

UGANDA / JUDGMENT

# SABA GIFCO Uganda Limited v DHL Global Uganda Limited (Civil Suit 138 of 2016) [2021] UGCommC 147 (12 July 2021)

[2021] UGCommC 147

## COURT

Commercial Court of Uganda

## BEFORE

Stephen Mubiru, J

## CASE / FILE NUMBER

Civil Suit 138 of 2016

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## THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA (COMMERCIAL DIVISION) CIVIL SUIT No. 0138 OF 2016

| 5 | SABA GIFCO UGANDA LIMITED | ..... PLAINTIFF | |

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| | VERSUS | |

| | DHL GLOBAL UGANDA LIMITED | ..... DEFENDANT | |

**Before: Hon Justice Stephen Mubiru.****JUDGMENT**

- a) The Plaintiff's claim
- 15 The Plaintiff sued the defendant for recovery of US \ \$ 17,756 arising from breach of contract of transportation and provision of logistical services, interest and costs. The plaintiff's claim is that on or about 9th February, 2015 the defendant contracted the plaintiff Company to undertake the transportation and provision of logistical services of different consignments of goods to and from several destinations in Kampala and Mombasa. It was an agreed term under the contract that the 20 defendant would be allowed 48 hours to off load and 48 hours to load cargo, beyond which any extra day would attract "idle charges" at US \ \$ 250 per day. The defendant defaulted in its undertaking and held the plaintiff's trucks for several days. Upon completion of its services, the plaintiff demanded for the payment of both the principal sum and the idle charges but the defendant only paid the principal sum and disputed the idle charges invoices, hence this claim.

- 25
- b) The defence to the claim

In its written statement of defence, the defendant admits that it did contract the plaintiff to provide transportation and logistical services but it is not indebted to the plaintiff. The defendant contends that it paid the plaintiff in full for the services rendered and the invoices for the idle days claimed are not the responsibility of the defendant since they arise out of truck detention caused by customs authorities. The alleged delays were not due to the fault of the defendant but rather were due to the inaction of the plaintiff and third parties. The defendant further contends that on a number of occasions, the plaintiff did not have port passes which entitle trucks to enter the port to off load the shipping containers and thus could not load imports.

### c) The issues to be decided

In their joint memorandum of scheduling, the parties agreed upon the following issues to be decided, namely;

- 1. Whether the defendant's actions amount to breach of contract.
- 2. Whether the defendant is indebted to the plaintiff in the sum of US \$ 17,756 fine arising from 10 idle days spent at the ports.
- 3. What remedies are available to the parties?
- d) The submissions of counsel for the plaintiff;
  - 15 Counsel for the Plaintiff M/S Kampala Associated advocates submitted that it was an agreed term of the contract, for the defendant to allow the plaintiff 48 hours for loading or offloading each truck, and for customs clearances at the border crossing, beyond which the defendant would be obliged to pay a surcharge of US \$ 250 per day ("idle time" charge). The defendant had the duty to ensure that there was cargo ready for loading at the Mombasa Port before requesting for a truck
  - 20 from the plaintiff, for loading and offloading the trucks within the stipulated time. The defendant undertook to pay the invoice raised by the plaintiff within 30 days of receipt. It was the duty of the plaintiff to obtain port passes for the trucks. The plaintiff's claim is backed by the respective truck management data, board passes and invoices. The delays were occasioned by the defendant both at Mombasa Port (in failing to load on time) and at Malaba Border crossing (in failing to
  - 25 handle customs clearances in a timely manner). The parties agreed on a sum of US \$ 250 per idle day of detention payable as liquidated damages. This clause was triggered by the defendant's breach. They therefore prayed that judgment be entered in the plaintiff's favour.
- e) The submissions of counsel for the defendants;

Counsel for the defendant M/S Kaggwa and Kaggwa advocates submitted that the defendant is not indebted in the sum claimed. In all cases, delays were occasioned by the plaintiff when it failed to procure port passes on time. Since the defendant is not in breach of the contract, the plaintiff is not entitled to any of the reliefs sought. The suit should accordingly be dismissed with costs to the defendant.

#### f) The decision;

The first and second issues are intertwined and will accordingly be considered concurrently.

| | First issue; | whether the defendant's actions amount to breach of contract. | |

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| | Second issue; | whether the defendant is indebted to the plaintiff in the sum of USD 17,756 | |

| 15 | | arising from idle days spent at the ports. | |

The Plaintiff's claim in breach of contract is as a result of the defendant's failure to load / offload the Plaintiff's trucks and secure timely customs clearances as agreed in the contract and thereby attracting a charge for idle time, which the defendant denies. The defendant instead contends that

20 the delays were as a result of the plaintiff not having secured port passes to allow its drivers access the Mombasa port whereas customs clearances were occasioned by the URA.

The approach to construction of contracts is to determine objectively the parties' intentions by reference to the contractual language, taking into account the contract as a whole and the wider context (see *\*Wood v. Capita Insurance Services Ltd* [2017] AC 1173\*, para. 10; *\*[2017] 2 WLR 1095; [2017] 4 All ER 615)\**. A contractual provision imposing a time limit for performance of specified acts, with financial consequences for non-compliance, must be construed narrowly, because the parties are not lightly to be taken to have intended to extinguish or reduce their rights and remedies arising from breaches of important contractual obligations without using clear words.

In the instant case the general terms of the contract are not in issue. The only point of difference between the parties is whether or not the delays that occurred in respect of the contested instances are attributable to the defendant or not. While the plaintiff contends they are all attributable to the defendant, the defendant on its part contends they arose due to the plaintiff's failure to procure 5 "port passes" in time. It is not in dispute though that the plaintiff's trucks required port passes before access to the port at Mombasa. P. W.1 Mr. Kassim Mohammed testified that they plaintiff did not have a permanent port pass during the period in issue and obtained passes on a truck-to-truck basis as required for the trucks to gain access to the port. Attributing liability thus requires court's examination of the relevant documents in respect of all the contested trips. The delay at 10 Mombasa can only be attributed to the plaintiff itself if it is proved that the defendants were ready to load the trucks but could not do so in time due to the

plaintiff's failure to access the port by reason of not obtaining port passes in time.

As regards delays at the Malaba Border crossing, the defendant attributes these to the Uganda Revenue Authority (URA), which is the statutory body responsible for the administrative process through which the customs clearances are done. The defendant further denies liability for the delays occasioned by the process of "verification and clearance" of the trucks after loading, since the contract is silent about them. However, in the plaintiff's offer letter dated 9th February, 2015 (exhibit P. Ex.1) the plaintiff specified its charges and under the sub-heading "Price Excludes"

20 stated as follows;

Border Customs clearance duty payments at Malaba customs excluded and shall be the responsibility of consignee. Free time 48 hours upon truck arrival at the border customs, thereafter, truck idle charges of US \$ 250 per each per day will be applicable.

Contracts specifically allocate many risks through the contract conditions and also sometimes through risk matrices drafted by the parties and included in the contract. Although the plaintiff expressly excluded liability for "Customs clearance duty payments" and imposed the obligation thereof upon the defendant, the offer letter is silent on liability for delays occurring in the process of that clearance. Silence on a matter in a contract creates an ambiguity when it involves a matter naturally within the scope of the contract. Once a court determines that a clause in a contract is ambiguous, the intent of the parties then is a question of fact.

In principle, where the contract is silent on who bears the risk of particular events, a useful approach is to assume the risk lies where it falls. Alternatively, unless specific circumstances dictate, such as where the parties could not have reasonably foreseen the events creating the risk, the risk associated with the performance of a contractual obligation is that of the party required to

- 5 perform the obligation. The risk of adverse site conditions in performance is placed with the party whose duty it is to perform to the extent that it or an experienced party in a similar position ought to have foreseen such conditions. Moreover, where the contract does not allocate a risk expressly it may do so by implication. When the parties to a contract contemplate a known risk and have agreed in express or implied terms that the risk of loss from such adverse conditions shall fall upon
- 10 one or the other parties, full effect is given to such a provision. Thus a consignee undertaking the process of customs clearance of taxable goods must consider and make allowance and provision for the possibility that adverse conditions beyond its control may arise in that process.

In the instant case, since it was the intention of the parties that the costs involved in "customs clearance duty payments," and hence clearances of a similar nature, will lie with the party that has to deal with them, namely the defendant, it follows that the defendant thereby bore the risk

of any delays arising as a result of difficulties inherent or arising in the process of such clearances. Had the defendant wished to exclude liability in the event of unforeseen conditions being encountered, it would have been the easiest thing in the world for it so to have provided in specific terms. It did not do so. Although it is not expressly written down in the contract, it is an implied term given the nature of the plaintiff's business and the purpose for which it was contracted. The guiding principle

was stated in \*F. A. Tamplin Steamship Co. Ltd. v. Anglo-Mexican Petroleum Products Co. Ltd [1916] 2 A. C. 397, at p 403-404\* as follows; A court can and ought to examine the contract and the circumstances in which it was

made, not of course to vary, but only to explain it, in order to see whether or not from the nature of it the parties must have made their bargain on the footing that a particular thing or state of things would continue to exist. And if they must have done so, then a term to that effect will be implied, though it be not expressed in the contract ... no court has an absolving power, but it can infer from the nature of the contract and the surrounding circumstances that a condition which is not expressed was a foundation on which the parties contracted.

I therefore find that by implication, the defendant bore the risk of delays in customs clearances occasioned by inefficiencies inherent or failures in the system put in place by the Uganda Revenue Authority at the Malaba border, or by such other similar authorities. It is on that basis that the court will now proceed to examine of the relevant documents in respect of all the contested trips, in order to attribute liability for the delay.

**i. Invoice No. SG/INV/1074 dated 13th August, 2015;**

According to the plaintiff's invoice No. SG/INV/1074 dated 13th August, 2015 (exhibit P. Ex.12C) 10 the Moroto – Mombasa trip by tractor head Registration No. UAT 517 S and Trailer Registration No. UAT 883 R arrived at the Malaba Border on 18th July, 2015 and left on 21st July, 2015 thereby incurring one (1) day of idle time. It arrived at Mombasa Port on 23rd July, 2015 and offloaded on 27th July, 2015 thereby incurring one (1) day of idle time.

- 15 With regard to the delay at Malaba attributed to URA, I find that the defendant is liable for US \$ 250. With regard to the delay at Mombasa, D. W.1 Mr. Oboth Patrick testified that on that occasion the port pass was only obtained on 27th July, 2015 (exhibit D. Ex.6). The task of getting port passes lay on the Plaintiff. This therefore means that the Plaintiff could only enter Mombasa port the point of offloading on the 27th day of July 2015 or after. The truck was offloaded the very day the port pass was obtained. Therefore there were no idle days attributable to the defendant. I find the defendant has rebutted this part of the plaintiff's claim. The claim in respect of that aspect of the invoice is accordingly disallowed.

- ii. Invoice No. SG/INV/1068 dated 12th August, 2015;

iii. Invoice No. SG/INV/1070 dated 12th 25 August, 2015

According to the plaintiff's invoice No. SG/INV/1068 dated 12 th August, 2015 (exhibit P. Ex.12B) the Moroto – Mombasa trip (the export trip) by tractor head Registration No. UAT 613 M and Trailer Registration No. UAT 513 R arrived at Mombasa Port on 30th July, 2015 and offloaded on 3 rd 30 August, 2015 thereby incurring two (2) days of idle time. According to the plaintiff's invoice No. SG/INV/1070 dated 12th August, 2015 (exhibit P. Ex.12A) the Mombasa - Moroto trip (the import trip), the tractor head and Trailer arrived at Mombasa Port on 7 th August, 2015 and loaded on 9 th August, 2015 thereby incurring two (2) days of idle time.

It appears from the two invoices that tractor head Registration No. UAT 613 M and Trailer Registration No. UAT 513 R arrived at Mombasa Port on 30th July, 2015 and offloaded on 3rd 5 August, 2015. It is not clear whether or not the truck remained in Kenya or returned to Uganda during the period of six days after offloading. What is clear though is that it was not until 9th August, 2015 that it was loaded for the return trip. Out of that period, the plaintiff acknowledges responsibility for only one (1) day's delay when it was called for loading on 7 th August, 2015 but was able to do so only on 9th 10 August, 2015 (exhibit P. Ex.12A). It is contended by the defendant that on that occasion the port pass was only obtained on 6th August, 2015 (exhibit D. Ex.5). This therefore means that the plaintiff could only have accessed the port on that day or after, hence it cannot claim for the purported two idle days that arose before obtaining the port pass and entering Mombasa port which was the designated of loading point.

I find that the defendant's evidence does not rebut the plaintiff's claim of the truck having arrived at Mombasa Port on 30th July, 2015 and offloaded on 3rd August, 2015. I find that exhibit D. Ex.5 obtained on 6th August, 2015 is not related to that export trip but rather it relates to the import trip that was made almost a week later. I accordingly find that the defendant is liable for US \ \$ 500 on 20 Invoice No. SG/INV/1068. As regards Invoice No. SG/INV/1070, the truck was called to load on the 7th August, 2015 at 10.00 am and it loaded on 09th August, 2015 at 1.03 am. The time difference is well within the 48 hour period provided for by the contract. Therefore there was no idle time

attributable to the defendant. The claim in respect of that invoice is accordingly disallowed.

#### **iv. Invoice No. SG/INV/1078 dated 13th 25 August, 2015;**

According to the plaintiff's invoice No. SG/INV/1074 dated 13th August, 2015 (exhibit P. Ex.12D) the Mombasa – Kampala trip by tractor head Registration No. UAU 752 A and Trailer Registration No. UAT 511 R arrived at Mombasa Port on 23rd July, 2015 and loaded on 3 rd August, 2015 thereby incurring nine (9) days of idle time. It underwent verification on 6th 30 August, 2015 and was cleared on 11th August, 2015 thereby incurring three (3) days of idle time.

D. W.1 Mr. Oboth Patrick testified that on that occasion the port pass was only obtained on 3 rd August, 2015 (exhibit D. Ex.7). The task of getting port passes lay on the Plaintiff. This therefore means that the Plaintiff could only enter Mombasa port the point of offloading on the 3 rd August, 2015 or after. This is corroborated by exhibit D. Ex.1 dated 29th July, 2015 being an email

5 communication between the plaintiff's and the defendant's officers with the former explaining, \*inter alia\*, they were yet to obtain port passes for the trucks. The truck was subsequently loaded the very day the port pass was obtained. Therefore there were no idle days attributable to the defendant on this instance. The claim in respect of this aspect of the invoice is accordingly disallowed. However as regards the delay at the verification and clearance point, I find the delay 10 attributable to the defendant. I accordingly find that the defendant is liable for only US \\$ 750 on Invoice No. SG/INV/1078.

**v. Invoice No. SG/INV/1084 dated 13th August, 2015;**

According to the plaintiff's invoice No. SG/INV/1074 dated 14th 15 August, 2015 (exhibit P. Ex.12E) the Mombasa – Kampala trip by tractor head Registration No. UAT 518 M and Trailer Registration No. UAT 541 R arrived at Mombasa Port on 23rd July, 2015 and loaded on 3rd August, 2015 thereby incurring nine (9) days of idle time. It underwent verification on 6th August, 2015 and was cleared on 11th August, 2015 thereby incurring two (2) days of idle time.

D. W.1 Mr. Oboth Patrick testified that on that occasion the port pass was only obtained on 3rd August, 2015 (exhibit D. Ex.7). The task of getting port passes lay on the Plaintiff. This therefore means that the Plaintiff could only enter Mombasa port the point of offloading on the 3rd August, 2015 or after. This is corroborated by exhibit D. Ex.1 dated 29th July, 2015 being an email 25 communication between the plaintiff's and the defendant's officers with the former explaining, \*inter alia\*, they were yet to obtain port passes for the trucks. The truck was subsequently loaded the very day the port pass was obtained. Therefore there were no idle days attributable to the defendant on this instance. The claim in respect of this aspect of the invoice is accordingly disallowed. However as regards the delay at the verification and clearance point, I find the delay 30 attributable to the defendant. I accordingly find that the defendant is liable for only US \\$ 500 on Invoice No. SG/INV/1084.

**vi. Invoice No. SG/INV/1081 dated 14th August, 2015;**

According to the plaintiff's invoice No. SG/INV/1081 dated 14th August, 2015 (exhibit P. Ex.12F) the Moroto - Mombasa trip by tractor head Registration No. UAU 752 A and Trailer Registration No. UAT 511 R arrived at Malaba Border on 12th July, 2015 and left on 15th 5 July, 2015 thereby incurring one (1) day of idle time. The defendant attributes this delay to the URA. I find that the defendant is liable for the US \\$ 250 on invoice No. SG/INV/1081 as claimed.

**vii. Invoice No. SG/INV/1077 dated 13th August, 2015;**

According to the plaintiff's invoice No. SG/INV/1077 dated 13th August, 2015 (exhibit P. Ex.12G) the Moroto - Mombasa trip by tractor head Registration No. UAU 752 A and Trailer Registration No. UAT 511 R arrived at the offloading point on 17th July, 2015 and was offloaded on 23rd July, 2015 thereby incurring four (4) days of idle time.

D. W.1 Mr. Oboth Patrick testified that on that occasion the port pass was only obtained on 21st July, 2015 (exhibit D. Ex.9). The task of getting port passes lay on the Plaintiff. This therefore means that the Plaintiff could only enter Mombasa port the point of offloading on the 21st July, 2015 or after. The truck was subsequently offloaded on 23rd July, 2015. Therefore there were no 20 idle days attributable to the defendant on this instance. The claim in respect of this aspect of the invoice is accordingly disallowed.

**viii. Invoice No. SG/INV/1086 dated 14th August, 2015;**

- According to the plaintiff's invoice No. SG/INV/1086 dated 14th 25 August, 2015 (exhibit P. Ex.12H) the Mombasa - Kampala trip by tractor head Registration No. UAT 505 S and Trailer Registration No. UAT 385 T arrived at Mombasa on 23rd July, 2015 and was loaded on 4th August, 2015 thereby incurring ten (10) days of idle time. P. W.1 Mr. Kassim Mohammed attributed this delay to the fact that the defendant did not have cargo ready for loading by the date of the truck's arrival. It later arrived at the point of off-loading on 8th August, 2015 and was offloaded on 10th 30 August, 2015 thereby incurring one (1) day of idle time.
- 9

D. W.1 Mr. Oboth Patrick testified that on that occasion the port pass was only obtained on 4 th August, 2015 (exhibit D. Ex.10). The task of getting port passes lay on the Plaintiff. This therefore means that the Plaintiff could only enter Mombasa port the point of offloading on the 21st July,

- 2015 or after. The truck was subsequently loaded on 4 th 5 August, 2015 the very day the port pass was obtained. Therefore there were no idle days attributable to the defendant on this instance. I find that this evidence does not rebut the testimony of P. W.1 Mr. Kassim Mohammed to the effect that securing a port pass takes less than an hour after a truck's arrival at the port gate. I am therefore inclined to believe his testimony that the delay is attributable to the fact that there was no cargo to
- be loaded prior to 4 th 10 August, 2015. I accordingly find that the defendant is liable for the US \ \$ 2,500 claimed in that regard. As regards the delay at the point of offloading, I find that too attributable to the defendant. I accordingly find that the defendant is liable for the US \ \$ 2,750 claimed on Invoice No. SG/INV/1086.

**ix. Invoice No. SG/INV/1103 dated 17th 15 August, 2015;**

According to the plaintiff's invoice No. SG/INV/1103 dated 17th August, 2015 (exhibit P. Ex.12I) the Mombasa - Kampala trip by tractor head Registration No. UAT 615 M and Trailer Registration No. UAT 540 R arrived at Mombasa Port on 3rd August, 2015 and was loaded on 12th August, 20 2015 thereby incurring seven (7) days of idle time.

D. W.1 Mr. Oboth Patrick testified that on that occasion the port pass was only obtained on 6 th August, 2015 (exhibit D. Ex.10). The task of getting port passes lay on the Plaintiff. This therefore means that the Plaintiff could only enter Mombasa port the point of offloading on the 6 th August, 2015 or after. The truck was subsequently loaded on 12th 25 August, 2015. Excluding the two free days, the implication is that there were only four (4) idle days and not the seven (7) days of idle time claimed by the plaintiff.

I find that this evidence does not rebut the testimony of P. W.1 Mr. Kassim Mohammed to the 30 effect that securing a port pass takes less than an hour after a truck's arrival at the port gate. I am therefore inclined to believe his testimony that the delay is attributable to the fact that there was no cargo to be loaded prior to 6 th August, 2015. I accordingly find that the defendant is liable for the US \\$ 1,750 claimed on Invoice No. SG/INV/1103.

**x. Invoice No. SG/INV/1099 dated 17th August, 2015;**

According to the plaintiff's invoice No. SG/INV/1099 dated 17th August, 2015 (exhibit P. Ex.12J) the Moroto - Mombasa trip by tractor head Registration No. UAT 615 M and Trailer Registration No. UAT 540 R arrived at Malaba on 26th July, 2015 and left on 28th July, 2015 thereby incurring one (1) day of idle time. It arrived at Mombasa Port on 30th July, 2015 and was offloaded on 3 rd 10 August, 2015 thereby incurring two (2) days of idle time.

The defendant attributes this delay to the URA. I therefore find that the defendant is liable for the US \\$ 250 on that part of invoice No. SG/INV/1099 as claimed. As regards the delay at Mombasa, D. W.1 Mr. Oboth Patrick testified that on that occasion the port pass was only obtained on 6 th

- 15 August, 2015 (exhibit D. Ex.11). The task of getting port passes lay on the Plaintiff. This therefore means that the Plaintiff could only enter Mombasa port, the point of offloading, on the 6 th August, 2015 or after. That the truck accessed the port on 30th July, 2015 and was offloaded on 3rd August, 2015 is not supported by any documentary proof to rebut the implication of exhibit D. Ex.11. I find that this part of the claim has not been proved on the balance of probability and it is
- 20 accordingly disallowed.

**xi. Invoice No. SG/INV/1101 dated 17th August, 2015;**

According to the plaintiff's invoice No. SG/INV/1101 dated 17th August, 2015 (exhibit P. Ex.12K) 25 the Moroto - Mombasa trip by tractor head Registration No. UAT 053 M and Trailer Registration No. UAT 643 R arrived at Malaba on 26th July, 2015 and left on 28th July, 2015 thereby incurring one (1) day of idle time. It arrived at Mombasa Port on 31st July, 2015 and was offloaded on 3rd August, 2015 thereby incurring one (1) day of idle time.

30 The defendant attributes this delay to the URA. I therefore find that the defendant is liable for the US \$ 250 on that part of invoice No. SG/INV/1101 as claimed. As regards the delay at Mombasa,

D. W.1 Mr. Oboth Patrick testified that on that occasion the port pass was only obtained on 6 th August, 2015 (exhibit D. Ex.12). The task of getting port passes lay on the Plaintiff. This therefore means that the Plaintiff could only enter Mombasa port, the point of offloading, on the 6 th August, 2015 or after. That the truck accessed the port on 30th July, 2015 and was offloaded on 3rd August,

5 2015 is not supported by any documentary proof to rebut the implication of exhibit D. Ex.11. I find that this part of the claim has not been proved on the balance of probability and it is accordingly disallowed.

**xii. Invoice No. SG/INV/1095 dated 17th August, 2015;**

According to the plaintiff's invoice No. SG/INV/1095 dated 17th August, 2015 (exhibit P. Ex.12L) the Moroto - Mombasa trip by tractor head Registration No. UAT 518 S and Trailer Registration No. UAT 541 R arrived at Malaba on 12th July, 2015 and left on 15th July, 2015 thereby incurring one (1) day of idle time. It arrived at Mombasa Port on 17th July, 2015 and was offloaded on 23rd 15 July, 2015 thereby incurring four (4) days of idle time.

The defendant attributes this delay to the URA. I therefore find that the defendant is liable for the US \$ 250 on that part of invoice No. SG/INV/1095 as claimed. As regards the delay at Mombasa, D. W.1 Mr. Oboth Patrick testified that on that occasion the port pass was only obtained on 21st 20 July, 2015 (exhibit D. Ex.13). The task of getting port passes lay on the Plaintiff. This therefore means that the Plaintiff could only enter Mombasa port the point of offloading on the 21st July, 2015 or after. The truck was subsequently offloaded on 23rd July, 2015. Therefore there were no idle days attributable to the defendant on this instance. The claim in respect of this aspect of the invoice is accordingly disallowed.

**xiii. Invoice No. SG/INV/1105 dated 17th August, 2015;**

According to the plaintiff's invoice No. SG/INV/1105 dated 17th August, 2015 (exhibit P. Ex.12M) the Mombasa - Kampala trip by tractor head Registration No. UAT 053 M and Trailer Registration No. UAT 643 R arrived at Mombasa Port on 3rd August, 2015 and was loaded on 12th 30 August, 2015 thereby incurring seven (7) days of idle time.

D. W.1 Mr. Oboth Patrick testified that on that occasion the port pass was only obtained on 6 th August, 2015 (exhibit D. Ex.10). The task of getting port passes lay on the Plaintiff. This therefore means that the Plaintiff could only enter Mombasa port the point of offloading on the 6 th August, 2015 or after. The truck was subsequently loaded on 12th August, 2015. Excluding the two free 5 days, the implication is that there were only four (4) idle days and not the seven (7) days of idle time claimed by the plaintiff. I find the four (4) days' delay attributable to the defendant.

I find that this evidence does not rebut the testimony of P. W.1 Mr. Kassim Mohammed to the effect that securing a port pass takes less than an hour after a truck's arrival at the port gate. I am therefore inclined to believe his testimony that the delay is attributable to the fact that there was no cargo to be loaded prior to 6 th August, 2015. I accordingly find that the defendant is liable for the US \\$ 1,750 claimed on Invoice No. SG/INV/1105.

**xiv. Invoice No. SG/INV/1094 dated 17th August, 2015;**

According to the plaintiff's invoice No. SG/INV/1094 dated 17th August, 2015 (exhibit P. Ex.12N) the Moroto - Mombasa trip by tractor head Registration No. UAT 505 S and Trailer Registration No. UAT 385 T arrived at Malaba on 12th July, 2015 and left on 15th July, 2015 thereby incurring one (1) day of idle time. The defendant attributes this delay to the URA. I therefore find that the defendant is liable for the US \\$ 250 on invoice No. SG/INV/1094 as claimed.

In summary, the plaintiff has proved the following amounts as owing;

- i. Invoice No. SG/INV/1068 dated 12th August, 2015 US \\$ 500
- ii. Invoice No. SG/INV/1074 dated 13th August, 2015 US \\$ 250
- iii. Invoice No. SG/INV/1078 dated 13th 25 August, 2015 US \\$ 750
- iv. Invoice No. SG/INV/1081 dated 14th August, 2015 US \\$ 250
- v. Invoice No. SG/INV/1084 dated 13th August, 2015 US \\$ 500
- vi. Invoice No. SG/INV/1086 dated 14th August, 2015 US \\$ 2,750
- vii. Invoice No. SG/INV/1094 dated 17th August, 2015 US \\$ 250

**viii. Invoice No. SG/INV/1095 dated 17th 30 August, 2015 US \\$ 250**

ix. Invoice No. SG/INV/1099 dated 17th August, 2015 US \\$ 250

- x. Invoice No. SG/INV/1101 dated 17th August, 2015 US \\$ 250
- xi. Invoice No. SG/INV/1103 dated 17th August, 2015 US \\$ 1,750
- xii. Invoice No. SG/INV/1105 dated 17th August, 2015 US \\$ 1,750

Therefore, regarding the issue as to whether the defendant is indebted to the plaintiff in the sum of US \\$ 17,756, I find that the plaintiff has only proved the sum of US \\$ 9,500 as owing from the defendant. A breach of contract occurs when a party neglects, refuses or fails to perform any part of its bargain or any term of the contract, written or oral, in a timely manner without a legitimate legal excuse. I find that the defendant, not having advanced any legitimate legal excuse for its failure to pay the amounts as certified above, is in breach of contract.

- **Third issue;** what remedies are available to the parties?

- 15 The plaintiff's claim seeks to recover special damages of US \$ 17,756 being the value of the amount accrued for the idle time charges, costs of the suit and interest at commercial rate from the date of accrual until payment in full.

### **i. The principal sum.**

The law is that not only must special damages be specifically pleaded but they must also be strictly proved (see *\*Borham-Carter v. Hyde Park Hotel* [1948] 64 TLR\*; *\*Masaka Municipal Council v. Semogerere* [1998-2000] HCB 23\* and *\*Musoke David v. Departed Asians Property Custodian Board* [1990-1994] E. A. 219\*). Special damages compensate the plaintiff for quantifiable monetary losses such as; past expenses, lost earnings, out-of-pocket costs incurred directly as the result of infringement or passing off. Unlike general damages, calculating special damages is much more straightforward because it is based on actual expenses and losses. It is trite law though that strict proof does not necessarily always require documentary evidence (see *\*Kyambadde v. Mpigi District Administration*, [1983] HCB 44; *Haji Asuman Mutekanga v. Equator Growers (U) Ltd*, S. C. Civil\*)

30 *\*Appeal No.7 of 1995\** and *\*Gapco (U) Ltd v. A. S. Transporters (U) Ltd* C. A. Civil Appeal No. 18 of\*

### **Total US \$ 9,500**

*\*2004\**). General principles of contract law require that so far as possible there should be *\*restitutio in integrum\**, with due regard to what was in the reasonable contemplation of the parties.

The currency that will most effectively compensate the plaintiff must be taken to be the one that was within the contemplation of the parties in entering into the contract. If the contracting parties have agreed on a particular currency as the currency of account and payment in respect of all transactions arising under the contract, including the payment of damages for breach, judgment should be given for damages in that currency. Once it is recognised that judgement can be given in a foreign currency, justice requires that it should be given in every case where the currency of the contract is a foreign currency; otherwise one side or the other will suffer unfairly by the fluctuation of the exchange (see *\*Federal Commerce and Navigation Co. Ltd. v. Tradax Export SA* [1977] 2 All E. R. 41, at p. 51\*).

In paragraph 4 (a) and (b) of the claim, the plaintiff specifically claimed a sum of US \$ 17,756 although it has proved only US \$ 9,500 as due and owing. I therefore find that the sum proved as special damages was not only specifically pleaded but has been established as owing to the required standard. It is accordingly awarded.

## ii. General damages.

The plaintiff claims general damages on account of the fact that its trucks accumulated a total of 72 days of idle time during which it had to cater for its drivers' accommodation and meals thereby incurring costs. It would also have earned income during that time or re-invested the money due had it been paid on time.

Damages are said to be "at large," that is to say the Court, taking all the relevant circumstances into account, will reach an intuitive assessment of the loss which it considers the plaintiff has sustained. The award of general damages is in the discretion of court in respect of what the law presumes to be the natural and probable consequence of the defendant's act or omission (see James 30 \*Fredrick Nsubuga v. Attorney General, H. C. Civil Suit No. 13 of 1993\* and \*Erukana Kuwe v. Isaac Patrick Matovu and another, H. C. Civil Suit No. 177 of 2003\*). A plaintiff who suffers damage due

to the wrongful act of the defendant must be put in the position he or she would have been if she or he had not suffered the wrong (See \*Hadley v. Baxendale (1894) 9 Exch 341\*; \*Charles Acire v. M. Engola, H. C. Civil Suit No. 143 of 1993\* and \*Kibimba Rice Ltd v. Umar Salim, S. C. Civil Appeal No. 17 of 1992\*).

General damages are the direct natural or probable consequence of the wrongful act complained of and include damages for pain, suffering, inconvenience and anticipated future loss (see \*Storms v. Hutchinson [1905] AC 515; Kabona Brothers Agencies v. Uganda Metal Products & Enamelling Co Ltd [1981-1982] HCB 74\* and \*Kiwanuka Godfrey T/a Tasumi Auto Spares and\*

10 \*Class mart v. Arua District Local Government H. C. Civil Suit No. 186 of 2006\*). As a general rule, a person who has suffered loss as a result of another's breach of contract is entitled to be restored to the position that the person would have occupied had the breach not occurred.

Firstly the parties agreed on a liquidated sum of US \$250 per day as a reasonable estimate of the 15 damage occasioned by delay. This is a pre-determined amount due to the plaintiff as compensation for the defendant's failure to perform a specific task or comply with a particular duty or obligation, hence a liquidated damages clause. The defendant has not proved it to be other than a true representation of a genuine, reflective estimate of the loss following a breach of the contract, hence it is not a penalty clause. One of its purposes as a liquidated damages clause is to prevent the 20 plaintiff in a breach of contract situation from claiming any sum of money or other remedy in relation to the loss actually suffered. The plaintiff has not demonstrated that the rate of liquidated

- damages which was nominated under the contract is disproportionately small compared to the actual damage which has been incurred as a result of the defendant's delay. A valid and mandatory liquidated damages clause which stipulates a positive amount of liquidated damages will ordinarily 25 evidence an intention by the parties that general damages cannot be claimed (see \*Temloc Ltd v.\*

- \*Errill Properties Ltd (1987) 39 BLR 30\*).

Considering that the plaintiff has not proved any damage apart from the late payment of money due to it under the contract, an award of interest should compensate the plaintiff for loss of the use

30 of money throughout the period during which that loss has subsisted. In the circumstances, an additional award of general damages would be tantamount to overcompensation.

### iii. Interest and costs.

Under section 26 (1) of \*The Civil Procedure Act\* where interest was not agreed upon by the parties, Court should award interest that is just and reasonable. In determining a just and reasonable rate,

- 5 courts take into account "the ever rising inflation and drastic depreciation of the currency. A Plaintiff is entitled to such rate of interest as would not neglect the prevailing economic value of money, but at the same time one which would insulate him or her against any further economic vagaries and the inflation and depreciation of the currency in the event that the money awarded is not promptly paid when it falls due (see \*Mohanlal Kakubhai Radia v. Warid Telecom Ltd, H. C.\*
- 10 \*Civil Suit No. 234 of 2011\* and \*Kinyera v. The Management Committee of Laroo Boarding Primary School, H. C. Civil Suit No. 099 of 2013\*).

Interest can be demanded only by virtue of a contract express or implied or by virtue of the principal sum of money having been wrongfully withheld, and not paid on the day when it ought 15 to have been paid. Interest falls due when money is wrongfully withheld and not paid on the day on which it ought to have been paid (see \*Carmichael v. Caledonian Railway Co. (1870) 8 M (HL) 119\*). If a party does not pay a sum when it falls due the aggrieved party is entitled to interest from the time payment is due to the time of payment. The other justification for an award of interest traditionally is that the defendant has kept the plaintiff out of his money, and the defendant 20 has had the use of it himself so he ought to compensate the plaintiff accordingly.

Interest is a standard form of compensation for the loss of the use of money. The award should address two of the most basic concepts in finance: the time value of money and the risk of the cash flows at issue. As per the coerced loan theory, the plaintiff was effectively coerced into providing

- 25 the defendant with a loan at the date of the original breach, and therefore deserves to earn interest on this forced loan at the unsecured borrowing rate. Compensation by way of interest is measured by reference to a party's presumed borrowing rate in the relevant currency because that rate fairly represents the loss of use of that currency (see \*Dodika Limited & Others v. United Luck Group Holdings Limited [2020] EWHC 2101 (Comm)\*). The borrower typically pays interest on a loan at

- 30 a rate equal to the base rate plus an agreed applicable margin.

The Ministry of Finance noted that foreign currency denominated loans decreased to an industry average of 4.7 per cent in December from 5.6 per cent to November 2020 (see the "Daily Monitor" Newspaper of Wednesday 24th March, 2021). The primary goal of an award of interest should be the realistic compensation, in commercial terms, of the plaintiff for loss of the use of money.

5 Interest should not as a general rule be payable at a punitive rate. The general rule should be that entitlement to interest should be neutral as between the parties so that neither benefits from delayed payment. Considering that this rate may be significantly lower than the rates prevailing in the year 2015 when payment fell due, the plaintiff should not be prejudiced by averaging it at 5% per annum from the date of filing the suit, i.e. 4th March, 2016 until payment in full.

The general rule under section 27 (2) of \*The Civil Procedure Act\* is that costs follow the event unless the court, for good reason, otherwise directs. This means that the winning party is to obtain an order for costs to be paid by the other party, unless the court for good cause otherwise directs. I have not found any special reasons that justify a departure from the rule. Therefore in conclusion,

15 judgment is entered for the plaintiff against the defendant, as follows;

- a) Special damages of US \ \$ 9,500
- b) Interest thereon at the rate of 5% p.a. from the date of filing the suit, i.e. 4th March, 2016 until payment in full.
- 20 c) The costs of the suit.

Delivered electronically this 12th day of July, 2021 .....Stephen Mubiru.....

Stephen Mubiru Judge, 12th 25 July, 2021.

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