

THE REPUBLIC OF UGANDA,

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL SUIT NO 314 OF 2007

COPY LINE LIMITED}.....PLAINTIFF

VS

1. RAPID SHIPPING AND FREIGHT UGANDA LTD}

2. RAPID FREIGHT INTERNATIONAL L.L.C}.....DEFENDANTS

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

JUDGMENT

The Plaintiff commenced this action against the first Defendant which is a limited liability company incorporated in Uganda and the second Defendant, a limited liability company incorporated in the United Arab Emirates. The action is for recovery against the Defendants jointly or severally of special damages amounting to US\$38,360, general damages, interests and costs of the suit. The goods were loaded by the second Defendant in Dubai for shipment to the Plaintiff in East Africa. The Plaintiff paid the first Defendant in Uganda for the freight charges. The goods got lost on transit from Mombasa to Busia at the Uganda border. Both Defendants deny the suit. For the second Defendant it is admitted that it shipped the Plaintiff's goods from Dubai to Mombasa according to the shipping documents. However the second Defendant asserts that it fulfilled its part of the bargain. The Plaintiff thereafter instructed third parties to freight the goods from Mombasa to Busia when they got lost en route. The Plaintiff on the other hand asserts that it instructed the first Defendant to clear and ship the goods from Mombasa to Dubai. The first Defendant denies this and claims that it acted as an agent of the second Defendant only and that is why it received freight charges for the goods on behalf of the second Defendant.

The Plaintiff is represented by Counsel Adubango Richard of Messieurs Lwere Lwanyaga and Company Advocates while the Defendant is represented by Counsel Noah Mwesigwa of Messieurs Shonubi Musoke & Company Advocates.

The agreed issues are:

1. Whether or not there was a contract between the Plaintiff and the first Defendant, and if so on what terms?
2. Whether or not there was a contract between the Plaintiff and the second Defendant, and if so on what terms?
3. Whether the Defendants breached the contract?
4. What remedies are available to the Plaintiff?

The receipt for US\$2160 was tendered in evidence as exhibit P1 and is dated 13th of March 2007. Secondly the house to house Bill of lading was tendered in evidence as exhibit P2. The matter originally proceeded before Hon Mr. Justice Lamech Mukasa and was subsequently transferred to me upon his transfer to another division of the High Court.

The Plaintiff called one witness PW1 Mr Stephen Lubega, the Managing Director of the Plaintiff and closed its case while the Defendants called two witnesses namely, DW1 Mr Herman Lewis, Director of the first Defendant and DW2 Mr Walter Pereira, Head of Operations of Rapid Freight International LLC, the second Defendant.

The court was addressed in written submissions and the facts of the dispute are considered together with the written submissions.

The Plaintiff's Counsel first addressed the second issue of whether or not there was a contract between the Plaintiff and the second Defendant and if so on what terms first.

In the written submissions the Plaintiff relies on Black's Law Dictionary Abridged Fifth Edition page 170 for the definition of a contract as an agreement between two or more persons which creates an obligation to do a particular thing. Secondly he relies on the definition of an agreement as a concord or understanding and intention between two or more parties with respect to the effect upon the relative rights and duties of certain past or future fact or performances. Furthermore the Plaintiff's Counsel relies on Cheshire and Fifoot, Law of Contract 10th Edition page 25 for the definition that an agreement is not a mental state but an act and as an act, it is a matter of inference from conduct. The parties are to be judged not by what is in their minds but what they have said or written or done.

The Plaintiff's Counsel sought to demonstrate that there was an agreement between the Plaintiff and the Defendant judging by the documents exhibited in court and the conduct of the parties. With reference to the evidence of PW1 Mr Stephen Lubega, the Managing Director of the Plaintiff Company, the Plaintiff deals in office equipment and stationery in Kampala. The managing director travelled to Dubai in January 2007 from where he contracted the second Defendant to ship the Plaintiff's goods to Mombasa while he contracted the first Defendant on his return in Kampala, to clear the goods in Mombasa and transport them to Busia, Uganda. The list of items the Plaintiff bought was exhibited as exhibit P3 - P18. PW1 testified that there were a total of 60 packages which it took to the second Defendant's yard in Dubai and the second Defendant agreed to ship them to him in Kampala via Mombasa. He met an employee of the second Defendant one Leticia who received the goods and agreed to ship the goods to Kampala. He was further informed that if he had no money left on him he would pay the freight charges in Kampala at the offices of the first Defendant. He came to Kampala and offices of the first Defendant and met Mr. Herman Lewis who requested him to pay US\$2160 which he according to the receipt exhibit P1 issued by the first Defendant's office in Kampala. Furthermore after paying the money the first Defendant gave the Plaintiff a copy of the Bill of lading exhibit P 19 dated 8th of February 2007. DW1 later requested the Plaintiff's managing director to give to the first Defendant the Plaintiff's parking list to enable the first Defendant clear the goods in Mombasa and transport it to the Plaintiff in Busia, Uganda as agreed. The Plaintiff travelled to Busia but did not receive the goods because DW1 later told him that the goods have been lost by Container Freight Ltd, the Kenyan transport company which the Defendant had hired to transport the containers in which the goods were to Uganda. Exhibits D8 and D19 documents from Kenya revenue authority and Kenya police confirm that container number TRLU 256 7120, which is known to have contained the Plaintiff's goods were indeed one of those containers that never reached its destination because they were reportedly stolen in Kenya on transit to Uganda.

The Plaintiff's Counsel submits from the testimony of PW1 as well as the documents exhibits D5, P1, P2 and P 19 and the conduct of the second Defendant that there is evidence of an understanding between the parties concerning the Plaintiff's goods that were received from PW1 for shipment to Kampala from Mombasa. Exhibit D5 is an invoice issued by the second Defendant to Stephen Lubega PW1, the managing director of the Plaintiff Company. It refers to Bill of lading number 701MSA – 038 (to exhibit P 19) which is the Bill of lading issued by the

Gulf Liner Shipping Agencies LLC as agents of Global Container Lines Ltd, the carrier of the second Defendant as the shipper and the first Defendant is mentioned therein as the consignee. The container number TRLU - 256 7120 in which the Plaintiffs goods were packed is referred to as a 20 feet container and is stated to contain 381 packages of tiles, auto spares, used engine, electronics and photocopy machine that were received from the shipper (the second Defendant) for shipment to Uganda via Mombasa on the consignee's own arrangement, cost and risk. The container details are stated to be house to house and the freight charge for the whole container is indicated to have been repaid by the shipper to the carrier before the ship sailed.

The invoice also makes reference to exhibit P2, number HDL 70032E which is a combined the bills of lading issued by the second Defendant to the people whose goods are in the container number TRLU – 256 7120. In it the shipper is indicated as Stephen Lubega c/o the second Defendant and the consignee is the Plaintiff. The goods are described to be 60 packages of photocopy machine measuring a total space of 9 feet. The notifying party and the delivery agent is the first party. The freight charges are to be collected from the consignee. Exhibit P1 is issued by the first Defendant in Kampala and it makes reference by numbers of the documents to the invoice exhibit D5 and P2, the combined the Bill of lading. DW1 and DW2 testified that the goods were shipped to Mombasa and a truck was hired to transport the container to Busia Uganda but the transporter diverted the container which was found empty at the border of Kenya and Tanzania.

From the documents and conduct of the parties the second Defendant in shipping the goods and sending the documents in respect of the goods and container to the first Defendant in Kampala for the benefit of the Plaintiff and other people's goods were in the container. The Plaintiff proved on the balance of probabilities that there was a contract between him while he was in Dubai in January 2007 and between the Plaintiff and the second Defendant to ship the Plaintiffs goods to it in Busia Uganda, via Mombasa.

The Plaintiff's Counsel further submitted that the terms of the contract on which the second Defendant agreed to ship the Plaintiff's goods requires an examination of exhibit P1, P2, P 19 and D5 again. Exhibit D5 is a document exhibited by the first Defendant. It is an invoice number 700 0094 issued by the second Defendant to Stephen Lubega, the managing director of the Plaintiff. It makes reference to 3 important numbers namely TRLU 2056 7120 which is the 20

feet container in which the Plaintiffs goods were packed. Secondly 701 MSA – 038 in which the number of exhibit P 19 is written at the bottom page 2 of the house/house contract and thirdly 70032E which is the number of exhibit P2, the Bill of lading said to be a combined transport Bill of lading.

Exhibit P1 is the receipt issued to the Plaintiff by the first Defendant for payment of US\$2160 being settlement of freight DXB/Busia LCL shipment. The document makes reference to number 7000094 which is the number of the invoice issued by the second Defendant to the Plaintiff and SF 70032E which is the number of the combined Bill of lading issued by the second Defendant to the Plaintiff in respect of its goods delivered to the second Defendant for shipment. Exhibit P2 is the combined Bill of lading issued by the second Defendant to the Plaintiff in respect of 60 packages of goods occupying 9 feet in a 20 feet container number TRLU 256120 LCL/LCL and the delivery agent is named as the first Defendant. It also provides that the freight charges are to be collected from the Plaintiff. Exhibit P 19 is a house to house Bill of lading in which the shipper is mentioned to be the second Defendant and the consignee as the first Defendant. The document provides that freight charges have been prepared by the consignee. Additionally, the goods are said to have been received for shipment in transit to Uganda on the consignee's own arrangement, costs and risk.

Counsel relies on a textbook on Shipping Law by Simon Baughen 4th Edition at page 14 for the submission that if the shipper fills an entire container it is referred to as "Full Container Load" (FCL). It involves delivery of the full container to the consignee at the end of the carriage and the contract would be FCL/FCL. If the shipper can only use part of the container, it will take its goods to the container terminal where it would be packed by the carrier into a container along with goods dispatched by other shippers in a similar situation and the contract would be known as "Less than Container Load" (LCL). At the end of the carriage, the consignee will take delivery of the goods after they have been unpacked from the container. Such a contract will be LCL/LCL. Where the shipper packs a single container for delivery to more than one consignee, the contract will be FCL/LCL.

The Plaintiff's case is that the contract for shipment of the Plaintiff's goods involved loading the Plaintiffs goods comprising of 60 packages measuring 9 feet in a 20 feet container described above. Other people's goods were to be filled up in the container together with the Plaintiff's

goods. Secondly it is to ship the container from Dubai to the Plaintiff in Busia, Uganda via Mombasa on an FCL/LCL basis rather than on an LCL/LCL basis. Exhibit P2 indicates the delivery to be LCL/LCL while exhibit P 19 shows that the whole container was filled and shipped by the second Defendant as the only shipper but to be delivered to the many different consignees including the Plaintiff whose goods filled up part of the container. In the premises the contract was FCL/LCL. Thirdly the term was to send all the documents relating to the Plaintiffs goods and consignment to the Plaintiff through the offices of the first Defendant in Kampala and notify the Plaintiff of the freight charges payable upon the arrival of the vessel carrying the container in Mombasa and Uganda through the first Defendant. Fourthly to deliver the goods to the Plaintiff in Uganda through the first Defendant who was to collect the freight charges in respect of the shipped goods from the Plaintiff before he took delivery of the goods.

Submissions in reply to the second issue of whether or not there was a contract between the Plaintiff and the second Defendant, and if so on what terms?

As far as the second issue is concerned, the Defendant's Counsel submitted that the existence of contractual dealings between the Plaintiff and the second Defendant was for all intents and purposes agreed to by the second Defendant. DW2 Mr Walter Pereira testified that he established that the Plaintiff approached the second Defendant with regard to the transportation of his goods to Uganda. This was to be transported both by air and sea freight in accordance with the terms of service of the second Defendant. Based on the agreement of the parties, the second Defendant duly issued in respect of the Plaintiff's goods a house airway bill exhibited D3 sending goods to the Plaintiff through Entebbe and also issued in respect of the sea freight a house to house bill of lading exhibit P 19 and an LCL shipment bill of lading. The shipment was on transit to Uganda via Mombasa. When cross examined, he testified that the second Defendant was to transport the Plaintiff's goods coming by sea from Dubai and Busia pursuant to a sea freight bill of lading and those from Dubai to Entebbe pursuant to a house airway bill exhibit D3. The second Defendant was a freight forwarder in this transaction. In the case of *Phones Ababa versus Swift Freight International* HCCS number 1403 of 2000, Honourable Lady Justice Stella Arach Amoko held that an airway bill is prima facie evidence of the conclusion of a contract of carriage. Similarly in *Equinox Global Trading Company Limited versus Panalpina Uganda Limited* HCCS 1298 of 1999 Honourable Lady Justice Stella Arach Amoko held that in international law a bill of lading

is a document acknowledging the shipment of the consignor's goods for carriage by sea. It operates as the receipt of the goods; it summarises the terms of the contract of carriage, and acts as a document of title of the goods. The legal doctrine was applied in *Rapid Shipping and Freight Uganda Ltd and another versus Copy line Ltd* Miscellaneous Application Number 216 of 2012. In the premises the Defendants Counsel submits that there was indeed a contract between the Plaintiff and the second Defendant. Therefore what needs to be considered are what the terms of the contract are?

It is settled law in the authorities quoted above that a bill of lading is evidence of the contract and summarises the terms and conditions of the contract. The Plaintiff in his submissions sought to make a distinction between exhibit P 19 and exhibit P2 which at best was mixing up the issues. PW1 and PW2 testified that the container which had the Plaintiff's goods was a shared container that included goods of other people some of which were destined beyond Uganda. The main bill of lading is issued by the shipping line and the specific and particular bill of lading is issued to each individual customer who has goods in the container. Exhibit P2 was issued specifically in respect of the Plaintiff. The Defendant therefore contends that it is redundant for the Plaintiff's submissions to dwell on exhibit P 19 and give a legal interpretation yet the document relates to more people than the Plaintiff. The document includes spares and tyres that were not part of the evidence given by the Plaintiff as part of his goods. The owners of those goods are not parties to this suit and have not in any event raised a complaint or suit against the second Defendant. In the premises the Defendants Counsel contends that what is relevant for purposes of this suit is exhibit P2 which is the Bill of lading between the Plaintiff and the second Defendant in respect of the same goods that PW1 testified about as part of his claim. In the premises the terms of the contract are spelt out in the bill of lading.

The Defendants Counsel further contends that PW1 knew the terms of the contract of freight/shipping including those governing the bill of lading as he testified that he went to the offices of the second Defendant where he met the managing director who agreed to ship his goods. Upon discussion he separated his goods. Because he did not have money it was agreed that the money is paid to the second Defendant's agents at the first Defendant's offices in Kampala. Furthermore PW1 testified that he had previously done business with the second Defendant and they had never lost his goods. In cross examination he testified that he knew the

second Defendant very well and it was not his first time to ship goods from Dubai. The purpose of meeting the manager was to discuss credit and to finalise the terms of how to ship the goods. This testimony was confirmed by DW2. Consequently PW1 cannot claim to be unaware of the terms of the bill of lading issued by the second Defendant. The other terms of the contract can be discerned from the evidence of DW 2 who testified that the Plaintiffs goods were 9 feet in a 40 feet container and the second Defendant's duty was to ship the goods from Dubai and Busia which included F.O.B. warehousing, container, Ocean freight, transit clearance and lastly Mombasa transport by container freight.

There was a contract and the terms of the contract were that the parties had contractual dealings which are agreed as a matter of fact. Secondly the parties met and discussed details of shipment by air and sea; the Plaintiff was knowledgeable of the process of shipping goods; the terms contained in the bill of lading and the airway Bill governed their contractual arrangements. The Plaintiff requested the second Defendant for credit and was conveniently allowed to pay in Kampala at the first Defendant's premises. The second Defendant was required to transport the Plaintiff's goods from Dubai to Busia, Uganda.

Without prejudice the Defendant's Counsel submitted that it is settled law that the principles governing contracts of freight/contract of carriage to which bills of lading apply, knowledge of the terms of the bill of lading are implied and presumed on the parties. In addition there are terms and conditions to which the consignee by agreeing to have his goods transported accepts the process of the contract. In exhibit P2 the contract evidenced by this bill of lading was governed by English law and in dispute should have been determined by the English courts only as between the Plaintiff and the second Defendant. The court having heard and obtained the benefit of the evidence should acknowledge and find that as far as regards the second Defendant, this court has no jurisdiction to hear and determine the matter or to apply Ugandan law.

Whether or not there was a contract between the Plaintiff and the first Defendant, if so on what terms?

The Plaintiff's Counsel with reference to the evidence of PW1 submitted that PW1 delivered the goods and the second Defendant's yard in Dubai and was advised by one Letitia an employee of the second Defendant to make payments at Kampala office of the first Defendant. He testified

that the first Defendant through DW1 called and informed him that the vessel carrying the goods had arrived in Mombasa. DW1 asked PW1 to avail DW1 with the Plaintiff's packing lists and invoices to enable the first Defendant submitted them to Kenya Revenue Authority and the Mombasa Port Authority to clear the goods in Mombasa. DW1 advised the Plaintiff that the first Defendant would clear the goods in Mombasa, transport and delivery them to the Plaintiff in Busia. Later on DW1 called the Plaintiff and advised him to go and take delivery of the Plaintiff's goods in Busia but later changed and said that the goods were stolen while on transit to Uganda by a transport company which he had hired to transport the goods to Uganda. DW1 tendered exhibits D8 and D9 from Kenya Revenue Authority and Kenya Police which confirmed that a complaint had been lodged about the stolen container and goods. Exhibit P 19 which is the bill of lading issued by the vessel/carrier, Global Container Lines clearly shows that the shipper of container number TRLU 257220 is the second Defendant while the consignee is the first Defendant. Also exhibit D5, the invoice issued by the second Defendant indicates that the customer is Rapid Shipping & Freight (U) Ltd which is the first Defendant. This means that for purposes of the container shipped by the second Defendant, the owner of the goods is the first Defendant.

The Plaintiff's Counsel submitted that it was an understanding between the first and second Defendants where the second Defendant shipped the container filled with the goods belonging to five different people to the first Defendant as the consignee. It was the first Defendant's obligation to notify the people, whose goods were in the container of the arrival of the vessel in Mombasa, collect from them the required documents for purposes of declaration and clearance of the goods, transport the container and deliver the goods to the owners of the goods in Uganda. In the case of the Plaintiff, the first Defendant also had to collect the freight charges from the Plaintiff, hence the receipt.

The Plaintiff's witness testified that DW1 advised him to pay the US\$2160 to the first Defendant and the first Defendant would clear and transport the goods from Mombasa to Busia Uganda upon receipt thereof. Thereafter the first Defendant notified the Plaintiff of the arrival of the container in Mombasa. Secondly the first Defendant asked the Plaintiff to furnish him with the packing list and invoices to be sent to Mombasa to enable the clearance of the container; hired a truck to transport the container from Mombasa to Busia Uganda; notified the Plaintiff to go and

receive its goods at Busia; notified the Plaintiff of the theft of the goods. The sequence of events confirms that there was an agreement and therefore a contract between the Plaintiff and the first Defendant in respect of the Plaintiff's goods which were shipped from Dubai by the second Defendant and consigned to the first Defendant in Kampala.

The second Defendant relied on the first Defendant for the clearance of the container in Mombasa, its transportation and delivery to the respective owners in Uganda. The first Defendant is a limited liability company whose objects fit the arrangement between the second and first Defendant in regard to the consignment shipped from Dubai to be delivered in Uganda. The first Defendant executed these jobs on its own hence the receipt on his letterheads does not state that they were acting as agents of the second Defendant. The act of hiring of the truck to transport the container from Mombasa, the clearance and payment of the requisite charges on the container at Mombasa is also included.

The Plaintiff's Counsel submitted that the Plaintiff discharged the burden of proving a contract between it and the first Defendant on the balance of probabilities and as demonstrated by the evidence above. As for the terms of the contract, from the conduct of the first Defendant, the Plaintiff engaged the first Defendant on the following terms; to notify the Plaintiff of the arrival of the container in Mombasa; to collect the necessary documentation such as packing lists and invoices from the Plaintiff and submit them to authorities in Kenya; clear the goods at Mombasa port, pay the requisite charges for its release; transport the goods/container from Mombasa to Busia, Uganda; notify the Plaintiff of the arrival of the goods in Uganda; and they did notify the Plaintiff of the loss of the goods.

In reply to the issue of whether there was a contract between the Plaintiff and the first Defendant and the terms thereof, the Defendants Counsel submitted that there was no contract. The Plaintiff alleged existence of exhibit P1 created a contract between the first Defendant and the Plaintiff. The submission is flawed. PW1 testified under cross examination that he requested for credit and was allowed to pay at the first Defendant's offices. Although he testified in chief that upon reaching the offices of the first Defendant, he entered into a contract for transportation from Mombasa to Busia separately, the Plaintiff's evidence falls short of this assertion. This is because PW1 did not adduce evidence to show the amount he had been charged from Dubai to Mombasa and the top up of Mombasa to Busia that would be apportioned to the first Defendant. This

would have been very important to the court in making the fundamentals of a valid contract, i.e. the consideration for the portion he claims the first Defendant was transporting for. The Plaintiff did not discharge the burden of proof.

Secondly the Bill of lading exhibit P2 has reference HBL RFI SF 70032E and indicating the container number TRLU 256 7120 is between the second Defendant and the consignee Copy Line Ltd. The first Defendant is merely listed in the bill of lading as a "notify party" and most importantly as a "delivery agent".

Thirdly the export instructions clearly indicate "shipment in transit to Uganda via Mombasa";

Fourthly exhibit P1 which forms the foundation of the Plaintiff's alleged Nexus with the first Defendant clearly stipulates that the amount paid was in settlement of "freight DXB/Busia LCL shipment 700 0094/SF 70032 E."

Additionally the defence evidence is clear on the issue. DW1 testified that the first Defendant received an invoice from the second Defendant exhibit D5. The invoice number was 700 0094. His testimony was further that his duty was to inform the Plaintiff and advise it to pay for the freight as agreed with the second Defendant in Dubai. He confirmed that the role of the first Defendant was merely that of an agent. Under re-examination he further pointed out that the Memorandum and Articles of Association of the first Defendant tendered as exhibit P 21 object (c) stipulated among objects to represent in Uganda foreign companies and entities engaged in the business of transportation, freight forwarding or such other similar business or undertaking as the company shall determine. In the premises DW1 testified that their role was merely that of an agent. On the other hand DW2 unequivocally testified that the first Defendant is a separate legal entity which acted as an agent in the transaction in question.

The Defendant's Counsel relies on the case of **Equinox Global Trading Company Limited versus Panalpina Uganda Limited HCCS No. 1298 of 1999** in which similar circumstances as to agency arose. The learned trial judge held that as the bill of lading was very clear as to its parties there could not exist a second contract of carriage and sale of goods especially as that would be inconsistent with the bill of lading. Secondly according to **Halsbury's Laws of England Fourth Edition Volume 1 Paragraph 855**, as a general rule, an agent cannot be liable on the contract to the other contracting party and only the principal can be sued or can sue.

According to **Charlesworth Business Law**, where an agent contracts as an agent for his principal, he incurs neither the rights nor the liabilities of the principal and there is no presumption of liability on the part of the agent.

In the premises the Defendants Counsel submitted that the first Defendant was an agent of a disclosed principal and did not enter into any contract with the Plaintiff but merely acted as an agent of the second Defendant. Because no contract existed between the same parties, there cannot be any terms of a non-existent contract.

Issue number 3: **Whether the Defendants breached the contract?**

The Plaintiff's Counsel submitted that it is an agreed fact that the Plaintiffs goods went missing in Kenya whilst on transit to Uganda. Additionally there are documents exhibits D8 and D9 which point to the same fact. The second Defendant advised the Plaintiff to pay freight charges for the shipment of the goods to the first Defendant in Kampala. On arrival at the first Defendant's offices in Kampala, the first Defendant informed the Plaintiff that upon payment of the amount advised, it would clear the goods in Mombasa, transport it by road and deliver it to the Plaintiff in Busia, Uganda. The Plaintiff paid and was issued with a receipt.

The first Defendant by the conduct did the following things: Notified the Plaintiff of the arrival of the container in Mombasa; collected from the Plaintiff the packing lists and invoices for purposes of clearance of the goods; submitted those same documents to the Kenya Revenue Authority and the Kenya Ports Authority in Mombasa; hired a truck to transport the container from Mombasa to Uganda. Notified the Plaintiff of the projected date of arrival and later informed the Plaintiff of the loss of the container. Additionally the first Defendant adduced evidence to show loss of the goods. The first Defendant breached the contract by failing to deliver the Plaintiff's goods to Busia, Uganda.

In reply the Defendant's Counsel submitted that there was no breach of contract. He relied on the case of **Ronald Kasibante vs. Shell Uganda Ltd**, where it was held by Hon. Bamwine J that breach of contract is the breaking of the obligation which the contract imposes, which confers a right of action for damages on the injured party. It entitles the injured party to treat the contract as discharged if the other party renounces the contract or makes its performance impossible or substantially fails to perform his promise. The victim of the breach will have to decide which of

the three possible courses is most appropriate such as suing for damages; treating the contract as discharged; and seeking a discretionary remedy, such as specific performance.

On the issue of whether there was breach of contract by the first Defendant, the Plaintiff's Counsel submitted that the first Defendant never breached any contract as it was merely an agent of a disclosed principal. The first Defendant if anything performed its obligations by receiving the Plaintiff's payment to the second Defendant and by releasing the bills of lading to the Plaintiff as required. Beyond that there was no contractual obligation which could have been breached.

On whether there was a breach of the contract by the second Defendant, Counsel submitted that DW2 testified that the second Defendant contracted Messieurs container freight to transport the container containing goods including the Plaintiff's goods from Mombasa to Busia. He testified that the lorry disappeared and has never been seen to date. DW1 also testified along the same lines and provided documentary evidence in exhibit PD8, D9 and D10. Investigations into the loss were still ongoing and the suspects have never been apprehended. The goods were lost in transit by a third party Messieurs Container Freight which information was brought to the knowledge of the Plaintiff. The second Defendant never delivered the Plaintiff's goods. This was due to an unforeseen criminal event which occurred while the goods were in the hands of a third-party and which frustrated the performance of the contract to transport the goods from Dubai to Busia.

Without prejudice, Counsel submitted that though the second Defendant took out third party proceedings and the notice was issued by the court, they were unable to trace the said Messrs Container Freight who were rumoured to have closed shop as a result of the incident. The second Defendant was unable to seek indemnification.

Issue Number 4: **What remedies are available to the Plaintiff?**

The Plaintiff's Counsel submitted that the Plaintiff's plaint seeks special damages of US\$38,360 being the value of the undelivered goods and US\$2160 being the freight charges it paid for the same. Secondly general damages for breach of contract to deliver the goods; interest at 10% per annum from the date of accrual till payment in full; and costs of the suit.

He submitted that the object of an award of general damages is to give the Plaintiff compensation for the damages, loss or injury he has suffered. Special damages are such as the law will infer from the nature of the act. They do not follow in the ordinary course but are exceptional in character and therefore must be claimed specifically and proven strictly (see *Storms Bruks Aktie Bolag vs. John Peter Hutchinson* (1905) AC 515 and *KCC versus Nakaye* (1972) EA 446).

Counsel relied on the exhibited receipts for items purchased in Dubai on behalf of the Plaintiff and handed over to the second Defendant for shipment to Uganda. The goods were received by the second Defendant who brought them on exhibit P2 and is 60 packages occupying 9 feet in the 20 feet container number TRLM2567120. The Plaintiff has the receipt for the payment of US\$2160. He submitted that the total amount spent on the goods according to the exhibits is 130,000= Dirham which is equivalent to US\$35,546. This amount has been proved by the Plaintiff.

Secondly Counsel submitted that the award of general damages is at the discretion of the court after considering the facts of each case. The Defendants took the Plaintiff's goods and lost it between themselves based on their internal arrangements and when the Plaintiff approached them they started tossing him around between Uganda and United Arab Emirates. He suffered loss of business and has been out the business since 2007. He is therefore entitled to an order of general damages. The Plaintiff's Counsel proposed a sum of Uganda shillings 30,000,000/= as an appropriate amount in the circumstances.

Furthermore Counsel submitted that the Plaintiff has not used its money since 2007 and is therefore entitled to an award of interest from the date of the loss of the goods in March 2007 and till the date of payment in full in terms of section 26 (2) of the Civil Procedure Act and as interpreted in *Charles Lwanga versus Centenary Rural Development Bank* (2000) KALR 652.

The Plaintiff's Counsel also prayed for taxed costs of the suit on the ground that costs should follow the event.

In reply the Defendant's Counsel submitted that the plaint is for damages comprised in US\$36,200 being the value of the goods in the container together with US\$2160 being freight charges and local shipment costs to Busia. The burden was on the Plaintiff to prove the validity and authenticity of its claims. On the burden of proof the Defendants Counsel relies on section

101 of the Evidence Act. He further submitted that special damages must be pleaded and strictly proved by the party claiming it (see the cases of Rosetta Cooper vs. General Neville and Another (1961) EA 63; Dada Cycles vs. Sofitra SPRL H.C.C.S. No. 656 of 2000 and Ronald Kasibante versus Shell Uganda Limited).

The Defendants Counsel submitted that PW1 testified that he bought and paid for items written in exhibit P3 – 18 as well as PID 1 – 7 which was never tendered in evidence. On cross examination on the particular exhibits P3 – 18 it was evident that he had no record or evidence to show that he in fact travelled to Dubai with a sum of money amounting to the alleged value of the purchases he made. When cross examined he confirmed that he had nothing to show that he had withdrawn while in Uganda and carried more than US\$10,000 and declared it to the customs officers in Dubai. The Law of United Arab Emirates requires every visitor to declare to customs whether he is travelling with money in excess of Dirham 100,000 which is approximately US\$27,000. The Plaintiff alleges that he had spent US\$36,200 in excess of the legal limit for purposes of declaration. Counsel invited the court to visit a website <http://www.dubaicustoms.gov.ae/en/eServices/ServicesForTravellers/Pages/DeclaringMoney.aspx> to verify the submission. The Plaintiff submitted a lot of information that would lend credence to his claim that he had breached the law. The court cannot accept this illegality or condone such practices.

The alleged receipts were not in the names of the Plaintiff. The only party to the suit is Messieurs Copy line Ltd. The receipts were in the names of Stephen or Yasin and some have no names. Only a party can sue on a document. The Defendants Counsel prayed that the court should be very cautious in accepting this evidence which may result in an injustice to the Defendants. Thirdly he submitted that some of the exhibits lack a receiver stamp i.e. exhibits P 10, 11, 12, 13, 14 and 15. Fifthly in addition to alleged supporting documents the dates are unclear or do not correspond to the period claimed in exhibits P6, 7, 8 and 9. On the sixth ground the documents provided merely indicate that they are invoices and receipts. There was no evidence of payment for such invoices. While exhibit P 16 clearly bears a paid stamp and the rest of the documents do not have it. Exhibit P 10, 11, 12, 13, 14, 15 and 18 clearly show that these are invoices with no record of payment. The documents are suspect and do not prove actual purchase. The documents further do not show any delivery notes or acknowledgement of delivery of receipt of the goods.

The Plaintiff never provided the packing list and never related the alleged documents in exhibit P3 – 18 to the bill of lading or packing list.

PW2 testified that it was common knowledge that anyone could obtain blank receipts in Dubai. The Defendants Counsel invited the court to take judicial notice of the reasons cited by Uganda Revenue Authority in applying their own value assessment because of tax avoidance through fictitious blank receipts issued in named countries which include Dubai.

The Plaintiff did not prove that it's claim as too many blanks remained as to confirm with certainty the goods lost or their value. PW1 in cross examination accepted that he travelled with some of the goods bought and that the alleged invoices by Air. These are the documents in exhibits D1 – 3. The Plaintiff never assisted the court by separating documents for goods which came by air and those who sent by sea freight. There is considerable uncertainty in that regard and the claim for special damages cannot stand. Counsel relied on the proposition in Uganda Telecom Limited versus Tanzanite Corporation Civil Appeal Number 17 of 2004 that special damages must be specifically pleaded and proved. He also referred to other authorities for the same principle namely Diary Development Authority versus Ngarambe HCCA No 10 of 2011. The onus was on the Plaintiff to specifically prove special damages. In the absence of adequate evidence special damages cannot be proved and the prayer for an award of special damages cannot be granted.

Without prejudice the Defendant's Counsel submitted that if the court is inclined to award any special damages, this could be based on the testimony of DW1 and DW2 based on the value ascertained by the Kenya Revenue Authority upon arrival of the entire container in Mombasa in exhibit D4. Exhibit D4 was given to the Defendant by the Plaintiff in his own testimony. The packing list was never provided in Dubai but only in Uganda after the goods had arrived. The customs value of the goods was assessed at Kenya shillings 4,000,000/= for the entire container according to exhibits D6 and D9. The approximate value of the Plaintiff's goods is US\$7850 and the second Defendant is willing to settle 50% of the said sum as the only proven or known special damages.

As far as the claim for general damages is concerned, DW2 testified that the offer to pay the Plaintiff is equal to 50% of the value soon after the event. The Plaintiff elected to sit back rather

than act as a prudent business person and recover that amount. The second Defendant could have also had the benefit of the insurance if the Plaintiff had lodged a formal claim earlier. This was never done. In the premises the Plaintiff is not entitled to the exercise of the courts discretion in the award of general damages.

As far as the claim for interest is concerned, in the event that the court deems it fit to grant interest, it ought to be granted at court rate because the Plaintiff did not come to this court with clean hands.

As far as costs are concerned the Defendants Counsel submitted that the Plaintiff had an option to resolve the suit long before the suit came to court and should therefore not be entitled to costs as against the Defendants. Lastly Counsel submitted that there was no contractual relationship with the first Defendant and the suit as against the first Defendant should be dismissed with costs to the first Defendant. Secondly the court should be pleased to dismiss the suit against both Defendants with costs.

Judgment

I have carefully considered the Plaintiff's suit, the evidence adduced orally by the witnesses and the documentary evidence and I have read through the submissions of Counsel as set out above.

The Plaintiffs claim as disclosed by the pleadings is that around the year 2007 its representative travelled to the United Arab Emirates and purchased various items for sale. The Plaintiff handed over to the second Defendant 60 pieces of items for onward shipping to the Plaintiff at Kampala according to a copy of the bill of lading issued to it by the second Defendant. The second Defendant advised the Plaintiff to pay for the freight services at the first Defendant's offices at Kampala. On reaching the first Defendant's offices, the Plaintiff agreed with the first Defendant to clear the Plaintiff's goods at Mombasa and transport it to the Busia entry point. The first Defendant thereafter informed the Plaintiff that the goods had been cleared at Mombasa port and the container was loaded on truck number KAU 570H/202673 driven by one David Ngugi destined for the Ugandan border. However, at the time of filing the suit as well as the time of hearing, the Defendants had failed to transport or deliver the consignment to the Plaintiff as agreed despite several calls and reminders to do so. On the basis of the above the Plaintiff alleges

breach of contract for failure to transport and deliver the goods at the agreed point and failure to keep the goods securely.

In reply the Defendants deny liability and as far as the first Defendant is concerned, they assert that there is no contract between the first Defendant and the Plaintiff for the transportation and clearance of goods either from Dubai or Mombasa. The first Defendant merely acted as an agent to collect and freight on behalf of the actual transporters. The Plaintiff's goods were under the custody of Container Freight Company and disappeared on transit from Kenya to Uganda. The Defendants rely on the police reports showing that the goods disappeared while on transit to Ugandan from Kenya.

For the second Defendant the claim is denied. The second Defendant asserts that it entered into a freight arrangement/contract with the Plaintiff and the particulars are contained in the house to house bill of lading which was prepared and issued by the second Defendant in respect of the cargo. The second Defendant shipped the Plaintiff's goods to the designated port of discharge where the same arrived. There was no formal contract between the Plaintiff and the second Defendant as to the transportation of the goods from Mombasa to Kampala. The Plaintiff was responsible for the transportation of his goods and remains liable for any loss from Mombasa to Kampala. The goods went missing in Kenya while on transit to Kampala. Among other things the second Defendant asserts that it is the third-party in whose possession the goods went missing who should be liable. In the alternative the second Defendant asserts that the value of the goods claimed by the Plaintiff are grounded on forgeries, are exaggerated, fictitious and cooked up and therefore fraudulent.

In the joint scheduling memorandum endorsed by both Counsels the following are the agreed facts:

1. The Plaintiff had a consignment of goods from Dubai to Uganda via Mombasa.
2. The Plaintiff's goods were shipped pursuant to a house to house Bill of lading (exhibit P2).
3. The first Defendant received US\$2160 from the Plaintiff on 13th March 2007.
4. The Plaintiff's goods went missing in Kenya while on transit to Uganda.

The receipt for US\$2160 was tendered in evidence as exhibit P1 and is dated 13th of March 2007. Secondly the house to house Bill of lading was tendered in evidence as exhibit P2.

The brief facts in support of the Plaintiff's case are that it had a consignment of goods from Dubai to Uganda via Mombasa. The Plaintiff handed over the goods to the second Defendant in Dubai to be forwarded to the Plaintiff in Uganda. The first Defendant received US\$2160 from the Plaintiff on 13th March 2007. The Plaintiff's goods went missing in Kenya while on transit to Uganda.

The Defendant's case on the other hand is that the Plaintiff contracted the second Defendant to carry out the freight of certain goods from Dubai to Busia and some from Dubai to Entebbe. The first Defendant is an agent of the second Defendant and undertook to receive the contractual sum on behalf of the second Defendant and handover the freight documents to the Plaintiff to enable the clearance of the goods. The goods disappeared while on transit to Busia on the Ugandan border and the Plaintiff filed this suit seeking recovery or compensation for his goods. Initially the first Defendant raised a preliminary point of law which resulted in the Plaintiff amending the plaint to include the second Defendant.

The agreed issues are:

1. Whether or not there was a contract between the Plaintiff and the first Defendant, and if so on what terms?
2. Whether or not there was a contract between the Plaintiff and the second Defendant, and if so on what terms?
3. Whether the Defendants breached the contract?
4. What remedies are available to the Plaintiff?

From the first two issues some crucial matters should be set out. It is not in issue that there was a contract between the Plaintiff and the second Defendant to freight goods from Dubai. What are in issue are the terms of the contract. What is in contention is whether the Plaintiff had a contract with the first Defendant and if so what the terms of that contract are. The first Defendant asserts that it merely acted as an agent of the second Defendant in Uganda through whom the Plaintiff paid for the freight services and it should be discharged. Lastly whatever the court decides it is an admitted fact that the goods went missing while on transit from Mombasa Port in Kenya to

Busia on the Ugandan border where the goods were to be delivered. There is a lot of contention as to the exact quantity of and value of goods shipped or agreed to be shipped to Mombasa in the very least destiny port. What is crucial for this issue is what goods and value thereof were shipped to under the arrangement with the second Defendant on behalf of the Plaintiff. The resolution of that issue would only arise if the court finds any or both of the Defendants liable for the loss of the goods.

Just like the Plaintiff has done the starting point is to establish what the terms of the contract between the Plaintiff and the Defendant are. I will therefore start with the second issue as framed by the Counsels in the joint scheduling memorandum.

ISSUE 2

Whether or not there was a contract between the Plaintiff and the second Defendant, and if so on what terms?

Because the question as to whether there was a contract between the Plaintiff and the second Defendant has been admitted by the second Defendant the issue left deals with what the terms of the contract are. Secondly the second Defendants Counsel also raised the question of jurisdiction of this court to try the issue though there is a ruling of the court in that regard where the question of the Jurisdiction of the High Court was dealt with as a preliminary issue. Can I revisit the same issue? In the ruling at page 10 thereof I was persuaded by the holding in **S.S. Ardennes (Owner of Cargo) vs. S.S. Ardennes (Owners) [1950] 2 All ER 517** by Goddard CJ between pages 519 and 520 that a bill of lading is not by itself the contract between the ship - owner and the shipper of the goods because inter alia it is unilaterally issued by the ship owner. The contract comes into existence before the bill of lading is issued. The shipper does not sign the bill of lading. While the bill of lading may be excellent evidence of the terms of the contract, evidence of the oral contract made before the bill of lading was issued is admissible. I held that evidence of the contract could be adduced in court before the conclusion that parties agreed to the clause on exclusive jurisdiction of the English courts in exhibit P2 where a dispute arose between the parties which required adjudication by a court of law. The point of law raised was whether the Ugandan courts had jurisdiction.

I have accordingly revisited exhibit P2 which is the basis of objection to jurisdiction by the second Defendant and is a combined transport bill of lading reference HBL NO: RFI SF 70032 E. Exhibit P2 is issued by Rapid Freight International L.L.C. and shows that the shipper is Stephen Lubega C/O Rapid Freight INT LLC P.O. Box 97710 Dubai U.A.E. and the consignee is Copy Line Ltd P.O. Box 71323 Kampala, Uganda. The notify party is Rapid Shipping and Freight (U) Ltd P.O. Box 11683 Kampala. The country of origin of the goods is Dubai United Arab Emirates and the domestic/exports instructions were "Shipment in transit to Uganda via Mombasa House to House. The particulars of the container are TRLU2567120 SEAL 129695. The number of packages is 60 PKG. It describes the goods to be on LCL/LCL (1/40'). The gross weight is 1,500 KGS and measurement of 9FT.

Additional description shows the delivery agent's address is Rapid Shipping & Freight (U) Ltd, Mukwano Centre, and Kampala, Uganda.

Finally on jurisdiction the Bill of Lading provides that:

"the contract evidenced by or contained in this Bill of Lading is governed by English Law and any claim or dispute arising hereunder or in connection herewith shall be determined by English Courts only and no other court."

Evidence was adduced by PW1 Stephen Lubega, the Managing Director of the Plaintiff. He testified that he bought goods from Dubai and took them to the warehouse of Rapid Freight LLC International in Dubai. I wanted them to ship the goods from Dubai to Mombasa and they agreed to do so. He met a Lady called Leticia who is the owner/director of the second Defendant and she agreed to ship the goods. Some goods were shipped by air and some by ship. He left them to ship sixty packages by ship. The goods were shipped on credit and he agreed to pay for them at Kampala through the first Defendant. At Kampala he met one Herman of the first Defendant Company who told him that his company could clear the goods from Mombasa and transport them up to Busia and he paid US\$ 2,160 which included freight charges from Dubai. The receipt issued is for freight costs from Dubai to Busia in exhibit P1.

There is no testimony about an agreement to sort out disputes under the exclusive jurisdiction of English Courts or to give the technical agreed terms of a contract such as on dispute resolution.

On the other hand the first Defendant through Mr Herman Lewis, the country coordinator of the first Defendant agreed that on 8th February 2007 he received an invoice from the second Defendant in respect of the Plaintiff's goods. The description of the injuries include Ocean freight charges DXB to Busia 9 feet container and the amount was 2160 according to a copy of the invoice. Secondly the first Defendant also received from the second Defendant a combined transport Bill of lading exhibit P2 and a general Bill of lading exhibit P 19 to be handed over to the Plaintiff, upon the Plaintiff paying for the freight to enable him to clear the goods in Uganda. According to him exhibit P2 contains the standard terms of the second Defendant. Freight was payable in Kampala. Some of the Plaintiff's goods were transported by L freight and cleared by the Plaintiff's agents. They obtained a packing list from the Plaintiff for purposes of clearance of the goods. The goods sent by sea freight went missing while under the custody of Messieurs Container Freight Ltd, a third party in Kenya.

PW2 Mr Walter Pereira, the general manager of the second Defendant resident in Dubai, United Arab Emirates testified that the second Defendant is involved in arranging for the transportation of goods as on freight documents contained in bills of lading to the destinations designated and paid for by the client. He confirmed that the Plaintiff approached their offices for transportation of goods both by air and by sea freight. The goods were to be transported by sea freight in accordance with the terms of service of the second Defendant. The Plaintiff delivered 60 packages of items which were said to contain photocopy machines. The second Defendant did not participate in the packing, accounting, verification or inspection of the goods and did not provide the second Defendant with the packing list for the goods. There were verbal discussions between the Plaintiff and the second Defendant in which it was agreed that freight would be payable for both the freight and sea freight and also on the price and the manner of payment. The Plaintiff did not have sufficient funds to pay for the air and sea freight at that point. It was agreed that freight would be payable in Kampala and the invoice will be sent to the first Defendant who was an agent of the second Defendant in Kampala. The second Defendant issued an airway Bill exhibit D3 and a house to house bill of lading exhibit P 19 in respect of the goods. He testified that both the airway Bill and the Bill of lading exhibit P2 clearly stipulated that any dispute in respect of the transaction regarding the matters covered in the Bill of lading would be subject to English law and the English courts shall have exclusive jurisdiction. Finally the goods went missing under the custody of a third party Messieurs Container Freight Ltd while transporting the

same to the Plaintiff. Principally the second Defendant relies on the Bill of lading for the terms of transportation of the Plaintiff's goods. DW2 admitted that they outsourced services of a transporter called Container Freight Ltd but the goods were stolen or robbed on the way. The Plaintiff is a known customer of the second Defendant having previously used the services of the second Defendant. It was the first Defendant Messieurs Rapid Freight (U) Ltd which arranged for the transport to Uganda from Mombasa although DW2 outsourced Container Freight Ltd.

I have carefully considered the question of jurisdiction of the Ugandan courts. The contract was to be performed in Uganda and in Dubai and was for purposes of transportation of goods to Busia in Uganda. The question is whether the clause in exhibit P2 about the application of English law as well as the exclusive jurisdiction of the English courts applies. Exhibit PE 2 provides that it is for the shipment in transit to Uganda via Mombasa house to house. On the other hand the second Defendant submitted that it was not liable for the loss of the goods because it was lost in the hands of a third-party, namely, Messieurs Container Freight Ltd. Paragraph 13 of the witness statement of DW two is that the container in which the Plaintiffs goods was packed went missing under the custody of Container Freight Ltd, a third-party, in Kenya while transporting the same to the Plaintiff. The matter was followed up with the Kenyan authorities.

As far as the first Defendant is concerned, the Defendants Counsel submitted that it did not breach any contract but was merely an agent of the disclosed principal with the second Defendant. On the other hand it was submitted that the second Defendant contracted Messieurs Container Freight Ltd to transport the container to Uganda. The goods were lost while in possession of the third-party and this information was brought to the attention of the Plaintiff. The second Defendant never delivered the Plaintiffs goods on account of loss due to criminal acts that allegedly occurred while the goods were in the hands of the third-party which frustrated the performance of the contract. The second Defendant was unable to trace the said Container Freight Ltd given for purposes of seeking indemnification.

In the preliminary objection on the ground of jurisdiction I held that the bill of lading was a unilateral document and further evidence of a contract agreeing to the terms of the outer of jurisdiction clause needed to be proved. I again revert to the ruling on preliminary objection. The basis of the ruling is the English law or common law of England which is applied by the High

Court by virtue of section 14 of the Judicature Act Cap 13 Laws of Uganda. It provides that subject to the written law the jurisdiction of the High Court shall extend and apply in conformity to the common law and doctrines of equity. The expression common law and doctrines of equity import the law of England in so far as the circumstances of Uganda and its people permit and subject to such qualifications as circumstances may render necessary. Common law is further defined by the Interpretation Act cap 3 laws of Uganda to mean under section 2 (n) thereof: "the common law of England". In Uganda the Sale of Goods Act Cap 80 is a re-enactment of the English Law. That notwithstanding in the ruling on the objection to jurisdiction delivered on the 24th of August 2012 I relied on the law as stated in **Halsbury's laws of England volume 9 (1) 4th** edition (reissue) paragraph 601 - 603 for the decision of a contract. "To constitute a valid contract there must be two or more separate and definite parties to the contract. Those parties must be in agreement in that there must be consensus on specific matters. They must intend to create legal relations in the sense that the promise of each side are to be enforceable simply because they are contractual promises and lastly the promises of each side must be supported by consideration by some other factor which the law considers sufficient. According to PS Atiyah in **An Introduction to the Law of Contract** fifth edition Clarendon press Oxford at page 185 the document taken as the contract signed or issued by one party only should be shown to have been accepted by the other party. There may be some doubt as to whether a unilateral document such as a bill of lading contains terms agreed upon. I also relied on section 1 of the Sale of Goods Act for the inclusive definition of a bill of lading among documents of title. In **Halsbury's Laws of England 4th edition reissue, vol. 43(2) paragraph 1532**, a bill of lading is defined as a document signed by the ship owner, or by the master or other agent of the ship owner, which states that certain specified goods have been shipped in a particular ship and which purports to set out the terms on which the goods have been delivered to and received by the ship. According to Atiyah (supra) at page 186 an agreement for the carriage of goods by sea is almost invariably recorded in the bill of lading which contains standardised, internationally agreed terms:

"But in practice an oral agreement for the carriage of particular goods on a particular ship will usually be made in advance, often by telephone; indeed the bill of lading is not usually issued until after the goods have been loaded."

The facts that a bill of lading may not be the contract itself was considered in **S.S. Ardennes (Owner of Cargo) v. S.S. Ardennes (Owners) [1950] 2 ALL ER 517** by Lord Goddard CJ when he held that a bill of lading was not in itself the contract between the ship owner and the shipper at pages 519 – 520. Oral evidence may be admitted on the terms of the contract. In this case there is no evidence that the Plaintiff accepted the term as to submission to the exclusive jurisdiction of the courts. The bill of lading though containing some agreed terms has a term on exclusive jurisdiction of the English Courts which terms are controversial and there is no evidence of an agreement thereto. In any case it is a unilateral document issued by the second Defendant. In the premises the Ugandan courts have jurisdiction on the question because the contract was performed partly in Dubai and was to be performed in Uganda as well. Payment was made in Uganda to an agent of the second Defendant carrying on business in Uganda, namely the first Defendant.

In conclusion there was a contract between the Plaintiff and the second Defendant and the terms thereof can be partly considered on the question of whether there was a breach of contract and if so the remedies.

Whether or not there was a contract between the Plaintiff and the first Defendant, and if so on what terms?

I have carefully considered the documents adduced in support of the proposition that there was a contract between the Plaintiff and the first Defendant. I have also considered the oral testimonies of PW1, DW1 and DW2.

Starting with the documentary evidence the Plaintiff relied on a receipt issued to it for the services of freight and clearance of the goods, and issued to it by the first Defendant. The first Defendant's Counsel submitted that the first Defendant acted as an agent of a disclosed principal while the Plaintiff's Counsel maintained that the Plaintiff separately contracted the first Defendant to clear and convey its goods from Mombasa to Uganda.

The Plaintiff relies on exhibit P1 which is a receipt dated 13th of March 2007 acknowledging receipt of US\$ 2,160.0 from the Plaintiff being in settlement of freight DXB/Busia LCL Shipment 7000094/SF70032E.

Exhibit P2 is a bill of lading issued by the second Defendant. It gives the reference HBL No. RFI SF 70032 E, a house to house bill of lading SHIPMENT INTRANSIT to Uganda via Mombasa.

Exhibit P19 is a bill of lading in relation to 381 packages of tiles, auto spares, used engine electronics and a photocopy machine. The consignee is the first Defendant.

The explanation of the defence witnesses is that exhibit P2 is a specific document issued to the Plaintiff in respect of its own goods which is to fit in a 40ft container TRLU2567120. The Plaintiff's goods contained 60 PKG and the gross weight is 1,500 kilograms. It occupied 9 FT in the 40FT container. The description of the goods is photocopy machine. The consignee is the Plaintiff. On the other hand Exhibit P19 concerns all goods stored in 1 container and the consignee is the first Defendant. The goods include 381 packages of tiles, auto spares, used engine electronics and photocopy machine. The container detail is TRLU – 2567120.

The container detail in exhibit P2 and P19 are the same. What varies are the description of the goods and the names of the consignee. I believe the testimony of the defence witnesses and I agree with the submissions of the Defendant's Counsel. Exhibit P2 concerns the Plaintiff's goods which were shipped together with other goods for different customers. Secondly exhibit P19 is the entire container containing goods for other customers. The first Defendant as a consignee acted as an agent for the second Defendant. DW1 who testified for the first Defendant testified that his company was an agent in the matter and he issued exhibit P1 on behalf of the second Defendant. DW2 who testified for the second Defendant agreed that the first Defendant was the agent of the second Defendant. Exhibit P2 which the Plaintiff relies on clearly stipulates that the obligation of the second Defendant was to ship the goods up to Uganda via Mombasa. Lastly DW2 testified that he outsourced the transporter Freight Container Ltd which lost the goods on transit.

In the premises there was no contract between the Plaintiff and the first Defendant. The first Defendant acted as an agent of the second Defendant and was supposed to deliver goods to several other consignees inclusive of the Plaintiff. Each consignee was delivered its own bill of lading for particular goods. In the premises because the principal has been disclosed, it is the finding of this court that the Plaintiff had a contractual relationship with the second Defendant and the first Defendant only acted as an agent of the second Defendant.

The question that remains in respect of the first Defendant is whether the suit against the first Defendant should be dismissed with costs?

It is clear from the evidence that the Plaintiff was not sure which of the two Defendants he ought to sue and he thought that one of them has an interest in the other. For that reason the Plaintiff was entitled to proceed under Order 1 rule 7 of the Civil Procedure Rules and sue both Defendants to establish which one ought of them or whether both of them are liable. It is the first Defendant who was supposed to clear the goods.

Halsbury's laws of England 4th Edition Reissue Para 256 where the Plaintiff is in doubt as to which of two or more persons from whom the Plaintiff is entitled to redress, he may join two or more Defendants so that questions as to which, if any, of the Defendant is liable, and to what extent, may be determined as between all the parties. Where judgment is entered against one of the Defendants, the unsuccessful Defendant may be ordered to pay to the Plaintiff the costs payable by him to the successful Defendant or to pay the costs of the successful Defendant direct to the Defendant.

In the premises the suit against the first Defendant is dismissed with costs and the question of who pays the costs will be determined at the end of the judgment.

ISSUE 3

Whether the Defendants breached the contract?

It is an agreed fact that the goods were not delivered. Though the issue was framed generally the actual matter in controversy is narrower and is whether the Defendants are liable for the loss of the Plaintiffs goods or for non delivery of the Plaintiffs goods.

Where the Plaintiff proves that it handed over the goods to the Defendant for purposes of the Defendant conveying the goods to a destination and that the goods did not reach their destination, the Plaintiff makes a prima facie case and the burden shifts to the Defendant to justify why the goods did not reach their destination. This was held in **Houghland vs. Low (Luxury Coaches) Ltd (1962) 2 ALL ER 159** by Willmer L.J. In that case the managers of a coach for an old people's outing lost the Plaintiff's luggage and were found liable. On appeal, Willmer L.J. held at page 162:

“In saying that I do not think that it makes any difference whether the case is put in detinue, or whether it is treated as an action on the case for negligence. Whichever be the correct approach, it has been admitted in argument that the Plaintiff, by proving the delivery of the suitcase at Southampton and its non-return on the arrival of the coach at Hoylake, made out a prima facie case. That prima facie case stands unless and until it is rebutted. The burden was on the Defendants to adduce evidence in rebuttal. They could discharge that burden by proving what in fact did happen to the suit-case and by showing that what did happen happened without any default on their part. ... Alternatively, the Defendants could discharge the burden on them by showing that, although they could not put their finger on what actually did happen to the suit-case, nevertheless, whatever did occur occurred notwithstanding all reasonable care having been exercised by them throughout the whole of the journey.”

In this case the Plaintiff has proved that it delivered possession of certain goods to the second Defendant at Dubai for onward transmission to the Plaintiff in Uganda. The goods never arrived. PW1 was only informed by the first Defendant's representative Mr Herman Lewis. DW1 testified that on 13th March 2007, that he telephoned the Plaintiff's representative and advised him to come and settle his freight charges in respect of the consignment of goods and also collect his bill of lading. The goods which were sent by sea freight went missing under the custody of Messrs Container Freight Ltd, a third party in Kenya while transporting the same to the Plaintiff. His company followed up with the Kenyan authorities and with the said Container Freight Ltd. They were availed with certain documents concerning a criminal matter. In his cross examination DW1 testified that the said container freight is a clearing agent in Mombasa contracted by the second Defendant. He did not have any document to show that the said container freight Ltd was contracted to transport the goods up to procedure in Uganda. However the freight charges which are collected from the Plaintiff covered the freight from Dubai to Mombasa.

The documents admitted in evidence include exhibit D7 which is a letter dated 13th of April 2007 in which one Container Freight Company Ltd wrote to the Commissioner of Customs Services Department Northern region explaining that the truck left Mombasa port on 7th March 2007. On 9th March 2007 they were informed by the driver that the truck was approaching Kericho and that it had developed a minor mechanical problem which was to be repaired. On 11th

of March 2007 the driver reported having reached Lwanda and was on his way to Busia and that was the last communication from the driver. On 12th March 2007 the company started investigating where the truck was but found no trace of the truck. On 13th March 2007 they reported the matter to the police and customs offices. Also admitted in evidence is exhibit D8 which is a letter from Kenya Revenue Authority addressed to Messieurs Container Freight of Mombasa. In the letter dated 10th April 2007 they wrote inter alia that the truck was loaded with two containers which contained the mixed Cargo in transit to Uganda. The transporter was hired by them and they were entirely accountable for all the errors of omission and commission during the transit period. The goods had not been traced and they also wrote that the goods were illegally consumed in Kenya contrary to section 85 read together with Regulation 104 of the East African Community Customs Management Act, 2004.

The Defendant also adduced in evidence exhibit D9 which contained the police abstract for theft/loss report. It reports that they had received the report of the theft/loss of the lorry KAU 570H ZC 2673 loaded with two containers containing goods worth 4 million while on transit from Mombasa port to Busia – Uganda. One of the containers is described as TRLU 2567120, which is the subject matter of the suit and which contained the Plaintiff's goods together with the goods of other persons. Lastly the Defendant also adduced in evidence exhibit D10 which contains a parking list for the goods in the last container, the subject matter of the suit.

The testimony of DW 2 who is the representative of the second Defendant only confirms the testimony of DW1. The goods went missing while under the custody of Messieurs Container Freight Ltd. Mr Walter Pereira was cross examined about the incident and confirmed that the goods were to come from Dubai to Busia in Uganda. They outsourced services of the transporter but on the way the container went missing. He further confirmed that there were proceedings in Kenya and the case of theft and robbery had been reported. They proposed to compensate the Plaintiff but they had a problem with the amount which the Plaintiff was claiming. The issue was that the values declared by the Plaintiff were exorbitant. The Plaintiff declared a packing list with no values. The second Defendant was willing to pay 50% of the declared value at Mombasa.

The conclusion of the matter is that the second Defendant or the first Defendant and agents did not have any explanation as to what happened to the goods. There is no evidence that the goods were not taken due to the criminal behaviour of the transporter or the agents such as the driver or

any person accompanying the truck. In the cited authority of **Houghland vs. Low (Luxury Coaches) Ltd (1962) 2 ALL ER 159**, the burden is on the Defendant to show what happened to the goods. This burden includes the burden to prove that whatever happened was without the negligence of the Defendant or whatever could have happened was not the fault of the Defendant. The burden has not been discharged because Messieurs Container Freight Ltd cannot even be traced. They acted on behalf of the second Defendant. Secondly they were never contracted by the Plaintiff.

Furthermore the contract of freight is only binding between the Plaintiff and the second Defendant. This is made even more apparent by the defence of the first Defendant who is represented by the same Counsel of the second Defendant. The defence is that they are merely agents of the second Defendant. In this case the second Defendant outsourced the transport to convey the goods to Busia from Mombasa. The Plaintiff is not a party to that arrangement. Secondly the said Container Freight Ltd is not a party to the suit. A similar matter was handled in the case of **Morris vs. C.W. Martin and Sons [1965] 2 ALL ER 725** where Lord Denning considered various case scenarios where a Plaintiff leaves goods with the Defendant and the goods got lost or damaged. In cases of bailment he held at page 731 that the Defendant as a bailee has a duty to take reasonable good care of the goods:

“(iii) Bailment for reward. Once a man has taken charge of goods as a bailee for reward, it is his duty to take reasonable care to keep them safe: and he cannot escape that duty by delegating it to his servant. If the goods are lost or damaged, whilst they are in his possession, he is liable unless he can show—and the burden is on him to show—that the loss or damage occurred without any neglect or default or misconduct of himself or of any of the servants to whom he delegated his duty. ...The bailee, to excuse himself, must show that the loss was without any fault on his part or on the part of his servants. If he shows that he took due care to employ trustworthy servants, and that he and his servants exercised all diligence, and yet the goods were stolen, he will be excused; but not otherwise. ... if it appears that the servant to whom he entrusted it was negligent in leaving the door unlocked, or collaborated with the thieves, or stole the fur himself, then the master is liable ...

(iv) Contract to take care to protect the goods. Although there may be no bailment, nevertheless circumstances often arise in which a person is under a contractual duty to take care to protect goods from theft or depredation ... The most familiar case is the keeper of a boarding house or a private hotel. He is under an implied contract to take reasonable care for the safety of property brought into the house by a guest. If his own servants are negligent and leave the place open so that thieves get in and steal, he is liable ...he undertakes impliedly that the coachman will take care to protect the goods in the brougham. If they are stolen owing to the coachman's negligence, the job-master is liable. So also if the coachman steals them himself..."

The goods got lost while in the custody of a third party contracted by the second Defendant. The second Defendant has no knowledge of what happened to the goods. One of the exhibits addressed by Kenya Revenue Authority to Container Freight Ltd exhibit D8 writes that the goods were illegally consumed in Kenya and the transporter was entirely liable for the errors of commission and omission. In the premises the second Defendant as the principal of Container Freight Ltd is liable for the loss of the goods and issue number 3 is answered in the affirmative.

The second Defendant is liable for the breach of contract to convey the Plaintiff's goods to Busia in Uganda.

ISSUE 4

What remedies are available to the Plaintiff?

Claim for Special Damages

The Plaintiff claims special damages of US\$38,360 being the value of the undelivered goods and US\$2160 being the freight charges. The Plaintiff also seeks for general damages for breach of contract to deliver the goods as well as interest at 10% per annum from the date of accrual till payment in full.

I have carefully considered the submissions of the Plaintiff's Counsel as well as that of the Defendants Counsel which have set out at the beginning of this judgment and on the issue of the remedies available to the parties.

As far as the claim for special damages is concerned, various arguments have been presented against the claim by the Defendant's Counsel. The Defendants Counsel prays that if the court is to award any damages, it should be those damages for goods declared by the Plaintiff for purposes of clearance of goods at Mombasa port. I entirely agree with that proposition because the courts cannot enforce damages which would be in contravention of the customs law. The applicable law is the East African Community Customs Management Act, 2004. The goods that the Plaintiff can claim for those goods declared to the customs authorities for purposes of assessment of customs duties. I do not need to consider all the exhibits presented by the Plaintiff for goods purchased in Dubai if they do not feature in the packing list availed by the Plaintiff's director Mr. Stephen Lubega for purposes of clearance of the goods with the customs authority.

There are several offences prescribed by the East African Community Customs Management Act, 2004. I need to refer to section 202 of the East African Community Customs Management Act, 2004. It makes it an offence to import or export goods which are concealed in any way or which are packed in a manner likely to deceive any customs officer or contained in any package of which the entry or application for shipment does not correspond with such goods. Secondly and related is section 203 of the same Act which makes it an offence to make a false or incorrect entry. An importer or exporter is expected to answer any question put to him or her. They should not get involved knowingly in any fraudulent evasion of payment of duty. Any person who contravenes any of the offences prescribed by section 203 (a) – (h) of the East African Community Customs Management Act, 2004 commits an offence.

In other words information that is not declared to customs for purposes of assessment of duty under the East African Community Customs Management Act, 2004 constitutes an offence.

The evidence given by DW1 Herman Lewis on the goods of the Plaintiff is the information given to him by Stephen Lubega, the Managing Director of the Plaintiff and is a list of items for purposes of declaration to customs that he forwarded to Mombasa Port in Kenya. This is exhibit D4 which contains a packing list in the handwriting of information given by the Plaintiff's director. Secondly an email by one Ezekiel Tuma giving details of the port declaration form C – 63 filled on the basis of the information given by the Plaintiff exhibit D11 has the following information.

1. Used Computers 2 pieces. This rhymes with exhibit D4.
2. Photocopiers 11 pieces. This also rhymes with exhibit D4.
3. Tonners 1581 pieces. In exhibit D4 it is 65 boxes/cartoons,
4. Box file written as 1318 pieces. In exhibit D4 what is written is 62 cartons of papers, box files, pens and binding machine.
5. Washing machine 1 piece. Rhymes with exhibit D4.
6. TV's 2 pieces. Rhymes with exhibit D4.
7. Radio 1 piece. Rhymes with exhibit D4
8. Kettles 1 piece. Rhymes with exhibit D4
9. Furniture 8 pieces. Exhibit D4 shows that it is 8 packages

The other details contained in exhibit D4 which are not in exhibit D11 are:

- 1 box of cartridges HP cannon. This is written separately from the 65 boxes/cartons of tonners.
- Fax Cannon machine 1 piece
- Trolley 4 pieces
- Sugar 2 bags
- Rice 2 bags
- Milk (NIDO) 5 tins

The Defendant did not get a packing list containing the prices of the goods. The Defendant alleged in testimony of Herman Lewis that the prices of the goods and goods indicated in exhibit P3 – P18 are fictitious, unsubstantiated and cannot be verified.

While some goods are replicated in the exhibits adduced in evidence, some details need to be given.

Exhibit P1 which is a receipt for the freight service of the second Defendant and issued by the first Defendant is not disputed as to the amount paid. It is 2,160 US\$.

Exhibit P3 does not indicate what CLP No. 290394 and CLP 290403 are for and I will skip it for the moment. Exhibit P6 is a description of a Cannon and a laminator with a price tag of 1205 Dirham. Exhibit P5 is for a TV sonny. Exhibit P7, P8 and P9 are a list of 33 items with various

quantities which are hard to link with exhibit D4 of D11. Exhibit P10 gives several cannon items. Some are spare parts and some are toners. Exhibit P11 has a similar list. It has toners and parts. Exhibit P12 has cannon NP 1215 CIB (K) and 13 items with various quantities on each item. Exhibit P13 seem to have tonners and drums and so does exhibit P14. There are several quantities of canon used copiers totalling to 19 copiers in exhibit P15. This does not rhyme with exhibits D4 and D11 at all. Some items such as tables, chairs do rhyme with the list given to the Defendant i.e. exhibits P16 and P17. There is also a used Monitor, used keyboard, used mouse in exhibit P18.

Neither these lists of items nor their prices were given to the Defendant for purposes of declaration to customs. Not to declare all the items would be concealment from East African Customs Authorities and an offence under the East African Community Customs Management Act, 2004 as I have set out above. To award the amounts contained in the exhibits of the Plaintiff would be to lend the court process to an illegality.

The law is that claims may be unenforceable on the ground of public policy. According to Halsbury's laws of England fourth edition reissue volume 25 and paragraph 494 claims are unenforceable if to do so would be against public policy:

"Claims may be unenforceable on the ground that to enforce them would be against public policy. If, for example, items have been brought into the country without customs duty being paid on them ..."

In the case of **Beresford v Royal Insurance Co Ltd [1938] 2 All ER 602** Lord Atkin explained the principle at page 607 and it is that:

"I think that the principle is that a man is not to be allowed to have recourse to a court of justice to claim a benefit from his crime, whether under a contract or under a gift. No doubt the rule pays regard to the fact that to hold otherwise would in some cases offer an inducement to crime, or remove a restraint to crime, and that its effect is to act as a deterrent to crime, but, apart from these considerations, the absolute rule is that the courts will not recognise a benefit accruing to a criminal from his crime."

Furthermore Lord Macmillan at pages 609 – 610 added that:

“The first question must always be: what is the principle of public policy which would be infringed by the enforcement of the contract? In the present instance, the principle which, it is said, would be infringed is the principle that no court ought to assist a criminal to derive benefit from his crime. It has also been put in this form—that no court ought to enforce stipulations tending to induce the commission of a crime. That there are such principles of public policy, to which the courts ought to give effect, I do not doubt. In the present case, would the enforcement of the respondents’ obligation enable a criminal to take benefit from his crime? Or can it be said that the obligation now sought to be enforced was one which held out an inducement to commit a crime, to wit, the crime of *felo de se*?”

In the case of **Geismar v Sun Alliance and London Insurance Ltd and another [1977] 3 All ER 570**, the Plaintiff insured against theft and while the policies were in force various articles were stolen from his house. This included some property which had been imported into the United Kingdom by the Plaintiff without being declared to customs and excise officers and without payment of the required duty. Talbot J held at page 580 – 581 that the policy would be unenforceable in respect of the smuggled articles and to enforce them would be in conflict with public policy. He relied on the above case of **Beresford v Royal Insurance Co Ltd [1938] 2 All ER 602** to reach his conclusion.

The law is that goods or their price or both which were not declared to the Revenue Authority for purposes of payment of customs dues cannot be included in a claim for special damages for their loss. The only evidence of the price of goods declared that is deemed admitted by the Defendant and therefore proved is that in exhibit D11 which has the follows values in Kenya shillings:

1. Used Computers 2 pieces. Kenya shillings (KSHS) 39,577/-
2. Photocopiers 11 pieces. KSHS 130,606/-
3. Tonners 1581 pieces. KSHS 170,974/-
4. Box file written as 1318 pieces. KSHS 39,577/-
5. Washing machine 1 piece. KSHS 23,746/-
6. TV’s 2 pieces. KSHS 39,577/-
7. Radio 1 piece. KSHS 47,493/-
8. Kettles 1 piece. KSHS 23,746/-

9. Furniture 8 pieces. KSHS 47,492/-

10. Total amount in KSHS is KSHS 562,788/-

According to exhibit D11 the amount in United States dollars at that time in total was about US\$ 7,850. This amount has been admitted by the Defendant. In addition the Plaintiff claims the special damages of US\$ 2,160 being the freight charges. In the premises the Plaintiff is awarded special damages of US\$10,010 (Ten thousand and ten United States Dollars).

Claim for General Damages and interest

The Plaintiff also claims general damages for loss of business of Uganda shillings 30,000,000/=. He claims to have been out of business since 2007 and is entitled to it. The Plaintiff also claims interest from the date of loss of goods in March 2007 till payment in full.

For the Defendant it was submitted that they are not liable to pay damages because the Plaintiff was offered 50% of the value lost soon after the event but he refused the same. Secondly, as a businessperson the Plaintiff ought to have insured the goods against loss.

I have carefully considered the submissions. The question of whether someone should insure goods against loss is a matter of prudence and does not affect the liability of a Defendant for whatever cause of action that arises. Insurance cannot be taken into account in assessing damages. Whether someone insured or not is not relevant. This was considered in **Parry v Cleaver [1967] 2 All ER 1168 at 1171** Lord Denning of the Court of Appeal considered whether insurance contributions to the injured party should be taken into account in assessing his damages. He agreed with an earlier decision that the contract (of insurance) is wholly independent of the relation between the Plaintiff and the Defendant which gave the Plaintiff the advantage (of indemnification) and obviously the Defendant cannot take the benefit of that. On appeal in the House of Lords in **Parry v Cleaver [1969] 1 All ER 555** Per Lord Reid emphasised the principal at page 558 when he held that:

“It would be revolting to the ordinary man’s sense of justice, and therefore contrary to public policy, that the sufferer should have his damages reduced so that he would gain nothing from the benevolence of his friends or relations or of the public at large, and that the only gainer would be the wrongdoer. We do not have to decide in this case whether

these considerations also apply to public benevolence in the shape of various uncovenanted benefits from the welfare state, but it may be thought that Parliament did not intend them to be for the benefit of the wrongdoer.

As regards moneys coming to the Plaintiff under a contract of insurance, I think that the real and substantial reason for disregarding them is that the Plaintiff has bought them and that it would be unjust and unreasonable to hold that the money which he prudently spent on premiums and the benefit from it should enure to the benefit of the tortfeasor. Here again I think that the explanation that this is too remote is artificial and unreal. Why should the Plaintiff be left worse off than if he had never insured? In that case he would have got the benefit of the premium money; if he had not spent it he would have had it in his possession at the time of the accident grossed up at compound interest.”

This position is echoed by **McGregor on Damages 15th edition (Sweet and Maxwell) Paragraph 1482** page 928. Where the Plaintiff has taken out accident insurance, the moneys received by him under the insurance policy are not to be taken into account in assessing the damages for the injury in respect of which he had been paid the insurance moneys.

In the premises the argument that the Plaintiff ought to have insured cannot be used for or against him. The matter falls under the usual doctrine of *restitutio in integrum*. The East African Court of Appeal in **Dharamshi vs. Karsan [1974] 1 EA 41** held that general damages are to achieve *restitutio in integrum*. It is a principle that the Plaintiff has to be restored as nearly as possible to a position he or she would have been had the injury complained of not occurred. The quantum of general damages is based on the same principle. In **Johnson and another v Agnew [1979] 1 All ER 883** Lord Wilberforce held that an award of general damages is compensatory and is intended to put the innocent party as far as money can do so in the same position as if the contract had been performed.

Because an award of interests which is not contractual is also meant to compensate the Plaintiff, it shares the same objective as an award of general damages. Where a Plaintiff has been deprived of the use of its money interest may be awarded as compensation. The award of interest can be compensatory and therefore there may be no need to also award general damages under the same

heading of compensation for deprivation of money. Section 26 (2) of the Civil Procedure Act provides that:

“Where the decree is for the payment of money, the court may in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.”

The section gives the court wide discretion to award interest from the date of the suit as well as from the date before the suit was filed i.e. from the date when the cause of action arose. In each case the essence is to compensate the Plaintiff for deprivation of the money. According to Lord Wright in **Riches v Westminster Bank Ltd [1947] 1 All ER 469 HL** and at page 472 that:

“...the essence of interest is that it is a payment which becomes due because the creditor has not had his money at the due date. It may be regarded either as representing the profit he might have made if he had had the use of the money, or, conversely, the loss he suffered because he had not that use. The general idea is that he is entitled to compensation for the deprivation...”

Furthermore according to **Halsbury's laws of England fourth edition reissue volume 12** (1) paragraph 850 it is “assumed that the Plaintiff would have borrowed to replace the assets of which he has been deprived...” Finally I am wholly persuaded by the holding of Forbes J in **Tate & Lyle Food and Distribution Ltd v Greater London Council and another [1981] 3 All ER 716** that the award of interest is:

“... part of the attempt to achieve restitutio in integrum. One looks, therefore, not at the profit which the Defendant wrongfully made out of the money he withheld (this would indeed involve a scrutiny of the Defendant's financial position) but at the cost to the Plaintiff of being deprived of the money which he should have had. ...in commercial cases the interest is intended to reflect the rate at which the

Plaintiff would have had to borrow money to supply the place of that which was withheld.”

Being persuaded by the above authorities my conclusion is that the Plaintiff is entitled to compensation for deprivation of his money. He would be awarded interest for the deprivation and not general damages claimed for the deprivation because the two heads of compensation fulfil the same objective of *restitutio in integrum*. I additionally award the Plaintiff US\$ 2,500.0 (three thousand five hundred United States dollars) only as general damages for inconveniences suffered as a result of loss of his goods.

The Defendants Counsel prayed that interest is awarded at court rate. I do not agree. The court rate is 8% per annum. The Plaintiff is entitled to an award of a commercial rate of interest on the dollar award. The Plaintiff claimed 10% interest per annum from the date of accrual till payment in full. The Defendant did adduce any evidence to show that this claim is unreasonable.

In the premises the Plaintiff is awarded interest on the special damages awarded at a rate of 10% per annum from April 2007 to the filing of the suit in February 2009.

Additionally the Plaintiff is awarded interest at 10% per annum on special damages from the date of filing the suit till date of judgment.

Finally the Plaintiff is awarded interest at 10% per annum on the aggregate sum awarded in the judgment at the date of judgment from the date of judgment till payment in full.

Costs follow the event and the Plaintiff is awarded costs of the suit as against the second Defendant.

Additionally second Defendant shall pay the costs of the first Defendant incurred in this suit according to my judgment above.

Judgment delivered in open court on the 19th day of August 2016

Christopher Madrama Izama

Judge

Judgment delivered in the presence of:

Adubango Richard for the Plaintiff

Noah Mwesigwa for the Defendant

Plaintiff in court

Representative of the second Defendant Herman Louis court

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

19/8/2016