IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA

COMMERCIAL DIVISION

Reportable
Civil Suit No. 0895 OF 2020 and No. 0006 OF 2021 (Consolidated)

In the matter between

1.WAGAGAI MINING (U) LTD
2.CHONGQUING INTERNATIONAL CONSTRUCTION CORPORATION **PLAINTIFFS**
3.CARGOWELL INTERNATIONAL LIMITED

And

1.FREIGHT SENDY LIMITED
2.KMB QUANTUM DEVELOPERS (U) LTD **DEFENDANTS**
3.MASTER EMPEX LIMITED
4.GEROMA KENYA LIMITED

Heard: 31 March, 2022
Delivered: 23 January, 2024

Contract Law *— Contract of carriage — Every person who holds himself out as ready to engage in the transportation of goods for hire as a business, and not as a casual occupation, and who undertakes, for hire, to carry the goods of all persons indifferently, is deemed a common carrier. — Quantum meruit — a carrier who delivers the goods safely at the port of discharge is entitled to freight on a quantum meruit basis unless the facts are such, as to defeat the implication.*

JUDGMENT

STEPHEN MUBIRU, J.

The plaintiff's claim:

[1] The 1st plaintiff is a private limited liability mining company. The 2nd plaintiff is a private limited liability road construction company, while the 3rd plaintiff too is a private limited liability clearing and forwarding company. The three companies were incorporated and are operating in Uganda. On the other hand, the 1st and 2nd defendants are licenced clearing and forwarding companies operating in Uganda, while the 3rd and 4th defendants are licenced clearing and forwarding companies operating in Kenya. Sometime during the months of May and August, 2020 the 1st and 2nd plaintiffs imported a consignment of bitumen and section steel through the port of Mombasa. When the goods arrived at the port of Mombasa, the 1st and 2nd plaintiffs contracted the 3rd plaintiff to clear and transport the goods as follows; the section steel to be transported to Busia-Uganda, while the bitumen was to be transported to Hoima, Uganda. The 1st and 2nd plaintiffs paid the 3rd plaintiff all the clearing and freight charges in full in advance. In turn, the 3rd plaintiff sub-contracted the 3rd defendant to transport the bitumen from Mombasa Port to the 2nd plaintiff at Hoima-Uganda and paid all freight charges in full in advance. The 3rd plaintiff further sub-contracted the 4th defendant to transport the section steel from Mombasa Port to the 1st plaintiff at Busia-Uganda and paid all freight charges in full in advance.

[2] However, out of the 13 containers of bitumen, the 1st defendant delivered only 12. The 2nd defendant too has since held onto 6 trucks of section steel belonging to the 1st plaintiff on account of non-payment of freight charges. Similarly, the 1st and 2nd defendant continue to hold onto one truck of bitumen belonging to the 2nd plaintiff on account of non-payment of freight charges. The plaintiffs contend that the detention of their goods is unlawful and constitutes a breach of contract. The

plaintiffs therefore seek an order of release of the goods, an award of general damages, interest and costs. The 3rd and 4th defendants never filed a defence to the claim.

The 1st and 2nd defendants' defence to the claim.

[3] By their joint written statement of defence, the 1st and 2nd defendant denied liability for the claim made by the 1st and 2nd plaintiffs. The 1st defendant describes itself as an e-commerce company that provides its platform for importers to access the services of third-party delivery service providers. The defendants contend they are lawfully holding onto the plaintiffs' goods now in their custody, in a lawful exercise of the carrier's lien. They are not privy to any contract between the 3rd plaintiff on the one hand and the 3rd and 4th defendants on the other. On 31st July, 2020 the 1st defendant was contacted by M/s Noble Commodities Juba Limited for the transportation of a consignment of bitumen and section steel from the port of Mombasa to Uganda, at the cost of US $ 115 per ton of bitumen and US $ 2,500 for every truckload of section steel. 70% of the agreed charges were to be paid upon loading and the balance, upon delivery of the goods at the specified destinations.

[4] The defendants duly executed their part of the contract but M/s Noble Commodities Juba Limited did not pay. Delivery of the consignments was bedevilled by delays occasioned by late payment of clearing and storage charges which as at 8th October, 2020 stood at US $ 41,784 for the bitumen and US $ 44,824 for the section steel, which M/s Noble Commodities Juba Limited was contractually bound to meet but has not met to-date, hence the defendant's exercise of the carrier's lien. The 1st and 2nd defendants therefore counterclaim for a sum of US $ 86,608 as outstanding fees, alternatively for an order of disposal of the goods in their custody for recovery of those fees, an award of general damages, interest and costs.

The reply to the counterclaim;

[5] In their reply to the counterclaim, the 1st and 2nd plaintiffs contend that the counterclaimants' claim should be enforced against M/s Noble Commodities South Sudan Limited. The counterclaimants have no cause of action against the 1st and 2nd plaintiffs. The carrier's lien is not exercisable in respect of goods of persons not privy to the contract of carriage.

The questions for determination;

[6] In their joint scheduling conference memorandum filed on 22nd October, 2022 the parties submitted the following issues for the Court's determination, namely;

1. Whether the plaintiffs/counter defendants are liable for payment of the transport, detention, storage and crane off-loading charges for the suit goods, to the 1st defendant.
2. Whether the 1st and 2nd defendants are unlawfully detaining goods consisting of 6 trucks of section steel and one truck of bitumen belonging to the 1st and 2nd plaintiffs.
3. What remedies are available to the parties?

Counsel for the plaintiffs' final submissions;

[7] Counsel for the plaintiff M/s Kampala Tax Advisory Centre-Legal Department submitted that the 2nd defendant was sub-contracted by the 1st defendant who in turn was sub-contracted by M/s Noble Commodities Juba Limited. The circumstances in which the latter became involved in the transaction is unclear. The 1st and 2nd plaintiffs only had dealings with the 3rd plaintiff who in turn sub-contracted the 3rd and 4th defendants. The plaintiffs respectively paid in full for the services so contracted and sub-contracted. M/s Noble Commodities Juba Limited was contracted by either the 3rd or 4th defendants. The 1st defendant's claim of a lien is based on Clause 8.6 of its contract with M/s Noble Commodities Limited.

The 2nd defendant who undertook the actual transportation and has physical custody of the goods has not claimed nay lien over them. Even then, they delivered only part of the goods and have not fully performed their part of the bargain so as to be entitled to the outstanding balance from M/s Noble Commodities Juba Limited. M/s Noble Commodities Juba Limited is a non-existent company and any dealings with it are illegal, so is the claim for the increased costs attributed to payment of a ransom before the goods could leave the port of discharge. None of the plaintiffs is responsible for the delays occasioned in the process of clearing the goods. The defendants cannot claim the costs of detention when they were incurred in the course of exercise of their wrongly assumed lien over the goods.

The submissions of counsel for the 1st and 2nd defendants.

[8] Counsel for the 1st and 2nd defendants M/s KTA Advocates (formerly Karuhanga, Tabaro & Associates), submitted that the 1st and 2nd defendants transported the 1st and 2nd plaintiffs' goods from the port of Mombasa to Uganda without having received any payment for their services, hence the exercise of the lien. The doctrine of privity cannot be invoked to defeat the lien. The plaintiffs are named in the customs documents as the cargo owners. They have the obligation to pay the freight and storage charges. At al material time the plaintiffs were aware that it was the 1st and 2nd defendants transporting their goods. The costs had since risen to US $ 138,131 as at 10th February, 2022. They are also entitled to general damages of shs. 100,000,000/= with interest and costs.

The decision;

[9] A common carrier has been defined as "one who undertakes, for hire or reward, to transport the goods, of such as choose to employ him, from place to place" (see Dwight v. Brewster, 1 Pick. 50 11 An. Dec. 133). Every person who holds himself out as ready to engage in the transportation of goods for hire as a business, and not as a casual occupation, and who undertakes, for hire, to carry the goods of all

persons indifferently, is deemed a common carrier. Under a contract of carriage of cargo, the carrier undertakes to deliver the cargo entrusted to him by the consignor to the point of destination to the person entitled to receive the goods, and the consignor undertakes to pay for the carriage of cargo the established fee. The suit raises questions as to whether a common carrier may exercise the unpaid carrier's articular lien against goods belonging to a consignee with whom the carrier has no contractual relationship. A lien is the right of the carrier to refuse to release goods or documents belonging to the shipper while its charges remain unpaid. A particular lien is exercisable only against the goods involved in a specific contract. A general lien is exercisable against any goods of the customer, even though they may not be the subject of the particular contract in respect of which sums are overdue.

First issue; whether the 1st and 2nd defendants are unlawfully detaining goods consisting of 6 trucks of section steel and one truck of bitumen belonging to the 1st and 2nd plaintiffs.

[10] From the facts of this case, the 1st defendant coordinates a third-party delivery service of sorts. The 1st defendant functions as a facilitator, connecting consignees with transporters to efficiently deliver goods. As an intermediary, the 1st defendant assumes responsibility for the logistical aspects of the delivery process. Once the 1st defendant receives an order on its electronic platform, it coordinates with a transporter who collects the cargo, and transports it to the customer's designated location. It was the testimony of D.W.1 Ms. Rose Kariuki that it was by email correspondence between the 1st defendant and M/s Noble Commodities Juba Limited (exhibit D. Ex.4) that the 1st defendant received instructions to arrange for the transportation of 9 trucks of section steel belonging to the 1st plaintiff and 13 containers of bitumen belonging to the 2nd defendant, from the Port of Mombasa to Busia-Uganda and Hoima-Uganda, respectively.

[11] The available email trail begins with a couple dated 13th and 14th August, 2020 respectively (at page 39 of the joint trial bundle) between a one Pricilla Kabacwamba of M/s Noble Commodities Juba Limited and the 1st defendant's Public Relations Officer, which refer to 36 containers ready for offloading but did not specify the type of cargo being transported. The ones between the same persons dated 17th August, 2020 (at page 37 of the joint trial bundle) contain instructions concerning the loading of six trucks of steel bars destined to Busitema, Uganda and six trucks of containers. Similarly, the ones dated 22nd and 25th August, 2020 (at page 42 of the joint trial bundle), too do not specify the type of cargo being transported but seek to explain the delays involved, the penalties and ransoms paid and an undertaking to avoid such occurrences in future. The same applies to the ones dated 4th, 7th and 8th September, 2020 (at page 46 of the joint trial bundle) which all relate to a consignment of steel bars. It would therefore seem that this particular set of email correspondences is not related to the transaction at hand.

[12] The contract of carriage on the basis of which the defendants seek to exercise the unpaid carrier's lien is dated 31st July, 2020 signed between the 1st defendant and M/s Noble Commodities Juba Limited (exhibit D. Ex.1). It is a framework agreement intended to last a period of 12 months from its "effective date" (presumably 31st July, 2020), unless terminated earlier. By clause 3.2 of that agreement, the 1st defendant was permitted to sub-contract the service delivery of consignments of cargo entrusted to it. By clauses 3.4 and 3.6 of that agreement, M/s Noble Commodities Juba Limited was from time to time for the duration of the contract, to place its orders via the 1st defendant's electronic platform, by providing accurate transaction data and a note detailing the contents of the consignment, including a description and particulars of the goods.

[13] There is no documentary evidence on record indicating how and when M/s Noble Commodities Juba Limited placed the order relating to the 13 containers of bitumen belonging to the 2nd plaintiff and the 9 trucks of section steel belonging

to the 1st plaintiff, parts of both of which are now in dispute. What is clear though is that both consignments ended up in the hands of the 2nd defendant and not with the 3rd and 4th defendants. It is the 2nd defendant who transported the bitumen from Mombasa Port to the 2nd plaintiff at Hoima-Uganda and the section steel from Mombasa Port to the 1st plaintiff at Busia-Uganda. It appears to be a fact that neither the 3rd nor the 4th defendant performed any role in this transaction. Therefore, the essence of the dispute in this transaction is whether when the 2nd defendant was engaged at the instance of the 1st defendant upon instructions from M/s Noble Commodities Juba Limited, whom the 1st and 2nd plaintiffs deny having had any dealings with, the 1st and 2nd plaintiffs are bound to meet the 2nd defendant's fees and charges.

[14] The general rule at common law is that a contract creates rights and obligations only as between the parties to such contract. A third party neither acquires a right nor any liabilities under such contract. Consequently, privity of contract is a doctrine of the law of contract that prevents any person from seeking the enforcement of a contract, or suing on its terms, unless they are a party to that contract. For a person to be able to enforce a contract, he or she must have given consideration to the promisor (see *Dunlop Pneumatic Tyre Co Ltd v. Selfridge Ltd [1915] AC 847at 853*). In the instant case, the contract of carriage is technically between M/s Noble Commodities Juba Limited, and the 2nd defendant, with the 1st defendant acting as an intermediary. In the email correspondence dated 7th October, 2020 (at page 45 of the joint trial bundle) which followed the signing of the framework contract, it was Ms. Pricilla Kabacwamba of M/s Noble Commodities Juba Limited who was notified of challenges met during delivery of the two consignments.

[15] One of the exceptions to the doctrine of privity is agency; where a principal not named in the contract may sue upon it if the promisee really contracted as his agent, and consideration was directed personally or via the promisee in the capacity of an agent. In other words, the real right of action then rests with the

principal as the contracting party, as the agent (promisee) then moves out of the arrangement so as not to sue or be sued (see *Wakefield v. Duckworth [1915] 1 KB 218*). However, in the instant case, there is nothing on record to show that M/s Noble Commodities Juba Limited acted as an agent of either the 1st or the 2nd plaintiffs. The implication then is that the 1st and 2nd plaintiffs as the consignees of the goods, are technically third parties to the contract of carriage initiated by M/s Noble Commodities Juba Limited, executed by the 1st defendant and performed by the 2nd defendant.

[16] A contract of carriage of goods is ordinarily entered between a carrier and a consignor where the carrier undertakes to move goods to another person, usually the receiver (or consignee), in return for payment. In the international transport market as it exists today, it is also common that the consignor contracts with a single party who does not actually perform any carriage obligations but then sub-contracts carriage to several sub-carriers who actually perform the carriage; it is customary to sub-contract a carrier for each leg of transportation, initially by road to sea or air and eventually by road again. The originally contracted carrier is often identified as the "contractual carrier," and the sub-contracted carriers are identified as the "actual" or "performing carriers."

[17] Irrespective of any lack in privity of contract on the part of the consignee, in the case of loss or damage to the goods while in the hands of "actual" or "performing carrier" contracted by the "contractual carrier," international conventions such as article 13 (1) of *The Convention on the Contract for the Carriage of Goods* by Road nevertheless confer upon the consignee an unqualified right of action against the carrier for such loss. Considered to act as an agency, the position of the intermediary will commonly be taken to create privity of contract between his principal and a third party, as well as assuming the duties normally associated with an agency role (see *Aqualon v. Vallana Shipping [1994] 1 Lloyd's Rep 669, at p. 677; Ulster-Swift Ltd and Pigs Marketing Board v Taunton Meat Haulage Ltd* and *Fransen Transport N.V., [1977] 1 Lloyd's Rep 346 and Texas Instruments v. Nason*

[1991] 1 Lloyd's Rep 146, at p. 149). A party (the "contractual carrier") may still be found to have acted as carrier even if subcontracting the performance of the entire carriage to another party.

[18] Alternatively, the intermediary may act as agent for the consignor or consignee in respect of one segment and as agent for a carrier in respect of another segment or for different parts of the process of transporting the goods. Such dual agency has been recognized in shipbroker cases by English courts, for example in *Maracan Shipping (London), Ltd. v. Polish Steamship Co. (The "Manifest Lipkowy"), (1988) 2 Lloyd's Rep 171* where it was held that "if [the intermediary] becomes involved as a sole intermediary with the knowledge and consent of both parties then [the intermediary's] role will involve negotiating with both principals on behalf of the other, in turn, and doubtless he will owe duties to both.

[19] An intermediary may; (a) contract for the freight forwarder to undertake carriage of his goods, in which case the freight forwarder would undoubtedly adopt the capacity of "carrier"; or (b) contract for the freight forwarder to arrange for his goods to be carried by another party, in which case the freight forwarder may decide in the contract to act as either principal for the carriage or as forwarding agent for the consignor. In the instant case, the 3rd plaintiff is the contractual carrier but the two would be performing carriers it contracted, never performed at all. Instead it is the 2nd defendant who did, who was never formally contracted by the 3rd defendant. The 3rd plaintiff as the "contractual carrier," did not explain how the Customs Transit Documents (exhibit D. Ex.2 at pages 8 to 26 of the joint trial bundle) it should have entrusted to the 3rd and 4th defendants, if that version is true, instead found their way into the hands of M/s Noble Commodities Juba Limited.

[20] The closest explanation can be found in the email correspondence dated 12th October, 2020 (at pages 44 of the joint trial bundle) from a one Mr. Onesmus Nganga Karanja of M/s Noble Commodities Juba Limited addressed to Ms. Pricilla Kabacwamba of the 1st defendant where he stated that; "we have confirmed the

cargo owner has not fully paid our contractor Master Empex Limited….” This suggests that M/s Noble Commodities Juba Limited was sub-contracted by the 3rd defendant. In such arrangements, the liability of the actual carrier is based on the contractual liability of the contractual carrier, but in this case the contractual carrier, the 3rd plaintiff, had no direct dealings with the actual carrier, the 2nd defendant. That notwithstanding, the 1st and 2nd plaintiff received part of the consignment actually delivered to them by the 2nd defendant who now retains the rest of it in exercise of a carrier’s lien over the goods.

[21] A “successive” carrier needs to be distinguished from an “actual” carrier, to whom a “contracting” carrier sub-contracts the performance of the carriage, or part thereof. An “actual” carrier, in contrast to a “successive” carrier, is not a party to the contract of carriage. Therefore, the question arises as to the liability of such an “actual” carrier, if damage occurs during the part of the carriage sub-contracted and performed by the “actual” carrier. In cases of “successive” carriage, each carrier is “deemed to be one of the parties to the contract of carriage [for the part of the carriage] performed under its supervision. Thus, “successive” carriers are deemed to be “contracting” carriers. In contrast, “actual” carriers are not parties to the contract of carriage, as their involvement in the performance of the carriage is not agreed on and evident from the outset.

[22] It would appear in this case that the 1st defendant only acted as agent of both M/s Noble Commodities Juba Limited and the 2nd defendant. The obligation it owed M/s Noble Commodities Juba Limited was restricted to choosing a competent transporting company to do the work. As long as the 1st defendant exercised reasonable care in choosing the person to do the work, it would have performed its contract (see *Jones v. European General Express [1920] 4 Lloyd’s Rep 127*). To this minimal degree of arranging for carriage as opposed to undertaking the carriage itself, the 1st defendant was not acting as carrier in relation to the transaction and therefore can neither enforce nor suffer to be enforced against it by or against the consignee, any rights and obligations arising under the contract

of carriage of 31st July 2020. The plaintiffs therefore have no recourse against the 1st and 2nd defendants, and *vice versa*, whether in contract or on basis of the law of agency. The alternative left is thus implied contract.

[23] The question whether or not any such contract is to be implied is one of fact, and its answer must depend upon the circumstances of each particular case. With the strict application of the doctrine of privity in contracts of carriage, in many instances it was found impracticable to confine carriers to rights against the consignor or the consignee and to rights afforded by their possessory lien. The consignor may be untraceable or insolvent, and possessory liens, which enable carriers to retain possession of the goods until certain charges have been paid, would be difficult or impossible to enforce in such circumstances. Therefore at common law, an implied contract to pay freight would always be found when a carrier surrendered his lien by giving delivery (see for example, *Allen v. Coltart (1855) 5 E. & B. 755; Stindt v. Roberts (1848) 17 LJQB 166; Young v. Moeller (1923) All E.R. 656 at 659; Brandt v. Liverpool Brazil & River Plate Steam Navigation Co Ltd. [1921] KB 575; Cho Yang Shipping Co Ltd v. Coral (UK) Ltd [1997] 2 Lloyd's rep 641; New Zealand Shipping Co Ltd v. AM Satterthwaite & Co Ltd (The Eurymedon) [1975] AC 154; White & Co Ltd v. Furness, Withy & Co Ltd [1995] AC 40 at 44 and The Aramis [1989] 1 Lloyd's Rep 213)*.

[24\ It is trite that while sitting in its equitable capacity, this court may avail itself of powers broad, flexible and capable of being expanded to deal with novel cases and conditions. However, no contract should be implied on the facts of any given case unless it is necessary to do so: necessary, that is to say, in order to give business reality to a transaction and to create enforceable obligations between parties who are dealing with one another in circumstances in which one would expect that business reality and those enforceable obligations to exist.

[25] Under the so-called *Brandt v. Liverpool* doctrine, there may be a contract implied, on bill of lading terms, typically at the end of the voyage and between the carrier

and a receiver who presents a bill of lading in exchange for delivery of the goods. Under the doctrine of implied contract, a consignee as the lawful holder of the bill of lading does not become liable under the contract of carriage until he takes steps to assert his rights under the bill of lading or contract of carriage. This implied contract is a separate contract from the original contract between the shipper and carrier. It has been clearly established in all the above cases that where the holder of a bill of lading presents it and offers to accept delivery, if that offer is accepted by the carrier, the bill of lading holder does come under an obligation to pay the freight and to pay the demurrage, if any, and there are general expressions in all those cases, in which the learned Judges have said that the contract so made by that offer and acceptance extends to include the terms of the bill of lading.

[26] In *Brandt v. Liverpool* it was held on the facts that the presentation of the bill of lading in exchange for delivery could give rise to a contract that effectively mirrored all the terms of the bill of lading contract. This enabled not only the carrier to sue the consignee for freight or demurrage, but the consignee to sue for damage to the goods. I find that when the 1st and 2nd plaintiff accepted part of their respective consignments delivered by the 2nd defendant (an actual carrier), and not the 3rd and 4th defendant as the 3rd plaintiff had arranged (the would-be successive carriers), they entered into an implied contract with the 2nd defendant. The law is that if the offeror so acts that his conduct, objectively considered, constitutes an offer, and the offeree, believing that the conduct of the offeror represents his actual intention, accepts the offer, then a contract will come into existence (see *Allied Marine Transport Ltd v. Vale do Rio Doce Navegacao SA (The Leonidas D) [1985] 1 WLR 925 at p.936*). When the 2nd defendant offered to deliver the goods and the 1st and 2nd plaintiffs took delivery of the partial consignments, both parties had an intention to treat their dealings as creating a contract, in that the two plaintiffs knew that the 2nd defendant was not offering a gratuitous service, hence in order to give business reality to the transaction a *Brandt v. Liverpool* contract should be found to exist.

[27] The circumstances were not such as would have suggested to the 1st and 2nd plaintiffs that the service was being given as a gift or gratuitously. The acceptance under circumstances that it would be inequitable for the 1st and 2nd plaintiffs to retain the goods delivered without paying the service thereof, then creates an expectation of payment for the party providing the service and for the law to infer a contract. Even in the absence of an express contract, when a person has benefited from another's non-gratuitous act, an obligation to compensate arises (see *Union of India v. Ram Charan (1964) AIR 215 and Bhim Singh v. Kan Singh (1980) AIR 727*). The doctrine of quasi-contract is based on the principle that no one should be allowed to enrich themselves unjustly at the expense of another. Moreover, section 58 (1) of *The Contracts Act, 7 of 2010* provides that where a person lawfully does anything for another person or delivers anything to another person, not intending to do so gratuitously and the other person enjoys the benefit, the person who enjoys the benefit shall compensate the person who provides the benefit in respect of or to restore, the thing done or delivered. Even if there is no formal agreement for payment, the Act implies an obligation to compensate the person who performed the act.

[28] Under that implied contract, the 2nd defendant's obligation was constituted in delivering the goods properly, including delivering them at the proper places, at the proper time and to the proper person i.e. to the consignees or their agents personally (see *Bourne v. Gatliff [1844] 132 E.R. 809*), which is the essential obligation on the carrier under the contract of carriage of goods. At common law, the contractual carriage should normally be completed and goods should be available for collection before the carrier is entitled to exercise a lien. While it is sometimes said that delivery of the goods and payment of freight are concurrent, it is more accurate to say that freight is due once the carrier is ready to deliver.

[29] Although in paragraph 9 (b) of the amended plaint the 1st and 2nd plaintiffs claim to have paid the 3rd defendant in full in advance, the costs of clearing and transporting the cargo, the receipts referred to were never attached nor subsequently

introduced in evidence. As matters stand, there is no proof of payment by the 1st and 2nd plaintiffs. In any event, at common law the mere inclusion of the words "freight prepaid" in the bill of lading does not of itself show that the shipper is not to be under any liability for the freight if it has not in fact been paid. Their insertion in the bill of lading does not without more serve to negative a pre-existing, undischarged, contractual liability to pay the freight (see *Cho Yang Shipping Co Ltd v. Coral (UK) Ltd [1997] 2 Lloyd's rep 641; The Nanfri [1979] AC 757 and Compania Vascongada v. Churchill [1906] 1 KB 237)*. Similarly, the mere fact of payment to the "contractual carrier" does not preclude a liability of the consignee for the freight but it is part of the evidence to be taken into account when considering whether or not the consignee is under a contractual liability to the "actual" or "performing carrier" for the freight. In absence of proof of payment, the 1st and 2nd plaintiffs remain liable to the 2nd defendant for the freight charges that have not in fact been paid.

[30] It is the plaintiffs' case that the 1st defendant is unlawfully detaining one truck of bitumen belonging to the 2nd plaintiff while the 2nd defendant is unlawfully detaining six containers of section steel belonging to the 1st plaintiff under an unjustified claim of a carrier's lien. However, D.W.1 Ms. Rose Kariuki testified that the 1st defendant did not use its trucks in transporting the goods but sub-contracted the 2nd defendant. The 1st defendant diverted the trucks away from the plaintiff's premises to the 2nd defendant's warehouse in Namanve in exercise of their right to a carrier's lien. The retention was in respect nine trucks whose contents were not delivered to the plaintiffs. They have retained the trucks for the fees indicated beside the trucks in the document at page 27 of the joint trial bundle, which is a breakdown of the outstanding fees. They are in respect of three trucks delivered and six held. For the 2nd plaintiff 11 were delivered and one was retained.

[31] A lien is a right to hold possession of another's property for the satisfaction of some charge attached to it. The essence of the right is possession. The carrier's lien for freight would be emasculated if he could not withhold the goods pending payment

of freight, and he is not bound to deliver until he has received his freight. This is because the voluntary parting with the possession of the goods amounts to a waiver or surrender of a lien; for as it is a right founded upon possession, it must ordinarily cease when the possession ceases. There are two sources of a carrier's right to lien the goods or withhold delivery: express agreement, and the common law which applies in the absence of express agreement. Express agreements for a lien for unpaid freight are now common and generally effect will be given to the terms of the express agreement. In the instant case, Clause 8.6 of the express agreement for a lien contained in the contract of 31st July, 2020 is binding only as against M/s Noble Commodities Juba Limited.

[32] Nevertheless, at common law (that is to say in the absence of a relevant contractual possession), a carrier has a possessory lien for unpaid freight. Such a right depends on possession of the goods. The common law remedy of a possessory lien, like other primitive remedies such as abatement of nuisance, self-defence or ejection of trespassers to land, is one of self-help. It is a remedy in rem exercisable on the goods, and its exercise requires no intervention by the courts, for it is exercisable only by a carrier who has actual possession of the goods subject to the lien. Since, however, the remedy is the exercise of a right to continue an existing actual possession of the goods, it necessarily involves a right of possession averse to the right of the person who, but for the lien, would be entitled to immediate possession of the goods.

[33] A common law lien, although not enforceable by action, thus affords a defence to an action for recovery of the goods by a person who, but for the lien, would be entitled to immediate possession (see *Tappenden (trading as English & American Autos) v. Artus and Another [1963] 3 All ER 213 at 216).* A carrier has a lien on the goods covered by a bill of lading or on the proceeds thereof in its possession for charges after the date of the carrier's receipt of the goods for storage or transportation, including demurrage and terminal charges, and for expenses

necessary for preservation of the goods incident to their transportation or reasonably incurred in their sale pursuant to law.

[34] Furthermore, such a right only exists at common law if the agreed time for payment of freight is contemporaneous with the time of delivery of the goods. So in the absence of express agreement, there is no lien for unpaid freight which was payable before the delivery of the goods or for freight which is not due when delivery of the goods is sought. The common law lien for freight applies to all goods coming to the same consignee on the same voyage for the freight due on all or any part of the goods. The carrier may do what is reasonable to maintain his lien. He will not lose his lien by warehousing the goods ashore. The possessory lien at common law does not of itself confer any right to sell goods the subject of the lien to realise the freight due, unless the goods have been abandoned by all persons entitled to them and have thereby become the carrier's property.

[35] At common law, a carrier will have a lien for general average contributions, freight and for expenses incurred in protecting and preserving the goods. However, in the absence of contract he will have no lien for dead freight (reserved but unutilised space on a truck), demurrage (storage costs beyond the time allowed for loading or unloading), or other charges.

[36] In the instant case, there having been created an implied contract of carriage between the 2nd defendant on the one hand, and the 1st and 2nd plaintiffs on the other, the 2nd defendant remaining unpaid as a carrier for services rendered to the latter, the issue then is answered in the negative. I find that 1st and 2nd defendants are detaining goods consisting of 6 trucks of section steel and one truck of bitumen belonging to the 1st and 2nd plaintiffs, in a lawful exercise of their common law right as unpaid carriers. The suit by the 1st and 2nd plaintiffs against the 1st and 2nd defendants is thus misconceived and is accordingly dismissed with costs to the two defendants.

Second issue; Whether the plaintiffs / counter defendants are liable for payment of the transport, detention, storage and crane off-loading charges for the suit goods, to the 1st defendant.

[37] The 1st and 2nd defendants' claims are essentially founded on quasi contract or *quantum meruit* on account of the principle of unjust enrichment. *Quantum meruit* claims often arise where the plaintiff is hired or encouraged by the defendant to perform work with the expectation of pay, but there is no valid contract. Courts generally treat actions brought upon theories of unjust enrichment, quasi-contract, contracts implied in law and *quantum meruit* as essentially the same.

[38] There is no general right to payment (even for requested services) in the absence of a contract. In the circumstances of this case, in the absence of a contract with either the 1st or 2nd plaintiff, the 2nd defendant has no automatic right to payment for the freight services, more so since they were requested for by the 1st defendant, who had no direct linkage to the 1st and 2nd plaintiffs. Furthermore, a party will not automatically be granted payment on a *quantum meruit* basis (i.e. a reasonable sum) for the work carried out, and is unlikely to succeed in such a case if it is found to have taken the risk of not being paid in pursuit of its own advantage (see *Moorgate Capital (Corporate Finance) Ltd v. H.I.G. European Capital Partners LLP [2019] EWHC 1421 (Comm)*. Despite being sometimes referred to as a "quasi-contract" or "implied contract" claim, *quantum meruit* is not a contract-based claim but instead provides equitable relief in the absence of an enforceable contract.

[39] The obligation to make restitution that arises in quasi-contract is not based upon any agreement between the parties, objective or subjective. Recovery is based on the equitable maxim that one person should not be unjustly enriched to the detriment of another. A contract implied in law also known as a quasi-contract, is a legal remedy that courts use to prevent one party from benefiting at the expense of another party unjustly. It is not an actual contract but rather an obligation

imposed by law. The breach of a contract implied in law occurs when one party benefits from the other party's unjust enrichment.

[40] For a claim based on unjust enrichment to succeed, three factors must be established: (i) the existence of enrichment or realisation of the benefit by the defendant; (ii) the existence of an "unjust" factor; and (iii) a value to any enrichment. The courts are in accord in stressing that the most significant requirement for recovery in quasi-contract is that the enrichment to the defendant must be unjust; that is, the defendant must receive a true windfall or "something for nothing."

[41] In order to justify the right to payment on a *quantum meruit* basis the Court will consider: whether services of that nature are generally provided free of charge, the nature of the benefit received, and the risks incurred in the provision of the services. The amount of time and effort invested in providing the goods or services too, is considered. This includes the duration of the engagement and any extra effort beyond the ordinary. Courts often assess the prevailing market rates for similar goods or services to determine a reasonable sum. This helps ensure that the claimant is compensated fairly based on industry standards. If the claimant incurred expenses in providing the goods or services, these may be factored into the determination of a reasonable sum.

[42] The court is likely to impose, and section 58 (1) of *The Contracts Act, 7 of 2010* indeed does impose, an obligation to make payment where the defendant has received an incontrovertible benefit as a result of the claimant's services; or where the defendant has requested the claimant to provide services or accepted them (having the ability to refuse them) when offered, in the knowledge that the services were not intended to be given freely. The court may well regard it as just to impose such an obligation if the defendant who has received the benefit has behaved unconscionably in declining to pay for it. In *Hain Steamship Company Ltd v Tate and Lyle Ltd [1936] 2 All ER 597* it was suggested that a carrier who delivers the

goods safely at the port of discharge is entitled to freight on a *quantum meruit* basis (by implied contract) unless the facts are such, as they were in that case, as to defeat the implication.

[43] As noted above, a quasi-contract is based on the ground that a person shall not be allowed to unjustly enrich himself at the expense of another. There is, however, similarity between quasi-contract and contracts in case of claims for damages. In case of breach of a quasi-contract, section 61 (3) of *The Contracts Act, 7 of 2010* provides for the same remedies (claim for damages) as provided in case of breach of a contract. It states that where an obligation similar to that created by contract is incurred and is not discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if that person had contracted to discharge it and had breached the contract.

[44] Traditionally, freight has been described as "the reward payable to the carrier for the safe carriage and delivery of the goods." At common law, no freight is payable unless the carrier has substantially performed his obligation under the contract of carriage by tendering delivery of the goods at the discharge port, and no freight is payable if the goods are lost on the voyage or if for any reason (other than the fault of the carrier) the goods are not tendered for delivery at the port of destination. If the carrier is able to deliver the goods, albeit in a damaged condition, at the port of destination, he is entitled to his freight in full without deduction for the damage, although he may be liable in damages to those interested in the goods. At common law, freight is payable once it has been earned, i.e. on tender of delivery of the cargo. Payment and delivery are concurrent acts. The carrier is entitled to refuse to discharge the cargo unless freight is paid for each portion as delivered.

[45] It is the 1st and 2nd defendant's case on the counterclaim that on or around 31st July, 2020 as evidenced by an email correspondence dated 1st September, 2020 (at page 44 of the joint trial bundle), they tendered delivery of the consignment now in dispute, subject to payment by the 2nd plaintiff, to no avail, hence the resort to

the carrier's lien. D.W.1 testified that it is on that account that the 1st defendant diverted the trucks away from the plaintiff's premises to the 2nd defendant's warehouse in Namanve in exercise of their right to a carrier's lien. The two defendants thus have furnished sufficient proof of having tendered delivery of the goods at the discharge port. By virtue of section 58 (1) of *The Contracts Act, 7 of 2010* the 1st and 2nd plaintiffs are under a legal obligation to compensate the 1st and 2nd defendants as the persons who provided the benefit in respect of the consignments so delivered.

[46] That the 1st and 2nd plaintiffs had paid the 3rd defendant in advance is of no legal significance to the implied contract, most especially since the 2nd defendant is an actual carrier as opposed to a successive one. The 1st and 2nd plaintiffs' recourse is probably against the 3rd defendant for recovery of the amount paid since it appears the carriers the 3rd defendant contracted never performed their part of the bargain and did not file a defence to give an account as to how the 2nd defendant came onto the scene. That the physical location of the business premises of M/s Noble Commodities Juba Limited are yet to be located does not imply it is a non-existent company or that a contract executed with it is illegal as contended by counsel for the plaintiffs. There is no evidence on record to show that it was never incorporated or that it lacked the capacity to execute the contract.

[47] Consequently, this issue is answered in the affirmative. I find that the 1st and 2nd plaintiffs/Counter defendants are liable to the 1st defendant, for payment of the transport, detention, storage and crane off-loading charges for the suit goods, since by the nature of the transaction, the 1st defendant assumed the status of an intermediary who in the capacity of a principal or contractual carrier, sub-contracted the actual carrier under the terms of the contract of 31st July, 2020.

Third issue; whether there are any available remedies for the parties.

[48] The 3rd plaintiff's claim against the 3rd and 4th defendants is essentially for money had and received. A suit for money had and received is a form of suit used by claimants who seek to recover from the defendant money which had been paid to the defendant: (i) by mistake; (ii) upon a consideration which has totally failed; (iii) as a result of imposition, extortion or oppression; or (iv) as the result of an undue advantage which had been taken of the claimant's situation, contrary to the laws made for the protection of persons under those circumstances, or where an undue advantage was taken of plaintiffs' situation whereby money was exacted to which the defendant had no legal right.

[49] Recovery under a "money had and received" claim focuses on whether retaining the money claimed would unjustly enrich the defendant, not the parties' agreement or intent (see *Shenol and another v. Maximov [2005] EA 280; Lloyds Bank plc v. Independent Insurance Co Ltd [1999] 1 All ER (Comm) 8; [2000] QB 110, [1999] 2 WLR 986 and Cloth Link (U) Ltd v. Africa Traders Investments Fund Ltd and another, H.C. Civil Suit No. 234 of 2010)*. The issue is whether the 3rd and 4th defendants received money that rightfully belonged to the 3rd plaintiff. When it is established by the evidence that the defendant has, or had, possession of money which belongs to the plaintiff, the burden of proving that equity and good conscience does not demand a refund devolves upon the defendant who offers such defence to the claim of the creditor.

[50] Benefits that are conferred through ineffective transactions have long been recoverable under the doctrine of unjust enrichment. For example, in *Rosales v. Fuentes (2017) BCSC 1311*, the plaintiffs took possession of a residential property that was purchased by the defendants, believing it would become theirs to own. They paid the defendants' deposit, mortgage payments and property taxes. They made renovations at their own expense. They understood that once they qualified for financing, the defendants would transfer the property to them and the plaintiffs

would become the registered owners. Over three years in, the arrangement fell apart. The defendants sold the property to a third party for a net profit of just over $ 2,000. Before the sale completed, the plaintiffs left and purchased elsewhere. Following a four-day trial, the Court was asked to determine whether the defendants were unjustly enriched by this outcome and the plaintiffs should be compensated.

[51] It was held that restitution through unjust enrichment is an equitable remedy and requires that the plaintiffs establish three elements: (1) enrichment of the defendants; (2) a corresponding deprivation of the plaintiffs; and (3) the absence of a juristic reason for the enrichment. The object of the remedy is to require the defendant to repay or reverse the unjustified enrichment. The law is clear that when one party receives money from another party (or is saved an expense), this fact, standing alone, is sufficient for the Court to find enrichment. The renovations were made to a property registered in the names of the defendants and they were the persons who ultimately sold it, with the renovations intact. The proceeds of sale went to the defendants. The established categories that can constitute juristic reasons include a contract; disposition at law; donative intent; or some other valid common law, equitable or statutory obligation. If the plaintiffs show that the enrichment did not arise from any of those, the analysis then shifts to whether there is another basis on which to deny recovery.

[52] As a result, there is a de facto burden of proof placed on the defendant to show the reason why the enrichment should be retained. Where the benefit is bestowed outside the scope of the contract, or where a contract has failed for lack of consideration or frustration, the contract might not constitute a sufficient juristic reason. In *Rosales v. Fuentes (2017) BCSC 1311* there was a direct causal link between the renovations and contributions made by the plaintiffs. The Court was satisfied there was no reason in law or justice for the defendants to retain the benefits conferred by the plaintiffs. The plaintiffs were entitled to a remedy equal to the benefit received by the defendants.

[53] In the case at hand the 3rd plaintiff adduced in evidence, electronic funds-transfer documents in proof of funds remitted to the 3rd and 4th defendants for a contract of carriage (exhibits P. Ex.1 - P. Ex.8 at pages 51 to 65 of the joint trial bundle). The 3rd defendant received; US $ 12,985 on 5th August, 2020; US $ 10,565 on 17th August, 2020; US $ 3,000 on 20th August, 2020; US $ 4,500 on 21st August, 2020 and US $ 3,400 on 26th August, 2020, hence a total of US $ 34,450. There is no evidence to show that 3rd defendant applied those funds to the agreed purpose. The 4th defendant received; US $ 8,400 on 26th August, 2020 and US $ 12,100 on 2nd September, 2020, hence a total of US $ 20,500. There is no evidence to show that 4th defendant applied these funds to the agreed purpose. None of the two defendants filed a defense to the suit. It follows that judgment is entered in favour of the 3rd plaintiff against each of them in the following amounts; US $ 34,450 against the 3rd defendant and US $ 20,500 against the 4th defendant.

[54] As regards the 1st and 2nd defendants' counterclaim for US $ 86,608 at the time of filing it, which has since risen to US $ 138,131 as at 10th February, 2022 the 1st and 2nd defendants adduced evidence of the manner in which the charges arose and the corresponding receipts (exhibit D. Ex.3 at pages 27 to 36 of the joint trial bundle). They include, among others; storage charges, truck detention charges, freight charges, mobile crane services, and so on. Recovery in quasi-contract is based upon restitutionary principles or alternatively the theory of *quantum meruit*. The carrier is entitled to recover all fees, charges and expenses arising directly from the terms of the implied contract, and those that may reasonably be supposed to have been in contemplation of both the parties as the probable result of the breach of the contract. Thus, when there are certain special or extraordinary circumstances present and their existence is communicated to the consignee, the non-performance of the promise entitles the carrier to not only the ordinary fees, charges and expenses but also special ones that may result therefrom. In the instant case, all fees, charges and expenses claimed by the 1st and 2nd defendants, including the cost of hiring a mobile crane to offload the trucks, were in the

reasonable contemplation of the 1st and 2nd plaintiffs as the probable result of their breach of the obligation to pay for the 1st and 2nd defendant's services in a timely manner. I therefore enter judgment in favour of the 1st and 2nd defendants jointly against the 1st and 2nd plaintiffs jointly and severally in the sum of US $ 138,131.

[55] 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. 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. 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).*

[56] Interest can be awarded 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 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 has had the use of it himself so he ought to compensate the plaintiff accordingly. An award of interest is compensation and may be regarded either as representing the profit the plaintiff might have made if he had had the use of the money, or, conversely, the loss he suffered because he had not that use. The general idea is that he is entitled to compensation for the deprivation (see *Riches v. Westminster Bank Ltd [1947] 1 All ER 469 at 472*).

[57] As per the coerced loan theory, the plaintiff was effectively coerced into providing 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 unpaid party to a contract is entitled as of substantive right to interest from the time when payment is contractually due. The 3rd plaintiff is accordingly awarded interest on the decretal sum at the rate of 8% per annum, from 26th August, 2020 until payment in full. The 1st and 2nd defendants too are accordingly awarded interest on the decretal sum at the rate of 8% per annum, from 31st July, 2020 until payment in full.

[58] Neither the 3rd plaintiff nor the 1st and 2nd defendants is entitled to any additional general damages. The common law does not award general damages for delay in payment of a debt beyond the date when it is contractually due (see *President of India v. La Pintada Compagnia Navigacia SA ("La Pintada") [1985] AC 104*). In special circumstances where the loss did not arise from the ordinary course of things, general damages are awarded only for such losses of which the defendant had actual knowledge (see *Hungerfords v. Walker (1989) 171 CLR 125*). Neither the 3rd plaintiff nor the 1st and 2nd defendants having proved such special circumstances beyond losses arising from the ordinary course of things when there is delay in payment of a debt beyond the date when it is contractually due, none of them is entitled to the award of general damages.

[59] 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.

Orders;

[60] Therefore, in conclusion, judgment is entered in favour of the 3rd plaintiff against the 3rd and 4th defendants, as follows;

a) US $ 34,450 against the 3rd defendant.
b) US $ 20,500 against the 4th defendant
c) Interest on (a) and (b) above at the rate of 8% per annum, from 26th August, 2020 until payment in full.
d) The costs of the suit.

[61] In the same vein the suit is dismissed and instead, judgment is entered on the counterclaim in favour of the 1st and 2nd defendants jointly, against the 1st and 2nd plaintiffs jointly and severally, as follows;

e) The sum of US $ 138,131 on *quantum meruit* basis.
f) Interest on (e) above at the rate of 8% per annum, from 31st July, 2020 until payment in full.
g) The costs of the suit and of the counterclaim.
h) In the event of the 1st and 2nd plaintiffs' failure to pay the decretal sum in full within a period of thirty (30) days from the date of this judgment, to dispose of the detained goods by public auction in partial or full satisfaction thereof, depending on the proceeds therefrom.

Delivered electronically this 23rd day of January, 2024 …Stephen Mubiru……

Stephen Mubiru
Judge,
23rd January, 2024.

Appearances

For the plaintiff: M/s Kampala Tax Advisory Centre-Legal Department

For the 1st and 2nd defendants: M/s KTA Advocates (formerly Karuhanga, Tabaro & Associates),