THE REPUBLIC OF UGANDA

THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

CIVIL SUIT NO. 0246 0F 2012

Nalea General Merchants Ltd……Plaintiff

Versus

1. **Equity Bank of Uganda Ltd**
2. **M/S Muganwa & Co. Advocates**
3. **Byamugisha Charles ……..……Defendants**

Before: Hon. Justice Dr Douglas Karekona Singiza

JUDGMENT

1 Introduction

Access to quick credit from banking institutions by small business enterprises in peril is important for keeping the country's business sector operational. It affords relief to struggling small business enterprises, the support of which has a multiplier effect on the economy. However, the approach remains that a bank that elects to advance credit in the form of a chattels mortgage transfer deed to any person must be aware that such a deed is enforceable only when it is lawfully made, attested, and registered as a charge.

Both at common law and in equity, a court will always rule in favour of the foreclosure of the property under charge whenever a chattels mortgage transfer deed is valid. The case before me calls this court to determine if, to avoid prolonged litigation, it is preferable that our banking institutions exercise prudence in deciding which properties are capable of creating a charge under a chattels mortgage transfer deed. That being said, the strategic importance of the banking sector demands that even if any charge which is created is penultimately legally problematic, bank depositors' funds should always be protected.

2 Background

This suit was brought against the defendants jointly and severally, and seeks declarations that the purported charge and sale on the two buses belonging to the plaintiff was illegal, null and void. Also challenged is the way the 2nd defendant was appointed as receiver or manager of the plaintiff's buses. It was the plaintiff's case that the appointment of the 2nd defendant was illegal, null and void, because the 1st defendant had prematurely invoked receivership. The plaintiff seeks special damages for the value of the two buses and loss of income or earnings at UGX

600,000/- per day from 12 September 2011 until payment in full in respect of the two buses from the 1st defendant. Furthermore, the plaintiff prays that the 1st defendant unconditionally releases UGX 20,601,590/- illegally frozen on the plaintiff's Account No. 1003200496304. The plaintiff prays, finally, for interest at the court's rate on the award until payment in full and costs of the suit.

3 Representation

At the commencement of the hearing, the plaintiff was represented by *M/S Victoria & Co. Advocates,* who were later replaced by *M/S Semuyaba, Iga & Co. Advocates*. The 1st defendant was represented by the Legal Department, Equity Bank Ltd; the second was represented by *M/S Muganwa, Nanteza & Co. Advocates;* while the third was represented by *M/S Ochieng, Harimwomugasho & Co. Advocates.*

I appreciate the arguments and authorities cited by all the lawyers in the case. As I do whenever I find that the clients' side of the story is well argued, I offer the usual courtesies; where I do not consider all the arguments and authorities cited, invariably it is done not out of disregard of the lawyers' contribution, but due to constraints of time and space.

3.1 Plaintiff's case

The plaintiff is a limited liability company[1] carrying on the business of bus transportation in Uganda, while the 1st defendant is a banking institution. The 2nd defendant is a firm of advocates registered and practising in Uganda under the name of M/S Muganwa Nanteza & Co. Advocates, a partnership firm of advocates. Lastly, the 3rd defendant is a male adult Ugandan carrying on the business of bus transportation.

[1] The plaintiff company was registered under the repealed Companies Act Cap 110 of 1961, which was later amended by the current Companies Act of 2012.

Retired Members of Parliament mooted the idea of establishing a post-retirement business to generate income as a part of their investment plan after leaving elective office. The plaintiff subsequently incorporated a company and acquired three buses (at the cost of UGX 275,000,000= each) for the purposes of running a transport business for profit. The plaintiff's buses were designated an operation route of Kampala-Iganga-Mbale-Soroti-Katakwi-Moroto. To expand their business, the plaintiff company applied for and obtained a loan of UGX 250,000,000 from the 1st defendant and undertook to deposit UGX 600,000/= daily as income from the said buses.

Various securities were put forward by the plaintiff company. To their surprise, during the running of the loan, the 1st defendant unlawfully recalled the loan and took possession of the two buses. The 1st defendant appointed the 2nd defendant as receiver/manager of the said buses. The latter then took and exercised all powers of sale necessary to recover all the outstanding sums of money owed by the plaintiff to the 1st defendant's bank, including powers to take over all the undertakings, property and assets and eventual sale.

After the sale, the 2nd defendant filed a notice that they had taken over all company assets and advertised the purported appointment in the newspaper in which the sale of one bus by the 1st defendant was advertised. In fact, two buses were sold. The plaintiff challenges these sales as illegal for the reason that there was no validly registered chattels deed or debenture, as required by the law, to be enforced against the plaintiff. The plaintiff impeaches the purported appointment of the 2nd defendant as receiver as null and void.[2]

[2] As it was then in the Companies Act Cap 110.

3.2 The defendants' pleadings

The 1st defendant takes the approach that the plaintiff's claim has no merit and that it is in fact bad in law, and warns the plaintiff that they would raise a preliminary objection to that effect.

The 1st defendant's story starts from the time they advanced UGX 250,000,000 to the plaintiff company as a credit facility. This facility was secured by the several properties in which the plaintiff executed a chattels mortgage instrument. Under the terms of the chattels mortgage instrument, the plaintiff consented and pledged their motor vehicles (along with other securities) for the advanced credit facility. These securities were duly attested and registered. It is the 1st defendant's' case that the requisite stamp duty on the instrument was paid and a caveat thereon lodged. When the plaintiff defaulted on their loan obligations (despite several reminders to remedy the breaches), the 1st defendant rightly exercised all the rights under the chattels transfer instrument. The two motor vehicles' (registration numbers UAM 832T and UAM 367Q) were then sold to the 3rd defendant so as to recover the monies due to him from the plaintiff. It was the contention of the 1st defendant that the right and the power to sell by itself or through its appointed agent could not be impeached.

The 2nd defendant's pleadings are little different from those of the 1st defendant, as most of the allegations in the plaint are denied. The only addition is in the contention that the charge on the motor vehicles at suit was lawfully created and registered. Thus, the disposal thereof under the terms of the chattels mortgage instrument was legally sound and could not be impeached; the defendant further insists that no debenture was ever created under the Companies Act. The explanation for this was that the disposal of the two buses preceded an evaluation report and open bidding in which the 3rd defendant emerged as the best bidder and the one to whom the buses

were sold. In any case, it was the 2nd defendant's case that these buses were disposed of only after the plaintiff had been given several opportunities to redeem them.

The 3rd defendant then raises a preliminary point of law dealing with the non-disclosure of the cause of action, contending that he did not participate in, or have any knowledge of, any illegality or fraud as alleged by the plaintiff. At this point, it appears that his major defence is that he bought the two buses without *mala fides* and without being aware of any fraud.

4 Issues for trial

At the scheduling of the case, the parties with the help of input from the court, framed four issues to be determined:

1. Whether the instant suit was sanctioned by the plaintiff.
2. Whether the plaintiff breached the credit facility agreements at the time that the 1st defendant bank recalled the facility.
3. Whether the sale of M/V Reg No. UAM832T Chassis No. JALMVI123R97000043 and M/V Reg No. UAM 367Q Chassis No. JALMVI123970000413 was lawful.
4. Whether the plaintiff is entitled to the remedies sought.

5 Parties' main arguments

Before trial, two preliminary objections were raised around the cause of action. The presiding judge disallowed these objections, holding that their concerns would be best determined once the evidence had been led. With that in mind, I propose to summarise the parties' submissions, first on the preliminary objection that was raised again after the full trial in as far as those objections touch on the first and second issues as framed above.

5.1 Arguments on the preliminary objection

The 1st defendant insists that the suit is bad in law because M/S Semuyaba, Iga & Co. Advocates (the law firm that filed the suit on behalf of the plaintiff) did not have ostensible authority to do so. The 1st defendant referred to a directors' resolution (DExh.32) to suggest very strongly that the purported 'three directors' who had signed the resolution to file the suit had previously been replaced and new ones appointed.

The plaintiff elected to deal with the preliminary point of law, beginning with the consequence of the orders from the interpleader application filed by the first defendant. Reference was then made to a consent judgment the result of which was that the certificates of title to some land that had been retained by the 1st defendant would be returned to the owners because those titles were personal in nature.

Under the consent judgment, it was also agreed that the logbook of M/V Reg No. UAM 223T Chassis No. JALMV1123R97000042 would be retained by the bank pending the court order of Company Cause No. 34 of 2012 on resolving the company's shareholding status. It was the understanding of the parties at the time that the court would first deal with the purported new executive before the question of which of the shareholder could deal with the 1st defendant, since no resolution had ever been registered with the company registry showing that M/S Victoria Advocates were the company's lawyers. The plaintiff disputes the 1st defendant's assertion that the company resolution that authorised the filing of the suit was bad in law. The point was made that the directors' resolution to file the present suit was resolved in the plaintiff's favour by a court pronouncement.

5.2 Determination

The defence assertion that seems to impeach the plaintiff's authority to file the suit is based on the letter from the registrar of companies (DEx4). That letter seems to suggest that, by 12 June 2012, Messrs William Sitenda, Richard Mukula and Avitus Tibarimbasa were no longer directors of the plaintiff company and therefore could not have given the plaintiff's lawyers any instructions. Numerous authorities hold that a suit filed by a lawyer on instructions of company directors without authority is bad in law,[3] and this court is bound by that.

The evidence that the High Court in fact had ordered for the retrospective rectification of the company register to reflect the plaintiff's shareholding status at incorporation weakens any arguments made on the basis of a letter from the registrar of companies, and therefore dilutes the concerns of the defendant (see DEXH 6). In my view, a ruling of the court on the shareholding status of the plaintiff is incontrovertible evidence that M/S Semuyaba, Iga & Co. Advocates had been properly instructed by the plaintiff to file the suit before this court. The preliminary objection is therefore dismissed.

6 Dealing with breach of the credit facility agreement

In principle, a trial court will find evidence of a breach of contract when a party fails to fulfil the obligations imposed by the terms of the contract. When one party to a contract fails to perform his or her obligations, or performs them in a way that does not correspond to the agreement, the guilty party is said to be in breach of the

[3] *Bugerere Coffee Growers Ltd v Sebadduka & Ano*r. This position is emphasised in *Steven Kaso zi and 2 others v Peoples Transport Services* SCCA No. 27 of 1993.

contract, and the innocent party is entitled to a remedy. [4] Where a contract is valid, it creates reciprocal rights and obligations between the parties.[5]

6.1 Validity of the credit agreement

The question of whether the plaintiff breached the credit facility agreements at the time the 1st defendant recalled the facility depends largely on the validity of the credit agreement itself. The determination of the validity of the facility in question (and the eventual foreclosure thereon) can be resolved by an examination of the existing framework on chattels mortgages. It also becomes necessary to examine the common law and equitable principles on liens in order to answer the question of whether a chattels mortgage transfer deed was capable of passing a good title to third parties.

6.2 Plaintiff's arguments

The plaintiff denies the allegation that they had ever been in default of their loan obligation, and point to the 1st defendant's admission to holding UGX 100M as a fixed deposit on interest as a collateral on behalf of the plaintiff. The plaintiff's point of departure rests on five claims, on the basis of which they invite this court to challenge the disposal of the vehicles in question.

1. The 1st defendant could not have exercised any power to sell the three buses through any appointed agent in absence of any default at all.
2. The alleged sale was wrong because the two buses were undervalued since the sale value was determined by an unqualified motor vehicle valuer.

[4] In *Uganda Building Services v Yafesi Muzira t/a Quickest Builders*, HCCS No. 154 of 2005.
[5] In *William Kasozi v DFCU Bank Ltd* HCCS No. 1326 of 2000 per Lady Justice CK Byamugisha.

3. The exclusion of the plaintiff from participating in the public auction should have put the 3rd defendant on notice that the sale and public auction were unlawful.
4. There was an absence of any valid chattels transfers and debenture deed allowing the 1st and 2nd defendant to sell the plaintiff's buses.
5. The 2nd defendant was wrongly appointed as receiver/agent.

It was the argument of the plaintiff that there was no debenture created under the Companies Act over the assets of the plaintiff company by the 1st defendant. Thus, the 1st defendant enjoyed no rights to vest the two buses for disposal by the 2nd defendant. The plaintiff argues instead that the sale of the buses to the 3rd defendant was executed under a convoluted framework unknown to the Chattels Transfer Act. Singling out one problem, the plaintiff explains that the fact that one bus had been advertised and yet three buses were sold, at a paltry price of UGX 70,000,000=, calls the validity of the disposal of the buses into further question.

In any case, the argument goes, at the time of the sale, the outstanding loan arrears was only UGX 70,000,000=, requiring no need to sell two buses at UGX 140,000,000=. It was the plaintiff's case that this court should find the disposal and sale of the buses wanton and malicious, since there was enough security to cater for any loan balances. A point was made that the buses were disposed of when the loan was still running, and with one of the directors (Hon. Sitenda Sebalu) making an offer of UGX 30M to release one of the buses. Besides, there is evidence that at the time there was a balance of UGX 20,601,590= on the plaintiff's account that was held with the 1st defendant, but which for some reason was never applied to offset the balance.

For strange reasons, the argument goes, the 1st defendant's head legal advisor (Mr Edward Ocen) rejected Hon. Sitenda Sebalu's offer, offering a vague reason (linked to the purported lack of permission from the company) that was construed as indicative of a wrongful motive. The plaintiff maintains that the 1st defendant bank had, in the past, elected to deal with 'rival' company directors rather than those recognised by the law, and that this amplified the 1st defendant's careless and malicious behaviour. On this account, the 1st defendant should be found culpable.

6.3 Defendants' submissions

For obvious reasons, the 1st defendant's point of departure is different from that of the plaintiff. The first point is that 1st defendant bank had advanced a loan facility of UGX 250,000,000 for the running of the plaintiff's bus transport business. In turn, the plaintiff handed over various securities for the facility. The plaintiff purportedly defaulted on repayment of the 1st instalment as well as on subsequent agreed instalments. When the 1st defendant detected evidence of the possible diversion of the loan facility from its intended purpose, they elected to sell off the two buses in terms of a duly executed chattels mortgage instrument.

The 1st defendant's arguments here hinge on what the true understanding is of the phrase 'breach of contract'.[6] While relying on **s**ection 33(1) of the Contracts Act,[7] the 1st defendant makes the point that it is not in dispute that there was an agreement with the plaintiff to access the UGX 100M for usage that would be capped at the UGX 250M stated in the letter of offer. The agreement was that the plaintiff would

[6] *Black's Law Dictionary* defines 'breach of contract' with reference to failure by one party to a contract to comply with his or her contractual obligation. The same definition was cited in the cases of *Nakana Trading Co. Ltd v Coffee Marketing Board* CS No. 137 of 1991 and *United Building Services Ltd v Yates Muskrat T/A Quickest Builders & Co* HCCS No. 154 of 2005.

[7] Section 33(1) of the Contact Act No.7 of 2010 provides that 'the parties to a contract shall perform or offer to perform, their respective promise, unless the performances is dispensed with or excused under this Act or any other law'.

deposit a sum of UGX 650,000 daily out of the income generated by the business. To their dismay, 1st defendant bank later detected that the funds meant for servicing the loan had been diverted to some other purpose. The 1st defendant's final argument is that the decision to 'recall the facility' was legally justified.

6.4 Validity of the chattels mortgage deed

The assertion by the 1st defendant that there had been a properly executed chattels mortgage deed in which the plaintiff pledged the three buses as a collateral security for the loan is considered a crucial point that requires detailed discussion. Reference was then made to the testimony of PW1 Hon. Sitenda Sebalu who, during cross-examination, seems to confirm that line of evidence. Indeed, according to Nantume Miriam Kasibante (DW1), clause 2(b)(i) of the chattels instrument, read within within the broader framework on disposal of secured collaterals, permitted the 1st defendant to dispose of the buses by public auction or private treaty. The only trigger necessary was evidence of a default by the plaintiff company on their loan obligation.[8]

The 1st defendant made the point that a court of law could not rewrite a contract between the parties, since the parties are bound by the terms of the contract unless coercion, fraud or undue influence are pleaded and proved.[9] The 1st defendant maintains that since the terms of the contract provided for a right to foreclose, the eventual disposal of the mortgaged buses was therefore lawful.

The 2nd defendant denies that the 1st defendant ever executed a debenture by insisting that they had been properly appointed as a receiver under a chattels mortgage deed

[8] See section 73 of the Chattels Securities Act 2014, which permits a secured party to realise a collateral upon default by a debtor by appointing a receiver or agent; this was complied with by the 1st defendant.

[9] See *National Bank of Kenya v Pipe Plastic Sankolit (K) Limited & Anor* [2001] KLR 112 at p. 118.

instead. The point was that where a chattels mortgage is executed, the lender is not required to execute a debenture and the issue of appointing a receiver does not arise. In any case, the argument remained that a chattels mortgage by its nature transfers title to the lender in the event of default by a borrower.[10] They further argued that they acted upon the instructions of the 1st defendant[11] and therefore wondered how the plaintiff could maintain a claim against them. Emphasis was placed on section 41 of the Chattels Transfer Act[12] to justify the disposal of the three buses.

The 3rd defendant did not file any submissions.

6.5 Understanding a chattels mortgage

The repealed Chattels Transfer Act Cap 70 detailed the framework on chattel securities and the transfer thereof.[13] Under the framework, a chattel security would be transferable as long it was of a moveable nature and capable of complete delivery to another person. The definition of the chattel specifically excluded shares and interest in company capital or property. A chattel security transfer could be of either permanent or temporary nature and with or without conditions. A chattel security transfer could also take the nature of a sale, security, pledge, gift, settlement, or a lease. A chattel security transfer could be proven by means of a chattel receipt, receipt of a purchase of money of chattels or other assurances.

A chattel transfer could also take the nature of a contract in which a right in equity to any chattel or charge or security over a chattel was acquired. A reference to the word 'machinery', as used in the definition of the term 'chattel', suggested that only

[10] Section 1(j) of the Chattels Transfer Act cap 70.
[11] Section 118 of the Contracts Act of 2010
[12] The framework established here is that when an instrument expressly or implicitly gives power to the grantee to sell all or any of the chattels comprised in it without applying to court, the sale shall be by public auction unless the grantor and encumbrances after the grantee, if any, consents to a sale by private treaty.
[13] See the long title of the Chattels Transfers Act Cap 70.

machines as used in the manufacture of agriculture products were considered as appropriate for chattel transfers.[14] The framework also provided for the registration of the chattels, with the requirement that a chattel had to be attested before it could validly be registered, without which it would be void.[15] This framework was repealed by the Chattels Securities Act, 2014.[16]

The new framework retains the previous approaches in the definition, with the further guide that no agreement for the chattel security and the transfer thereof can include the properties of the company.[17] Taking a less strict approach, the new framework's approach is that a chattel security may in fact take the nature of 'security interest' in a property. This may arise where a transaction secures a payment or an obligation to pay using any property as collateral under certain specific conditions.[18] To the extent that a security interest may take the nature of a floating charge and is capable of being attached to the collateral, then it can be enforceable as against a debtor. All that is necessary is to present evidence of the

[14] *Ibid* section 2.
[15] *Ibid* sections 3, 4, 5, 6 and 15.
[16] The purpose of the Chattels Securities Act, 7 of 2014 is regulate and enforce security interest in chattels by repealing the Chattel Transfers Act Cap 70.
[17] Section (1)(a) of the Act reads: 'any movable property that can be completely transferred by delivery, and includes machinery, book debts, stock and the natural increase of stock as hereafter mentioned, crops and wool, but does not include— (i) title deeds, choses in action or negotiable instruments; (ii) shares and interests in the stock, funds or securities of any government or local authority; (iii) shares and interests in the capital or property of any company or other corporate body; or (iv) debentures and interest coupons issued by any government, local authority, company or other corporate body.'
[18] In principle, therefore, five key elements must exist under section 9 of the Chattels Securities Act, 7 of 2014:

a) the intention to create a security;
b) the security interest must exist as a right *in rem* (creates real not personal rights);
c) the security interest must be created by a grantor or declaration or trust, not by reservation;
d) the security interest must be of a fixed or specific nature; and
e) the security interest should be taken by the creditor over his own obligation to the debtor.

intention to create such a security interest, with an ascertained value that vests rights in the debtor's collateral.[19]

It is emphasised that the transaction in the case before me took place under the repealed framework on chattel transfers, in which company properties were incapable of creating chattel securities. There is no question that the chattel mortgage deed dated 15 June 2012 and signed by both the plaintiff and the 1st defendant did not comply with the requirements of the law. Even if the deed had been properly attested and registered with all the stamp duty fees paid, the fact that chattel security was the property of the plaintiff company makes the deed voidable.

The reasoning that the chattel security deed under consideration could have taken on the nature of the debenture had it been registered, as argued by the plaintiff, is one this this court is not prepared to consider. The reasons for this, in my view, are obvious. The requirement for the mandatory registration of any debenture as a company charge is enough to invalidate the purported implied debenture on account of non-registration.[20] It is the determination of the court that the chattel mortgage deed between the plaintiff and the 1st defendant bank was invalid. However, an invalidly executed chattel mortgage deed can still operate as a contract inter parties that is capable of being breached.[21]

That said, the fact that the plaintiff received a credit facility from the 1st defendant remains uncontested. The obligation that the plaintiff would in any case pay back the advanced loan remains, except that terms thereof may have to be determined by

[19] Section 11 of the Chattels Securities Act 7 of 2014.
[20] See section 98 of the repealed Companies Act which mandated the registration of the record of the holder of the debenture issued by the company. Also, in terms of section 105 of the repealed Companies Act, a non-registered debenture issued as a charge would be void.
[21] See *Formula Feeds Ltd and 3 Others v KCB Bank Ltd* SC CA No 13 of 2020.

the surrounding circumstances, considering the invalid chattel mortgage transfer instrument.

It remains that this court must then determine if the plaintiff ever breached the obligation to pay back the loan, even when we do not have any formally written agreement to speak to the loan. The recalled loaned facility amount (which suggested a breach of the contract) included interest in which the plaintiff was given only seven days in which to clear the debt, with a clear threat to liquidate the chattel security in default (D1EX 3). It appears that the 1st defendant must have been inclined to realise that the notice of recall was probably written in a rush. A second 'final notice of default', to the amount of UGX 41,611,369.67= (including the accrued interest) and with a similar threat to liquidate the chattel security within seven days, was taken out on 11 May 2012 (D1EX 2).

In my view, this set of events does not in any way present evidence of a breach of the obligation to pay the loan, but shows rather that the plaintiff was intent on servicing the remaining unpaid loan balance. The details on the legal obligation to make good on the loan, even in the face of the challenged chattel security transfer deed, are discussed in the last part of this judgment.

7 Lawfulness of the disposal of the two buses

The question of whether the disposal of the two motor vehicles was lawful depends largely on whether the 1st defendant enjoyed any lien over them. For some reason, none of the defendants endeavored to make any arguments around this point. It is the view of this court that even with an invalid chattel mortgage deed, the 1st defendant could probably read-in a common law possessory lien in the plaintiff's motor vehicles to justify their eventual disposal by the 2nd defendant to the 3rd defendant. For this court to resolve the validity of the disposal of the two buses based

on the idea of a lien, an examination of the principles of two types of liens is preferred (as the discussion below shall reveal).

7.1 Common law possessory liens

Courts will usually read-in a common law possessory lien in a particular property on account of fairness rather than as a statutory consideration. Anglin J's consideration of whether a possessory lien over goods, the subject of application for a stay of execution, could succeed is considered a good starting-point. [22] The learned judge correctly restates the principle of a common possessory lien, with the view that such a lien is remedy *in rem* on goods[23] that requires no intervention by the courts. Such a lien, she explains, only empowers an 'artificer who has actual possession of the goods [which are] the subject of a lien'.[24]

It was the view of the court that such a lien is adverse to the owner of goods and therefore capable of extinguishing any claim thereto. In principle, the court took the view that a common law possessory lien is not a sword on which to sue, but rather a shield to use as a defence against any claim.[25] For a defence of common law possessory lien to be valid, there must be evidence that the goods had in the first place been lawfully delivered to the person claiming under it. The determination as to whether the buses in question were in lawful possession of the plaintiff is set out

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[22] See *K. Rogers Ltd vs Spedag Interfreight (U) Ltd* MA No. 2351 of 2012 (arising from EMA No. 2185 of 2015; also arising from HCCS No. 339 of 2012). In the head suit, 18 cartons of granite tiles and 1,250 cartons of glass blocks belonging to K. Rogers Ltd had been impounded by Spedag Interfreight (U) Ltd. Spedag then counterclaimed for the amount it paid in tax on behalf of K. Rogers Ltd, and in fact a judgment in counter claim was entered. The learned judge, in dealing with the application for a stay of execution, held that a common law lien was not available to Spedag because the goods had not lawfully come into their possession.

[23] The learned judge in the *K. Rogers Ltd* case relied extensively on *Tappenden v Artus* [1964] 2 Q.B. 185 at 195.

[24] *Ibid*.

[25] *Ibid.*

below.[26] For now, this court further examines whether the 1st defendant could also have enjoyed any equitable lien in the buses in the absence of a validly executed chattel mortgage deed.

7.2 Equitable lien as distinguished from common law lien

Given the possible limitation of the application of the common law possessory lien in the case before me, it is important to examine a related form of lien known as an equitable lien.

An equitable lien has its origin in the in the English courts of Chancellery and was generally concerned with the enforcements of sellers' liens. Over time, the application of this remedy changed owing to the changing demands of contracts and economics.[27] The application of this type of equitable lien later became deeply grounded in the equitable relationship between parties.[28] As Baker, P et al. explain, such a lien

> confers a charge upon property until certain claims are satisfied and differs from an equitable charge only in that it arises by operation of equity from the relationship between the parties rather than by acts of theirs. It exists independently of possession … It is enforceable by means of an order for sale.[29]

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[26] See section 7.4 of the judgment.

[27] See the approach of the English Court of Appeal in *Swiss Corp v Lloyds Bank Ltd* [1982] AC 584 and *Waitomu Wools (N.Z) Ltd v Nelbon (N.Z) Ltd* [1947] 1 NZ. LR 484. These decisions take the approach that an equitable lien is a creation of an agreement and may arise in three main ways:

1. conduct of the two parties over a period;
2. agreement; and
3. operation of the law.

[28] See generally *Barbara C,* 'The Equitable Lien: New Life in an Old Remedy?' (1994) p.1. Available at https://bottomlineresearch.ca/pdf/equitable_lien.pdf

[29] Baker, P et al. (eds.) *Snell's Principles of Equity* (29th ed.) London: Sweet & Maxwell (1990) p. 456.

There is thus no notable difference between an equitable lien and an equitable charge despite the existence of the two terms in the usage of many common law judges. In fact, both simply refer to an interest in property.[30] An equitable charge can be created either by an express provision or by construction whenever any property

> becomes liable, or specially appropriated, to the discharge of a debt or some other obligation and confers on the chargee a right of realization by judicial process, that is to say, by the appointment of a receiver or an order for sale.[31]

7.3 Determination

In answering the question of whether a possessory or an equitable lien had been created (the basis on which the two buses could have been legally disposed of), the approach followed here is to highlight the history of infighting among the plaintiff company's directors.

As understood by this court, the evidence is that the plaintiff's shareholders developed a misunderstanding (which culminated in the creation of a splinter group known as NALECO SACCO). This disagreement prompted some of the directors of the plaintiff company to hand over the custody of the remaining two buses after one bus, Mv Reg No. UAM 223T, had had its number plate plucked off (D1EX 8). It appears that these two sets of events were precipitated by the plaintiff company's resolution dated 6 January 2012, which changed its directors and appointed new ones as well as allotting new shares (D1EX 5, D1EX 6). These changes were in fact confirmed by the Uganda Registration of Service Bureau (URSB) in a letter dated 26 March 2013 (D1EX 4).

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[30] *Palmer* v. *Carey* [1926] A.C. 703.
[31] See *LAC Minerals Ltd. v International Corona Resources Ltd* [1982] A.C. 595 per Buckley LJ.

On 9 January 2012, a dispute about these changes and the process of allotting certain shares to Hon. Tom Kayongo was a subject for determination in the High Court. This dispute was resolved on 4 April 2014, where Nyanzi J retrospectively rectified the company register with orders that the shareholding status of the company revert back to what it was at the date of incorporation. The plaintiff was also ordered to hold a meeting to resolve the dispute about the admission of new members and to ensure that third parties such as the 1st defendant were not prejudiced.[32]

Amidst this confusion, on 8 September 2011 (D1EX 3) the 1st defendant took out a notice of recall of facility on the loan balance of UGX 130,700,000=, an amount that included interest. The recall letter gave only seven days in which to clear the debt, with a clear threat to liquidate the chattel security in default. Again, on May 2012 (D1EX 2) the 1st defendant took out what they describe as a 'final notice of default' of UGX 41,611,369.67=, an amount which also included the accrued interest, along with making a similar threat to liquidate the chattel security within seven days.

On 25 June 2022, a letter that appears to be a response to the plaintiff's offer to resolve the debt dispute – with an offer of UGX 30,000,000= for settling the outstanding debt (D1EX 9) – was rejected. The 1st defendant indicated their readiness to liquidate the purported chattel securities in which 2nd defendant was appointed as receiver/manager for the purposes of liquidating the chattel.[33]

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[32] See *William Sitenda Sebalu and another v Tom Kayongo* High Court (Civil) Company Cause No. 34 of 2012.

[33] Section 74(1) of the Chattels Securities Act, 2014, reads: 'Where a debtor is in default, a receiver may be appointed in respect of the collateral, by (a) the secured party where a security document in respect of the collateral so provides or (b) by court. (3) Before appointing a receiver under this section, the secured party shall serve a notice on the debtor and shall not make the appointment until 15 working days from the date of service of the notice lapse. (4) A receiver appointed under this section shall exercise the powers, rights and duties of a receiver specified under the Mortgage Act. Section 6 provides for knowledge of fact in relation to a particular transaction. (1) for the purpose of this Act, a person knows or has knowledge of a fact in relation to a particular transaction

7.4 Assessment

The evidence that the 1st defendant should have been put on notice from the outset that no validly executed chattel mortgage deed had been created is by now fully clear. In addition, the infighting amongst the plaintiff company's shareholders (as evidenced by instances of rival or 'shadow' shareholders unilaterally handing over the plaintiff's two buses to the 1st defendant) is too obvious to be ignored by this court. An interesting story emerges around the decision by the shadow shareholders of the plaintiff company to remove the number plates from two of the buses. This set of events further extinguishes any equities that would then have vested to the 1st defendant bank in the form of a charge. This court takes exception to the apparent acquiescence by the 1st defendant in the 'dirt' of the infighting in the plaintiff's company and their conscious decision to take advantage of this conflict.

Furthermore, the manner in which the 1st defendant ignored the High Court's rectification order also suggests that they never intended to invoke any equities in the form of a charge against the two buses in the future. Thus, the decision to quickly recall the loan facility while at the same time holding UGX 20,601,590= in the

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where that person (a) has actual knowledge of the fact: or (b) receives actual or has constructive notice of the fact, where not the person acquires actual knowledge of the demand notice or document (2) a person shall be deemed to have received constructive notice of a fact if the circumstances are such that, that person would be reasonably expected to have been aware of that fact. Section 16 provides for requirements for enforcement against third parties (1) A security interest may be enforced against a third party including a purchaser of the collateral, a creditor, a judgment creditor and landlord distressing for rent, a trustee in bankruptcy, liquidator, receiver or administrator where (a) the debtor signs a security document that contains an identifying description of the collateral which on its true construction indicates that the purpose of the agreement was the creation of a security over the collateral, except where the collateral is in the possession of the secured party, or the possession of another person on behalf of the secured party and (b) the security interest is perfected. Section 23 provides for protection of purchasers of goods (1) A purchaser of goods in the ordinary course of business of the seller, takes the goods free of a perfected security interest created by the seller, even if the purchaser is aware of the existence of the perfect security interest.'

plaintiff's company bank account as of 7 September 2012 (PEX 7) (funds that could have partly discharged the loan obligation) creates sufficient suspicion with regard to the already weakened charge. The rejection of efforts by one of the shareholders to 'redeem' the two buses is a fact that this court has considered as capable of extinguishing whatever equity claim in the two buses could have remained for the 1st defendant as a charge. It is the finding of this court, therefore, that neither the common law possessory lien nor any equitable charged could come to the rescue of the 1st defendant.

7.5 Impeaching the 3rd defendant's title

In the absence of a validly executed chattel mortgage deed in law, at common law and in equity, it is the reasoning of this court that no power ever vested to the 1st defendant to instruct the 2nd defendant to sell the plaintiff's buses to the 3rd defendant. This conclusion is discernible from the purported foreclosing documents that seem to offer yet more interesting revelations.

The *New Vision* advertisement for the sale of the vehicles (PEX 10(1)G) clearly shows that what was for sale was one and not two buses. The fact that the 3rd defendant did not first carry out due diligence and bought the two with such reckless conduct excludes him from the claim that he had acquired the two buses *bona fides*.[34] All the evidence here suggests that the 3rd defendant should have been made aware of the *mala fides* in the purported sale triggering the full force of section 6 of the Chattels Securities Act.

[34] This court considered the fact that each of the buses were bought at UGX 350M (USD 109,000) and had comprehensive insurance from Uganda National Insurance Corporation at a cost of UGX 50M. These buses had run for a period of only two years, but were disposed of at UGX 70M each. Assuming that there were a valid chattel mortgage deed (this court has already ruled there was none), on the authority of *Moses Jim Jagwe v Standard Chartered Bank* HCCS No. 43 of 2020 a duty care which is usually imposed on an official receiver to exercise diligence had obviously been breached.

Cumulatively, these events provide sufficient reasons from which this court cannot legally draw any inference that any legal title was capable of being transferred from the 2nd defendant to the 3rd defendant. As a result, the plaintiff retained a reversionary interest in the two buses.

7.6 Money had and money received.

Although the transaction between the plaintiff and the 1st defendant was marred by illegalities, the 1st defendant's right to recover the outstanding loan amount from the plaint remains solid.

This view is supported by section 53(2) of the Contract Act, which cautions debtors not to expect to be able to take an advantage or benefit from an invalid contract. The position is that such a debtor must return (so to speak) any advantage that he or she could have enjoyed arising out of such a contract. Section 54(1) and (2) decrees that such a person

> is bound to restore it or to pay compensation for it, to the person from whom he or she received the advantage. (2) Where a party to a contract incurs expenses for the purposes of performance of the contract, which becomes void after performance under section 25(2), the court may if it considers it just to do so …

The above provision restates the old doctrine of the English law on unjust enrichment.[35]

[35] See *Fibrosa SA v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32; [1942] 2 All ER 122. In this case, view was that a claim for money had and received rests on the legal obligation to clear a debt notwithstanding the uncertainty of the contract or *indebitatus assumpsit.* The court in the case citation here is that the principle of money had and received is intended to discourage unjust enrichment. In essence, the recoverable money is not contingent on the contract.

Applying the above doctrine to the impugned chattel mortgage instrument before me, it is the decision of this court that the plaintiff must make good on all the unpaid balances that had been advanced by the 1st defendant bank.

8 Remedies available to the parties

This court has already determined that the disposal of the two buses was unlawful. This is because the disposal was executed by the official receiver who had been improperly appointed by the 1st defendant under an invalid chattel mortgage deed instrument. The conclusion was that, as a result, no title in the two buses passed to the 3rd defendant. The prayers sought, which I will discuss shortly, are therefore against all the defendants. There is evidence on record that the rest of the securities, including personal guarantees which had been executed under the instrument, were (by mutual agreement) discharged because they were personal in nature.

The remedies under discussion here shall concern only the two buses (the subject of the chattel mortgage instrument). The plaintiff prayed and pleaded for special damages to the actual value of the two buses. Also prayed for is a claim in the losses of daily income from the two buses, along with the unconditional release of UGX 20,601,590= (an amount that remained frozen on the plaintiff's Account No. 1003200496304=) held by the 1st defendant. The plaintiff also prayed for general and aggravated damages for the illegal sale of the two buses as security. The plaintiff prayed that interests on special, general, and aggravated damages start to run from the date the cause of action arose. They also prayed for costs of the suit.

8.1 Assessment of damages

The idea that damages are a form of costs for litigation is now well accepted in the determination of the reliefs available in cases of this nature. The consensus of the

courts seems to be that damages are intended to give the wronged persons compensation for the loss or injury suffered.[36]

Whenever a party makes a prayer for special damages, a particular injunction is then imposed by a court requiring that those damages must always be pleaded and proven.[37] Special damages are usually linked to the actual money lost, and must flow directly and immediately from the breach of contract. The principle is that these damages are assessed from the time the hearing of the case began and are granted on account of the fact that the liable party should have anticipated that an injury would be suffered.[38]

There is no gainsaying that the grant of general damages is a discretionary exercise of the judicial power and should always be exercised with caution.[39] In determining the nature and extent of general damages, the courts are called upon to consider the value of the subject matter, the economic inconvenience suffered, and the extent of the breach.[40] In summary, general damages are restitutive in nature such that the injured person can be returned to the position that he or she was in before the wrong.

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[36] *Robert Cuosesens v Attorney General* SCCA No. 8 of 1999.

[37] Blackstone, W *The Laws of England volume II* University of Chicago Press: Chicago (1979: 218) defines 'special damages' with reference to restitution of a wronged party that does not naturally flow from the wrong but is nonetheless the outcome of the circumstances of the wrong; depending on the wrong complained of, the injured party is then entitled to compensation. According to Black HL & Black HC *Black's Law Dictionary* (6th ed) Springer: Berlin 1891–1991: 392 para I l, 'special damages' refers to those damages 'which are actual, but not the necessary, result of the injury complained of, and which in fact follow it as a natural and proximate consequence in the particular case, that is, by reason of special circumstances or conditions ... which do not arise from wrongful act itself, but depend on circumstances peculiar to the infliction of each respective injury'.

[38] See *Uganda Commercial Bank v Deo Kigozi* [2002] l EA 293.

[39] *Fred Kamugira v National Housing & Construction Company* CS No. 127 of 2008 per Bashaija J.

[40] *Uganda Telcom v Tanzanite Corporation* [2005] 351.

Arguably, it is preferred that the court consider whether the plaintiff ever attempted to mitigate the wrong.

9 Final orders

Given the findings made on all the issues as framed by the parties, the following final orders are made:

1. The chattel mortgage instrument executed between the plaintiff and the 1st defendant is declared invalid and unlawful with no force of law.
2. The recall of the loan facility was unlawful because there is no sufficient evidence that the plaintiff had defaulted on the obligation to pay the loan balance of UGX 41,611,369.67=.
3. The appointment of the 2nd defendant as the official receiver under the terms of an invalid chattel mortgage instrument was illegal and of no consequence.
4. Notwithstanding the illegal instrument, the disposal of the two buses by the 2nd defendant could still have passed a good title only when third parties had no notice of the *mala fides.*
5. It is declared that the 3rd defendant acquired no title in the two buses because he purchased the two buses *mala fides.*
6. Considering the evidence that the 1st defendant foreclosed the plaintiff's loan with a demand default notice of UGX 41,611,369.67= when the plaintiff had UGX 20,601,590= in their account implies that they must have anticipated that their action would in fact cause injury. I therefore allow special damages of UGX 20,601,590= against the 1st defendant.
7. It must also have been known to the 1st defendant that no valid chattel mortgage deed instrument was incapable of creating any charge on the two

buses. In view of this consideration, I will also allow special damages of UGX 500,000,000= against the 1st defendant for the two buses, taking into account the depreciation rate of 10% from the date of purchase to the time of disposal.

8. The award in paras 6 & 7 shall attract the commercial rate of interest from the date of filing the suit until payment in full.

9. Given the loss of daily income from each of the buses of UGX 600,000=, I will allow general damages determined as follows:

a) I will also award UGX 100,000,000 against the 1st defendant as general damages, which I consider enough to atone for the inconvenience suffered by the plaintiff.

b) An award of UGX 20,000,000 as general damages against the 2nd defendant is granted given the failure to conduct the necessary diligence required of a law firm in the disposal of the two buses to the 3rd defendant.

c) Also awarded is UGX 10,000,000 as general damages against the 3rd defendant for the decision to acquire the two buses *mala fides.*

d) The two buses should be handed back immediately to the plaintiff.

e) The award in para 9(a), (b) and (c) shall attract the commercial rate of interest from the date of judgment until payment in full.

1. Costs are also awarded and shared in the ratios of 75% for the 1st defendant, 20% for the 2nd defendant, and 5% for the 3rd defendant.

2. The total amount of award shall consider UGX 41,611,369.67= deductible at source as the outstanding loan due at the time of the foreclosure.

9.1 Obiter

This court noted that Mr Denis Kiwalyabye, who previously represented the 1st defendant during trial, opted to testify as the 1st defendant's witness. He elected to testify after the closure of the plaintiff's case. It was the argument of the plaintiff that his decision to defend the 1st defendant contravened the Advocates (Professional Conduct) Regulations. [41] Mr Kiwalyabye in fact admitted that he had represented the 1st defendant bank by drafting pleadings, fully participating in scheduling case conferences and cross-examining the plaintiff's witness.

Wambuzi CJ as he was then, while discussing the equivalent Rule 9 of the Advocates (Professional Conduct) Regulations, takes the view that

> it is generally accepted that the main intention of this regulation is that an advocate should not act as Counsel and witness in the same case … an advocate who acts or appears in a case should know whether or not he would be required as witness. If so, then he must not appear before a court as an advocate in the case.[42]

This court can only question the ethical judgment of the 1st defendant's lawyer, who initially defended the suit but then later elected to testify as a witness. However, I find no precedents to suggest that such behaviour may invalidate the proceedings of the court of law.

[41] Regulation 9 of SI 267-2

[42] *Yunusu Ismail v Alex Kamukama & Ors* Civil Appeal No. 7 of 1987 (unreported). See also *Uganda Development Bank v Kasirye Byaruhanga* SCCA No. 35 of 1994 where Platt JSC advises such advocates never to continue in the conduct of the case.

Douglas Karekona Singiza

Acting Judge

14 December 2023