THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

COMMERCIAL DIVISION

HCCS NO. 1291 OF 1999 NOW CONSLIDATED WITH MENGO CHIEF MAGISTRATES COURT MISC. APPLICATION 424 OF 1999 (ARISING FROM MIS. APPLICATION 223 OF 1999)

ASSIST. (U) LIMITED :: PLAINTIFF

VERSUS

1. ITALIAN ASPHALT AND HAULAGE LIMITED]
2. TITO TWIJUKYE T/A TRUST MASTER AGENCIES] ::::::: DEFENDANT

BEFORE: MR. JUSTICE KIRYABWIRE

JUDGMENT:

The facts of this case are that on or about the 6th September 1995, the Plaintiff and 1st Defendant entered into a sub-lease agreement (hereinafter called "The Agreement") in respect of the 1st Defendant's property situated at Bunamwaya Kampala comprised in the land title Kyadondo Block 265 plot 339. This agreement was for a period of 4 years. According to the agreement, details of which I shall discuss later in this judgment, the Plaintiff was authorized to effect repairs on the property and the costs of the repairs carried out would be reimbursed by the 1st Defendant either by way of a abatement of rent or whilst valuing the premises for a possible sale of the property to the Plaintiff.

The Plaintiff then took possession of the property and effected repairs. Notwithstanding a few misunderstandings between the Plaintiff and 1st Defendant that led to the Institution of Criminal charges against the Plaintiff, the sub-lease proceeded to its final year when the events leading up to this dispute

unfolded. The Plaintiff at this time decided to withhold the rent payable to the 1st Defendant and instead wanted to be reimbursed for the repairs that he had effected on the said property.

The parties were unable to agree on the value of the repairs that had been effected by the Plaintiff. The Plaintiff claimed that he had effected repairs worth US$ 42,600. The 1st Defendant for their part engaged its own valuers M/S Barker, Barton and Lawson who gave a repair value of US$ 14,387. In response to this the Plaintiff also engaged its own valuers called M/S Real Estate surveyors who put the cost of repairs at US $ 48,176. Attempts by the parties to reach an amicable resolution of this dispute came to nothing.

The 1st Defendant then instructed their lawyers to levy distress for the outstanding rent against the Plaintiff. The 2nd Defendant obtained a certificate of distress issued by The Mengo Chief Magistrate's Court vide Mis. Application No. 223 of 1999 on the 3rd September 1999. However by this time the Plaintiff had started to move his property out of the premises at Bunamwaya to another location not far away at Plot 682 and 684 Nalukolongo Industrial area, Sembule Zone also in Kampala. The 2nd Defendant pursued the Plaintiff to Nalokolongo where he levied distress on the property he found there.

The Defendant then went ahead to advertise the distressed property for sale. However the Plaintiff challenged the sale and obtained an interim order stopping the sale. What then followed was a multiplicity of legal actions on the same subject matter, which I with the consent of the parties consolidated into this suit.

Out of the now consolidated actions the following agreed issues emerge

1) What was the extent of disrepair of the premises at the time when the plaintiff took possession.

2) What was the extent of the improvements/repairs undertaken by the Plaintiff.
3) Whether the distress executed by the Defendants was lawful/regular in the circumstances.
4) What items were attached by the defendants and what was their value?
5) Whether any property of the Plaintiff was misplaced lost or converted during the execution of the certificate of distress.
6) Where did the attachment actually take place?
7) Whether the Plaintiff owes rent to the first Defendant and if so what is the quantum?
8) Whether the Defendants trespassed on plot Nos. 682 and 648 at Nalukolongo?
9) Whether the Plaintiff breached the sub-lease agreement.
10) Whether the 1st Defendant breached the sub-lease agreement.
11) Whether the Plaintiffs damaged the 1st Defendants property, if so, to what extent
12) Whether the parties are entitled to the relief's claimed.

The issues for determination are quite many as a result of the consolidation of the various actions that were being litigated before the courts. However some of them in reality overlap in fact and law therefore the resolution of some of the earlier issues will resolve the later ones. However before I look at the issues let me say something about the case. It is a 1999 case and is therefore 5 years old. Certain aspects of the case such as the state of property date even further back i.e. 1995 and are therefore 9 years old. The multiplicity of actions in the courts kept the dispute in the courts for an inordinately long time, which has led to delays. Unfortunately these delays and length of time have had a clear impact on the quality of evidence adduced at the trial. In this regard some miscarriage of Justice has occurred and legal maxim of "**Justice delayed is Justice denied** "is true in this case. However the parties have tried their best to reconstruct the

evidence as it was and it is with this clear limitation that I have made my decision.

Issue No. 1 what was the extent of disrepair of the premises at the time when the Plaintiff took possession?

This issue takes us back up to 9 years ago. For the Plaintiff it has been submitted that the property required substantial repair and this was reflected in clause 3(c) of the sub-lease agreement where the word "substantial" was written. According to the Plaintiff the plain meaning of the work being substantial means a "Large in amount or value: considerable" according to the Oxford Advanced learners dictionary. Indeed the Plaintiff claims to have affected repairs worth US$ 42,660.

For the Defendant it was submitted that the term substantial was not defined in the agreement and since there was varying testimony by the Plaintiff and 1st Defendant, the court should base its findings on the contra proferentem rule. It was submitted the word substantial should be understood in a special way and not necessarily the dictionary sense of the word," but that which is generally understood subject always to admissible evidence being adduced to show the word is to be understood in some other technical or special sense" (the authority of Anson. Sir William on English Law of contract 22nd. edition P. 139 cited in support of this). Based on evidence of DW 3 Luciana Paul the property was in the following state; -

a) The main house was in reasonable condition.
b) The boy's quarter was solid and only needed repainting and minor tile replacements.
c) The entertainment out house was in perfect condition.
d) The workshop required only a roof in order to be usable.

According to the case for the Defendants the repairs done were only worth US$ 14,387.

From the evidence adduced and the submissions of both counsel the extent of disrepair of the property rests on the interpretation of the word substantial which appears in clause 3(c) of the agreement which reads

> *"The demised premises are in need of* ***substantial*** *repairs and the sub-lessee shall have the option to repair the premises at his discretion and shall be reimbursed by the sub-lesser for the costs incurred thereof by way of an abatement rent or whilst valuing the premises for the purpose of sale to the sub-lessee"*

Counsel for the Defendants submitted that authors of the Agreement, M/S. Mulira & Co. Advocates who according to the evidence of DW 3 – Luciauna Paul were Counsel to the Plaintiff and ought to have defined the term in the agreement. I was unable to find that part of the testimony where DW 3 says that Mulira and Co Advocates acted for the Plaintiff. What appears to be clear from her testimony is the following. In her written statement DW 3 Mrs. Paul stated; -

> "*3. To sign the agreement Instructed Mr. Eliezer Kaggwa to negotiate a Sublease agreement with Assist (U) Limited on my behalf.*
>
> *4. He (Eliezer Kaggwa) negotiated it and informed me that a lawyer had checked the agreement and it was all right for signature.*
>
> *5. I proceeded to sign the agreement"*

During cross-examination she further testified that Mr. Eliezer Kaggwa worked for the audit firm Coopers & Lybrand and she signed the agreement without

duress on the assurance of Mr. Kaggwa. Mr. Kaggwa acted as a witness for both parties to the agreement as a Director of Queens way Trustees (Uganda) Limited (It is not clear which this Company was).

It seems that Mrs. Paul (DW 3) delegated her negotiation rights to Mr. Kaggwa who cleared para 3(c) of the agreement that described the property as in need of substantial repairs. This was further looked at by a lawyer. Having decided to conduct her affairs in that fashion she is bound by its outcome.

I have been asked by the defence to interpret para 3(c) under the contra proferentem/rule. However the contra proferentem is normally used by courts to interpret exclusion clauses restrictively against the person relying on them; see for example **Omer Saleh Audalih and another** Vs. **A. Besse and Co. (Aden) Limited [1960] EA 907**

I find that para 3(c) of the Agreement is not an exclusion clause but a term of the sub-lease agreed upon by the parties to the agreement. In the premises I find that the word substantial should be given its natural plain and literal meaning. I find no other technical or special sense in which the word substantial was used. In this regard the dictionary meaning of "large in amount or value; considerable" is very instructive and so I adopt it for this case. I therefore on the evidence agree with counsel for the Plaintiff that the extent of disrepair was large in amount or considerable.

Issue No. 2 what was the extent of improvements/repairs undertaken by the Plaintiff.

With regard to this issue all parties concede that some repairs were carried out by the Plaintiff. Indeed there are 3 figures that have been advanced to show the extent of the repairs. One is by the Plaintiff of US $ 42,660, the second is by a

Professional Valuer M/S Barker, Barton and Lawson on behalf of the Defendant of US $ 14,387 and the third is another professional valuer M/S Real Estate Valuers on behalf of the Plaintiff (In response to the Barker, Barton and Lawson report) of US $ 48,176.

From the onset it is important to note that issue as framed refers to both **repairs and improvements** whereas para 3(c) of the agreement only makes reference to **repairs**. This is a small but important contractual difference.

The Plaintiff produced vouchers and receipts being exhibits P2 through P161 and then P164 a total of 160 exhibits some of the exhibits carried more than one voucher/receipt. Exhibit P 161 tries to itemise these claims for repairs which total Ug. Shs. 14,942,249/= (being a total of 211 single items). The Plaintiff's figures of US $ 42,660 and Ug. Shs. 14,942,249/= need some reconciliation. Again some of the exhibits tendered like P 58, which was a receipt for padlocks, cannot be classified as a repair.

There is little doubt that repair work was carried out by the Plaintiff. Indeed DW 3 Mrs. Paul provided court with photographs taken by the Plaintiff with an imbedded print date of 18th November 1995 (being exhibits D 12 being 10 photos in all), which showed some repairs (Mostly fresh painting) that had taken place.

What appears to be mammoth task for the court is to sort out all the vouchers and receipts presented by the Plaintiff. Indeed both counsel in this case chose to rely more on the evidence of the expert surveyors report to argue their cases than to rely on the receipts. I don't blame them for that approach.

Mr. Roger Edward Allen DW 1 who was the author of the M/S Barker, Barton and Lawson report exhibit P 42 was called to give evidence on his report. Mr. Okuku

who was the author of The Real Estate valuers report on behalf of the Plaintiffs was not called to give evidence. That not withstanding DW 1 Mr. Allen did give a constructive criticism of The Real Estate Valuers report, which was instructive to court. DW 1 Mr. Allen is a fellow of the Royal Institute of chartered surveyors of England. He has practiced in Uganda for the last 12 years. DW 1 on the other hand also admitted to being a representative of the 1st Defendant in Uganda though he said that this did not cloud his Judgment as professional surveyor giving an opinion on the extent of work done. That notwithstanding court has taken into account a possible conflict in these two roles. In the introduction to his report Exhibit P 42, DW 1 makes the following observations before making his estimates.

> *"... As instructed we have not considered that aspect of work that Assist (the Plaintiff) claims to have carried out with regard to site clearing and cutting and filling of excavated materials to form a platform for their heavy plant."*
>
> *You will appreciate our task is rather difficult to accurately execute at this stage when the work was carried out four years ago..."*

I find that this was on honest caveat to the report. DW 1 Mr. Allen then puts the total costs of repairs at US $ 14,387. The items included in the repairs were under the following general heads

Main house
Servant's quarters
Workshop/Garage
Gates to workshop

When cross -examined on the Real Estate Surveyor's report Exhibit P 43 he said that his and that report were not too dissimilar in scope of work but the difference was in the quantities and unit rates.

The Real Estate Surveyor's report had the following summary at Pg. G S/1

" **Item**	**Description**	**Page**	**amount US $.**
1.0	Main house	4	8,180.00
2.0	Domestic quarters	6	3,092.00
3.0	Workshop & Garage	6	9,246.00
4.0	Gate and Gate house	6	258.00
5.0	Pit Latrines	6	3,000.00
6.0	External work	7	24,400.00
Total Valuation		**US$**	**48,176.00** "

At P. 7 of the Real Estate Surveyor's report which deals with External works the following caveat and comments are made

" **Note:**

The estimates given below are for guidance and therefore provisional. Both parties should agree on some reasonable sum of money since the works were actually executed although the exact quantities cannot now be accurately determined

A. Clear site of bush grass etc....................6,000/=

B. Grade level and compact parking yard...6,000/=

C. Cut and fill parking yard.......................12,000/=

D. Remove from workshop/stores existing
Scrap and redundant materials.................400/=

24,400/= "

The Real Estate Surveyor's Report has a wider scope than the Barker, Barton and Lawson Report. In particular the Real Estate Surveyor's Report includes items on a pit latrine and External works which the Barker Barton and Lawson report does not.

On items which are similar in the same report namely The main house, servants quarters, workshop/Garage and gates to workshop, the Barker Barton and Lawson report gives a figure of US $ 14,387 while the Real Estate Surveyors' Report gives a figure of US$20,776 a difference of US $ 6,389 or 44.4% (well over 1/3). Save for the evidence of DW 1 Mr. Allen this difference remains unexplained by the Plaintiff.

On the issue of grading and creating a parking yard for the plaintiff's heavy equipment I must agree with counsel for the Defendants that this cannot be said to be a repair within the meaning of clause 3(c) of the agreement. I accept the definition of the word repair as

> " *To put back in good condition after damage, to renew, to restore to revive"* (websters New World Dictionary P. 1204).

I do not doubt having visited the locus in quo that more parking was required by the Plaintiff. However since para 3 (e) of the agreement provides for the following use of the land

"To use the premises only for business and/or residential/commercial purpose and in particular but without prejudice to the generality of the foregoing to carry out the business of road building, allied trades or saleable commodities and residential purposes to keep the premises so occupied throughout the term hereby created".

It can safely be found that the additional parking created for the heavy equipment was an improvement paragraph 3(d) provides

> *"Any such improvements made by the sub-lessee shall belong to the sublesses."*

A case could be made for the clearing of the site of bush, grass etc which the sub-lessor should have done prior to granting of the sublease; but the caveat given in the Real Estate surveyor's report that it is safer for the parties to agree on a reasonable sum on this item cannot be ignored. On the evidence given to court I therefore make no finding on this.

In summary in the on this second issue based on the evidence before court I find that US $ 14,387 as the estimated cost of repairs given in the Barker Burton and Lawson report more pursasive. A look at the exchange rate in 1995 (would probably put this figure nearer Exhibit P116 of the plaintiff (The summary of receipts), which gives a figure of Ug. Shs. 14,942,249.

I also find that under the agreement improvements are not recoverable.

Issue No 3 whether the distress executed by the defendants was lawful/regular in the circumstances.

The distress in this case was the trigger of the multiplicity of legal actions that have led to this consolidated case.

For the plaintiff it is submitted that the Issuance of the certificate for distress was unwarranted and misconceived in so far as they led evidence to show that there was a good reason why the 1st Defendant was not paid the rent arrears

totaling US$18,000 as the plaintiff had not been reimbursed US $ 42,660 towards repairs it had made. In any event attempts at settlement were still going on.

Secondly the second defendant did not did not levy distress in accordance with the law and the certificate of distress itself. In this regard it has been submitted that exhibit p49 (The certificate of distress) was issued in respect of Kyadondo Block 205 Plot 329 and not plot 682 and 648 Nalukolongo Industrial area Sembule zone where the distress was actually levied.

I was referred to the case of **J.Tumushabe vs. M.S Ango-African Ltd and Anor SCCA** No 79 of 1999 where the Hon. Mr. Justice Kanyeihamba (JSC) observed.

"He who chooses to distress for rent under the Act must do so strictly in accordance with the provisions of that Act"

Thirdly the plaintiffs argue that the distress was illegal and irregular in so far as the items that were attached by the 2nd defendant far exceeded the purported rent of US$1800. In the view of Mr. Ian Anderson (PW1) the property attached was about US$59,500 in addition to divers items (i.e. tyres and spare parts) valued at Ug.Shs. 66,000,000/=. The valuation by M/S Kavuma & Associates put the value of the attached motor vehicles and plant at Ug. Shs. 104,000,000/=.

Lastly the plaintiffs submit that they did not fraudulently or clandestinely remove their property from Bunawaya in order to avoid paying the rent.

It is also submitted that the 2nd Defendant cannot claim any form of Immunity because as a person distressing for rent he acted as an agent for the Landlord. In this regard I was referred to a paper by Justice Ntabgoba (Principle Judge as

he then was) entitled *"The Role of court Bailiffs/Auctioneers in the Administration of Justice - A Judiciary perspective (at P 31)"*

For the Defendants it is strongly argued that the distress though not done at Bunamwaya was lawful and regular.

The Defendants submit that there was rent due and owing of US $ 18,000 which had no been paid. Secondly the agents of the Plaintiff were served with the certificate of distress at Bunamwaya but the certificate was ignored. Instead the Plaintiff and its agents fraudulently and clandestinely removed their properties from Bunamwaya to avoid the distress. The second Defendant then rightly vigilantly pursued the property to what is termed "a transit point" being a swampy yard at Nalukolongo. This so-called yard had no structures on it.

According to the Defendants Halsburys Laws of England 4th edition para 3 54-355 entitles a landlord to pursue the moveable property beyond the premises in question if the tenant fraudulently and clandestinely removes the chattels from the premises to prevent the landlord detraining on them.

Distress according to The Concise Law Dictionary by Osborn sweet and Maxwell 1964 at P. 121 states that distress means

> *"The act of taking moveable property out of the possession of a wrongdoer, to compel the performance on an obligation, on procures satisfaction on an obligation committed. It is a mode of "self help" e.g. ...distraining for rent due...".*

At common law a legal right was given to a landlord to distrain for arrears of rent by seizing whatever moveables he finds on the premises out of which the rent or services issues and to hold them until the rent is paid or the service is

performed. It is important to note that at common law the landlord could not sell the items distressed see.

Lyans Vs. Elliot 1QBD(1876) 210 at 213.

It is also the position at common law that the right of the landlord to distrain need not be expressly reserved (i.e. by agreement).

In Uganda distress for rent is a statutory remedy under The Distress for Rent (Bailiffs) Act (Cap 76) and The Distress for Rent (Bailiffs) rules S 1 68-1.

Section 2 of The Distress for Rent (Bailiffs) Act provides

> *"No person other than a landlord in person or his or her attorney, or the legal owner of a reversion shall act as a Bailiff to levy any distress for rent unless he or she shall be authorized to act as Bailiff by a certificate in writing of a certifying officer and such certificate may be general or apply to a particular distress or distresses".*

Section 1 provides that a certifying officer means a chief magistrate and a magistrate grade 1.

The law in Uganda like the common law does not provide a right to sell the distrained items. Simply put the remedy of distress for rent allows the landlord or person authorized by him and certified by court to take into his possession the chattels of his tenant who has not paid rent to be held as a pledge/lien but not for sale to compel the payment of rent.

In this particular case a certificate of distress (Exhibit 49) was issued to the second Defendant Mr.Tito Twijukye p/a Trust master Agencies dated 3rd September 1999 by The Chief Magistrate at Mengo Magistrates Court.

Rules 5 and 6 of The Distress for Rent (Bailiffs) rules read together allow 3 categories of persons who may be granted a certificate of distress namely:

1. An Advocate of The High Court (Rules).
2. An Auctioneer Licenced under the Auctioneer licensed under the auctioneers Act (Rule 5).
3. Any other person who is considered by the granting authority as a fit and proper person.

From the evidence adduced in court the 2nd Defendant fell under category 2 above.

Save for the misdiscription on the certificate of distress stating Block 205 Plot 329 instead of Block 265 plot 339 Bunamwaya I find that the procedure used to procure the certificate of distress as proper. The wrong description of premises itself however poses a legal challenge in itself. Such a misdiscription could be fatal to the distress action itself because a miscarriage of Justice could be occasioned if a bailiff actually went to the misdiscribed property to levy distress. I am fortified in this finding by Rule 24 of the Distress for rent (Bailiffs) Rules, which requires every Bailiff levying distress at the request of the tenant to produce the said certificate of distress. A misdescription on the certificate would entitle the tenant to resist the distress. The proper procedure would be for the applicant of a certificate of distress to ensure that court gives him a certificate that correctly describes the demised premises and if there is an error to ensure that it is amended accordingly. In this case, this finding may just as well be academic because evidence shows that the distress was

levied at a different location altogether not being the rented demised premises nor the misdescribed one either! The real question is whether the landlord can pursue a tenant when he moves his property, which I shall deal with later on in this Judgment.

As to whether the application for the said certificate was un warranted and misconceived is really a question of whether rent was due, demanded and yet remained unpaid.

From a contractual point of view para 3 of the agreement raises two positions. First there is para 3 (a) where The sub-lessee covenants.

> *"To pay the rent hereby reserved in the manner aforesaid without any deduction ..."* (emphasis mine)

The second is the already discussed para 3 (c) which allows the sub-lessee to carry out repairs to the premises and

> *"...be reimbursed by the sub-lessor for the costs incurred either by way of an abatement of rent or whilst valuing the premises for purposes of sale to the sub-lessee..."*

Read together I do not see the re imbursement of rent as conferring an automatic right of set off with regard to para 3 (a) when rent is due. Two options of reimbursement by the sub-lessor are provided for namely, an abatement of rent or an adjustment on the value of the property in the event of a sale.

Secondly under the present law an application for a certificate of Distress is an ex parte application. This means that all the applicant has to do is to provide a

Justifiable Prime facie case to court for the grant of the said certificate. In the this particular case I find that a prima facie case for the grant a certificate of distress had been made out and therefore at the time cannot have been said to be un warranted or misconceived. However if on the merits of the dispute there is evidence that the certificate should not have been issued then an application should be made to the same court to have it set aside.

It has also been submitted that the distress was illegal and irregular in so far as it caused the attachment of assets of the Plaintiff, which were far in excess of the US $ 18,000 being demanded as rent.

This is one of triable issues, which I shall deal with later. For now it shall suffice to say that there was a clear valuation problem in this case as the certificate of distress claimed rent of US$ 18,000 being the equivalent to Ug. Shs. 26,460,000/= and the values of the properties to be destrained as being 25,000,000/=.

Then there is the matter of whether the 2nd Defendants being auctioneers/bailiffs can claim immunity for their actions under 3 of the while distraining for rent. I think that the law is quite clear on this point. I agree with the authorities cited by counsel for the Plaintiff namely first **Chidan Official Receiver** Vs**. Reg's Property Co.** Limited [1941] 3 ALL E.R 491.

Where it was held that a Bailiff remains an agent of the landlord who employs him. This means such a Bailiff is not acting Judicially.

Secondly the paper by Justice Ntabgoba (Principal Judge as he then was) entitled "*The Role of court Bailiffs/Auctioneers in Administration of Justice – A Judiciary perspective*"

Where he clearly states

> " ....*the following cannot enjoy immunity while performing their functions...*
>
> *b).. Bailiffs for purposes of Distress for Rent under the Distress for Rent (Bailiffs) Act."*

I am persuaded by the above authorities and follow them in finding that Bailiffs cannot claim Immunity for their actions under the Distress for Rent (Bailiffs) Act.

I would now like to address the matter of the landlord pursuing a tenant's moveable property beyond the premises in question if the tenant fraudulently and clandestinely removes the said chattels from the premises to prevent the landlord distraining on them.

On this point I find Halsbury's Law of England vol. 13 (Re-issue) para 679 et al very instructive.

Paragraph 679 states

> " *The general rule is that a distress can only be made of goods found on some part of the premises out of which the rent issues. This however does not exclude a distress on that part, if any, of a public highway which by presumption of law is included in the demise.."*

This appears to be the position at common law; paragraph 680 then provided two exceptions to above general rule, which may be relevant to this case

1) where by agreement between the parties the landlord may distrain on goods on other lands than those out of which the rent issues.

2) where the tenant fraudulently or clandestinely removes his goods or Chattels from the demised premises to prevent the landlord from distraining them for arrears of rent, the landlord or his agent may within 30 days after the removal of the goods seize them as a distress wherever they may be found (here reference is made to The Distress for Rent Act 1737 S 1 (as amended), provided they have not previously been sold bona fide and for valuable consideration to a person not bring to the fraud (here reference is made to The Distress for Rent Act 1737 S 2 as amended).

A further two exceptions relate to cattle and stock, which are not relevant to this case and in any case are statutory in nature.

In this particular case I find that in England, the right of the landlord to pursue moveable property fraudulently and or clandestinely removed from the rented property and seize it elsewhere is granted by statute. I find no similar provision under the equivalent Ugandan law. Secondly in this case I find no express agreement by the parties allowing the landlord to distrain on properties away from the demised premise. Before I totally leave this issue let me say something about illegal or irregular distress. Halsbury's law of England at para 776-781 states as follows; -

"

1) Illegal distress. This is where the distress was wrongful at the very outset that is to say there was no right to distrain or where a wrongful act was committed at the beginning of the levy invalidating all subsequent proceedings. Here examples cited include a distress by a landlord after he has parted with the reversion, a distress when no rent is in arrears, for a claim or debt which is not rent, a distress made after a valid tender of rent has been made, <u>a distress made off the premises or on the highway</u>, a distress made contrary to the law (emphasis mine).

2) Irregular Distress. This is where although the levy was legal and in order, the subsequent proceedings have been conducted in an unlawful manner. Here examples cited include sale (In this case there was an attempt to sale the distrained property by the second Defendant), detaining or removing the chattels when a tender of rent and costs is made after distress and before impounding."

However according to Mc Gregor on Damages 17ed 2003 para 33-090 it is stated that no distinction existed at common law between an illegal and an irregular distress a position which was changed by The Distress for Rent Act 1737 (S 19) of England.

Since Uganda does not have a statutory equivalent the common law position still pertains. An irregular distress is an illegal distress. In concluding this issue I find that primia facie the issuance of the certificate of distress was not unwarranted or misconceived. However the certificate of distress issued was defective and not enforceable in its current form. I further find that the landlord did not have the legal right to pursue and seize the tenants' property off the demised property. I accordingly find the distress both illegal and irregular in these circumstances.

Issue No. 4 what items were attached by the Defendant and what was their value.

From the evidence and the submissions made to court it is not dispute that the following items were attached

1) 1 caterpillar D8
2) 4 Trucks i.e.
   i) 1 foden
   ii) 2 Bedford trucks (are unregistered)
   iii) 1 Bedford truck with a crane.

However there is no agreement as to their valve. What is in further dispute are properties said to have been loaded on the tucks at the time of the seizure such as tyres, spare parts, gear boxes batteries etc... being 27 items valued at Ug. Shs. 66,000,000/=.

I shall first deal with the assorted properties said to have been on the trucks that were seized. The items were listed in paragraph 10 (a) to the plaint. PW 1 Mr. Ian Anderson identified the list of items in the plaint above. However at the time of the seizure he was in the United Kingdom so could not be said to have direct knowledge of what was actually loaded on the trucks. PW II Mr. Edward Benyendeza who was the Chief Account at Assist (U) Limited at the time PW III Dect/Constable David Moses Adipa, PW IV PC George Odaga, PWV Mr. Abbas Sematemba who was LC 1 secretary for security at time at Sembule Zone and PW VI Fred Mageni a watchman with Assist (U) Limited all agree that the trucks were loaded with spares and other equipment. However none of these witnesses was able to refer to these spares and equipment specifically.

The photographs exhibits D 13 and D 16 show at least 2 trucks with things on them but it is impossible to make out what they were. Perhaps the most unfortunate thing are the documents, which could be, regarded as reliable and independent evidence of the said items namely:-

1) Exhibit P. 162 which is an inventory of the items attached on the day and signed all those present.

2) Exhibit P. 39 which is a letter confirming the items attached written on the 9th September 1999 by The Divisional Police Commander Katwe Police Station to The Magistrate (written to Magistrate & Co. Advocates sic) all do not list the items that were on the trucks. No evidence was led as to why this was so. I accordingly find that the items of assorted spares and equipment, alleged to have been on some of the trucks at the time of attachment or distrain, have not been sufficiently proved for me to make a finding and so I make none.

As to the non-contested items, I am grateful to the parties for agreeing to a joint valuation expert M/S Kavuma & Associates to assist court with an independent value of the non-contested items. His report is dated 27th May 2004. The terms of reference were carrying out a valuation of the items.

"*a) calculate the forced sale and market value as at 3rd September 1999.*
b) Calculate the current forced sale and market values."

The report clearly state as the court also did see during the proceedings locus in quo at Bunamwaya that all five units were cannibalised and various components removed. He also made the following valuations:

1) Caterpillar D & L Bulldozer

a) market value as at 3rd Sept. 1999	Shs.	10,000,000/=
forced-sale as at 3rd Sept. 1999	"	6,000,000/=
b) Current market value	Shs.	7,000,000/=
Current forced sale value	"	4,200,000/=

c) If the plant was in a serviceable and road worthy condition on the 3rd Sept. 1999

Market value	Shs.	80,000,000/=
Forced sale value	"	48,000,000/=

2) Foden Truck 948 UCR (Removed)

a) Market value as at 3rd September 1999............	"	4,000,000/=
Forced sale value as at 3rd September 1999...	"	2,400,000/=
b) Current market value	"	2,500,000/=
current forced sale value	"	1,500,000/=

c) If it had been serviceable and road worth as at 3rd September 1999

Market value	"	12,000,000/=
Forced sale value	"	7,200,000/=

3) Bedford Truck 963 UDH

a) Current value as at 3rd September 1999	Shs.	1,500,000/=
Forced Sale value as at 3rd September 1999	"	900,000/=
b) Current market value	"	1,000,000/=
Current forced sale value		600,000/=

c) If it had been serviceable and road

worth as at 3rd September 1999

Market value	Shs.	4,000,000/=
Forced sale value	"	2,400,000/=

4) Bedford Truck (No registration Not shown)

a) Market value at 3rd September 1999	Shs.	1,500,000/=
Forced sale value as at 3rd September 1999	"	900,000/=
b) Current market value	Shs.	1,000,000/=
Current forced sale value	"	600,000/=

c) If it had been serviceable and road worthy as at 3rd September 1999

Market value	Shs.	4,000,000/=
Forced sale value	"	2,000,000/=

5) Bedford Truck (No. Registration No. Shown)

a) Market value as at 3rd September 1999	Shs.	1,500,000/=
Forced Sale value as at 3rd Sept. 1999	"	900,000/=
b) Current market value	Shs.	800,000/=
Current forced Sale value	"	480,000/=

c) If it had been serviceable and road worthy as at 3rd September 1999

Market value	Shs.	4,000,000/=
Forced Sale value	"	2,400,000/=

All these above vehicles have currently been described cannibalized, unserviceable, unroad worthy and or in a scrap condition.

I think the valuer was given very wide terms of reference hence wide scenario of figures given for each vehicle.

According to Mc Gregor on Damages 17^{ed} 2003 para 33-087 the learned author has this to say about illegal distress:

> *"...the Defendant will have committed a trespass, an action for illegal distress is just an action of trespass based upon a distress. The damages therefore are the same as in the ordinary tort action and indeed the claimant can sue in trespass to goods, in conversion or generally, in trespass to land. Thus the normal measure of damages is the value of the goods illegally distrained."*

According to the valuation report I deem this to be the market value of the vehicles in serviceable and road worthy condition as at 3rd September 1999.

The other figures given by the valuer are harder to justify as a basis for valuation for this case and may confuse issues further. It would appear from the evidence that at the time of the attachment all the said Trucks were serviceable because they were all driven from Nalukolongo and back. The Bulldozer was actually found in action clearing the site. However as to whether the said vehicles were roadworthy is another matter, as some of the vehicles were not registered. Registration is the best test for the court to infer

roadworthiness of the said vehicles. In this respect, I agree with Mr. Tuma counsel for the Defendants.

Again due the passage of time and the manner in which the evidence was led it is not completely possible to know which vehicle had which number plates save for

(1) 963 UDH, which was a Bedford truck.
(2) 948 UCR, which was a foden truck.

One other truck was registered as 110 UDM but it is not possible to tell from the evidence nor the valuation report which one it was. Another truck according to exhibit P 162 was not registered but again from the evidence and valuation report it is not possible to determine which one it was.

By elimination these two trucks could be the Bedford chassis No. 452430 engine No. K 6500547 fleet No. 187 or the Bedford with a Crane (engine number not given) fleet No. 20. The Bulldozer was unregistered. Where no registration can be discerned then the forced Sale value shall be used. On the basis of the valuation report I find the values of the vehicles attached distrained as follows: -

1) 963 UDH Bedford truck market value..............................4,000,000/=
2) 948 UCR Foden truck market value.............................. 12,000.000/=
3) (Registration unknown) Bedford truck fleet
   No. 187 forced sale value...2,400,000/=
4) (Registration unknown) Bedford truck with
   a Crane fleet No. 20 forced Sale value...........................2,400,000/=
5) (Registration unknown) DL 8 Bulldozer
   forced Sale value...<u>48,000,000/=</u>

Total **<u>68,800,000/=</u>**

Issue No. 5 whether any property of the Plaintiff was misplaced lost or converted during the execution of the certificate of distress

This issue according to the submissions is in reference to the divers spares and equipment that were said to be loaded on the trucks that were attached. However in light of my findings on issue No. 4 that the quality of evidence led on this issue was insufficient, I am unable to make a finding.

Issue No. 6 where did the attachment actually take place

This issue had already been dealt with the attachment was done at Plot 682 and 648 Nalukolongo industrial area, Sembule Zone.

Issue No. 7 whether the Defendant owes rent to the Plaintiff and if so how what quantum.

This is another issue that has largely been dealt with and there is consensus by both parties that there was rent due and owing of US $ 18,000. This of course, the Plaintiff argues is subject to what is owed to his client by way of reimbursement for repairs, a point I shall deal with when handling the final relief's later in my Judgment.

Issue No. 8 whether the Defendants trespassed on plots Nos. 682 and 648 Nalukolongo?

Again this is dealt with indirectly based on my earlier findings. The Defendants did not have a legal right to pursue the Plaintiff outside the demised premises. In that sense given that the liability for trespass is strict see **The Estate of**

Shamji Visram & Anor Vs. Shankeprasad Bhatt & other [1965] EA 789 (EACA).

The tort of trespass is quite wide. In this particular case one, can talk of trespass to goods arising out an irregular, illegal and or excess distress. One can also talk of trespass to the land itself. The way this present issue is framed seems to draw divergent submissions from both counsels. For the Plaintiff his focus seem to be on trespass on the goods themselves while the Defendants seem to look at it from the perspective of trespass to land.

The issue framed refers to trespass on plots Nos. 682 and 648 Nalukolongo. To my mind that would be trespass to land as the Defendants seem to see it.

According to McGregor on Damages sweet and Maxwell 17th ed 2003 damages for trespass to land will largely depend on the nature of occupation on the land. At paragraph 24-041 it would appear that the normal measure of damages would be the market value of the property occupied or used for the period of wrongful occupation or use.

At paragraph 34-032 and 34-054 of the same book it is stated that where the claimant's claim consists of a limited interest (i.e. a lessees) the damages will be limited to the period of wrongful interference.

In this particular case the trespass to plots 682 and 648 Nalukolongo took place when the plaintiffs had just recently taken possession as lessees/tenants, which is a limited interest. Furthermore the evidence shows that the 2nd Defendant interfered with the land for a very short period of time. Indeed the evidence shows that the property in question was still being prepared with the Plaintiff's D8 Bulldozer for occupation. The period of time not withstanding I find that the Defendants did trespass on plots Nos. 682 and 648 Nalukolongo.

Issue No. 9 whether the Plaintiff breached the sublease agreement.

Under this issue the 1st Defendant has submitted that the plaintiff extensively breached the sublease agreement. In this regard the 1st Defendants cites the following breaches:

i) Clause 3(a) requiring the Plaintiff to pay rent without deduction.

ii) Clause 3(f) requiring the Plaintiff to report infestation by bats and ants.

iii) Clause 3(h) not to part with possession of the premises without the consent of the landlord.

iv) Clause 3(j) requiring the delivery up to the 1st Defendant the premises in good condition and to make good all damage.

v) An implied term that alternation of a substantial nature required the consent of the landlord. In this regard the Plaintiffs excavated and created a parking area without the consent of the 1st Defendant.

The Plaintiffs deny any such breaches and in fact states that the excavated area was an improvement for parking. The sublease agreement does not seem to state much on the subject of breaches of covenants there under. Paragraph 4(e) reads:

"that the sub lessee paying the rent hereby reserved and performing and observing the obligations on the sub lessee's part here in contained or implied shall peacefully hold and enjoy the premises during the term hereby created without any interruption by the sub lessor or any person lawfully claiming under or in trust for the sub lessor"

It appears that in the event of a breach of covenant or non-payment of rent the sub lessee will lose "quiet possession" of the demised property. This gives the

sub lessor wide latitude to interfere with the lease and probably also to terminate it. I must say this clause stands out more as a threat than a tangible remedy.

Most of the breaches listed were contentious and their verification difficult as a result of the passage of time. I have however earlier found that the Plaintiff was in technical breach of paragraph 3(a) of not paying rent without deduction. To that extent the Plaintiff did breach the sub-lease agreement. However the agreement does not offer much as a remedy in the event of the breach. It also appears that the interference of the lease by way of distress came a little late in the day.

Issue No. 10 whether there was breach of the sub-lease agreement by the 1st Defendant.

This issue like the last one was not well articulated by both counsels to the case. For the Plaintiff it is argued that the 1st Defendant was in breach of the agreement for not reimbursing their costs in repairs by way of an abatement of rent or valuation whilst selling the premises to them. They argue that the distress levied on them was a violation of their quiet possession of the property.

The Defendants maintain the quantum of repairs had not been agreed upon. These are all matters I have earlier addressed in this Judgment so in effect the issue was repetitive.

Issue No. 11 whether the Plaintiff damaged the premises.

As stated in issue No. 9 much of the evidence surrounding this disputed issue is contentious and its verification difficult given the passage of time. For purposes of the sub-lease at the time the excavation of land for more parking was an improvement given the limited parking space at the start of the tenancy.

Unfortunately the excavation by its nature that cannot "belong" or be retained by the sub-lessee.

Even though one could argue that the excavated area be restored, the proceeding <u>locus in quo</u> at Bunamwaya show that given the way the initial letting was handled and the subsequent passage of time it would be impossible to determine what amounts to a restoration. The court therefore declines to make a finding on this issue.

<u>Issue No. 12 whether the parties are entitled to the relief's prayed for.</u>

Both parties have made a long list of the prayers for relief being the Plaintiffs' claim and the Defendant's counter claim. I shall now proceed to deal with them item by item.

1. **<u>Claims by The Plaintiff</u>**

    (a) The Plaintiff seeks a declaration that the Defendant's trespassed <u>On the Plaintiff's divers properties</u>

    In light of my finding that the Distress for rent was illegal/Irregular with regard to the distrain of the vehicles/equipment at plots 682 and 648 Sembule Zone Nalukongo Industrial area Kampala, I find and declare that the Defendants committed an act of trespass on <u>the Plaintiffs divers properties</u>

    (b) The Plaintiff prays for an order for delivery up or release of the Plaintiffs' vehicles and other Plaintiff's divers properties wrongfully distrained from Plot No. 682 and 648 Sembule Zone Nalukolongo <u>Industrial area Kampala.</u>

Counsel for the Plaintiff in his written submissions sought courts indulgence to amend their pleadings and pray that the Defendants alternatively pay for the value of the wrongfully attached properties.

He relies on 06 r 18 and 30 of the CPR and the case of **Bawa** Vs. **Singh** [1961] EA 282 as authority that the parties may amend pleadings at any time.

Counsel for the defendant opposed that amendment to add an alternative prayer as offending order 6 rule 6 which states that an application would have to be made by Chamber Summons which is mandatory.

I shall start with this request for amendment. With due respect to counsel for the Defendants the applicable rule in this regard is that cited by counsel for the Plaintiff namely Order 6 r 18 with regard to the amendment of pleadings. This is where such amend may be made necessary for the purposes of determining the real questions in controversy between the parties.

Order 6 r 6 on the on the hand deals with a departure from the original grounds of claim or allegation of fact.

Order 6 r 18 echoes section 33 of the Judicature Act where the High Court in the exercise of its Jurisdiction is charged with the grant of all such remedies in respect of any legal or equitable claim so that as far as possible all matters in controversy between the parties may be completely and finally determined.

In this case the parties went as far as agreeing to appoint an independent valuer of the vehicles to get their value. Such an amendment would not therefore prejudice any party and I accordingly grant it.

In any event the Plaintiff in its plaint prayed for any further relief as this court deems proper to be granted and this would be one such further relief.

From the evidence adduced at the trial the divers property that was distrained is now only of scrap value it does not make legal sense to order their return to the plaintiff.

According to McGregor on Damages (supra) para (c) 33-087, 33-088 damages for wrongful distress (i.e. being illegal), would be the same as in the ordinary tort action in trespass to goods and or conversion. The normal measure of damages is the value of the goods illegal distrained. I find that the first and proper remedy under this head would be damages being the value of the goods. This value I have already found under issue No. 4 to be Shs. 68,800,000/=.

(c) The plaintiff also prayed for a permanent injunction restraining the Defendants by themselves or through their authorized agents/servants/employees from selling the suit properties or in any other way dealing with the said properties.

This prayer in light of evidence given in court and remedies so far granted is clearly overtaken by events.

(d) The Plaintiff has also prayed for special damages pleaded in para 10(a) of the plaint.

This is a claim for Ug. Shs. 66,265,400/= being assorted items said to be loaded on the vehicles at the time the attachment was made. These damages have to be specifically and strictly proved. As it is I have earlier found that this was not done so I make no award under this head.

(e) The Plaintiff has also prayed for general damages

Under this head counsel for the Plaintiff in his written submission also prayed to amend his pleadings under order 6 r 18 to add punitive and exemplary damages of Shs. 100,000,000/=. Counsel for the Defendants opposed this amendment.

I shall address the issue of punitive/exemplary damages first before that of general damages.

It is trite law that punitive/exemplary damages are to compensate a claimant for a wrong done to him/her and secondly to punish a Defendant for his/her conduct in inflicting that harm. This is normally so where the acts of the Defendant inter alia were out of malice, fraud, insolence or were oppressive state like actions.

Here Defendants acted on a warrant of distress which turned our to be defective. In my view this is not a proper case to impose punitive/exemplary damages and I so decline to award them.

As to general damages, Counsel for the Plaintiff relies on the case of **James Kabatraine** Vs. **Charles Oundo** HCCS 177/94.

Where Shs. 10,000,000/= as awarded as general damages for trespass, detenue and conversion. This he argues was 10 years ago and an equivalent award today should shs. 100,000,000/=.

Counsel for the Defendant submits that there was no injury to the Plaintiff as there was no evidence of loss of income. The Defendants also argued that the Plaintiff's did not mitigate their losses so are not entitled to recover such damages as could reasonable be avoided.

It is trite law that general damages are the direct or probable consequence of the act complained of. Such a consequence may be loss of use, loss of profit physical inconvenience, mental distress, pain and suffering. It is therefore much wider than suggested by counsel for the Defendant. That not withstanding the Plaintiff did not address court in monetary terms what its direct or consequential loss was save for suggesting a figure of Shs. 100,000,000/=.

I think that shs. 100,000,000/=, is a lot of money today to award in general damages. Furthermore given the multiplicity of actions that this dispute generated I think the dispute remained in the legal system far longer than it should have. I would award the sum of Shs. 12,000,000/= in general damages.

(f) <u>The Plaintiff has also prayed for interest.</u>

The Plaintiff claim interest of 42% from the filing of the suit on the special Damages prayed for in para 10q.

I find that the 42% interest prayed for to be excessive and punitive. I think that a flat 15% on the general damages from the date of filling the suit (special damages

having been declined) and also on costs from the date of Judgment is more just and equitable.

(g) Costs

I award the Plaintiff the cost of the main suit that they filed.

2. Counterclaim by the Defendants.

(a) The defendants counterclaim the cost of rectifying damage and restoring land.

The defendants pray for the sums of US $ 17,812 and US $ 20,000 being the costs of restoring/repairing the premises and restoring the ruined/damaged land.

These figures are lifted from the second part of Exhibit P.42 the Barker, Barton and Lawson report of 12 August 1996 and justified by DW 1 Mr. Lawson. Unlike the first part of the Barker, Barton and Lawson Report, which estimated the **actual** work and cost of repairs carried out by the Plaintiff, the second part estimates the work and costs **required** to rectify the damage to the house and restoration of the land.

I take it that there is a difference in estimating work actually done and work to be done. I have already made reservations about the passage of time in determining what would now amount to a rectification or restoration. It would to my mind have been better to treat this head as a special damages where actual rectification and restoration work was done and then proved specifically. This would also have served to mitigate whatever loss was incurred by the 1st Defendant. However since was not done I am unable to make an award under this head.

(b) <u>The Defendant has counter claimed for rent arrears of US $ 18,000</u>

In light of the evidence adduced at the trial and my earlier findings I find this figure not to be in dispute and so I award it to the Defendant.

(c) <u>The Defendant has counter claimed in special damages</u>

The amounts counter claimed are:

	US $	**Ug. Shs.**
Legal fees to Angela & C0..................	500	
Fees to Roger Allen	2,198,93	
Payment to trust masters (Bail. Doffs)		2,090,000/=
Payment to Gleeson	585	
Payment to terrain	240	
Payment to Gailey Roberts	900	
Payments to UEB		207,800/=
Ultimate Security bills		1,264,185/=
Air tickets	-----------	1,940,000/=
	US$ **4,423.93**	UG.Shs.**5,501,985/=**
	======	========

Of the above only item (vii) being payments of Shs. 207,800 have been accepted by the Plaintiff and the rest has been denied. I find that since the Plaintiff had not paid rent and a dispute arose out this the 1st Defendant would also be entitled to those costs incurred while trying to get its unpaid rent though this would not cover the illegal/Irregular distress and its subsequent bills.

In this regard I would award item (i) Exh. D5 of 500$ and item (ii) Exh. D11 of $ 2,198.93. The rest I would disallow as a result of the illegal/Irregular distress. This would then come to Ug. Shs. 207,800/= and US $ 2,698.93.

(d) The defendants have counter claimed for general damages.

The defendants have counter claimed for general damages for breach of contract and for inconvenience. From my earlier findings I would say that the Plaintiff did breach the sub-lease agreement by insisting on payment of outstanding rent after deduction of repairs, which was prohibited by para 3(a). However this breach is mitigated by para 3 (c) of the sub lease agreement, which also required the sub leassor to reimburse the costs of by either abatement on the same rent of reduction on the sale price if the property was sold to the sub lessee. This the sub leassor did not do. Here I would award general damages of Ug Shs 5,000,000/=.

(e) The Defendants have counterclaimed for interest

The Defendants like the Plaintiff pray for Interest at 45%. This I have held is excessive and will reduce it to 15%.

I award the 1st Defendant the costs of the counter claim.

Hon. Justice Geoffrey Kiryabwire

Date 24/02/05