

**THE REPUBLIC OF UGANDA,
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
CIVIL SUIT NO 299 OF 2015**

3WM UGANDA LIMITED}.....PLAINTIFF

VERSUS

- 1. LOADWELL FREIGHT LOGISTICS LTD}**
- 2. OMAR MENZA KITHOME}**
- 3. CHRISPINE O. ODONGO}DEFENDANTS**

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

JUDGMENT

The Plaintiff is a limited liability company carrying on the business of importing and exporting used Japanese motor vehicles in Uganda. The first Defendant is a limited liability company incorporated and registered in Kenya. The second and third Defendants are mainly Kenyan citizens resident in Mombasa, Kenya. Secondly it is averred that the second Defendant is a shareholder and director of the first Defendant and the third Defendant is the general manager of the first Defendant.

The Plaintiff filed this action in Uganda against the three Defendants holding them jointly and severally liable for recovery and payment of US\$63,036 alleged to be fraudulently misappropriated by the Defendants, interest on the principal, general and special damages and costs of the suit. The basis of this suit is the service level agreement executed between the Plaintiff and the first Defendant on the 1st May, 2013 to clear and forward the **Plaintiff's consignments**. The first Defendant was represented by the second and third Defendants as director and general manager respectively. The Plaintiff alleged in the plaint that the Defendants severally and/fraudulently misappropriated the Plaintiff's monies meant for the clearing and forwarding outstanding US\$86,126. Following the misappropriation of the Plaintiff's money, the first Defendant acknowledged being indebted to the Plaintiff in the sum of US\$86,126 according to a copy of acknowledgement dated 16th January, 2014 signed by the second Defendant on behalf of the first Defendant. Following the first Defendant's undertaking to pay, the Defendant paid the Plaintiff a total of US\$40,140 leaving an outstanding US\$45,986 by the time of filing the suit. By 19th September, 2013 the Plaintiff paid a total of US\$21,349 to the first Defendant by telegraphic fun transfer on the first Defendant's account number 1560261366501 held in Equity Bank Moi Avenue Mombasa. Out of this sum the first Defendant was required to utilise

US\$15,530 clear and for the Plaintiffs consignments under Bill of lading number SNY 010 0421. However the Defendants jointly and or severally misappropriated US\$50,530 meant to clear and for the consignments. On 28th October, 2013 the second Defendant sent an e-mail admitting to having misappropriated funds paid by the Plaintiff to clear the consignment according to the e-mail correspondence of the second Defendant attached to the plaint. Subsequent to the second Defendant's admissions on 29th October, 2014 the Plaintiff paid the first Defendant an additional sum of US\$14,750 for purposes of clearing and forwarding its consignment and the Bill of lading number SNY 010 0421.

Sometime in July 2013 the Defendants also lost one Premio motor vehicle while on transit to the Plaintiff's car bond in Kampala and they failed to account for the same up to date. The motor vehicle was worth US\$2300. In the month of November 2014 various Plaintiff's representatives travelled to Mombasa several times in an attempt to clear the consignments abandoned by the Defendants despite the fact that the Defendants had already received payment for the said consignment and try to establish from the Defendants reasons for their flagrant actions.

In the premises the Plaintiff claimed US\$ 60,736 meant for clearing and forwarding the Plaintiffs consignments, failure to deliver Toyota Premio US\$2300 shipped to the second Defendant.

The Defendants did not file any defence and interlocutory judgment was entered against the Defendants as prayed for under Order 9 rule 8 of the Civil Procedure Rules on 22nd September, 2015. By direction of court the Plaintiff was required to address the court on the preliminary issue as to why this would was filed in Uganda when the Defendants are residents of Kenya. The Plaintiff's Counsel addressed the issue and the court ruled on the same on 16th December, 2016 whereupon the suit was fixed for formal proof. The Plaintiff called two witnesses namely PW1 Mr. Shigeru Kawachi the Country Manager of the Plaintiff and PW2 Pamela Nabwire the Business Manager of the Plaintiff. Both witnesses had their written testimonies admitted on oath as their evidence in this suit.

The Plaintiff was represented by Counsel Joseph Amany of Messrs Nambogo & Advocates who addressed the court in written submissions.

Written submissions of the Plaintiff's Counsel

The summary of evidence in the written submissions are that on or about 1st May 2014, the Plaintiff Company entered into a Service Level Agreement (SLA) with the 1st Defendant duly represented by the 2nd and 3rd Defendants as Director and General Manager respectively. Sometime in 2013, the Defendants severally and/or jointly misappropriated Plaintiff's monies meant for the clearing and forwarding the Plaintiff's consignments totaling to US\$86,126 (United States Eighty Six Thousand One Hundred Twenty Six). Following misappropriation of the Plaintiff's monies, the 1st Defendant acknowledged indebtedness to the Plaintiff in the amount of US\$ 86,126 (United States Eighty Six Thousand One Hundred Twenty Six). Consequent to the said acknowledgement above and a mutual undertaking by the Defendants to settle the debt of

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US\$ 86,126 (United States Eighty Six Thousand One Hundred Twenty Six) owed to the Plaintiff, the Plaintiff and 2nd Defendant mutually agreed that the 1st Defendant company remains its clearing agent for purposes of clearing and forwarding the Plaintiff's motor vehicle consignments. As at September 2014 the Defendants had paid to the Plaintiff a total of US\$ 40,140 out of the total debt of US\$ 86,126 leaving a balance of US\$ 45,986 outstanding to date. By 19th September 2014, the Plaintiff had paid a total of US\$. 21,349 (United States Dollars Twenty One Thousand Three Hundred Forty Nine) to the 1st Defendant by telegraphic funds transfer to the 1st Defendants account no. 1560261366501 held in Equity Bank, Moi Avenue branch in Mombasa, of which US\$ 15,530 (United States Dollars Fifteen Thousand Hundred & Thirty) was to enable the Defendants clear and forward the Plaintiffs consignments under Bill of Lading No. SNY0100421. Out of US\$ 21,349, the Defendants jointly and/or severally misappropriated US\$ 15,530 (United States Dollars Fifteen Thousand Five Hundred and Thirty only) meant to clear and forward the consignment under Bill of Lading SNYO 1 00421. Subsequent to the 2nd Defendant's admission on 29th October, 2014 the Plaintiff paid the 1st Defendant an additional sum of US\$ 14,750 for purposes of clearing and forwarding its consignment described in Bill of lading No. SNY0100421. In July 2013 the Defendants also lost one Premio motor vehicle chassis number AT 211-0094645 which was in transit to the Plaintiff's car bond in Kampala and they failed to account for the same to date. The said motor vehicle was worth US\$ 2,300 (United States Dollars Two Thousand Three Hundred). In November 2014, the Plaintiffs representatives travelled to Nairobi several times in an attempt to clear the consignments abandoned by the Defendant.

The issues for determination are:

1. Whether the Defendants breached the Service Level Agreement?
2. Whether the Plaintiff is entitled to the remedies sought.

In resolution of issue one on whether the Defendants are Defendants breached the loan agreement; the Plaintiff's Counsel submitted that it's important to note that this Court entered an interlocutory judgment on the 22nd September, 2016. The position of the law is that once an interlocutory judgment is entered by Court, it settles all questions relating to liability as held by the Supreme Court in **Haji Asumani Mutekanga v Equator Growers (U) Ltd, SCCA No. 2 of 1995** (unreported).

Pursuant to the interlocutory judgment, Counsel submitted that the Plaintiff has proved its case on the balance of probabilities. Without prejudice Counsel submitted that breach of contract is defined in **Black's Law Dictionary 5th Edition p171** as where one party to a contract fails to carry out a term. In **EMMANUEL KYOYETA VS EMMANUEL MUTEBI H.C.C.S. NO 781 OF 2014** the court defined a breach of contract to mean where one or both parties fail to fulfill the obligations imposed by the terms of contract. Relating this to the facts, the Plaintiff's witness, Mr. Shigeru Kawachi confirmed the existence of a service level agreement between the Plaintiff and the Defendants meant for clearing and forwarding services. He further testified that the sums claimed arose out of persistent breaches of the admitted service level agreement in paragraphs 9, 10,11,12,13, and 14 of his witness statement. PW2 Ms. Pamela Nabwire in her witness statement in paragraphs 4 and 5 further illustrated how the Defendants failed to honor

their obligations to the extent of forcing the Plaintiff to send their officials to clear abandoned consignment. From the testimony of the Plaintiff's two witnesses, it can be discerned that the Defendants failed to honor their obligations and this amounted to breach of contract.

In resolution of issue 2 on **whether the Plaintiff is entitled to the remedies sought?** The Plaintiff's Counsel submitted that the Defendants having failed to file a defence and interlocutory judgment was entered against them, they owe the Plaintiff the liquidated sum claimed in the plaint which arose out of their failure to honor their obligation. The law is that where the Defendant has failed to file a defense to a claim upon service of summons, he is deemed to have admitted all the contents of the claim according to the holding in **Allan Nyirikindi vs. Commissioner (or Land Registration Misc Cause No 44 of 2014..** In **Sylvan Kakugu Tumwesigye vs. Trans Sahara International General TRDG LLC HCCS NO 95 of 2005** Hon. Justice Geoffrey Kiryabwire while following **Agard Didi vs. James Namakaso HCCS No 1230 of 1988** held that: "failure to file a defense raises a presumption of constructive admission to the claim made in the plaint and the story told by the Plaintiff, in the absence of defense to contradict; it must be accepted as the truth." In the premises the Defendants are deemed to have jointly admitted the claim.

In the pleadings the Plaintiff prayed for refund of US\$ 63,036 (United States Dollars Sixty Three Thousand Thirty Six Only) as well as Interest on the same at the prevailing Bank of Uganda Dollar rate from the date of filing the suit till payment in full and the same ought to be granted. Secondly, the Plaintiff prayed for Special damages as particularized in paragraph 9 of the plaint. The law on special damages is that they must be strictly pleaded and proved as held in **Eladam Enterprises Ltd vs. S.G.S (U) Ltd & Others Supreme Court Civil Appeal No. 20 of 2002.** The Plaintiff proved that its officials travelled to Mombasa two times and spent 7 days there in a bid to clear the consignments abandoned by the Defendants. The Plaintiff's witnesses proved expenses to a tune of US\$1,516 (United States Dollars one thousand Five hundred and sixteen only) for air tickets and Kenya Shillings 45,800 (Kenya Shillings Forty Five Thousand Eight Hundred Only) for accommodation. The air tickets and receipts were admitted as attachments to the witness statement of Mr. Shigeru Kawachi and Pamela Nabwire, specifically illustrated in paragraphs 15 and 16 plus 5 and 6 of the witness statement respectively. He invited Court to find that the special damages are proved and to award the same. The Plaintiff also prayed for general damages on the basis of Section 61 of the Contract Act No 5 OF 2010 which provides that where there is a breach of contract, the party who suffers the breach is entitled to receive from the party who breaches the contract, compensation for any loss or damage caused to him or her. He submitted that general damages are awarded by court at large and after due court assessment, they are compensatory in nature in that they should offer some satisfaction to the injured party as held in **Uganda Revenue Authority v Wanume David Kitamirike (CACA No. 13 of 2010).** The Plaintiffs Counsel submitted that the Plaintiff's business is dependent on selling cars. Mr. Shigeru Kawachi in paragraph 17 of his witness statement testified that the Plaintiff Company was inconvenienced and compelled it to engage another clearing agent on short notice and costs not planned for and thereby occasioning continuous losses of business to the Plaintiff.

Finally Counsel prayed for the costs of the suit as stipulated in Section 27(2) of the Civil Procedure Act that costs should follow the event unless the court for good reasons orders otherwise.

Judgment

I have carefully considered the Plaintiffs suit and the first point to note is that this suit proceeded in default of a defence. Secondly, it was a suit filed by ordinary plaintiff for recovery of a liquidated demand of US\$63,036. This is clearly averred in paragraph 5 of the plaint. The claim for liquidated demand includes the claim for interest on the principal amount, general and special damages and costs of the suit. Interlocutory judgment was entered on 22nd September 2015 under Order 9 rule 8 of the Civil Procedure Rules. Order 9 rule 8 deals with inter alia the assessment of pecuniary damages. The head note of Order 9 rule 8 of the Civil Procedure Rules reads "Assessment of damages." Rule 8 provides as follows:

"Where the plaint is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages, and the Defendant fails or all Defendants, if more than one, fail to file a defence on or before the day fixed in the summons, the Plaintiff may, subject to rule 5 of this Order, enter an interlocutory judgment against the Defendant or Defendants and set down the suit for assessment by the court of the value of the goods and damages or the damages only, as the case may be, in respect of the amount found to be due in the course of the assessment."

A liquidated demand and pecuniary damage were distinguished by this court in **Uganda Baati vs. Patrick Kalema High Court, Commercial Division, Civil Suit Number 126 of 2010** where it was noted that:

"According to Stroud's judicial dictionary, the terms "liquidated demand" inter alia means and includes, the amount on a bill of exchange, definite interest on a contract or under a statute, a sum certain in money, a statutory demand for the payment of a total debt and an amount due on a judgment.

The application of the rules in cases of liquidated demands and pecuniary damages, as distinguishable grounds of claims in an application for judgment in default of a defence, was considered in the case of **Abbey Panel & Sheet Metal Co Ltd v Barson Products (a firm) [1947] 2 All ER 809** per Somervell LJ at page 809:

"...In the second place, where a Plaintiff is claiming pecuniary damages plus a liquidated demand and does not exercise his right to sign final judgment in respect of the latter, but signs an interlocutory judgment in respect of the whole claim, I do not think the Defendant can claim to have the final judgment which is subsequently given set aside as irregular. Under the rules, the Plaintiffs are entitled to final judgment against the Defendants in respect of the liquidated demand covered ex hypothesi by the final judgment. It may be that the court could itself take the objection when the inquiry takes place and make the Plaintiffs sign a separate final judgment in respect of the liquidated demand, but,

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if the court includes the liquidated demand in the final judgment, I can see no grounds for allowing the Defendants to challenge the judgment in respect of an amount included in it for which, under the rules, the Plaintiffs were clearly entitled to a final judgment against them.

Evershed LJ at page 810

“The intended scope and purpose of RSC, Ord 13, rr. 3–7 inclusive, appear to me to be reasonably plain. They provide that where a Plaintiff has in his writ made a claim against a Defendant for one or more of the following, viz, (a) a debt or liquidated demand, (b) detinue, and (c) pecuniary damages, and such Defendant, though properly served, does not choose to appear to the writ, then the Plaintiff may, without having to take any further steps against that Defendant, obtain judgment against him for his claim—in the case of a liquidated demand, a final judgment; in the other cases, an interlocutory judgment subject to assessment by the court of the monetary amount he is entitled to recover.”

In that case I held that the Plaintiff was entitled to a final judgment against the Defendant in respect of a liquidated demand even if there is a claim for pecuniary damages in the suit. In other words, the deputy registrar can enter final judgment for the liquidated demand and set up the claim for pecuniary damages for formal proof after entering interlocutory judgment in respect thereof.

A default judgment entered under the provisions of Order 9 Rules 6 or Order 9 Rule 8 of the Civil Procedure Rules may be set aside on the same grounds. The procedure for setting aside the ex parte judgment is found under Order 9 Rule 12 of the Civil Procedure Rules. It is provided that where judgment has been entered under the preceding rules which include rules 6 for liquidated demand or rule 8 for pecuniary damages, the court may set aside or vary the judgment upon such terms as may be just. In other words if the Defendant appears and the court sets a judgment aside, the grounds under Order 9 Rules 6 or Order 9 rule 8 for setting aside are the same unless the Defendant clearly has no defence to the suit. Therefore it matters not whether judgment is entered for the liquidated demand or the claim is objected to formal proof.

Following the above authorities, the Plaintiff is entitled to an award of the liquidated demand as set up in paragraph 5 of the plaint as well as in the prayers of the Plaintiff in the plaint of US\$63,036.

I further agree with the submissions of the Plaintiff's Counsel that upon failure to fulfil the terms of the service level agreement by clearing the relevant consignments referred to in the submissions after being paid, the first Defendant breached the service level agreement dated 1st of May 2014. Moreover, the Defendants having failed to file a defence are deemed to have admitted the Plaintiffs claims in accordance with the authorities relied on by the Plaintiff's

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Counsel namely: **Allan Nyirikindi vs. Commissioner for Land Registration Misc Cause No 44 of 2014; Sylvan Kakugu Tumwesigye vs. Trans Sahara International General TRDG LLC HCCS NO 95 of 2005 and Agard Didi vs. James Namakaso HCCS No 1230 of 1988.**

Additionally the testimony of PW1 and PW2 remain uncontested. First of all PW1 and PW2 proved that the Plaintiff and the first Defendant signed the service level agreement on the 1st of May 2014. Secondly, the Plaintiff paid the various amounts which are included in the written testimony of PW1 paragraphs 4, 6, 7, 8, 9, 10, 11, 12, 13, 15 and 16. The Plaintiff acknowledged indebtedness in a letter dated 16th of January 2014 annexure "B" in the sum of US\$86,126. They wrote that the Plaintiff would deduct the amount at \$70 per unit a Bill of lading from the agency fees of the Defendant. The Plaintiff proved transfer of fees to the Defendant from Crane Bank Ltd annexure "C". I have considered all the documentary evidence and it is my conclusion that the Plaintiff has proved its case on the balance of probabilities as against the first Defendant only.

PW2 attached several e-mails correspondences marked E where the Defendants Menza Menza acknowledged failure to clear goods. Annexure H, I1 and J1 and J2 proving that the Plaintiff incurred expenses in hotel bills proved by hotel receipts and air tickets for travel while following up the consignments due to abandonment of the Plaintiff's consignment by the Defendant in Mombasa. The Plaintiff incurred special damages of US\$ 1,516 in air tickets to Mombasa and back. Secondly accommodation expenses totalling to Kenya Shillings 45,800/= according to copies of receipts attached by PW1 and PW2 as J1, and J2.

Last but not least the Plaintiff claimed general damages under section 61 of the Contract Act for compensation. General damages are compensatory as held in **Johnson and another v Agnew [1979] 1 All ER 883**. It was held by Lord Wilberforce held at page 896 that the award of general damages is compensatory and meant to place the innocent party so far as money can do so, in the same position as if the contract had been performed.

In **Dharamshi vs. Karsan [1974] 1 EA 41** The East African Court of Appeal held that they are awarded to fulfil the common law remedy of *restitutio in integrum* which means 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.

According to **Halsbury's Laws of England 4th Edition Reissue volume 12** (1) and paragraph 812 thereof general damages are those losses, usually but not exclusively non-pecuniary, which are not capable of precise quantification in monetary terms. They are presumed to be the natural or probable consequence of the wrong complained of with the result that the Plaintiff is required only to assert that such damage has been suffered.

The Plaintiff has not quantified or led evidence to prove the kind of pecuniary damage which has been lost. The suit had been fixed to assess pecuniary loss in terms of Order 9 rule 8 of the Civil Decision of Hon. Mr. Justice Christopher Madrama Izama *^*~ *&*\$\$#\$ xtra+ maximum735securityx 2017 style

Procedure Rules. Compensation may in the premises proceed from an award of interest on the money withheld because it also achieves the result of compensation for money wrongfully withheld by the Defendant. In **Tate & Lyle Food and Distribution Ltd vs. Greater London Council and another [1981] 3 All ER 716** at page 722 Forbes J held that interest is not awarded against a Defendant as a punitive measure for having kept the Plaintiff out of his money but as part of an attempt to achieve *restitutio in integrum*. It is awarded in commercial cases to reflect the rate at which the Plaintiff would have had to borrow money to supply the place of that which was withheld.

Because general damages cannot be precisely calculated the Plaintiff will be awarded interest in lieu thereof on the same principle of *restitutio in integrum*.

Last but not least the correspondences attached demonstrate that the second and third Defendants acted on behalf of the first Defendant and no evidence was led against them personally. Following the above, the following orders shall issue namely:

1. A declaration issues under Order 2 rule 9 of the civil procedure rules that the first Defendant breached the service level agreement dated 1st May 2014 between the Plaintiff and the Defendant.
2. The first Defendant shall refund to the Plaintiff a sum of US\$63,036.
3. The first Defendant shall pay to the Plaintiff special damages in the amount of US\$1516 and Kenya shillings 45,800/=.
4. The Plaintiff is awarded interest on the United States dollars in paragraphs 2 and 3 above at the rate of 10% per annum from November 2014 to the date of judgment.
5. The suit against the second and third Defendants is dismissed with no order as to costs.
6. The Plaintiff's suit against the first Defendant succeeds with costs.
7. Interest is awarded at 6% per annum on the decreed amount at the date of judgment till payment in full.

Judgment delivered in open court on 7th April, 2017.

Christopher Madrama Izama

Judge

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Judgment delivered in the presence of:

Counsel Joseph Amanyu for the Plaintiff

Plaintiff is not in court

Patricia Akanyo: Court Clerk

Christopher Madrama Izama

Judge

7th April, 2017