

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL SUIT NO. 04 OF 2010

FUELEX (U) LIMITED:.....PLAINTIFF

VERSUS

**THE COMMISSIONER GENERAL,
UGANDA REVENUE AUTHORITY:.....DEFENDANT**

BEFORE HON. JUSTICE SSEKAANA MUSA

JUDGMENT

BACKGROUND

The plaintiff filed this suit in 2010 against the defendant for recovery of special and general damages for loss of business, loss of user, loss of trading goods, unlawful confiscation of its property, unlawful seizure of its goods and tools of trade, loss of profits and costs of the suit.

On the 21st December, 2009 the defendant through her officers forcefully took over the plaintiff's fuel station at Nalukolongo, in Rubaga Division Kampala District which also had a restaurant and a grocery store. The plaintiff's employees were all evicted from the petrol station.

The defendant stated that on 21st and 23rd of December 2009, while acting on search warrants and in presence of police officers from Natete Police Station and local council officials of the searched the Plaintiff's station at Nalukolongo and recovered registers, delivery notes/invoices and several Congolese Number Plates in proof that the plaintiff was dealing in uncustomed/diverted fuel.

In the process of the search, the plaintiff's agents/officers in the course of their employment refused to open the underground fuel tanks for access by the search team and hid the fuel dipping sticks in an attempt to frustrate the criminal investigations and conceal their illegal business transactions.

The plaintiffs supervisor operations and in-charge sales were arrested and charged Nakawa Chief Magistrate court in connection.

The parties filed a joint scheduling memorandum where the following facts and issues were agreed for court's determination;

Agreed facts

- 1). The plaintiff is a limited liability company carrying out the business of trading in fuel.
- 2). The defendant is the Executive of Uganda Revenue Authority
- 3). That on the 21st of December 2009, the Defendant through her officers entered and took over the plaintiff's fuel station at Nalukolongo.
- 4). The plaintiff's fuel station at Nalukolongo had on it a restaurant and grocery store.
- 5). The plaintiff's fuel station has underground tanks used to store fuel for trade.
- 6). That on the 31st day of May 2010 a verification exercise was conducted at the plaintiff's premises at premises at Nalukolongo by His Worship Isaac Muwata and a report prepared.

ISSUES

1. *Whether the taking over and possession/occupation of the plaintiff's fuel station by the defendant was unlawful?*
2. *Whether the plaintiff suffered loss or damage?*
3. *What are the remedies available to the parties?*

The plaintiff was represented by *Mr. Oscar Kamusiime* while the defendant was represented by *Mr. Okello George*.

The plaintiff lead evidence of one witness while the defendant lined up 10 witnesses in defence of the case. The parties filed written submissions in this matter and the court has considered them in writing this judgment.

Whether the taking over and possession/occupation of the plaintiff's fuel station by the defendant was unlawful?

The plaintiff's counsel submits that the Defendant's act of forcefully taking over and occupying the Plaintiff's fuel station at Nalukolongo was unlawful because;

- It involved the use of unwarranted excessive force
- The Defendant exceeded the mandate of the search warrant
- The Defendant lacked lawful justification for the continued occupation of the Plaintiff's premises
- The continued occupation of the station violated the Plaintiff's constitutional rights

This evidence was confirmed in cross examination of PW1 wherein she clarified she was at the station and that the first group of URA officers came at 1.00 pm while the second group came past 4 pm. The evidence also shows that military personnel were used by the Defendant in forcefully taking over the Plaintiff's fuel station.

PW1 testified that the fuel station was taken over by military police who were deployed at all times until the fuel station was handed over. In cross examination, DW6 confirmed that the URA team dispatched was composed of both Uganda police force and Uganda People's Defense Force operatives on secondment.

It is the Plaintiff's submission that where one's premises have been entered upon by an authority such as the defendant lawfully but authority then accrues out or perpetrates illegalities, the occupation of the premises becomes a trespass thereon.

The Plaintiff submits that the continued occupation by the Defendant's officers after conducting the searches on 21st and 23rd December 2009 was unlawful. While the search warrants allowed the Defendant's officials to enter and search the Plaintiff's premises, the moment the search was completed and the certificates of search were signed, the Defendant's powers to stay at the Plaintiff's fuel station lapsed. However, regardless of having completed the searches at the Plaintiff's fuel station, the Defendant's remained for a further 5 months.

The authority of ***Monitor Publications Ltd v. AG HCCS No. 747 of 2013*** is applicable in this case in that it has similar facts, and in which this Honourable Court determined the issue of Government agencies closing off businesses under

the guise of conducting searches. In this case, the Uganda Police Force, armed with a search warrant took over the Monitor offices in search for a document that was published on 7/5/2013. The Police searched for 3 days to no avail and Monitor moved Court to vacate the search warrant. The Police refused to vacate and remained at the premises for 7 more days with no commercial operation taking place. Justice Wangutusi held as follows;

To act otherwise and continue without in fact returning the search warrant to the court did not only mean disobedience of court orders but confirmation of a process originally allowed by the court but had been vacated. The fact that the officials of the Defendant did not go through the cores provided for under Section 27 of the Police Act only moves to confirm that the officials remained in occupation under a vacated search warrant.

The Plaintiff further submits that the Defendant's occupation of the Plaintiff's fuel station was in violation of Article 27 (1) of the Constitution. **Article 27 (1) of the Constitution** provides as follows;

No person shall be subjected to—

- (a) unlawful search of the person, home or other property of that person; or**
- (b) unlawful entry by others of the premises of that person.**

Therefore, at the point when the certificates of search were signed, the Defendant's authority to remain on site ceased and as such the continued occupation of the Plaintiff's premises constituted unlawful entry by the Defendant.

The Plaintiff further submits that the Defendant had no justifiable reason for maintaining presence at the Plaintiff's fuel station for 5 months because the Defendant did not expect to find the fuel that had allegedly been dumped at the Plaintiff's premises, the taxes attendant thereto were secured by a bond and the Defendant did not institute any proceedings or enforcement measures, having obtained documents from the Plaintiff.

The defendant's counsel submitted that, the allegations of excessive use of force are not proved, having not been supported by any other evidence, beyond the witness statement of PW1. No photographic/ documentary evidence was adduced in evidence to show the alleged use of arms and how it was used

unlawfully. No evidence was taken from or given by the alleged employees of the Plaintiff, be it oral or documentary, to prove the alleged assault.

Court is not told how the alleged assault were occasioned, and which parts of the bodies of the said employees suffered the alleged assault. Was it a common assault, or an assault occasioning actual or that occasioning grievous bodily harm?

There is no criminal reference bureau number, reporting any alleged crime (s) to Police or any authority, by the Plaintiff, or her said officers. The allegation is not only false but malicious.

Secondly, without prejudice to the first above, use of fire-arm is a monopoly of the Uganda Police and the officers of the UPDF, and other persons licensed. Thus, even if any firearm had been sighted during the takeover of the Plaintiff's premises (there is no such evidence), then, that *per se* would not have made the takeover and possession unlawful.

Given that the constitutional mandate of the Police is to keep law and Order, the execution of those duties usually calls for securing the scene of crime, as the case may be. Thus, if in the present matter, firearm had been used, there would be no illegality about that. At any rate, the fuel station would require guarding against third parties, whose interests could be adverse to the Plaintiff's and the Defendant's- e.g. robbers, etc.

The defence counsel submitted that the alleged exceeding of the search warrant is an afterthought, an unpleaded matter, and not put in issue during the trial. Thus, the same was not responded to, and thus not addressed, either at the hearing, or otherwise, by the defence.

Without prejudice to the foregoing, the plaintiff's contention that, staying beyond the period of the search warrant was unlawful, cannot stand in law. This so because Court has not been addressed on the search warrant (and rightly so, the same not being contentious) and no evidence adduced in that regard. More importantly, it is not shown the said warrant was recalled by the issuing Court (as was the case in **Monitor Publications Ltd vs. AG, HCCS NO. 747 of 2013**, heavily relied on by the Plaintiff).

The impossibility of finding fuel dumped, in the circumstances, could well be true, but one should not lose sight of the undercurrents, leading to the Defendant's

search of the fuel station, and the presence at the station for the stated duration. The search, as evidence abundantly show, was informed by confession of suspects who dumped fuel at the station.

The search then resulted into several useful discoveries, for example, documents and false registration plates, which all were useful in informing the Customs Audit Report, testified about by James Kisaale (DW5).

Moreover, as extensively pleaded in the WSD and as supported by evidence adduced by the Defense witnesses, the Plaintiff's refusal to cooperate in furthering of the smooth but quick conclusion of the Police Investigations at her premises, elongated the handover process.

In summary, the Plaintiff and her officer, Jane Rugambwa (PW1) refused to cooperate with the Defendant from December 2009 to March, 2010, by refusing to hand over the keys to the underground/ fuel reserve tanks, and specific dipping sticks, to allow for the verification of the fuel in the underground reserve tanks. The exercise was necessary, to validate or rebut the case of diversion and "dumping" of uncustomed fuel at the station.

The evidence on record by the defence witnesses shows that, the Plaintiff frustrated the verification exercise, until 30th April, 2010 when Hon. Justice Musoke Kibuuka made an order that a verification exercise be conducted, with the Plaintiff's participation. This prompted cooperation of the Plaintiff, hence the exercise of 31st May 2010. As per the evidence of Mr. Balamaga, between the date of the Order and the eventual verification, delays were occasioned by the Plaintiff's indifference.

Thus, the handover could not have been effected before the verification exercise, with the full participation of the Plaintiff.

It was their contention that there was nothing unlawful about the time lag. There was for example no Court Order compelling the officers of the Defendant out of the fuel station. They thus remained pursuant to a warrant and s.157 (2) (h) of the East African Community Customs Management Act, which permitted the presence.

Having ably rebutted the Plaintiff's allegations and submissions, the Defendant submits that the actions of its officers in taking over and remaining in possession of the Plaintiff's fuel station at Nalukulongo, Kampala District, from 21st December, 2009 to 31st May 2010, when it was handed over, was lawful, in that;

- i) The Defendant followed a lawful warrant. The same was never set aside or recalled by the issuing Court.
- ii) The Defendant's action was allowed by section 157 (2) (h) of the East African Community Customs Act which allows an officer of URA to lock up, seal, mark, or otherwise secure any such premises, room, place, equipment, tank or container.

In the present case, the strong room was sealed with the URA seal, a fact confirmed by the verification Exercise Report (Exh. D11). See also the witness statement of Mitango Twaha (DW10), a Scene of Crime Officer.

My Lord, the conclusion reached in Exh. D11 is apt, that ***"the Defendant having concluded the dipping exercise, has handed over the fuel station"***. This statement by the witnessing Court officer resonates with the Defense contention that the fuel station could not have been handed over before the dipping exercise could be jointly executed. In other-words, had the cooperation of the Plaintiff been secured much earlier, the delay to hand over the station would not have been occasioned.

In light of the foregoing analysis and evaluation of the evidence on record, we submit that the Defendant is not to blame for anything, but the Plaintiff who engaged in illegal activities and allowed export fuel to be diverted and dumped at her fuel station.

Determination

The plaintiff's counsel submitted that, the defendant's acts of forcefully taking over and occupying the fuel station was unlawful because of excessive use of force; exceeded the mandate of the search warrant; defendant lacked lawful justification for the continued occupation; the occupation violated the plaintiff constitutional rights.

The plaintiff witness consistently tried to qualify the take over as being forceful. Whatever the qualification of the force, the defendant as a body (office) mandated to collect taxes has to respond to all manner of tax evasion whenever detected.

The circumstances of this case are quite clear as put forward by the defence witnesses; They got information from a turn-man on 19th November 2009 who made an extra judicial statement confessing that they had offloaded transit fuel at Fuelex Nalukolongo on 18th September 2009. Later the driver was also arrested and equally confirmed that the fuel was offloaded at the plaintiff's petro station.

This triggered the defendant's officers to swing into action to establish the truth and this led to the deployment of police officers and Army men in Uniform to cordon off and secure the plaintiff's premises. The evidence of the plaintiff witnesses that it was done in a forceful manner does not mean anything.

The take-over was secured by armed police officers and military police and to that extent there was no forceful take over since it was buttressed with search warrant in accordance with the law.

The plaintiff witness appears to have understood her chasing away as the act of being forceful coupled with taking over the entire petrol station and the restaurant, garage and tyre clinic. This is undisputed by the defendant and there is no indication of forceful take over.

It would appear in her view there was no need to have such a heavy deployment of both police and Military police officers. It is up to the defendant to assess the required deployment depending on the circumstances of the case. The deployment would not have any problem unless the plaintiff contends that in the course of their deployment they violated any rights. The witness does not state any rights they violated in the process.

There is no basis for challenging the deployment as involving the use of excessive force to secure the petrol station at Nalukolongo.

Section 157 of the East African Community Customs Management Act provides;

A proper officer may, if he or she has reasonable grounds to believe that there are on any premises any uncustomed goods or documents relating to any uncustomed goods, enter upon and search premises by day or by night; and for such purpose the proper officer may use all reasonable force and may require the assistance of, and take with him or her, another officer or a police officer.

Reasonable force varies depending on the circumstances. In order to determine if the amount of force used is reasonable, the 'reasonable person standard' is applied. Under this standard, actions will be considered reasonable if a reasonable person would have acted in the same way under the same (or similar) circumstances.

The courts are instructed to confront the facts of a case as they were presented to the officer when the decision to use force was made and to determine if the actions were 'reasonable' given the circumstances and what was known to the officer at the time.

As noted earlier there is no evidence of excessive use of force. It must be emphasized that the excessive use of force is the same as unreasonable use of force. The use of force in the circumstances of the case was not in any way excessive. The defendant's officers were acting in accordance with the law and there was unreasonable or excessive use of force.

The plaintiff further contended that the continued occupation by the defendant officers after the searches on 21st and 23rd December 2009 was unlawful and that there was no justification.

The search was not merely confined to the premises but everything including the fuel tanks that are underground. The evidence produced by the defence

witnesses shows that the plaintiff refused to cooperate in ending the search exercise in the shortest time possible.

They stated that the plaintiff officers refused to provide dip sticks to check the fuel in the underground tanks. Without a dip stick the defendant could not conclusively determine the amount of fuel available against what was 'dumped'.

The search warrant remained valid until the plaintiff had complied with the orders of court and required total cooperation to establish the truth. Indeed the impasse was broken when the High Court ordered that the verification exercise be carried out in presence of the plaintiff. This was conclusively done in May in presence of the His Worship Isaac Muwata (now Judge) and the petrol station was handed over.

The intransigent behavior of the plaintiff's directors delayed the conclusion of the exercise and this led to the delay. The law does not give any time limit and so long as the information is withheld, the defendant was justified to continue the cordoning off of the premises.

The plaintiff's counsel has cited the Articles of the Constitution which provide for unlawful search and unlawful entry by others on the premises of that person. The enjoyment of this right is subject to the other laws.

Section 158 of the East African Community Customs Management Act provides;

Without prejudice to any other power under this Act, where any officer declares on oath before any magistrate that he or she has reasonable grounds to believe that there are in any uncustomed goods or documents relating to any uncustomed goods, then such a magistrate may by warrant under his or her hand authorize such officer to enter upon and search, with such force as may be necessary and by day or by night, such premises and to seize and carry away any uncustomed goods or documents relating to uncustomed goods found therein.

When a statute authorizes the doing of an act, which would otherwise be a tort or an infringement of that right, the injured party has no remedy except the one provided under the Act.

But statutory powers are not charters of immunity for any injurious or violation of rights done in exercise of them. The act done in pursuance of the statutory powers given by a statute, must be exercised with judgment and caution.

The purpose underlying the power of search is to assist the law enforcement agency to investigate suspected violations of the law by unearthing evidence for the suspected violations or breaches of the law which may not be available to the government agency.

The Act authorized a search for the uncustomed goods and documents and this is not a violation of any right. The search warrants were issued by court and the same was executed in accordance with the court directives and guidance. The case of ***Monitor Publications Ltd v AG HCCS No. 747 of 2013*** is very distinguishable on facts and the law.

It is the duty of the court to determine whether the person claiming that his or her privacy was infringed could reasonably expect his or her privacy to be protected in the particular circumstances.

The power to search or seek an order for a search is an exercise of discretionary power and the court will interrogate whether the officer concerned has acted *bonafide* or *malafide* in ordering a search or acted on non-existent grounds or irrelevant considerations or has applied his mind or not to the question.

Therefore, an order to conduct a search can be challenged on any of the grounds on which the exercise of a discretionary power can be challenged. In the case of ***Income Tax Officer v Seth Bros, AIR [1970] SC 292; [1969] 2 SCC 324***; the Supreme Court observed that;

“Since by the exercise of the power a serious invasion is made on the rights, privacy and freedom of the tax payer, the power must be strictly in accordance with the law and only for purposes for which the law authorizes

it to be exercised. If the action of the officer issuing the authorization or of the designated officer is challenged, the officer concerned must satisfy the court about the regularity of his action. If the action is maliciously taken or power under the section is exercised for a collateral purpose, it is liable to be struck down by the Court. If the conditions for the exercise of the power are not satisfied the proceeding is liable to be quashed.”

Article 43 of the Constitution provides:

In the enjoyment of rights and freedoms prescribed in this chapter no person shall prejudice the fundamental or other human rights and freedoms of others or public interest.

The right to privacy of person, home and property is not an absolute right. It can be taken away in public interest like in the present case, where a person suspected to be holding uncustomed goods and documents (has committed an offence). The Plaintiff’s petrol station in this case was searched and cordoned off for contravening the provisions of the East African Community Customs Management Act, 2004 by having uncustomed goods. Therefore, the search remaining on the premises was lawful.

Article 17 (g) of the Constitution provides that it is the duty of every citizen of Uganda to pay taxes. Therefore, the Plaintiff must pay taxes when required to do so unless exempted by the law. This position was strongly held in the case of ***Uganda Projects Implementation and Management Centre v URA Supreme Court Constitutional Appeal No.2 of 2009*** where **Lady Justice Kitumba** stated;

“According to Article 17 of the Constitution a citizen has a duty to pay taxes and to do so promptly, so that government business can go on.”

The actions of the plaintiff were intended to defeat it’s core obligation of payment of taxes while conducting its business and the actions of the defendant were carried out in accordance with the law. The plaintiff’s claims for the unlawful take over or occupation of the petrol station are devoid of any merit, since it was done to restrain the plaintiff from committing offences under the East African Community Customs Management Act.

The prevention of tax evasion is an important reason leading to a search and seizure and it is an act in public interest.

Whether the plaintiff suffered loss or damage?

The Plaintiff submits that it suffered loss as a result of the Defendant's unlawful actions. PW1 Jane Rugambwa testified that at the time of the takeover of the station on 21st December 2009.

The following items were present;

- a) The restaurant had trading stock of **Ushs. 18,000,000/=** and the grocery shop had trading stock of **Ushs. 36,000,000/=**
- b) The safes and strong room had cash amounting to **Ushs. 154,445,100** and **Kshs. 500,000.**
- c) The Station also had cash sales for 21st December 2009 amounting to **Ushs. 9,800,000/=**
- d) There were 2(two) fuel trucks motor vehicle registration numbers **UAB 971K** and **UAE 605N** packed at the station **each loaded with 30,000 litres of PMS.**
- e) Underground tank 1 had **32,000 litres of PMS fuel**, underground tank 2 had **39,500 litres of PMS fuel**, underground tank 3 had **32,000 litres of AGO fuel** and underground tank 4 had **31,200 litres of BIK fuel.**

In cross examination PW1 maintained that when the Defendant's officers broke into the strong room, they took everything that was there including money sales of **Ushs. 9,800,000, Ushs. 154,445,100** and **Kshs. 500,000.**

PW1 also testified on the status of the fuel station at the point of handover on 31st May 2010, as follows;

- a) Isuzu Truck registration number UAB 791K that originally had 30,000 litres was found with no fuel at all.
- b) Mercedes Benz Truck registration number UAB 605N which originally had 30,000 litres was found with no fuel at all.
- c) The 32,000 litres of PMS in tank 1 was all found.

- d) Out of the 39,500 litres of PMS fuel in tank 2, only 37,250 litres were found. **(2,250 litres lost)**
- e) Out of the 32,000 litres of AGO fuel in tank 3, only 20,333.3 litres were found. **(11,666.7 litres lost)**
- f) Out of the 31,200 litres of BIK fuel in tank 4, only 28,950 litres were found. **(2,250 litres lost)**
- g) That at the time of the handover, the safe was broken, the drawers were broken and money was missing, specifically **Ushs. 9,800,000, Ushs. 154,445,100** and **Kshs. 500,000. [paras 21-25 of PW1's witness statement]**

The Plaintiff submits that it suffered loss at the hands of the Defendant and the evidence shows that the Defendant descended on the station in search of 50,000 litres of uncustomed fuel but as a consequence the Plaintiff lost **60,000 litres packed in the trucks, 2,250 litres of PMS in the underground tank 2, 11,666.7 litres of AGO in underground tank 3, 2,250 litres of BIK in underground tank 4** and cash **Ushs. 9,800,000, Ushs. 154,445,100** and **Kshs. 500,000**.

The defendant's counsel submitted that the allegations by the Plaintiff's witness are patently false, and should fail, for the following reasons;

Nowhere does PW1 state that the amounts mentioned above were lost (see PW1's witness statement in its entirety, dated 7th September, 2011, filed in Court on 9th September, 2011).

No case of theft of cash or otherwise was reported to Police or any other authority by the Plaintiff. No complaint/ protest was made to the Defendant or any other authority, immediately after the handover or so soon thereafter, or at all, by the Plaintiff, upon "discovery" that monies were "missing" from the safe.

In paragraph 5 of her witness statement, PW1 alleges that the Defendant's officials **"broke into the safes and strong room, using a gas welding machine they got from across the road"**. According to counsel, this evidence should be treated with a pinch of salt! The safe allegedly broken into, was intact on the date the strong room was sealed off with the URA seal till the handover date. (Refer to paragraphs 8 and 9 of the witness statement of Sabiiti Fred; see also Exh. D16 (iii and iv), paras 5 and 6 of Balamaga's witness statement, as well as paras 4 and 5 of the witness statement of Mitango Twaha (*supra*)).

The verification exercise report (Exh. D11) by His Worship Isaac Muwata (DR as he then was) confirms that the strong room was unsealed in his presence, on the handover date, being 31st May, 2010. Thus, the allegations about the gas welding machine is a figment of PW1's imagination.

PW1 was not the cashier or a person in charge of the sales and finances of the company, so as to be able to competently testify about the alleged monies the plaintiff had allegedly generated and allegedly kept in the safe, on the material day. The above allegation raises more questions than answers! Was the alleged monies cash for the day, or from the previous sales, or cash not connected to the business? What were the average sales receipts, each day? Were some sales being made and payments received in Kenyan shillings?

PW1 alleges (in cross examination) that the fuel purchase and invoice books were taken away from her premises by the Defendant's officials. The Plaintiff did not apply for discovery or production thereof, if at all the alleged documents still remained with the Defendant as at the trial date (which was not), and if they were relevant to the issues before Court.

Moreover, there is no evidence that the sales records for the period between May to December 2009 were taken by the Defendant. My Lord, this was the relevant period (considering that the search operation was conducted on 21st and 23rd December, 2009 (para 3 of the witness statement of Sabiti Fred, refers); See also the search warrant, mentioned by Sabiiti Fred, although attached to the witness statement of Botte Fred).

The defence counsel surmised that if the safe had cash, then the cash remained intact therein, given the safe was never opened in the presence of the Defendant, on the Plaintiff repossessing its premises and thus the strong room.

As a General Manager of the Plaintiff company, PW1 further testified (in cross examination) that the company could keep record of fuel offloaded/ deposited at the station and that sales records would be reported by an outlet supervisor.

In a nutshell, we submit that the Plaintiff's "money" allegations are a pack of lies, rehearsed and choreographed by PW1, but not intelligently, as most lies usually are. The defence counsel prayed that Court holds that the alleged loss of money,

claimed as special damages, was not proved, let alone strictly. The prayers ought to fail.

Determination

The plaintiff's claim was pegged on the unlawfulness of the actions of the defendant. However, this court has found that the actions of the plaintiff were not unlawful since they were conducted in accordance with the law.

The plaintiff's claims should have been proved as violations of right to property and tortious acts of conversion of goods and money. The plaintiff's witness attempted to list the losses according to her and money stolen or taken by the defendant's officials.

The defendant's witnesses have denied the said losses of both fuel and money and it is the duty of this court to weigh and evaluate the evidence of the two sides and come to a right conclusion.

It is clear that the evidence of the parties regarding the sequence of events or occurrence is conflicting. So how should court determine which version is truthful?

Sakar's Law of Evidence, 14th ed offers very good guidance at page 924 to 925 thus:

*"... There is no better criterion of the truth, no safer rule for investigating cases of conflicting evidence, where perjury and fraud must exist on the one side or the other, to consider what facts are beyond dispute, and to **examine which of the two cases best accords with these facts, according to the ordinary course of human affairs and the usual habits of life.** The probability or improbability of the transaction forms a most important consideration in ascertaining the truth of any transaction relied upon."*
(Emphasis added)

It is this court's view that the version of the Defendant is more in consonance with "*the ordinary course of human affairs and the usual habits of life*". And this is demonstrated here below:

Although the Plaintiff alleges that money was taken or stolen in hard cash from the safe which was broken by wielding it open. Apart from talking about it no other corroborating evidence is led to support it. The Defendant led evidence to show that the strong room and safe were opened and found intact at the time of verification under the supervision of court.

It is clear from the pleadings (plaint) that the plaintiff never pleaded any breaking into the safe and strong room. It is just coming up in the witness statement filed after six years. This would be a complete departure from the pleading which is contrary to Order 6 rule 7 of the civil procedure rules. In the case of ***Interfreight Forwarders (U) Ltd v East Africa Development Bank Ltd SCCA No. 33 of 1992*** the Supreme Court held that;

“A party is expected and is bound to prove the case as alleged by him and as covered in the issues framed. He will not be allowed to succeed on a case not set up by him and be allowed at the trial to change his case or set up a case inconsistent with what he alleged in his pleadings except by way of pleadings.”

The plaintiff never amended its plaint to show that the money was stolen or taken by the defendant’s officers. It remained a mere statement and allegation of loss which any specific particulars of how it was lost. For example, the trading stock at grocery and at restaurant what happened to it was it stolen and it expired. What happened to the fuel on trucks and in the under-ground tanks? Was it siphoned out of the tanks? What is the proof of existence of such huge volumes of fuel in the trucks or in the underground tanks? Wasn’t it found at the time of verification?

The plaintiff’s claim for loss and damage has not been proved on balance of probabilities?

In sum, the plaintiff’s claim fails and the suit is dismissed with costs.

Dated, signed and delivered be email and whatsApp at Kampala this 29th day of May 2020

***SSEKAANA MUSA
JUDGE***