

**THE REPUBLIC OF UGANDA,**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**(COMMERCIAL DIVISION)**  
**CIVIL SUIT NO 389 OF 2010**

1. RAHIMA NAGITA}  
2. DRAKE KYEYUNE}  
3. FRED M BAGUMA} .....PLAINTIFFS

**VERSUS**

1. RICHARD BUKENYA}  
2. BN CARGO SERVICES}  
3. W.E.C LINES } .....DEFENDANT

**BEFORE HON JUSTICE CHRISTOPHER MADRAMA IZAMA**

**JUDGMENT**

The plaintiff's suit against the defendants jointly and severally is for an order of release of motor vehicles BMW X 605JTF chassis No.WBA FB 32040LH 60224, Engine No 51132290 and BMW T 793 UDU chassis No WBADR1204 OBR 97158 Engine No C8491990 and assorted household items, special damages, general damages, interest and costs.

The facts constituting the plaintiff's cause of action are that; the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs engaged the services of the 2<sup>nd</sup> defendant to transport motor vehicle BMW X 605JTF chassis No.WBA FB 32040LH 60224, Engine No. 51132290 and the 3<sup>rd</sup> plaintiff's owner of motor vehicle No BMW T 793 UDU chassis No. WBADR1204 OBR 97158 Engine No C8491990 and other household items in container number XXXX 890243-5 and duly paid for the said services. The plaintiffs aver that on 30<sup>th</sup> March 2010, the items were transported from the United Kingdom CIF Kampala, Uganda. They aver that the 2<sup>nd</sup> defendant engaged the services of the 1<sup>st</sup> defendant as a consignee, to receive the goods on arrival to Kampala for distribution to various owners who had engaged its services on presentation of proof of ownership. The plaintiffs aver that the 2<sup>nd</sup> defendant under a different arrangement and without the consent of the plaintiff engaged the services of the 3<sup>rd</sup> defendant, an international shipping company to deliver the motor vehicles and household items to Kampala-Uganda and were accordingly shipped on 30<sup>th</sup> June 2013. Furthermore, that the motor vehicles and the goods arrived in Uganda on 20<sup>th</sup> August 2010, the same having been packed in one container with other items belonging to different individuals. The plaintiffs aver that ever since the goods and motor vehicles arrived in Uganda, they have tried to have them released by the defendants to no avail. Furthermore, that the 1<sup>st</sup> defendant is the agent of the 2<sup>nd</sup> defendant in Uganda and both defendants have been elusive toward the

plaintiffs to date, and the motor vehicles and the goods along with the original bill of lading and in the possession of the 3<sup>rd</sup> defendant. The plaintiffs further aver that the defendant's conduct, actions and acts or omissions have occasioned the plaintiff colossal financial loss and inconvenience, and prayed for special damages of £690 being the cost of travel for the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs on 16<sup>th</sup> June 2010 from London to Kampala, car-rental for the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs from 1<sup>st</sup> September 2010 to date at a cost of Uganda shillings 22,800,000/=, loss of earnings for the 1<sup>st</sup> plaintiff from 1<sup>st</sup> September 2010 to date at a cost of £11,361.9, and loss of earnings for the 2<sup>nd</sup> plaintiff from 1<sup>st</sup> September to date at the cost of £17,960. The plaintiff also prayed for general damages, interest and costs.

In the written statement of defence of the 1<sup>st</sup> and 2<sup>nd</sup> defendant then Messrs BN Cargo Services, both defendants denied the allegations set out in the plaint. The 1<sup>st</sup> defendant contended that the suit is not maintainable in law against him in as far as he was transacting business as an employee of BN Cargo Services. He further contended that BN Cargo Services transported the said motor vehicles and assorted goods to Kampala and is waiting for security clearance from the government of Uganda. The 1<sup>st</sup> defendant contended that he could not go ahead to release the goods and motor vehicles to the plaintiffs without the authorisation of the BN Cargo Services, hence the plaintiffs have no cause of action against him since he is not a partner in the business of BN Cargo Services.

BN Cargo Services contended that the suit does not disclose a cause of action against him and should be dismissed. It contended that it lawfully entered into a contract of transporting the plaintiffs motor vehicles BMW X 605JTF chassis No.WBA FB 32040LH 60224, Engine No. 51132290 and BMW T 793 UDU chassis No. WBADR1204 OBR 97158 Engine No. C8491990 and other assorted goods from London UK to Kampala, but the parties did not agree on the time period agreed within which the properties should be delivered to the plaintiffs and therefore the suit is premature.

In its written statement of defence, the 3<sup>rd</sup> defendant WEC Lines now the 2<sup>nd</sup> defendant contended that there was no contractual relationship with the plaintiffs and that the plaint does not disclose a cause of action against it. In further answer but without prejudice, the current 2<sup>nd</sup> defendant contended that on or about 30<sup>th</sup> June 2010, BN Cargo Services contracted it as an international shipping company, to ship a consignment from England for delivery to the 1<sup>st</sup> defendant in Uganda. That the contract was cash on delivery and the 1<sup>st</sup> defendant was issued an invoice dated 30<sup>th</sup> August 2010 for the value of USD 8,544.30 after the consignment had been delivered to Kampala-Uganda. The 1<sup>st</sup> defendant has to date failed and refused to settle the said invoice leading to the retention of the consignment by BN Cargo Services, in exercise of its lien thereon. Furthermore, the 2<sup>nd</sup> defendant contends that it will claim any accumulated demurrage against the 1<sup>st</sup> defendant before the said consignment can be released, and that the plaintiffs are strangers to the shipping contract and cannot maintain any claim against it.

## **Issues**

1. Whether the plaintiffs can legally claim the shipped goods from the 3<sup>rd</sup> defendant.
2. Whether the 3<sup>rd</sup> defendant is entitled to hold onto the shipped container until the freight is fully paid by the shipper or the consignee.
3. Remedies

### **Submissions.**

#### **Issue one: Whether the plaintiffs can legally claim the shipped goods from the 3<sup>rd</sup> defendant.**

The plaintiff's counsel submitted that the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs in their testimonies adduced evidence to show that they contracted the BN Cargo Services in the United Kingdom, to ship an assortment of goods including; a BMW X 605JTF Chassis No. WBA FB 32040LH, 4 suitcases of used clothes and shoes, 1 electrical tread mill, 1 baby Ferrari car seat, 1 used gas cooker, 12 wine glasses and ice cream bowls, 1 used computer screen, scanner, printer and tower, 1 glass coffee table, 2 air double mattresses with electrical pump and one microwave oven. The plaintiffs adduced a copy of the motor vehicle registration certificate (Exhibit P1) and a copy of the motor vehicle log book (Exhibit P2) proof of ownership of the motor vehicles, an invoice dated 11<sup>th</sup> November 2010, issued by the 2<sup>nd</sup> defendant to the plaintiffs, showing the detailed description of the household items shipped and the evidence of payment of £780 as shipment costs for the items (Exhibit P4) and an invoice dated the 30<sup>th</sup> March 2010 (Exhibit P5), showing proof of payment of £1800 as shipment costs for the motor vehicle was tendered in court. No evidence was adduced by the defendants to dispute the ownership of the goods.

Counsel submitted that what is in contention is whether the plaintiffs are entitled to the goods. The 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs contracted BN Cargo Services to ship their goods to Uganda, and paid the requisite shipping dues. BN Cargo Services in turn subcontracted the 3<sup>rd</sup> defendant to ship the goods to Kampala, without the knowledge and consent of the plaintiffs. A contract for shipment of goods, between the plaintiffs and BN Cargo Services constituted a contract of bailment and the 1<sup>st</sup> defendant is the consignee on the bill of lading marked Exhibit D1. According to P.S Atiyah in his book "The Sale of Goods" 6th Edition Pitman P7, as cited by Hon. Justice Geoffrey Kiryabwire in the case of **Sylvan Kakugu Tumwesigiyire Vs Trans Sahara General Trading L.L.C** (HCCS NO. 95 of 2005), a contract of bailment is defined as a "transaction under which goods are delivered by one party (the bailor) to another (the bailee) on terms which normally require the bailee to hold the goods and ultimately to redeliver them to the bailor or in accordance with his directions..."

The bill of lading indicating the 1<sup>st</sup> defendant as consignee was meant to enforce the contract of bailment thereby entitling the plaintiffs to claim under it and therefore, the 2<sup>nd</sup> defendant's contention that the plaintiffs cannot legally claim the goods because they were not parties to the contract between it and the 2<sup>nd</sup> defendant is misconceived. Counsel relied on the case of **The Ardennes (Owner Of Cargo) Vs The Ardennes (Owners)** [1950] 2 ALLER 517 per Lord Goddard CJ at pg 520 for the proposition that a bill of lading was not the contract but additional evidence may be taken of the terms of the contract earlier on entered into.

Evidence was that the plaintiffs were undisclosed principals which evidence was not contracted by the 2<sup>nd</sup> defendant's witness Jennifer Kusasira DW1 who neither disputed ownership of the goods by the plaintiffs nor the fact that the plaintiffs entered into an earlier contract and settled all their obligations with BN Cargo Services. The 2<sup>nd</sup> defendant's justification for holding onto the goods is non payment of shipping charges by BN Cargo Services. The 1<sup>st</sup> defendant, Richard Bukenya the consignee, testified that the goods belong to the plaintiffs and that payments for the shipment of the goods had been made but BN Cargo Services did not enforce its part of the bargain to the 2<sup>nd</sup> defendant. Furthermore, that some of the beneficiaries of the shipped goods in the container had not paid their shipping costs to BN Cargo Services. Holding onto the plaintiffs' goods would therefore be unjust hence the plaintiffs should be entitled to claim their goods.

The plaintiffs' also remained undisclosed principals under the bill of lading and for purposes of this transaction the 1<sup>st</sup> defendant and BN Cargo Services acted as agents for the plaintiffs. This gives further right to the plaintiffs even as third parties to claim their goods under the contract since proof of ownership and payment of shipment costs has been adduced. Counsel prayed for unconditional release of the goods to the plaintiffs as undisclosed principals and on account of doctrines of equity.

In reply counsel for the 2<sup>nd</sup> defendant submitted that the pleadings and evidence adduced at the trial show that BN Cargo Services contracted the 2<sup>nd</sup> defendant to ship the goods from England to Kampala with the 1<sup>st</sup> defendant as the consignee and party to be notified, to receive the goods and pass them on to the plaintiffs. The 1<sup>st</sup> defendant testified that the container had goods that belonged to various owners but some of the owners of the goods failed to pay for the shipping services hence the failure by the 1<sup>st</sup> defendant to pay freight charges to the 2<sup>nd</sup> defendant in order to retrieve the container. The evidence adduced further established that BN Cargo Services did not have a ship of its own but used the 2<sup>nd</sup> defendant to ship the container in question, and that according to Ms. Jennifer DW1, the freight charges amounting to USD 8,544.30.had not been paid and therefore, the 2<sup>nd</sup> defendant was holding on to the container until the freight charges are paid.

Counsel submitted that the evidence shows that there was a bailment between the plaintiffs and BN Cargo Services and a sub-bailment between BN Cargo Services and the 2<sup>nd</sup> defendant. What remained was to establish the relationship between the plaintiffs and the 2<sup>nd</sup> defendant since it is not disputed that there is no direct contractual relationship between the two parties. This issue of the relationship between the owner of the goods and the sub-bailee was considered in the case of **The Pioneer Container KH Enterprise (Cargo Owners) vs. Pioneer Container (Owners) [1994] 2 All E R 256**. In resolving the issue, their Lordships relied on an earlier decision of the Privy Council in the case of **Gichrist Watt & Sanderson Pty Ltd V. York Products Pty Ltd [1970] 3All E R 825**, where two cases of clocks that were shipped from Hamburg to Sydney. On arrival of the ship at Sydney the goods were unloaded, sorted and stacked on the wharf by the defendants who were the ship's agents and stevedores. When the plaintiffs sought delivery of the two cases from the defendants, one was missing and was never found. The plaintiffs sought to hold the defendants responsible as bailees of the goods. It was found that the defendants took upon themselves an obligation to the plaintiffs to exercise due care for the safety of the goods, although there was no contractual relation or atonement between the plaintiffs and the defendants. In support of that conclusion the Privy Council relied in particular on **Morris Vs.**

**CW Martin & Sons [1965] 2 All E R 725** in which Lord Denning invoked an authoritative statement of the law in **POLLOCK AND WRIGHT ON POSSESSION (1888) P 169** where it is stated;

***"if the bailee ,of a thing sub-bails it by authority, there may be a difference according as it is intended that the bailee's bailment is to determine and the third person is to hold as the' immediate bailee of the owner, in which case the third person really becomes a first bailee directly from the owner and the case passes back into a simple case of bailment, or that the first bailee is to retain ( so to speak) a reversionary interest and there is no direct privity of contract between the third person and the owner, in which case it would seem that both the owner and the first bailee have concurrently the rights of a bailor against the third person according to the nature of the bailment. "***

The question that arises is whether BN Cargo Services had the authority to sub-bail the goods to the 2<sup>nd</sup> defendant. BN Cargo Services had such authority because the 1<sup>st</sup> plaintiff testified that she did not know whether BN Cargo Services had any ships at all. Even the trade name "BN Cargo Services" is instructive of the fact that the firm provides cargo handling services and not shipping services. Furthermore because of the fact that the 1<sup>st</sup> plaintiff had used the firm on more than one occasion to transport goods from England to Uganda, she knew or reasonably ought to have known that this was only possible through sub-bailment to a ship. By contracting them to deliver their cargo from England to Kampala, the plaintiffs impliedly authorised BN Cargo Services to sub-bail the goods to a shipping line for that purpose. Based on the decided cases above and the evidence at the trial, the relationship between the plaintiffs and the 2<sup>nd</sup> defendant is that of a bailor and sub- bailee and would entitle them to legally claim the goods from the 2<sup>nd</sup> defendant subject to the terms of the sub-bailment.

In reply, counsel for the plaintiffs submitted that it was not in contention that there was a bailment between the plaintiffs and BN Cargo Services and a sub- bailment between BN Cargo Services and the 2<sup>nd</sup> defendant. The question that arises is whether BN Cargo Services had the authority to sub- bail to the 2<sup>nd</sup> defendant. The legal authorities as cited by the 2<sup>nd</sup> defendant indicate that for a sub- bailment to be valid or for the bailor to incur liability under it, the bailor should have consented to the sub- bailment by the first bailee. Counsel relied on the statement of Lord Denning in **Morris Vs CW Martin & Sons [1965] 2 ALL ER 725**, at page 169. He submitted that the "sub-bailment by authority" meant there had to be authority to sub bail. From the evidence adduced, it is clear that the plaintiffs did not authorize the sub-bailment. The contract was between the plaintiffs BN Cargo Services and all payments were made for delivery of the goods to Kampala as per the terms of the contract. It is inconceivable that the plaintiffs knew that BN Cargo Services did not own a shipping line of its own. The plaintiffs testified that they had contracted the services of BN Cargo Services on previous occasions and at all times no problems were encountered in the shipment, and all shipped goods had been previously delivered through its agent, the 1<sup>st</sup> defendant. As further testified by the plaintiffs and Ms Jennifer Kusasira, the plaintiffs and BN Cargo Services had never transacted before. It was therefore not the plaintiffs' responsibility to personally visit the dock to determine whether BN Cargo Services had a ship of its own and what mattered to both parties was that delivery was effected to the final port of destination by the cargo firm. As such, the argument that a sub- bailment was created by authority cannot stand. The plaintiffs contracted with BN Cargo Services and paid the shipping charges hence they are entitled to all remedies claimed under this suit.

**ISSUE 2: Whether the 3<sup>rd</sup> defendant is entitled to hold onto the shipped container until the freight is fully paid by the shipper or the consignee.**

Counsel for the plaintiff submitted that the plaintiffs' ownership of the bulk of the goods in the container and the fact that payments amounting to £2,580 were effected by the plaintiffs to the BN Cargo Services are not disputed. It is further not disputed that the 2<sup>nd</sup> defendant had not been paid freight charges of USD 8,544. The plaintiff should however not be held liable for the acts of the 1<sup>st</sup> defendant and BN Cargo Services. The 2<sup>nd</sup> defendant could otherwise seek to recover from BN Cargo Services by suing for performance of the contract or by exploring other legal remedies that may be available to it, including attachment of the consignee's goods or other beneficiaries of goods that have not paid transportation charges. It would be unjust both in law and in equity to subject the plaintiffs to suffer damages for an arrangement that was entered into without their knowledge or consent or to be affected by the acts of other beneficiaries of the goods in the container. Each party should bear its own responsibilities under a contract and therefore, there is no reason for holding onto the container the plaintiffs' goods.

On the other hand, counsel for the 2<sup>nd</sup> defendant submitted that when BN Cargo Services contracted the 2<sup>nd</sup> defendant to ship the container from England to Kampala, the 2<sup>nd</sup> defendant became a sub-bailee for reward, and according to the bill of Lading (Exhibit D1), the freight charges were to be paid at Kampala. It is not in dispute according to the evidence on record that the 2<sup>nd</sup> defendant shipped the container from England to Kampala and has not been paid the freight charges amounting to USD 8,544.30. The contract between BN Cargo Services and the 2<sup>nd</sup> defendant as evidenced by the bill of Lading lawfully passed possession of the goods to the 2<sup>nd</sup> defendant and thus imparted on them the common law lien over the goods for unpaid freight, which confers upon the 2<sup>nd</sup> defendant a right to detain the goods until freight charges are paid in full. The Plaintiffs are bound by the undertaking by BN Cargo Services to pay the freight charges and although they were not party to that contract, they are bound by the 2<sup>nd</sup> defendant's lien over the goods.

In the case of **The Pioneer Container (supra)**, it was held that if the sub-bailee is for reward, the obligation owed by the sub-bailee to the owner must likewise be that of a bailee for reward. Likewise a bailee can make a contract in regard to the goods which will bind the owner although the owner is not party to the contract. The owner of the goods is bound by a contract concluded by the bailee although the owner is not a party to that contract and cannot sue or be sued on it and this means that the plaintiffs are bound by the undertaking by BN Cargo Services to pay the freight. It is immaterial whether the plaintiffs actually paid BN Cargo Services if the 2<sup>nd</sup> defendant remains unpaid. The only way the Plaintiffs can defeat the 2<sup>nd</sup> defendant's lien would be proof that the 2<sup>nd</sup> Defendant were holding the goods illegally or that they were paid for their services. Lord Denning in the case of **Scruttons Limited V Midland Silicons Ltd** [1962] AC 446 held that a bailee can make a contract in regard to the goods which can bind the bailor. The owner of the goods is bound by it the contract and cannot claim the goods in defiance of the lien. Furthermore section S. 108 of the **Contracts Act No. 7 of 2010** provides that the bailee may retain the goods until he or she receives remuneration due for the services rendered in respect of the goods. A carrier's right to detain the goods under his/her custody for unpaid dues was

considered by the English Court of Appeal in the case of **Tappenden vs. Artus & Another** [1964] 2 B.B 195-196 where Diplock L.J held that:

***Where therefore possession of the goods was originally given to the artificer not by the owner himself, but by a bailee of the owner, the test whether the artificer can rely upon his common law lien as a defence in an action in detinue against him by the owner is whether the owner authorized (or is stopped against the artificer from denying that he authorized) the bailee to give possession of the goods to the artificer. "***

The plaintiffs failed to prove payment to BN Cargo Services. They rely on invoices marked Exhibit P4 and P5. An invoice is defined by Cambridge International Dictionary of English as "a list of items provided or work done together with their cost for payment at a later time"

An invoice cannot be proof of payment but is a demand for payment and unfortunately the only party who can corroborate that evidence is BN Cargo Services but the Plaintiffs elected not to proceed against them and withdrew the case against them. The 2<sup>nd</sup> defendant therefore enjoys a common law lien over the goods for unpaid freight charges and the plaintiffs have not adduced any evidence to defeat this lien. Hence the only remedy available to the plaintiffs is to sue BN Cargo Services for breach of contract and recover appropriate damages. The plaintiffs' suit against the 2<sup>nd</sup> defendant should be dismissed with costs.

In reply, counsel for the plaintiffs submitted that the defendant has no right to hold onto their goods as the sub- bailment was created without the plaintiffs' authority and should therefore be considered null and void. The plaintiffs are further willing to clear all taxes levied against them by Uganda Revenue Authority but issues to do with demurrage and other storage charges should be borne by the defendants.

### **Issue three: Remedies.**

Counsel for the plaintiff submitted that the plaintiff prayed for the reliefs sought in the plaint as follows;

a) Release of the plaintiffs' motor vehicle and assorted goods from the container held by the 2<sup>nd</sup> defendant.

b) **Special damages;** The plaintiffs have incurred numerous expenses while trying to secure the release of their items, as specifically pleaded and proved, to wit;

i. Cost of air travel for the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs from London to Entebbe on 16th June 2010 at a cost £345 each.

ii. Cost of car rental from 1<sup>st</sup> September 2010 to date amounting to Uganda Shillings 22,800,000 as proved by Exhibit P7.

iii. Loss of earnings arising from loss of employment by the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs amounting to £23,321.9 as seen in annexure "H" and "I" to the plaint.

(c) **General damages;** for the mental anguish, psychological torture, general torture, depression and apprehension suffered by his evidence, the loss of his job and the damage to his family and its reputation. In **Robbialac Paints (U) Ltd Vs VKB Construction Ltd** [1976] HCB 45, as cited

in **Sylvan Kakugu Tumwesigyire Vs Trans Sahara International General Trading LLC** (HCCS NO. 95 of 2005), it was held that substantial physical inconvenience, or even inconvenience that is not strictly physical, and discomfort caused by a breach of contract will entitle the plaintiff to damages.

e) **Interest** on general damages as prayed at commercial rate from the date of filing this suit till payment in full.

## **Judgment**

The facts in support of the plaintiff's suit are substantially not in dispute. The evidence adduced in support and on behalf of the first defendant and the second defendant is also not substantially in dispute. The resolution of the issues would substantially revolve around questions of interpretation and not factual controversy. The agreed facts in this matter are that the first and second plaintiffs are the registered keepers of a UK registered motor vehicle BMW X 605 JTF chassis No WBA FB 32040LH 60224 engine number 51132290. Secondly the BN Cargo Services contracted the services of the 2<sup>nd</sup> defendant to ship the container containing an assortment of goods including the plaintiff's motor vehicle referred to above from England to Kampala. Thirdly the first defendant is the consignee of the container whose freight is to be paid at Kampala. Fourthly the container arrived in Kampala but the freight for the shipped container plus demurrage charges have not been paid to the 2<sup>nd</sup> defendant.

The third plaintiff did not call any witnesses and did not appear and therefore his suit defendant's is dismissed for want of prosecution with no order as to costs.

The plaintiff's action was originally brought against the four defendants, namely the first defendant Richard Bukenya, B.N. Cargo Services, WEC Lines Ltd, and Uganda Revenue Authority. The action against Uganda Revenue Authority was discontinued. Secondly on the 22 March 2012 by notice of withdrawal, the plaintiffs withdrew the action against BN Cargo Services, which defendant was originally the second defendant. Consequently the action proceeded against two defendants namely Richard Bukenya as the first defendant and WEC Lines Ltd as the second defendant. In the original plaint, WEC Lines Ltd was the third defendant. In this judgement, WEC Lines Ltd will be referred to as the second defendant. The agreed issues for determination are:

- 1. Whether the plaintiffs can legally claim the shipped goods from the 2<sup>nd</sup> defendant.**
- 2. Whether the 2<sup>nd</sup> defendant is entitled to hold onto the shipped container until the freight is fully paid by the shipper or the consignee.**
- 3. Remedies**

**Whether the plaintiffs can legally claim the shipped goods from the second defendant**



I have carefully considered the written submissions of the second defendant on this issue. The second defendant does not dispute the right of the plaintiffs to claim the goods. The second defendant's submission is that it had received the container containing the goods from BN Cargo Services in England. Under the terms for the transportation of the goods to Kampala, the first defendant is the consignee and the party to be notified. Secondly freight charges were to be paid in Kampala. Freight charges were not paid and therefore the goods cannot be released. The first defendant's case is that his role was to receive the goods and deliver them to various respective owners. The goods would be paid for in England to BN Cargo Services. In other words the first defendant does not dispute the right of the plaintiff to claim their goods.

There is no dispute that the freight charges amounting to US\$8554.30 has not been paid to the second defendant. The plaintiff's case is that they had paid the freight services for the vehicle and other assorted goods to BN Cargo Services in England. Last but not least the second defendant argues that the plaintiff authorised BN Cargo Services to enter into a sub bailment contract with the second defendant to transport the goods to Uganda. Learned counsel for the second defendant contends that the plaintiffs knew that BN Cargo Services had no ship to transport the goods to Kampala. It followed that the goods would be transported by someone else and therefore they had impliedly authorised BN Cargo Services to subcontract someone to ship the goods to Kampala. Consequently learned counsel submitted that their relationship is that of a Bailor and sub bailee. He concluded that the plaintiffs can claim the goods subject to the terms of the sub bailment. The only remaining controversy between the plaintiff and the second defendant is whether the plaintiffs can claim the goods without paying the freight charges. In other words on the admission of the second defendant W.E.C. Lines, the plaintiffs can claim the goods which it shipped from England on instructions of BN Cargo Services. It is the second defendant who is holding on to the goods. The issue as to whether the plaintiffs can only claim the goods upon payment of the freight charges is an issue that involves determination between the first defendant, the plaintiffs and the second defendant and will be considered in the second issue.

Second issue

**Whether the second defendant is entitled to hold onto the shipped container until the freight is fully paid by the shipper or the consignee**

Again in the second issue the second defendant submits that the freight charges are payable in Kampala. The contention is that the second defendant has a lien on the goods. In support of its common law rights the second defendant's case is based on dictum in the case of **Scruttons Ltd versus Midland Silicones Ltd** [1962] AC 446 where it was held that the owner of the goods is bound by contract concluded by the bailee although the owner is not a party to the contract. Learned counsel contended that it is immaterial that the plaintiff paid BN Cargo Services. He contended that the plaintiff elected to withdraw the suit against BN Cargo Services.

The plaintiff's submissions are that they should not be liable for the acts of BN Cargo Services and their agent Richard Bukenya. That the second defendant should enforce the lien against BN Cargo Services and the consignee by suing them for performance of the contract by exploring other remedies that may be available to them including attachment of the consignee's goods. That the plaintiff should not suffer damages for an arrangement that was entered into without their knowledge or consent or caused by the failure of other beneficiaries of goods in the container to pay the fees of BN Cargo Services.

I agree with the submissions of learned counsel for the second defendant and the authorities cited particularly the cases of **Scruttons Ltd v Midland Silicons Ltd [1962] AC 446**, for the right of a bailee to get paid and the case of **Tappenden (trading as English & American Autos) v Artus and Another [1963] 3 All ER 213**.

Instructions for carriage of goods were given by BN Cargo Services to the second defendant. In other words, BN Cargo Services acted as an agent of the plaintiffs when giving the instructions. This is because the plaintiff is trying to proceed direct against the second defendant to gain possession of the goods. Yet, the consignee named in the Bill of lading is the first defendant. The plaintiff may argue that it is the first defendant who should pay the fees of the second defendant's. Whatever the case may be, the second defendant would be entitled to receive money for the services it rendered to convey the goods from England to Kampala. The basis of the claim of the second defendant is a contract of bailment. The question of whether the plaintiffs paid for the carriage of goods to BN Cargo Services, cannot affect the second defendant who has provided the services of a bailee and is willing to deliver the goods to the proper party upon payment of its fees. In another situation, the second defendant would have been entitled to bring interpleader proceedings to establish to whom to deliver the goods subject to the payment of their charges/fees. There is however no controversy about ownership of the goods.

Secondly, the plaintiff having withdrawn the suit against BN Cargo Services cannot complain that it ought to have paid the freight charges to the second defendant. Thirdly the plaintiffs seek to take the benefit of the conveyance of the goods to Kampala on the assumption that the BN Cargo Services subcontracted the second defendant to convey the goods to Kampala. This is because clearly the consignee in the Bill of lading is the first defendant. Yet all the parties to the action agree that the plaintiff can claim the goods. The absence of BN Cargo Services as a defendant ensures that it cannot be held accountable in this action for any monies which could have been paid to it by the plaintiffs. Clearly there was no connection between the plaintiff and the second defendant except through BN Cargo Services. It is admitted by the parties that BN Cargo Services could only have acted on the instructions of the plaintiff and other persons with goods in the same container. My short conclusion is that the plaintiff cannot claim that the goods were conveyed without their consent by the second defendant and at the same time seek to take benefit from that contract while leaving BN Cargo Services to walk away without any accountability. Since the second defendant admits that the plaintiffs may receive the goods, it is

the plaintiffs' dilemma to establish how the second defendant can be paid. Can they move against the nominal consignee?

As far as the BOL is concerned, there is no connection between the plaintiffs and the second defendant except as bailee and bailor by sub bailment. I therefore agree with the second defendant's submission, that the fact that the plaintiffs could have paid freight charges to BN cargo services, cannot be visited on the second defendant who is not concerned with the relationship between BN cargo services and plaintiffs at the material time. Moreover BN Cargo Services has a local representative in Uganda to receive the goods. BN Cargo services used its internal mechanism to consign the goods to Richard Bukenya, the first defendant. The concern of the second defendant arises on the point when they received instructions to convey the plaintiff's goods to the consignee in Kampala. The foundation of the plaintiffs claim against the second defendant is for delivery of the goods and is based on its rights as the owner of the goods having instructed BN Cargo Services to convey the goods to Kampala.

According to Halsbury's Laws of England Volume 2 and 4<sup>th</sup> edition paragraph 1501 a bailment arises from delivery of personal chattels on trust, usually on a contract, express or implied, that the trust shall be duly executed, and the chattels redelivered in either their original or an altered form, as soon as the time or use for, or condition on, which they were bailed shall have elapsed or been performed. The element common to all types of bailment is the imposition of an obligation, because the taking into possession in the circumstances involves an assumption of responsibility for the safe keeping of the goods. In this case the instructions were to convey the goods to Kampala and the second defendant conveyed the goods to Kampala.

To constitute a bailment, the actual or constructive possession of a specific chattel must be transferred by its owner or possessor, or his agent duly authorized for that purpose, to another person (the bailee) or his agent for that person to perform some act in connection therewith. In the absence of a particular trade or custom, a special lien on a particular chattel cannot be enlarged so as to include a general balance on account. If in such a case the bailor demands the particular chattel and tenders the specific amount due on it. If the bailee refuses to re-deliver, not only is his lien gone, but he is also liable to the true owner in an action for trover. A bailee who keeps a chattel to enforce his lien cannot charge for keeping it.

The first and second plaintiffs handed over the goods to BN Cargo Services who sub contracted the carriage thereof to the second defendant. BN Cargo retained control over the goods through the first defendant.

In the premises 2<sup>nd</sup> defendant is willing to hand over the plaintiffs goods subject to the payment of their charges/bailees fees. There is therefore no controversy over the issue of whether the goods should be handed over to the rightful owners who have proved their right as bailor and the plaintiffs are therefore entitled to get their goods as provided for hereunder.

## **Remedies**

According to the first defendant who was not represented, he used to get goods on instructions of one Nyanzi who is his brother-in-law from London. He would help them to deliver the goods to the owners without receiving any payments for the services. He testified in court that the second defendant was demanding money from Nyanzi and his wife for the suit goods. Some people paid for the goods and others did not pay. He does not know which others did not pay his relatives in London. The problem is that the goods have not been released. On cross examination by learned counsel for the second defendant, the first defendant testified that he had a list of people who had paid. He however had no demand against the plaintiffs. I agree with the holding in **Tappenden (trading as English & American Autos) v Artus and Another [1963] 3 All ER 213**. The bailee in that case had handed over the van of the bailor for repairs to a mechanic. Subsequently the bailor withdrew authority from the bailee and traced the van in the hands of the mechanic (artificer). The mechanic had executed repairs to van at a charge of £40 and refused to deliver up the van to the bailor except on payment of this sum in reliance on his artificer's lien. The bailor filed an action against the bailee and artificer, claiming return of the van and damages for its detention. Lord Diplock held on appeal at page 216 stated the common law as:

*“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 an artificer 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 adverse to the right of the person who, but for the lien, would be entitled to immediate possession of the goods. 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.”*

In this case where possession of the goods was originally given to BN Cargo Services, and it went ahead to deliver it to the second defendant with instructions to deliver the goods to its consignee in Kampala, the test is whether the owner of the goods authorised BN cargo services to convey the goods. It is also whether the owner of the goods is estopped from denying that the authorisation of the agent to subcontract the carriage of the goods to Kampala. It is my humble opinion that the plaintiffs upon submitting that there are bailors and the second defendant is the bailee, are estopped from denying the authority of BN cargo services to subcontract the consignment for carriage of their goods to Kampala. In addition reference can be made to the case of **The Pioneer Container KH Enterprise (cargo owners) v Pioneer Container (owners) [1994] 2 All ER 250** where the Privy Council discussed the rights and obligations arising from sub bailment. Their Lordships held that where a sub bailee accepts possession of goods for the purpose of taking care of them, and delivering them to the holders of bills of lading, they take upon themselves the obligation to exercise due care for the safety of the goods though there was no contractual relationship between them. Secondly, the relationship between the owner of the

goods and the bailee is that of bailor and bailee even when the first bailee subcontracted to a sub bailee. Their Lordships did not consider a situation where there was no authority given by the owner of the goods to the bailee to subcontract another bailee to take possession of the goods under the terms of the bailment. However, I agree with the second defendant's counsel on the ground that BN Cargo Services was a forwarding agent. They had to rely on other carriers to convey the goods to Kampala. What is even more important is that they consigned the goods to their representative in Kampala namely the first defendant. It cannot therefore be said that they lost possession of the goods. The contract was to convey the goods to Kampala and that is what they did. They used a carrier they subcontracted to convey the goods to their representative in Kampala. The problem that arises is that the representative has neither cleared the goods nor handed them over to the beneficiaries.

The plaintiffs remedy could have been to compel BN cargo services to release the goods by paying for it or simply to obtain an order of specific performance against them. As it is the suit was withdrawn against BN cargo services. Perhaps this is because the cargo was assigned to the first defendant who has not denied the right of the plaintiffs. The first defendant is an agent of BN Cargo Services. The goods were conveyed in container and required a block freight charge for their carriage. The goods were assigned to the first defendant in the bill of lading as consignee. This was under an arrangement where Bukeya is deemed as an agent of BN Cargo services to have agreed to be the consignee for various people for whom he would clear the goods.

In the circumstances the plaintiff's action for damages as against the second defendant/WEC lines Ltd has no merit. Secondly the plaintiffs claim against the second defendant is only for delivery of the goods. The goods cannot to be delivered without payment of freight charges.

As far as the first defendant is concerned, he is liable as an agent of BN cargo services by his own admission. It is admitted that he received goods as the consignee and in his capacity as agent of BN Cargo Services for the benefit of several persons whose goods are conveyed in the container. It is in the testimony of Richard Bukenya that under the arrangement he would convey the goods to his home and then distribute them to the various owners from there. The plaintiffs have proved that they paid all charges to convey their particular goods to BN Cargo Services. The arrangement to name Richard Bukenya as the consignee in Kampala was between BN Cargo Services and the first defendant. It is also proved that under the contract of carriage, the freight charges were to be paid in Kampala. The second defendant's witness DW1 also testified that she knew Bukenya and it was Bukenya who would clear the goods in other past transactions. When the container housing the plaintiff's goods arrived, Bukenya, the first defendant abandoned it and could not be traced. According to Stroud's Judicial Dictionary of Words and Phrases 2000 Edition a Consignee is defined as follows:

***"Is a person residing at the port of delivery to whom the goods are to be delivered when they arrive there."***

According to Atiyah on The Sale of Goods 9<sup>th</sup> Edition page 414:

***“The carrier has a lien on the goods for the freight due, and this takes priority over the seller's right of stoppage. Hence the carrier can refuse to deliver the goods to the seller unless the latter is first prepared to discharge the amount of the freight.***

Though in this case, the plaintiffs who are the owners of the goods did not instruct the carrier, it is BN Cargo Services which did and they are bound by the terms of the contract of carriage. This situation is that the plaintiffs proved that they had paid for carriage of goods to Kampala to BN Cargo Services. However BN Cargo services did not pay for the freight of the goods in England. Evidence on record is that freight charges were to be paid in Kampala.

The question becomes who was to pay these charges. The first defendant is the consignee of the goods and a full representative of BN Cargo Services. He had a duty to convey the goods to the actual beneficiaries whose details were forwarded to him by BN Cargo Services. The first defendant cannot avoid liability for the consignment which came in a container. All the beneficiaries of the goods in the container can only get it through him. He has admitted that the plaintiffs paid for the services provided by BN Cargo Services since he has no claim against them. He is a mere trustee with a duty to clear the goods for the benefit of the actual beneficiaries/owners.

It is the order of this court that the first defendant shall pay the freight charges of USD 8,544 US\$ to the second defendant and clear the goods of the plaintiffs in his capacity as an agent of BN cargo services, and trustee consignee on behalf of the beneficiaries. It is upon the first defendant who has held himself out on several occasions as an agent of BN Cargo Services in Uganda both to the second defendant and the plaintiffs to claim any refund from BN cargo services if he so pleases. The freight charges are enforceable against the first defendant.

The first and second plaintiffs also claimed special damages against the defendants. I have already disallowed any damages against the second defendant. As far as the first defendant is concerned, having withdrawn the suit against BN Cargo Services, the claim for special damages is disallowed.

The first and second plaintiffs spent more than a year pursuing the release of the goods. They had to file an action in the High Court for redress. They had nothing to do with the arrangement between the first defendant and BN Cargo Services. However they were supposed to get their cargo from Kampala. In Kampala it was the first defendant who was the representative of BN Cargo Services. From his testimony, some owners of goods in the container had paid for the services to convey the goods to Kampala to BN Cargo Services while others had not. In other words he refused clear the container of goods because some other persons had not paid. The plaintiffs had been held on ransom by the actions of the first defendant. The plaintiff to prove that they have suffered a lot of inconvenience moving from one office to the other, trying to trace

the first defendant who had simply disappeared, and trying to obtain the goods. They had to fly in from England to Uganda. They were subjected to economic hardships.

In the premises the first defendant shall pay general damages of Uganda shillings 30,000,000/= to the plaintiffs for failure to clear the plaintiffs goods leading the plaintiffs to incur general damages for inconveniences and costs suffered pursuing the claims.

Secondly, the plaintiffs are obliged to pay any taxes due on the goods to Uganda Revenue Authority.

The claim for damages against the second defendant/WEC lines is dismissed with costs. WEC lines will release the goods of the plaintiffs after payment of the freight charges through execution for it against the first defendant. The plaintiffs are not entitled to costs as against the second defendant.

The plaintiffs and the second defendants are awarded costs as against the first defendant. Ruling delivered in open court this 16<sup>th</sup> day of November 2012

Hon. Christopher Madrama

Judge

Ruling delivered in the presence of:

Dennis Kanabi for the plaintiff

First plaintiff in court

Francis Buwule for the second Defendant

First defendant in court

Charles Okuni

Hon. Christopher Madrama

Judge

16 November 2012