18.

The defence case was led through the DW.1 Simon Peter Lukwago, DW.2 Parmal Babubhai. Defence relied on a set of exhibits which were listed from defence exhibit number 1 to 24.

All details of this evidence is available on the court record but owing to its voluminous nature, I will not reproduce it in this Judgment, but I will discuss the evidence as it relates to the issues for determination as I do here below;

1. Whether the Plaintiff was a Tenant on Industrial Property known as Plot 16/ 16A Bonyoli Road Mbale.

The plaintiff's argument is that prior incorporation, the plaintiff was a business name known as Medium Industries. After incorporation the plaintiff was incorporated on the 18th of May 1992 as exhibited under exhibit P1.

According to **PW.1 Musiwa**, the plaintiff upon incorporation took over all assets of the former Medium Industries with **PW1 E.K Musiwa** as the managing director, (that is contained in paragraphs 2, 5 and 7 of **Musiwa**'s witness statement).

In further support of this argument, **Mr. Musiwa** referred to exhibit P2 which was also referred to by the defendants as exhibits number 1 for the defence. This was a letter written to the plaintiff as a tenant by the management represented by DW1. In order to bolster up their case, the plaintiffs further relied on exhibit for the defence number 10 which is the dishonored cheque as evidence that this cheque bore the initials U M I which meant the plaintiff. It was further argued that the evidence by PW1, PW2 and DW1 and DW2 (in cross-examination) showed that the exterior wall of the premises in question bore bold writings inscribed on them in the names of "**UGANDA MEDIUM INDUSTRIES LIMITED.**"

The plaintiff disowned the exhibited court proceedings contained in the exhibits D24, D25 and D27 for the defence on grounds that these were documents prepared by **Counsel Musiiho** and that Counsel referred to the evidence of PW1 as the Managing Director of the plaintiff (UMI Limited) and that he had instructed **Counsel Musiho** to sue in the names of UMI Limited, but that Counsel had sued instead in the names of a wrong plaintiff.

It was therefore argued for the plaintiff that it was the plaintiff occupying the suit premises as a tenant and not **PW1 Musiwa**.

On the other hand the defendants' Counsel made arguments that the tenant was **PW1 Musiwa**, not the plaintiff named in the plaint. They relied on the fact that in PW1's statement it is stated that he gave cheque exhibited as D1 (P.6) in his name and signature which was proof of the fact that the tenant was **Musiwa**. **DW2 Patel** testified that PW1 gave him a visitation card bearing the names **E.K. Musiwa** to differentiate between himself and the plaintiff, which card was marked as exhibit PE3.

Counsel for the defence relied also on correspondences marked from D11 - D17 to make arguments that since the payment was made by **E. K. Musiwa** in his personal capacity vide exhibit D18 and drawn from his personal account, this was evidence that he was the one in

occupation of the premises. He also referred to the Civil Suit under documents D24, D25 and D27 as evidence to show that the plaintiff **Musiwa** was claiming the same as an individual and not as a company. This was evidence that **Musiwa** was a tenant and not the plaintiff according to defence Counsel. He therefore prayed that court should find that **Musiwa** was the rightful plaintiff in occupation of the properties and not Uganda Medium Industries Limited as was argued by counsel for the plaintiff.

Given the above evidence, this court finds that what is at stake here is who was the lawful tenant of the 3rd defendant? From the evidence it is not denied that there were three separate entities which are revealed by this evidence. These entities were (1) **Musiwa**, (2) Uganda Medium Industries and (3) Uganda Medium Industries Limited.

I notice from the evidence on record which is not denied that Uganda Medium Industries Limited is a registered legal entity as evidenced by exhibit P1. From the arguments by plaintiff's counsel, there is a need to determine if the activities of Uganda Medium Industries Limited were one and the same with those of **Musiwa** its Managing Director. This is so because the defence's argument is that the defendant dealt with **Musiwa** in his personal capacity and not the Company known as Uganda Medium Industries Limited who is the plaintiff.

I have examined the document PE3 also exhibited as DE1 and I noted that this was a letter written by Kintu & Co. Advocates and it was signed by a one **S. Gandesha** and it was addressed to Uganda Medium Industries Limited plot 16/16A Bunyori Road Work Shop Mbale. This letter informs the addressee as follows and I quote

“We have instructions from MS Anglo African Limited the agent of the Registered Proprietor of the above plot to manage the above plot and collect rent from you, arrange to meet the under signed or Mr. P. B Patel to negotiate a schedule of payments of the arrears to avoid further action to recover the arrears”.

This letter establishes the nexus of instructions between the parties. This letter however specifically addresses U M I Limited as a person. The defence however argues that upon receipt of that letter, they dealt with **Musiwa** the Managing Director in his personal capacity as their tenant.

I find the above position as stated by the defence untenable in view of the legal provisions which govern the operations of Companies as separate legal entities. This position was long settled in the case of **Solomon Vs. Solomon (1897) AC 22** where it was held that;

“Upon incorporation a new and separate artificial entity comes into existence, at law a corporation is a distinct person with its own personality separate from and independent of the persons who formed it who invest money in it and who direct and manage its operations”.

This principle has been interpreted and upheld in various decisions in Uganda for example in the case of **Kalibbala Musazi Fred Kaggwa & 3 Others HCT-CV-MA- 09 of 2015** where **Justice Musota** observed that “Once a Company is registered as a limited liability Company, it acquires the legal personality capable of being sued in its own right, freezing the Companies account automatically puts its activities at a standstill crippling the Company as a separate entity from the individual members”.

This position is again re instated in the case of **Sentamu Vs. UCB and Another (1983) HCB 61**. The import of the law above is that when the defendant recognized and dealt with UMI limited in their exhibit D1 setting forth the *modus operandi* they in essence recognized the plaintiff as the tenant on plot 16/16A Bunyori Road. This letter is specific and informs the client (named therein as Uganda Medium Industries Limited) to deal with a one **Mr. P. B Patel** (the 1st defendant) when negotiations followed in the nature revealed in all sets of Documents referred to by D1 including exhibits 11 to 17.

The said Patel should have kept it at the back of his mind that all these transactions were in reference to PE2/ DE1 which was a bid to recover rent from the plaintiff. The evidence from PW1 is that he did whatever he did on behalf of Uganda Medium Industries Limited as its Managing Director.

I do agree with counsel for the plaintiff that there is enough evidence in proof of this fact. The plaintiff was the tenant of the defendant. He sufficiently explained how the documents attributed to him by defendants comprised in the court pleadings under D24, 25 and 27 came up. I believe this, since it has been a long held principle of law that mistake of counsel cannot be visited on

the client. I also find the evidence of PW1, PW2, PW3 relevant in proving the fact that the premises bore inscriptions and the writings on the walls, reading “Uganda Medium Industries Limited”. This is evidence of the fact that they were in occupation of these premises as the tenants thereof.

The denials by the defendants that they never dealt with UMI limited because the personality of **Musiwa** issued the cheque and documents is not sustainable on the strength of the arguments propounded by the plaintiff on the evidence as adduced.

I also agree with the plaintiff’s counsel that the plaintiff was a tenant of the defendant on plot 16/ 16A Bunyori Road in Mbale and I do therefore terminate that issue as above.

2. Whether the 2nd defendant laved distress for rent on the plaintiff’s goods and if so whether it was lawful or excessive.

The plaintiff’s argument here is that the bailiff did not restrain the plaintiff’s movable property to recover rent, but instead locked up the premises which led to loss and wastage of plaintiff’s property.

The defence case is that the property restrained was not for the plaintiff but for a one **Musiwa**. The defence argues that what was done by defendant was legal and no loss or wastage occurred to plaintiff’s property.

Following the findings under the first issue, it suffices to point out that the rightful tenant, to whom distress for rent proceedings ought to have been directed at was the plaintiff in this case; (that is UMI limited). However defendants argue and maintained that the tenant who owed the rent and against whom distress was meted out is a one **Musiwa** and not the plaintiff in this case.

This position is legally flawed since **Musiwa** was acting for the Company as it seemed. The distressed property therefore belong to the Company and did not belong to **Musiwa**.

The evidence however further indicates that what was meant to be a lawful distress for rent transcended into a series of extra activities whereby the defendant caused the removal of some property from the premises, locked the premises and later put guards on the premises.

See **Mr. Parimal**’s statement on oath under paragraphs 9, 10, 11, 12, 13, 14, 15 and 16.

Counsel for the defendant in submission argued that D1 set out to distress the property, but failed to have it completed because a one **Mr. Musiwa** had locked the premises.

From the evidence and the law I find that the evidence of **D1 Peter Lukwago** shows that on the 13th of October 1997, they went to distress and on reaching there, they locked the premises, put a security guard and took an inventory of what properties lay in the open.

DW3 Dawson Kadimba said he locked the premises and also put there guards. The law on distress for rent was discussed in the case of **Magallues Distillers Uganda Ltd and Another Vs. Byansi and Another HCCMA. NO. 9 of 2009**. The Judge held that:

“for a distress for rent to issue there must be a subsisting landlord tenant relationship.”

Also in the case **Assist Uganda Ltd Vs. Halian Asphalt and Hanlage Ltd and Another. HCC 1291 of 1999**, court referred to the Concise Law Dictionary 8th Edition for a definition of Distress and defined it thus;

“The act of taking movable property out of possession of a wrong doer to compel the performance of an obligation or procure satisfaction on an obligation committed. It is a mode of a legal “self help.”

In **Lynas Vs. Elliot 1 QBD (1876) 210**, the common law position is that the landlord could not sell the items distressed.

In our law in Uganda, the Distress For Rent Bailiff’s Act does not give the landlord the power to sell distressed items.

From the Supreme Court case decision of **Tumushabe Vs. MS Anglo African and Another Supreme Court case NO. 79 of 1999, Hon. Justice Kanyaihamba** as he was then, he held that;

“He who chooses to distress for rent under the Act, must strictly do so and in accordance with the provisions of that Act”.

I have examined the warrant for distress D20, It is signed by MS Dagira & Co. and it was dated 18th of September 1997 and executed on 13th of October 1997.

The warrant did not specify which items were to be distressed though it granted permission to enter the premises and restrain such items as can be distressed to recover Shs One million eighty hundred sixty nine thousand(1, 869,000/=) and fees of two hundred thousand(200,000/=).

This action was carried out in the manner described by witnesses including locking the premises.

Clearly this was contrary to the legal requirements for Distress. There ought to have been an inventory of items to be distressed. The items would have been clearly marked and a return made, they ought to have been kept in a legally recognized store and vacant possession of the premises secured.

Locking the premises, and letting a third party carry away properties was clearly illegal. This issue is therefore found in the negative as the activities carried out on the plaintiff's goods did not amount to distress for rent.

3. REMEDIES AVAILABLE TO THE PLAINTIFF

a) Special damages

Having found as above, the plaintiff claimed for special damages and general damages. The law is that special damages have to be specifically proved. The plaintiff through evidence of PW1, PW2 and PW3 (as argued also in submissions) showed that plaintiff's business was involved in produce buying, selling and processing. PW1 relied on exhibits P10 to P18 paragraph 35 and 36 of PW1's statement on oath. Evidence was led to show that the property got lost, destroyed or wasted (paragraph 38 of PW1's statement) collaborated by PW2 and PW3 in that properties as alleged were locked up on the premises.

The sum total of loss as per Exhibit 10 is Shs 65,542,500/= which plaintiff prays for as special damages.

The defendants' counsel argued that plaintiff suffered no damages since he was not a tenant on the premises; a fact I have already discounted. He further argued that the properties were carried away by **Musiwa's** tenant called **Anyanzoi**. He referred to Dw2 who stated that he allowed **Anyanzoi** to remove the machines. He argued that **Musiwa** knew **Anyanzoi** and hence defendant is not liable. He argued that other properties' condition cannot be blamed on

defendant because defendant acted within the law and the properties were probably taken by **Musiwa**'s business associate **Anyanzoi**.

The defence argument is not borne out by evidence. It only proves that defendant 1 acted unlawfully to give **Anyanzoi** property belonging to plaintiff in a belief that it belonged to him.

The law is that special damages can be proved by both documentary and or oral evidence. See: **Gapco(U) Ltd Vs. As Transporters Ltd SCC NO. 7 of 2007**

I find that the plaintiff has proved that he is entitled to the amount of Shs 65,572,500/=

b) General damages

The aim of general damages is to put the claimant in the position he or she was in immediately before the mischief. These are wholly non financial losses and not calculatable but evaluated on some basis. The basis chosen for evaluation is basically convention, coupled with comparison with previous awards, experience and sheer intuition. See the **Uganda Civil Justice Bench Book 1st Edition. 2016 page 207.**

The plaintiff did not give any other justification for this award save the fact that the plaintiff was unlawfully and illegally deprived of the use of the properties and the premises. They prayed for Shs. 450, 000,000/=. I find the above vey excessive. The fact is that rent was due and had not been paid. The defendants however in the process of trying to levy distress, instead committed an illegality which led to the plaintiff losing several properties.

Given the evidence showing loss of machinery, wastage of properties including the lorry, and other assorted items which defendant's counsel proposed could have been taken by **Musiwa**'a associate; would award a sum of 20,000,000/= but of which I would deduct Shs. 1,869,000/= , leaving a total of Shs 18,131,000/= as general damages.

c) Interest

The position of the law is that interest on special damages is awarded from date of filing of the suit until payment in full, while interest on general damages is awarded from the date of Judgment until payment.

See: **Mukisa Biscuit Manufactures Co. ltd V West End Distributors Ltd 1970 EA 469.**

I award interest at court rate on both special and general damages to take effect as per the law above.

COUNTER CLAIM

Issue 4: Whether Defendant suffered any Loss and whether Plaintiff is Liable

The counter claim was not proved given the findings under the main suit. The counter claim is by counsel for defendant's own arguments against the wrong party. He categorically argued that he was proceeding against **Musiwa**, but **Musiwa** is not the plaintiff/ defendant counter claimant. The defendant/ counter claimant is UMI ltd.

Court cannot grant the sought for remedies under the counter claim against a wrong / nonexistent party. As argued by counsel for the plaintiff, the counter claim is not sustainable and fails having not been proved.

The hiring of the security guards is an expenses unrelated to the actions of the plaintiff. It cannot be visited on them as the counterclaimant insisted that the party to blame is **Musiwa** whom they (defendants) did not sue but wanted court to hold as the same as UMI ltd well as not.

On the whole, I find no merit in the counterclaim and it is not proved. It is dismissed with costs.

In the result this court enters Judgment for the plaintiff in terms as above with costs. The court dismisses the counter claim with costs. I so order

Henry I. Kawesa

JUDGE

10.05.2017