

UGANDA / JUDGMENT

**Stanbic Bank(u) Ltd v Nakanyonyi
Development Association(NADA) Ltd
& Ors (Civil Suit No. 137 of 2012) [2015]
UGCommC 144 (30 November 2015)
[2015] UGCommC 144**

COURT

Commercial Court of Uganda

CASE / FILE NUMBER

Civil Suit No. 137 of 2012

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THE REPUBLIC OF UGANDA,

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL SUIT NO 137 OF 2012

STANBIC BANK (U) LTD}..... PLAINTIFF

VERSUS

1. NAKANYONYI DEVELOPMENT ASSOCIATION (NADA) LTD}

2. ALI KIRUNDA}

3. NAMUTEBI MARTHA}..... DEFENDANTS

AND

1. STANBIC BANK (U) LTD}

2. NABUSOBA IRENE}

3. AUTOMOBILE ASSOCIATION OF UGANDA}..... COUNTER DEFENDANTS

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

JUDGMENT

The Plaintiff's action against the first three Defendants jointly and/or severally is for breach of contract and the recovery of Uganda shillings 116,814,442/=, interest thereon at prevailing market rates and costs of the suit.

The basis of the suit is a financial lease facility taken out by the first Defendant amounting to Uganda shillings 150,000,000/= for purposes of financing the purchase of a Water Drilling Rig mounted on a Motor Vehicle and insurance premium of Uganda shillings 7,509,000/=. The lease facility was secured by the personal guarantees of the second Defendant and the third Defendant. The asset the subject of the financial lease agreement was acquired and handed over to the first Defendant. The first Defendant defaulted on its repayment of the facility and the Plaintiff impounded the equipment and subsequently sold it at Uganda shillings 25,000,000/=. The Plaintiff avers that the Defendant since then defaulted on the undertaking to pay the monies owed to the Plaintiff despite various demands.

The first, second and third Defendants filed a joint written statement of defence admitting that they bought a water drilling rig at a cost of Uganda shillings 250,000,000/= out of which the Plaintiff financed Uganda shillings 150,000,000/= together with insurance premium facility of Uganda shillings 7,509,000/=. The Plaintiff retained all the purchase transaction documents including the party's agreement and the original documents of title. The Defendant started servicing the facility for a period of one year until around the year 2011 when the Defendants without notice impounded the machine. The Defendants alleged that they only received one demand notice in September 2011 after the machine had long been impounded. The machine was sold around the year 2012 without any valuation at an under value. The Defendants alleged that the selling of the equipment at Uganda shillings 25,000,000/= when it was bought at Uganda shillings 250,000,000/= was unjust to the Defendants. Secondly the selling of the machine without being valued first was wrongful.

The Defendant counterclaimed against the Plaintiff and filed an action against two other persons as entitled. In the counterclaim the second counter Defendant is described as a female adult Ugandan while the third counter Defendant is A FIRM of valuation surveyors. The action is inter alia for a declaration that the sale of the truck number UAJ 282 F by the first counter Defendant was improper/illegal. A declaration that the sale amounted to breach of contract and an order for payment of general damages for breach of contract, interest and costs of the suit. The gist of the counterclaim was that upon default by the Counterclaimants the respondent immediately impounded the vehicle the subject matter of the release of 7 January 2011 and advertised it on 24 January 2011 without giving the Counterclaimant notice. The Counterclaimants asserted that failure to give notice amounted to a fundamental breach of the lease agreement and deprived the Counterclaimants of the right to salvage the machinery before the sale. As far as the second and third Defendants in the counterclaim are concerned the counterclaim against them is for alleged fraudulent valuation of the equipment at a very unreasonably low price. The Counterclaimants contend that the same valuation surveyors had valued the vehicle at Uganda shillings 300,000,000/= only two years earlier and later on valued it at an unreasonable price of 30,000,000/.

The Counterclaimant seeks a declaration that the sale of the water drilling equipment mounted on a motor vehicle was improper or unlawful. A declaration that the sale of the leased equipment by the first counter Defendant amounted to breach of contract, general damages for breach of contract, exemplary damages, interest and costs of the counterclaim.

In the reply to the joint written certain of defence and counterclaim, the Plaintiff denies the allegations of the Counterclaimants. The Plaintiff maintains that the asset was sold at the prevailing market rates. Secondly upon the Plaintiff serving the Defendant with a demand notice, the Defendants thereafter paid Uganda shillings 8,000,000/= in partial settlement of the demanded amount. Consequently upon the Defendants making the payment they are barred by the doctrine of estoppels from challenging the amounts that were outstanding thereafter. The demand notice was issued on 2 September 2011 and received by the Defendants on 5 September 2011. The asset was sold after 14 September 2011 by Messieurs Armstrong Auctioneers and Court Bailiffs at the then prevailing market value.

As far as the Plaintiff is concerned the Plaintiff asserts that the Counterclaimants were in default of the obligations under the lease facility and were aware of the default. Secondly the parties are bound by the terms and conditions of the lease facility agreement.

As far as the second and third Defendants to the counterclaim are concerned they deny liability to the Defendants/Counterclaimants. As far as the second Defendant to the counterclaim is concerned she received instructions from the third counter Defendant to inspect analyse and issue a valuation report for water drilling equipment registration number UAJ 282 F which works she carried out diligently and professionally. She is not to be sued personally for acts carried out in the course of her employment. The facts are that around September 2000 and the first counter Defendant instructed the third counter Defendant to carry out an inspection assessment and valuation of the truck with specific details such as year of manufacture of 1986. The truck was at that time not registered. It was assessed at a market value of Uganda shillings 292,700,000/= and a forced sale value of Uganda shillings 205,000,000/=. From April 2011 the first counter Defendant instructed the third Defendant to carry out an inspection, assessment and valuation of water drilling equipment registration number UAJ 282 F with specified engine numbers and chassis numbers. The vehicle was valued at Uganda shillings 30,000,000/= being the asset's market value and Uganda shillings 21,000,000/= being the forced sale value. The truck which was not registered and the water drilling equipment are two different and separate trucks do not refer to some trucks. Consequently the two valuation reports referred to 2 distinct and separate trucks. Last but not least the second and third counter Defendants averred that the instructions received from the first counter Defendant were restricted to valuation and assessment of the trucks and as such they are not liable for the results of the said sale of the truck.

At the hearing of the suit Counsel Isaac Bakayana represented the Plaintiff as well on the other hand Counsel Innocent Ngobi Ndiko represented the second and third counter Defendants. Counsel Himbaza Godfrey represented the Defendants.

All the documents were agreed to and the following issues were agreed:

1. Whether the Defendants/Counterclaimants are jointly and/or severally indebted to the Plaintiff as claimed in the plaint or at all?

2. Whether the valuation and consequent sale of the leased assets was fraudulent, improper/illegal?
3. Whether the counterclaim discloses a cause of action against the second counter Defendant?
4. What are the remedies available to the respective parties?

Subsequent to the court taking evidence from witnesses of all the parties, the court was addressed in written submissions.

The Plaintiffs case as contained in the written submissions against the Defendants jointly and severally is for the recovery of Uganda shillings 116,814,442/=, interest thereon at the prevailing market rates and costs of the suit. The Plaintiff's case is based upon the first Defendant default, a demand being made on the second and third Defendants and failure to pay.

1. **Whether the Defendants/Counterclaimants are jointly and/or severally indebted to the Plaintiff as claimed in the plaint or at all?**

Submissions of Plaintiff's Counsel

On this issue the Plaintiff's Counsel prayed that it is answered in the affirmative because the Defendants admit to have taken the facility and defaulted on repayment. They further admits that the water drilling rig was bought at the cost of Uganda shillings 250,000,000/= out of which the Plaintiff paid Uganda shillings 150,000,000/=. This admission is further contained in the scheduling memorandum. They admitted taking the facility and defaulting on its repayment. In terms of section 57 of the Evidence Act, a fact admitted need not be proved. Counsel contended that there is an admission of fact and a party may apply to court for judgment upon admission under Order 13 rules 6 of the Civil Procedure Rules. The Plaintiff's Counsel prayed that the court finds that the facility was duly taken and there was a default on the same. Consequently he contended that the only remaining question is whether they are indebted to the Plaintiff and the question should be answered in the affirmative.

The Plaintiff relies on the first Defendant's statement with the Plaintiff. Plaintiff's Counsel contended that this evidence was not challenged at all (exhibit P8). It shows the outstanding amount of Uganda shillings 142,292,238/=. There were arrears amounting to Uganda shillings 7,522,204/=. The leased asset was sold at Uganda shillings 25,000,000/= leaving an outstanding amount of Uganda shillings 124,814,442/=. On 14 October 2011, the Defendants deposited Uganda shillings 8,000,000/= thereby leaving an outstanding balance of Uganda shillings 116,814,442/= which is the amount pleaded in the plaint.

The second and third Defendants are indebted to the Plaintiff by virtue of the lease offer exhibit P1 under which the directors give personal guarantees of Uganda shillings 150,000,000/=. The first Defendant through the second and third Defendants agreed to the terms of the lease offer. The company through resolution authorised the second and third Defendants to provide the required security according to the facility letter and exhibit P3. The second and third Defendants also executed personal guarantees undertaking the payment and satisfaction on demand or any

sum owing on any account of the first Defendant. By demand dated second of September 2011 duly made and served upon the Defendants on 5 September 2011, what owed was demanded. The Defendants have not denied any of the documents. Counsel relies on the decision of this court in **Barclays bank of Uganda Ltd versus Jing Hong and Guo Dong** where it was held that the liability of the guarantor arises only upon default of the principal debtor in his or her obligations. The evidence demonstrates that the first Defendant defaulted on its repayment obligations to the Plaintiff. The results are that the Defendants are jointly or severally liable to the Plaintiff for the sums claimed.

Submissions of the Defendants Counsel in reply:

Counsel for the 1st, 2nd and 3rd Defendants submitted that the Defendant's bought a water drilling rig at close to Uganda shillings 250,000,000/=. The Plaintiff contributed through a financial lease Uganda shillings 50,000,000/= together with insurance premium facility of Uganda shillings 7,509,000/=. The Defendants were servicing the facility until 2011 when the Plaintiffs without any notice impounded the machine and later sold it off at an undervalued price. The Defendants maintained that they were honouring the loan obligations and were willing to continue honouring them. The Defendants were at all material times willing to rectify the default had they been given an opportunity by way of notices of default. The Plaintiff unlawfully sold the Defendants asset for which the Defendants claim for judgment against the Plaintiff in the counterclaim. The Defendant admitted being in default at a certain point but were willing and required a chance to rectify the default had the Plaintiff not acted harshly.

Upon default the Plaintiff immediately impounded truck registration number UAJ 282 F, the subject of the lease agreement dated 7th of January 2011 and advertised it for sale on 24 January 2011. The Plaintiffs never gave the Counterclaimant's the requisite notice which was mandatory under the lease agreement. Counsel submits that clause 11.2.1 of the lease agreement provides for 14 days written notice upon default of the borrower and upon expiry of the notice the Plaintiff would be entitled to dispose of the goods in any manner. The language used in the provision is mandatory. The sale of the property was contingent upon giving notice to the Counterclaimants. Consequently Counsel submitted that failure to give notice was a fundamental breach on the part of the Plaintiff bank. Notice was only given to the Counterclaimant on 2 September 2011 eight months after impounding, advertisement and sale of the leased machinery. Failure to give the notice amounted to a fundamental breach which went to the root of the whole matter and deprive the Counterclaimants of the right to salvage the machinery before the sale for which they are entitled to general damages.

The Defendant submitted that due to the actions of the Plaintiff in selling the truck they incurred damages by way of loss of business income for which they hold the Plaintiff liable as claimed in the counterclaim.

Submissions of the 2nd and 3rd Defendants to the Counterclaim:

Counsel for the third counter Defendant agreed that the third counter Defendant was engaged by the Plaintiff/first counter Defendant to carry out a valuation of the equipment and submit reports to the Plaintiff. The third counter Defendants Raymond Mugisha admits the valuation of the asset on 1 September 2008 before the Counterclaimants had acquired the truck and it was as follows:

The Asset was valued at a market rate of Uganda shillings 292,700,000/= with a forced sale value of Uganda shillings 205,000,000/=. The Plaintiff again engaged the third Defendant to value the Water Drilling Rig in a parking yard along Salaama Muyonyo Road. It was valued at a market value of Uganda shillings 30,000,000/= with a forced sale value of Uganda shillings 21,000,000/=. Counsel submitted that the third counter Defendant was a limited liability company.

Counsel for the second and third counter Defendant submitted on whether the suit is maintainable against the third counter Defendant? This was an additional issue.

Issue number one on whether the Defendants/Counterclaimants are jointly or severally liable and indebted to the Plaintiff as claimed in the plaint does not concern the second and third counter Defendants.

2. Whether the valuation and consequent sale of the leased assets was fraudulent, improper/illegal?

Submissions of Plaintiffs Counsel:

The Plaintiff's Counsel submitted that the basis of the allegation for improper/illegal sale of the leased assets is the averments in paragraph 3 (b), (c) and (d) of the amended written statement of defence. Starting with the averment that there was undervaluation of the property, Counsel submitted that this was rebutted. The relationship between the lessor and the lessee was governed by contract. It was agreed under clause 11.2.1, 11.1.1 and 11.1.2 that in the event of breaches the agreement would be cancelled and the Plaintiff would be entitled to the repossession of the goods and thereafter to dispose of the goods in any manner. The manner that the Plaintiffs adopted has not been demonstrated by the Defendants to have been unreasonable. The Plaintiff contacted persons qualified to give a fair assets of the value of the leased assets whereupon the valuation report exhibit P 12 was provided. The report indicated that the assessed market value was Uganda shillings 30,000,000/= while the forced market value was Uganda shillings 21,000,000/=. Thereafter through an advertisement in the new vision of 24 January 2011 exhibit P 10 the Plaintiff invited members of the public interested in the leased assets to express their interest. Following the advertisement, two offers were received and the property was sold at Uganda shillings 25,000,000/=. In the premises the Plaintiff cannot be faulted for the price at which the property was sold. The Defendants have not adduced any evidence to show that they had any better value for the property than that at which the property was sold. The burden of proof is on the Defendants to prove a better valuation. In the premises the Plaintiff's Counsel submitted that the sale of the leased assets was proper and not in breach of any provision of the lease agreement.

The second and third counter Defendants provided that the asset valued in 2008 was different from the asset valued in 2011. He looked at both valuation report confirmed the assertion that the asset are different. However, the best person to explain the difference in the asset is the Defendant. It is stipulated under the terms and conditions exhibit P1 particularly clause 1.1 that the lessor would buy the goods, which the lessee has selected from the supplier. The lessee is further required to inspect the goods for defects and damage before accepting. From this provision the asset was chosen by the Defendants who then took delivery of the same. They held that the asset on behalf of the Plaintiff. The second Defendant confirmed that the asset in exhibit P7 was the machine that was delivered to them. The insinuation that the Plaintiff interchanged machines after impounding by the bailiffs has no basis and is not supported by any evidence and therefore ought to be rejected.

The Defendants further alleged that the leased asset was impounded without notice and that the notice was only served in September 2011. During his cross examination PW1 confirmed that the notice is or is issued before the asset is impounded. The bank physically contacts the customer and also writes to them asking them to make good when they are in arrears. In the premises notice was given to the Defendant prior to impounding of the leased assets.

The Plaintiff's Counsel submitted in the alternative and without prejudice that failure to give notice to the Defendant does not entitle them to claim against the Plaintiff or even to the remedies sought in the counterclaim. It further cannot turn the valuation of the sale of the leased asset into an unlawful process. The obligations of the parties as stipulated in the lease agreement. The provisions do not include any clause penalising the Plaintiff for failure to notify the Defendant prior to founding the leased asset. The Court of Appeal in **Behange versus School Outfitters (U) Ltd (2000) 1 EA 20** held that the parties are bound by the terms of the agreement and the role of the court is simply to enforce those terms. In the premises issue number 2 ought to be answered in the negative and further the counterclaim to be dismissed with costs.

Reply of the 1st, 2nd and 3rd Defendants Counsel:

The Defendant's Counsel submitted that the facts adduced in evidence prove that the truck was impounded on 7 January 2011 and advertised on 24 January 2011 leading to the eventual sale. The demand notice was issued to the Defendants on 2 September 2011 eight months after the impounding, advertisement and sale and amounted to breach of clause 11.2.1 of the lease agreement. The Supreme Court held in **Imelda Nassanga versus Stanbic Bank and another SCCA number 10 of 2005** that where there has been an irregularity in any sale, the wronged party may sue for compensation. Counsel further relied on the judgment of this court in **Gladys Nyangire and Another versus DFCU leasing company Ltd HCCS 106, 150 and 78 of 2007** where the sale of the mortgaged property was set aside for failure by the Defendant give the Plaintiff demand default notice under the mortgage. The court further has jurisdiction to set aside a sale conducted in a manner prejudicial to the interest of the mortgagor in the circumstances of the case. As against the second and third counter Defendants, the Counterclaimant alleged fraud and inconvenience. This is on the ground that the vehicle was valued at an unreasonably low price of Uganda shillings 30,000,000/= without justification when it had been valued at Uganda shillings

300,000,000/= only two years previously. The report itself alleged irrelevant factors such as rust and that the vehicle had been used for four years when it had only been used for two years. It ignored an earlier valuation report made on 1 September 2008 by the same valuation surveyors. At the time of the valuation for the first time, it was clearly indicated that the vehicle had not yet been used in Uganda.

In the premises the Defendants/Counterclaimants claim loss of income and business from the date of impounding the suit property amounting to approximately Uganda shillings 100,000,000/= as well as loss of reputation and inconvenience. The Defendants testified that the Plaintiff was colluded with the third counter Defendant to produce a valuation report for a different vehicle from that which was leased. The Plaintiff ought to have known that the valuation was not accurate. The sum total is that the sale was marred with irregularities from the onset and the Plaintiffs are in court with unclean hands seeking to benefit from the illicit actions to the detriment of the Defendants who have already suffered. Consequently the Defendant's pray for the suit to be dismissed and judgment be entered in the counterclaim.

Submissions of the 2nd and 3rd Counter Defendant's Counsel:

On this issue the second and third counter Defendants Counsel associated with the submissions of the Plaintiff's Counsel. The second and third counter Defendants are valuation surveyors and the appropriate question is whether the valuation was fraudulent? As valuation surveyors they are not concerned with the sale of the truck. What is the duty of the valuation surveyor? The valuation surveyor carries out professional work and therefore owes a duty to both the parties appointing him or her and the recipient of his or her valuation report. This was the ratio in **Glenworth Financial Mortgage Insurance versus Hodder Rook & Associates** [2010] NSWSC 1043 with reference to another case of **Kestrel Holdings versus APG of properties** [2009] FCAFC 144. In certain circumstances the valuer owes a duty of care to the recipient of valuation containing negligent misstatements causing economic loss.

The question is whether the third counter Defendant indeed breached this duty owed to the bank and to the Counterclaimants. The Counterclaimants allege fraud on the part of the second and third counter Defendants. Fraud according to the definition of the Supreme Court in **David Sajjaka Nalima vs. Rebecca Musoke C. A. No. 12 of 1985** means actual fraud, dishonesty of some sort or what is called constructive fraud. The court relied on the definition of Lord Lindley in **Assets Company versus Mere Roihi** (1905) AC 176. The definition was restated in **Frederick Zaabwe verses Orient bank and five others** SCCA 04 of 2006. The evidence adduced by the Counterclaimants does not prove any of the elements of fraud defined in the above authorities apart from merely alleging fraud. Fraud must not only be pleaded but must be strictly proved. The standard of proof is higher than that of the balance of probabilities though may be short of that beyond reasonable doubt.

In the cross examination of the leaser's Manager Recoveries in Stanbic bank, the process of obtaining a lease facility from the bank is that once the customer identifies the item, he approaches the bank for financing. The bank confirms that the supplier is on an accredited list of

companies and the customer is required to make an equity contribution. Once it is made, the bank confirms with the supplier that the equity contribution is made. The bank provides a list of valuation surveyors from whom the customer may choose. Once the customer meets the criteria then the item is released to the customer.

The facts are that the Counterclaimants around October 2008 identified and Ashok Leyland truck drilling rig from Smart Flow Ltd. He applied for financing and the bank to give them an approved list of surveyors. They chose the third counter Defendants who undertook an inspection through Raymond Mugisha and gave their valuation report. The equipment was valued as indicated above.

Subsequently in the second valuation Irene Nabusoba inspected the vehicle upon instructions and valued a water drilling equipment of an Ashok Leyland registration number UAJ 282 F registered in Uganda on the 19th of May 2007. The drilling equipment that she valued was aged and rusty and because of that condition the water drilling equipment was assessed at a market value of Uganda shillings 30,000,000/= and the forced sale value at Uganda shillings 21,000,000/=. The bad condition of the water drilling equipment was supported by the evidence of Felix Musiime who testified that the truck was brought by a break down vehicle from Jinja to where it was packed and was in a bad condition. The valuation report depicts the condition of the vehicle at the time of its valuation before sale. The valuation report makes comments about the cabin, body/interior, the engine, transmission system etc which gives the poor conditions.

In the premises there was no fraud that could be attributed either to the second or third counter Defendants as alleged by the Counterclaimant. Furthermore the equipment that the second and third counter Defendants valued before the granting of the facility is different from that which was valued at its disposal.

Submissions of the Plaintiff's Counsel in rejoinder

On the question of the propriety of the valuation and consequent sale of the leased asset, the Plaintiff's Counsel submitted in reply to the contention that it was necessary to give a 14 days' notice that clause 11.2.1 of the lease agreement relating to notices is directory and failure to comply with the it did not in any way affect the liability of the Defendants or create any liability for the Plaintiff under the contract.

He contended that the financial lease agreement provides for a 14 days' notice to be issued to the lessee before disposing of the goods in any manner but does not prescribe a sanction against noncompliance and does not indicate that non-compliance would invalidate subsequent acts. In the premises Counsel submitted that the clause is merely directory. In the case of **Edward Byaruhanga Katumba versus Daniel Kiwalabye Musoke Civil Appeal Number 2 of 1998** and **David Kayondo versus the Co-Operative Bank Ltd Civil Appeal Number 10 of 1991**, it was held that the word "shall" in a statutory provision did not necessarily make the provision mandatory. Where the legislature intended the provision to be mandatory, it would provide a sanction for non-compliance with the provision. In the absence of a penal sanction, the inference is that the

parties did not intend the provision to have an invalidating consequence in the case of non-compliance.

The Plaintiff's Counsel further relied on the case of **Steel vs. Sirs (1980) All ER 529** where Lord Diplock held that where the meaning of the words is plain and unambiguous, it is not for the judges to invent fancied ambiguities as an effect to its plain meaning because they considered the consequences for doing so would be inexpedient or even unjust or immoral. Accordingly the Defendant's contention that failure to serve a written notice of amounts to a fundamental breach is without any basis and is tantamount to rewriting the contract.

The Plaintiff's Counsel further distinguished the case of **Gladys Nyangire and others versus DFCU Leasing Company Ltd civil suit number 106, 150 and 788 of 2007** on the ground that the notice referred to in that case was a mandatory notice under the Mortgage Act. The notice under this provision is based on a lease agreement. Secondly in that case what was dealt with was land whereas in the current case it is a chattel mortgage. The Mortgage Act does not apply to the chattels. Furthermore Counsel submitted that financial leases are not dependent on any legal requirements but are designed under the common law and freedom of contract. In the terms it is the lessee who selects the equipment to be supplied by the manufacturer or dealer and the lessor provides the funds and acquires the equipment. It allows the lessee to use it for all of its expected useful life. In the premises the provisions for notice under the Mortgage Act Cap 229 are inapplicable.

As far as evidence is concerned, the Defendant started defaulting on the rental payments as early as 2009. When the asset was impounded, the Defendants did not take any steps to ensure that the arrears were duly settled. The asset was impounded in January 2011 and was sold on 14 September 2011. The Defendants for this whole period had the opportunity of redeeming the mortgage but did not do so. Consequently they cannot in any event claim to have been denied an opportunity to redeem the asset.

On the question of valuation, the Plaintiff's Counsel rejoined that the valuation report dated 9th of April 2011 demonstrates that the vehicle was mismanaged by the Counterclaimants and thus the drastic fall in its value. The Plaintiff's Counsel further relies on the case of **Nassolo Farida versus DFCU Leasing Company Ltd** (supra) where Honourable Justice Lameck Mukasa noted that during the duration of the lease, the usual risks and rewards of ownership are transferred to the lessee who bears the risk of loss, destruction and depreciation of the leased equipment. He contended that it is the Counterclaimants who mismanaged the property thereby causing its loss of value. Upon default in rental payments, the Plaintiff repossessed the property and sold the same but could not recover the entire amount disbursed because the asset was mismanaged causing it to depreciate in value. In the premises Counsel maintains that the Plaintiff is entitled to damages for the entire transaction.

1. **Whether the counterclaim discloses a cause of action against the second counter Defendant?**

Submissions of the Plaintiffs Counsel:

The Plaintiff's Counsel submitted that this issue is for the Defendants and the second Defendant on the counterclaim and the Plaintiffs need not address the court on it.

Submissions of the Defendants Counsel

The Defendants Counsel submitted that the counterclaim discloses a cause of action by virtue of the fact that the first counter Defendant illegally sold the Counterclaimants drilling rig machine without notice at an undervalued price on the basis of the third counter Defendant's valuation report. The first counter Defendant was in charge of the purchase of the machine and connived with the second and third counter Defendants to sell the machine at an under value occasioning damages to the Counterclaimants.

Counsel submitted that at the proceedings the machine that was procured was different from the one that was impounded and sold. It was upon the Plaintiff to explain satisfactorily to court why it impounded and sold a different asset from the one that had been procured. This is a grave breach of duty on the part of the Plaintiff/counter Defendant. According to the leading case of **Auto Garage versus Motokov [1971] EA 314**; the three essential ingredients of a cause of action are present in the counterclaim. The Counterclaimants partly leased equipment from the Plaintiff and valued by the third counter Defendant in 2008. The machine was later sold by the first counter Defendant without due notice under the lease agreement and undervalued by the second counter Defendant in 2011 with the approval of the first counter Defendant prior to the sale of the property at the minimum price of Uganda shillings 25,000,000/=. The actions of the counter Defendants jointly and severally deprived the Counterclaimants of business, their source of income, reputation and caused great inconvenience. The second counter Defendant is an employee of the third counter Defendant at the time of the valuation in 2011. It is the same counter Defendant which conducted the initial valuation and there arises a question about the conduct of both valuations. There is therefore a cause of action against the second counter Defendant in the circumstances.

Reply of Counsel for the 2nd and 3rd Counter Defendants:

The 2nd and 3rd Counter Defendants Counsel submitted that the evidence is clear that the second counter Defendant is an employee of the third Defendant which is a limited liability company. Counsel relied on the definition of a cause of action in **Auto Garage and another versus Motokov (1971) EA 514** where the elements of a cause of action are that the plaintiff should show that the Plaintiff enjoyed a right; that that right has been violated; and that the Defendant is liable for violating the right. The question is whether the second counter Defendant is liable for violating the Counterclaimant's right? The question is whether the second counter Defendant is personally liable for the alleged fraudulent acts. It is clear from the evidence that the Plaintiff hired the third counter Defendant who came up with the valuation report dated first of September 2008. Secondly it is alleged that the Plaintiff connived with the third counter Defendant and produced a valuation report for a different vehicle from that which they had leased. Furthermore it is averred

that the vehicle was valued by the third Defendant. Clearly the second counter Defendant was not in any way personally liable for any allegations of fraud put up against her by the Counterclaimants because the Counterclaimants in the evidence only refer to the third counter Defendant and not the second counter Defendant. No case was proved against the second counter Defendant. The second counter Defendant was wrongly sued because at the time she valued the truck she was an employee of the third counter Defendant and acted in the course of her employment and the Counterclaimants have no cause of action against. Counsel further relied on the principle of vicarious liability in the case of **Kasekya Kasaijja Sylvan vs. A. G Civil Suit No. 1147 of 1998 and Muwonge vs. AG [1967] EA 17**. The principle is that an employer is vicariously liable even if the servant acted deliberately, wantonly, negligently or criminally for his own benefit so long as what was done was done in the course of the servant's employment.

The conclusion is that the Counterclaimants sued the wrong party as far as the second counter Defendant is concerned.

Whether the suit is maintainable against the third counter Defendant?

The second and third Counterclaimants relies on the name of the third Counterclaimant as "Automobile Association of Uganda" and submitted that the question was whether it has the capacity in law of suing or being sued. In the case of **Kakooza Mutale versus Attorney General and others [2001 – 2005] HCB 110** it was held that a legal person is defined as an entity with the legal capacity to represent its own interest and in its own name before a court of law. It can obtain rights or obligations for itself or impose binding obligations, grant privileges to others and therefore the status is conferred by law and cannot be assumed. The Automobile Association of Uganda is not such an Association recognised in law with the capacity to sue or be sued in its own name. Paragraph 5 of the counterclaim avers that the third Counterclaimant is a firm of valuers with capacity to sue and be sued. The averment assumes legal capacity on the side of the third counter Defendant which actually is non-existent in law. The third counter Defendant is a company limited by guarantee according to the certificate of incorporation adduced in evidence as DE 6. On the basis of the evidence that there is a company known as Automobile Association of Uganda Ltd, the Defendant sued in non-existent entity. Finally Counsel relied on the case of **Fort Hall bakery versus Frederick Muigai Wangoe [1959] EA 474** where it was held that a non-existent person cannot sue and once the court is made aware that the Plaintiff is non-existent and therefore incapable of maintaining an action, it cannot allow the action to proceed. In the premises the counterclaim against the third counter Defendant is a nullity and cannot proceed.

Prior to the above submissions Counsel maintained that the court for purposes of saving time had ruled that the preliminary points of law should be considered together with the submission on the merits of the action. In the premises the preliminary points of law should be considered and suit dismissed on that ground. In other words the submissions on the merits are submissions in the alternative.

In the premises Counsel prayed that judgment is entered against the Defendant/Counterclaimant and the counterclaim is dismissed with costs.

1. What remedies are available to the respective parties?

Submissions of the Plaintiffs Counsel:

On the basis of the Plaintiff's submissions, the Plaintiff's Counsel submitted that the proper remedy is for judgment to be entered against the Defendants jointly and severally as prayed for in the plaint.

As far as the counterclaim is concerned, the Plaintiff/Defendant to the counterclaim submits that the agreement did not provide a remedy for the Plaintiff's breach of any of the terms therein. Having agreed to the lease agreement, the Defendants have no right under the said agreement to maintain the counterclaim or even the prayers sought for lack of a contractual basis to do so. On this basis, the counterclaim would be dismissed with costs.

Submissions in reply of the Defendant's Counsel:

The Defendants on the basis of earlier submissions above prayed for dismissal of the suit and for judgment in the counterclaim. The Plaintiff breached the terms of the lease agreement and cannot benefit from its breach. Furthermore he comes to equity must come with clean hands (a maxim which is applicable to the current case). Furthermore Counsel submitted that the court cannot condone an illegality once it has knowledge that it would defeat justice according the case of **Makula International versus Cardinal Nsubuga Foundation [1982] HCB 11**. Furthermore the principal has been held in the case of **Imelda Nassanga versus Standard Bank and another** (supra) that where an irregularity in the sale has been occasioned, the wronged party may sue for compensation. In the premises Counsel prayed that the court declares the sale of the vehicles is unlawful and in breach of the contract and deems it fit to grant damages, interests and costs of the suit in the counterclaim.

Judgment

I have carefully considered the pleadings of the parties, the evidence adduced, submissions of Counsel, as well as the authorities cited. In the joint scheduling memorandum endorsed by Counsels of all the parties there are agreed facts.

The agreed facts are that the first Defendant sometime in October 2008 obtained a lease facility amounting to Uganda shillings 150,000,000/= from the Plaintiff bank for purposes of financing the purchase of a water drilling rig mounted on a motor vehicle.

The first Defendant further obtained an insurance premium facility in respect of the leased asset amounting to Uganda shillings 7,509,000/=.

The water drilling rig was acquired at Uganda shillings 250,000,000/= out of which the Defendants financed Uganda shillings 100,000,000/=.

The first Defendant by a company resolution dated 24th of October 2008 authorised the second Defendant and 3rd Defendant and Ms Mutesi Fatuma to accept on behalf of the first Defendant the terms and conditions of the lease and premium insurance facility.

The lease facility was payable within 48 equal monthly instalments of approximately Uganda shillings 4,564,555/= with interest.

The insurance premium facility was repayable in 10 monthly instalments of approximately Uganda shillings 812,850/=, with interest.

The lease facility was secured by the personal guarantee of the second Defendant and the third Defendant.

The asset the subject of the lease was consequently acquired and handed over to the first Defendant.

The first Defendant subsequently defaulted on its repayment of the facilities; the Plaintiff impounded the same and subsequently sold it at Uganda shillings 25,000,000/=.

Prior to the sale, the intended sale was advertised in the newspapers and a valuation of the asset was carried out.

The third counter Defendant's Raymond Mugisha made a valuation of the asset and it was as follows:

- * Assessed market value: Uganda shillings 292,700,000/=.

- * Forced sale value: Uganda shillings 205,000,000/=.

- * Furthermore the third counter Defendant Irene Namusoba made a valuation of an asset as follows:

- * Assessed market value of Uganda shillings 30,000,000/=.

- * Forced sale value of Uganda shillings 21,000,000/=.

The Defendant does not deny the fact that at the time the relevant asset was impounded, the first Defendant had defaulted in the payment of the rentals of the lease. The only case is that the Defendant's bought water drilling rig at the cost of Uganda shillings 250,000,000/= out of which the Plaintiff financed 150,000,000/= together with insurance premium facility of Uganda shillings 7,509,000/=. In the written submissions of the Defendants it is unambiguously written that the Defendants were at all material times willing to rectify the default had they been given opportunity by way of notice of default and therefore contend that the Plaintiff unlawfully sold the vehicle for want of notice. At page 2 of the submissions of the Defendant's Counsel it is written as follows: "the Defendants did default at some point, but had a chance to rectify the said default had the Plaintiff not acted harshly the way they did." Their complaint is that they were rendered incapable of continuing to service the loan and rectify the default as required by the law. Again at page 2 they further submitted as follows "the counterclaims averred that upon

execution of the lease agreement on 23 October 2008, they started servicing the loan, but at some point defaulted in payment. That upon default, the Counterclaimants immediately impounded the truck registration number UAJ 282 F, the subject of the lease agreement on the 7th of January 2011 and advertised it for sale on 24th of January 2011 without giving the applicant notice as a mandatory requirement under the lease agreement."

Whereas there seems to be an error in the submission that it is the Counterclaimant who impounded the vehicle, it is apparent from the rest of the submission that what is meant is that it is the Plaintiff who impounded the vehicle on 7 January 2011. In other words the Defendants admit being in default. On the basis of that admission the Plaintiff's Counsel had sought judgment on admission to the effect that the Defendants were in default of the rental payments.

I have carefully considered the contention of the Plaintiff that the Defendant's admitted the claim on the first issue as to whether the Defendants/Counterclaimants are jointly and severally indebted to the Plaintiff as claimed in the plaint or at all? The admission is not unequivocal. This is because the Defendants claim that there was no notice as envisaged in the lease agreement of 14 days prior to the impounding and selling of the property and they have claimed damages for alleged breach of contract.

The Plaintiffs claim is for recovery of rental arrears in the leased equipment of Uganda shillings 116,814,442/=. Secondly it is for interest at prevailing bank rates from the date of judgment till payment in full. Lastly it is for the costs of the suit. The Plaintiff admits in the plaint that the first Defendant defaulted on repayment of its loan whereupon it impounded the leased equipment and subsequently sold it at Uganda shillings 25,000,000/=.

The gist of the action as between the Plaintiffs and the Defendant is therefore whether the manner in which the Plaintiff impounded the vehicle and sold it was lawful or justifiable. The issue of whether the Defendants are indebted to the Plaintiff cannot be answered in isolation of the question of the manner in which the property was impounded and sold. Consequently the question of whether the Defendants/Counterclaimants owe the Plaintiff the sums of money claimed in the Plaint will abide the determination of the other issues raised in the counterclaim namely whether the valuation and consequent sale of the leased assets was fraudulent, improper/illegal? In other words it cannot be held that the Defendant is liable to the Plaintiff on the basis of the apparent admission by the Defendants that the first Defendant had defaulted in the loan obligations. The fact that the Defendants owed the Plaintiff money at the time of impounding of the leased asset is not in dispute. Some controversial facts were introduced during the trial. These include whether there was any notice prior to the impounding and sale of the property, whether it was the leased asset which was impounded and sold or another property.

Starting with the lease agreement whose terms are contained in the lease letter of offer dated 23rd of October 2008, the facility was a finance lease facility and insurance premium facility. The limit for the transaction was Uganda shillings 150,000,000/= with insurance premium facility at Uganda shillings 7,509,000/=. The purpose of the lease facility was to finance the purchase of a water drilling rig mounted on a motor vehicle, with spares, accessories and fittings plus a

compressor unit. Repayments were to be made by debit order on a monthly basis. The leased facility was to be repaid by 48 equal monthly rentals of approximately Uganda shillings 4,564,555/= commencing one month after delivery of the asset. Secondly the insurance premium facility was to be repaid in 10 equal monthly instalments of approximately Uganda shillings 812,850/=. The directors of the Defendant Company personally guaranteed the financial lease facility and have been sued as the second and third Defendants in this action. Last but not least it was a requirement of the lease offer that the Defendants would pay an initial amount of 40% equivalent to Uganda shillings 100,000,000/= to the supplier prior to the disbursement of the facility. The lease facility was subject to the standard terms of the Plaintiff bank.

It is not in controversy that the Automobile Association of Uganda made a report dated 1st of September 2008 of inspection, assessment and valuation of water drilling equipment. They assessed the market value at Uganda shillings 292,700,000/= and the forced sale market value at Uganda shillings 205,000,000/=. The equipment particulars which have become controversial were indicated in the report as follows:

The vehicle truck make was Ashok Leyland and the country of origin is India. At the time of the valuation report, it was an unregistered vehicle. The year of manufacture was 1986 and the engine number of the vehicle was ALEH – 49739. The chassis number was ALEK - 183935. At the time of the valuation the odometer reading was 67,978 km. The classification was HMV RIG. The number of axels is 2 and the number and size of tyres is 10: with a wheel size of 10:00 – 20. The vehicle seating capacity is 1.

The Rig type was KLR

The rig-dimension was 30 feet in length. The horsepower of the rig was 120 BPH for compressor. Maximum drilling height was approximately over 150 meters depth. The compressor Engine type is CUMMINS. The compressor type is Ingersoll Rand Cummins Engine. The service hours of the rig was not established.

The date of inspection was 1st of September 2008 and the inspector was Mugisha Raymond. The valuation of the market value included CIF Mombasa US\$140,000. Taxes and registration at Uganda shillings 15,500,000/= as well as dealers margin and inland costs at Uganda shillings 46,200,000/=. Among other things the valuation surveyor noted that a new drilling rig machinery would cost about US\$550,000 which is equivalent at the time to Uganda shillings 900,000,000/=. Secondly prices for used machinery of the type varied significantly with age, model, condition and country of origin. He noted that the vehicle had not yet been used in Uganda.

The second controversial report is dated 9th of April 2011. It is under the letterhead of the Automobile Association of Uganda. The officer who conducted the valuation or the inspector is Nabusoba Irene. The mode of inspection was running tests followed by photography. They assessed market value was Uganda shillings 30,000,000/= while the forced sale value was Uganda shillings 21,000,000/=. The equipment particulars are Ashok Leyland with the country of origin as India. The vehicle at the time of inspection was registered as UAJ 282 F. The engine number is

SYE – 216809 while the chassis number is SUG - 029376 the odometer reading was 88,810 km. The classification of the vehicle was trucked drilling. The number of axels is 2 with a tire number and size of tyres as 10 and 12:00 – 20 respectively with a seating capacity of two.

With respect to the rig type the report notes as follows. The rig type was not established. The rig dimension was about 30 feet length with a maximum drilling height of approximately 150 meters depth.

I have carefully considered the vehicle description in the valuation report for water drilling equipment on 1 September 2008 and the valuation report for water drilling equipment of 9 April 2011. The engine numbers are not the same. The first valuation report has the engine number of ALEH - 4978. The second valuation has the engine number SYE - 216809. Secondly the first valuation has a chassis number of ALEK - 183935. The second valuation has chassis number of SUG - 029376. Furthermore the year of manufacture of the equipment engine in the valuation report of 1 September 2008 is 1986. The year of manufacture of the second valuation of the Ashok Leyland is 1995. The odometer reading of the first valuation was 67,978 km while the second valuation odometer reading is 88,810. The seating capacity of the first valuation report is 1 while the second valuation report has a seating capacity of 2.

The rig type of the first valuation was established but the type of rig for the second valuation was not established and no further details were given in the second valuation.

The conclusion is that the valuation report which was carried out by Raymond Mugisha and written under the letterhead of Automobile Association of Uganda was in respect of a different vehicle from that in the second valuation dated 9th of April 2011. Before reaching a conclusion on the documentation as to what exactly happened between the time of the first valuation and that of the second valuation, I have considered the evidence adduced.

PW1 Mr Dennis Kizza in his written testimony testified that there was a default in the facility prompting the Plaintiff to appoint auctioneers to impound and sell the leased asset. Accordingly the Plaintiff instructed Messieurs Armstrong auctioneers to impound the asset and sell it. The auctioneers later impounded the asset. The asset was valued by Messieurs Automobile Association of Uganda as indicated above. On 24 January 2011 the asset was advertised in the New Vision by Armstrong auctioneers inviting interested members of the public to be before and purchase it. It was sold for Uganda shillings 25,000,000/= to the highest bidder. Secondly that the Defendant upon receipt of the demand notice from Messieurs M. B. Gimara advocates further deposited Uganda shillings 8,000,000/=. Finally the Defendants are still indebted to the Plaintiff. PW1 was intensely cross examined and admitted that he did not personally look at the machinery and did not get to know how much the machinery was supposed to be in terms of its value. He testified that valuation of assets is done by agreed valuation surveyors and once the supplier sends confirmation of receipt, the bank after assessment may disburse funds to supplier and the asset is released to the purchaser/borrower. They carried out a second valuation when there was a default. On further cross examination about whether the property sold was the same property, PW1 was able to tell that the first valuation reveals that the vehicle was not yet registered.

Furthermore it emerged that the vehicle in question was registered on the 19th of May 2007. He was not able to tell whether this was a different vehicle from that in the first valuation report.

PW2 Mr Felix Musiime of Messieurs Armstrong Auctioneers and court bailiffs testified that they were availed the second valuation report and subsequently sold the property to the highest bidder at Uganda shillings 25,000,000/=. He confirmed that the logbook exhibit P6 demonstrates that the first owner of the vehicle was Messieurs Smart flow Ltd. Furthermore he testified that the asset was in a bad state and most of the things (components) were not working. He testified that the asset was brought from Jinja using a breakdown vehicle.

On the other hand Mr Kirunda Ali a director of the first Defendant testified as DW1. The basic part of the testimony has been established by the documentary evidence. However he testified that the rig that was released to them had registration number UAJ 282 F. Furthermore the truck was impounded on 7 January 2011 and advertised on 24 January 2011 and eventually sold. A demand notice was given to them on 2 September 2011 eight months after impounding, advertisement and sale of the leased machinery. According to him the Plaintiff connived with the third counter Defendant and produced a valuation report for a different vehicle from the one that had been leased. He relied on the valuation report 1 September 2008 by Raymond Mugisha. He contended that the valuation was fraudulent on the basis of the differences in the particulars of the two vehicles in the first valuation and in the second valuation. On the question of why the machine was different he testified that it was taken away by agents of the Plaintiff and they ceased to know what happened to it thereafter. The details of the machine were with the bank. In other words his position is that the bank ought to know the particulars of the vehicles.

Finally Mr Felix Odongkara testified on behalf of the third counter Defendant and was able to demonstrate that the two valuation report referred to different model vehicles.

I have carefully considered the documentary evidence relied on in relation to the two vehicles the subject matter of the two valuation reports. I have come to the conclusion that the evidence clearly demonstrates what happened. On 1 September 2008 a certain Ashok Leyland truck was valued by Raymond Mugisha for Messieurs Stanbic bank (U) Ltd. Thereafter on 9 April 2011 another Ashok Leyland vehicle registration number UAJ 282 F was valued by the second counter Defendant and employee of the third counter Defendant. This was clearly a different vehicle and the evidence that it was a different vehicle can be discerned from the correspondence and the logbook.

Starting with the logbook it is established that the vehicle registration number UAJ 282 F was first registered in the names of Smart Flow Ltd on the 19th of May 2007. The manufacturer's model was 1995 and the year of manufacture was 1995. The chassis number was SUG 029376 while the engine number was SYE - 216809. It was first transferred to Messieurs Stanbic bank Ltd on 12 November 2008. According to exhibit D1 being the contractors plant and machinery policy number 11/08/UG/VAF/00498 Phoenix of Uganda Assurance Company Ltd insured the vehicle from 14 November 2008 up to 13 November 2009 and it was described as a vehicle registration number UAL 282F Ashok Leyland truck. The sum assured was Uganda shillings 250,000,000/=.

Secondly exhibit D2 demonstrates that the Plaintiff wrote to Messieurs Smart Flow Ltd in a letter dated 17th of November 2008 for the release of an Ashok Leyland truck drilling rig registration number UAJ 282 F. The letter reads that upon receiving comprehensive insurance policy for the vehicle, the Plaintiff requested the release of the vehicle to the first Defendant.

From the evidence it is clear that the first valuation report is an anomaly which cannot be explained. Nonetheless the vehicle that was released to the first Defendant had the registration number UAJ 282 F. The particulars of the vehicle in the registration book and in the second valuation report are the same. It follows that the particulars of fraud relying on the first valuation report cannot be sustained as against the Plaintiff or the second and third counter Defendants. The evidence of insurance of the vehicle is consistent with the value of the equipment and the loan being about Uganda shillings 250,000,000/= at the time it was released to the first Defendant. This does not imply that the vehicle was valued at Uganda shillings 250,000,000/= before the Plaintiffs offered the facility to the first Defendant and the first Defendant accepted. It is the contract of the parties that the Plaintiff would offer a lease facility of Uganda shillings 150,000,000/= and the Defendant would contribute 40% of the amount being Uganda shillings 100,000,000/= towards the purchase of the vehicle. This arrangement had nothing to do with the valuation report adduced in evidence and dated first of September 2008. If there was any valuation report prior to the consummation of the lease offer facility, it is not part of the evidence.

Finally before concluding the first issue I have established that there is no evidence adduced by the counter Defendants of fraud. It is an inference made from the fact that the vehicle was purchased for about Uganda shillings 250,000,000/= and subsequently sold at Uganda shillings 25,000,000/= after two years. No counter valuation report was adduced in evidence and no opinion contrary to that of the 3rd Counter Defendant offered. The court cannot base its conclusion on suppositions and has to rely on the evidence of valuation surveyors or persons knowledgeable about questions of fact in relation to vehicles of the nature that was sold to recover the Plaintiff's money. The Plaintiff established that the vehicle was valued at about Uganda shillings 30,000,000/= as the market value at the time of its impounding and its forced sale value was Uganda shillings 21,000,000/=. The Plaintiff also established that it sold it for Uganda shillings 25,000,000/= to the highest bidder. The first Defendant and the directors of the first Defendant who are the second and third Defendants did not offer an alternative valuation report or independent assessment of the value of the goods at the time it was impounded. In the absence of that evidence, the only admissible and credible evidence is that of the Plaintiff's witnesses. I cannot hazard a conclusion that because the vehicle was purchased at Uganda shillings 250,000,000/= at the time it was released to the first Defendant, it could not have a value of Uganda shillings 30,000,000/= 2 years later. No expert report was relied upon to counter that of the valuation surveyor.

Lastly on the first issue as to whether the Defendants are indebted to the Plaintiff, the issue is answered in the affirmative. There is no evidence rebutting the evidence of the Plaintiff that the first Defendant owed the money claimed in the plaint and that the second and third Defendants guaranteed the repayment of the loans.

Consequently this suit will be resolved on the question of whether notice was issued prior to the impounding of the leased asset and the effect thereof. I have duly considered the lease agreement.

The Defendants/Counterclaimants rely on clause 11.2.1 of the standard terms of the lease agreement which provides as follows:

"In the event of the breaches 11.1.1 and 11.1.2, cancel the agreement and take possession of the goods upon giving 14 days written notice to the lessee and in the event of breaches 11.1.3 to 11.1.10 immediately cancel this agreement and take possession of the goods. The lessor shall thereafter be entitled to dispose of the goods in any manner."

Evidence establishes that the vehicle was impounded on the 8th of January 2011. It was advertised in the New Vision, Monday, January 24, 2011 at page 59 by Armstrong auctioneers. The auction was to take place 14 days from the date of the advertisement by public auction/private treaty subject to reserve price. By exhibit P9 the Plaintiff established that the Plaintiff bank wrote a letter to Messieurs Armstrong auctioneers instructing them to impound the leased asset which could be traced in Jinja town. Last but not least the Plaintiff's lawyers in a letter dated 2nd of September 2011 purported to write a demand notice for payment of Uganda shillings 149,814,424/= addressed to the directors of the first Defendant. The instructions were to commence legal proceedings against the first Defendants and all its directors who guaranteed the facility. This is the only demand notice which is in evidence and which the directors of the first Defendant agreed they received. On 17 October 2011 they paid Uganda shillings 8,000,000/= by way of a cash deposit in the Plaintiff bank.

I have further considered the letters of offer adduced in evidence by Messieurs Armstrong Auctioneers and Court Bailiffs. It shows that by 14 September 2011, they had not yet sold the leased equipment. In exhibit P 14 they wrote to the Plaintiff indicating that they received instructions on 7 January 2011 and impounded the vehicle on 8 January 2011 to recover money for the bank. They had not been able to get offers for the equipment due to its poor mechanical condition. They however managed to get two offers with the highest offer being Uganda shillings 25,000,000/= from one Besiime Mohammed. In his written testimony Mr Felix Musiime testified that they advertised the property in the New Vision Newspaper dated 24th of January 2011. They were later availed the valuation report of Messieurs Automobile Association of Uganda assessing the market value of the property at Uganda shillings 30,000,000/= and the forced market value at Uganda shillings 21,000,000/=. The asset was consequently sold at Uganda shillings 25,000,000/= but the date of the sale was not disclosed in the written testimony. In his cross examination he testified that he could not recall when he sold the asset.

My conclusion is that it is not true that the vehicle was impounded and sold immediately. It was impounded on the 8th of January 2011. It was advertised for sale in the New Vision Newspaper of the 24th of January 2011. The vehicle was not sold until after the 14th of September 2011 more than seven months later. Last but not least the first Defendant and directors were aware that the Plaintiff had impounded the vehicle and did deposit an amount of Uganda shillings 8,000,000/= in October 2011 after receiving a threat to take legal action against them in September 2011.

Their complaint *inter alia* could have been that the vehicle could have been earning money during this period. The contractual period of notice the Counterclaimant's relied upon is however 14 days. The real question in controversy is whether failure to give prior notice to the first Defendant and directors prejudiced them? Secondly the issue is whether it was a fundamental breach that entitled the Defendants to damages.

As far as the question of prejudice is concerned, I do not think that the Defendants suffered a lot of prejudice and I will give my reasons for saying so. Failure to give notice could not have resulted in them failing to pay *in time per se*. They had sufficient time to pay but did not and could not. It is true that the asset impounded by the Plaintiff could have been used to earn money and therefore contribute to the payment of the outstanding loan. What was the significance of this? Failure to give the 14 days notice was in breach of clause 11.1.2. of the standard terms of the financial lease agreement. The prejudice the first Defendant suffered is simply the ability to earn money using the equipment for 14 days. How much money would they have earned in 14 days?

I have carefully considered the evidence. DW1 Mr. Kirundi Ali and a director of the first Defendant as well as the second Defendant testified under cross examination by the Plaintiff's Counsel that initially they were compliant with the instalment payments of the loan. Later on he admitted that there was default in repayment of the final lease rentals. He testified that the vehicle was in good running condition and he was around when it was impounded. He testified in chief that if they had been given notice they would have mobilised themselves and redeemed the machinery. In paragraph 14 he testified that as a result of impounding the machinery from the 2nd of March 2011 to date (15th of August 2014 when the witness statement was signed by him), they have lost income of about Uganda shillings 100,000,000/=. If DW1 is taken at his word, this loss is for a period of 42 months. This implies that the Plaintiff was earning about Uganda shillings 2,380,952/= shillings per month on the average. The implication is that in half a month being a period of about 15 days, the first Defendant could have earned Uganda shillings 1,190,476/=. However this implies that the first Defendant could not even service the loan facility which required a monthly rental of Uganda shillings 4,564,555/=. However using the assumption that the estimated income was after deducting the rental (which run for only a period of 48 months) from the date of receipt of the vehicle, then the Plaintiff was earning Uganda shillings 6,945,507/=. It assumes an income in 15 days of Uganda shillings 3,472,753/=. The assumptions however fail on the ground that the first Defendant had defaulted in rental repayment and was unable to fulfil its obligations. Secondly DW1 testified that they would have mobilised the money to redeem the property. They had an opportunity to redeem the leased property for over seven months after the leased equipment was impounded in January 2011 but never did. After notice to them of their

continued default they only paid Uganda shillings 8,000,000/= in October 2011.

The Defendants Counsel submitted that failure to give the requisite 14 days notice amounted to a fundamental breach while Counsel for the Plaintiff submitted that the provision was directory and not mandatory and there was no penalty or sanction for non compliance with the provision. The principles for considering whether a provision couched in mandatory terms is mandatory or directory is a principle of statutory interpretation and is inapplicable in the interpretation of contracts. It is established that there was a breach of the lease agreement. That breach was not fundamental in effect because the first Defendant still had an opportunity to redeem the property. Secondly there is no evidence that they could have mobilised sufficient funds to redeem the property within a period of 14 days notice. That being the case the appropriate remedy for breach of the clause to give notice is to award damages in lieu of notice. In the premises the first Defendant is entitled to damages in lieu of notice.

In the premises and on the grounds contained in the judgment the suit and counter claim are resolved as follows:

1. On whether the Defendants/Counterclaimants are jointly or severally indebted to the Plaintiff as claimed in the plaint, the issue is answered in the affirmative. They were indebted and the indebtedness is as claimed in the plaint of Uganda shillings 116,814,442/= less damages in lieu of notice of 14 days as written hereunder.
2. On the issue of whether the valuation and consequent sale of the leased assets was fraudulent, illegal or improper, the answer to the issue is in the negative. There is no sufficient evidence to answer the issue and the only credible valuation of the leased equipment is that of UAJ 282 F Engine Number SYE – 216809 and Chassis Number SUG – 029376 and valuation report of the 2nd counter Defendant dated 9th April 2011.
3. On the issue of whether the counterclaim discloses a cause of action against the 2nd Counter Defendant? I have found it unnecessary to determine whether she can be held personally liable having established that there was no evidence to suggest that the valuation was fraudulent, illegal or improper. In the premises the suit against the second and third counter Defendants stand dismissed with costs.
4. As far as the counterclaim against the Plaintiff is concerned, the suit success in part and the first Defendant is awarded damages in lieu of notice and for inconvenience suffered due to impounding the vehicle without notice. The first Defendant is awarded as against the Plaintiff Uganda shillings 15,000,000/=. The counterclaim succeeds as a set off to the Plaintiff's suit with costs of the counterclaim.
5. The Plaintiffs suit succeeds and the Plaintiff is awarded Uganda shillings 101,814,442/= as against the Defendants jointly and severally with costs.
6. The above award in the counterclaim and in the main suit carry interest at the rate of 20% per annum from the date of filing the suit to the date of judgment.

7. Further interest is awarded on the above awards in the main suit and counterclaim on the aggregate net amount due to the Plaintiff after setting off the counterclaim at the date of judgment at 20% per annum from the date of judgment till payment in full.

Judgment delivered in open court on the 30th of November 2015

Christopher Madrama Izama

Judge

Judgment delivered in the presence of:

Godfrey Himbaza for the Defendant/Counterclaimants

Ngobi Ndiko for the 2nd and 3rd Counter Defendants

Mulungu Peter holding brief for Isaac Bakayana for the Plaintiff Bank

Raymond Mugisha Employee of 3rd Counter Defendant in court.

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

30th of November 2015

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