REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL SUIT NO. 14 OF 2016

BETWEEN

HAUL MART KENYA LIMITED …….……..……
PLAINTIFF

AND

TATA AFRICA HOLDINGS (KENYA) LIMITED …..…….…..…….
DEFENDANT

(BY ORIGINAL ACTION)

TATA AFRICA

HOLDINGS (KENYA) LIMITED …….……..
DEFENDANT/COUNTERCLAIMANT

AND

CANELAND LIMITED ……..……..……1ST
DEFENDANT

HAULMART KENYA LIMITED ……..……..……2ND
DEFENDANT

(BY WAY OF COUNTERCLAIM)

CANELAND LIMITED …….. 1ST DEFENDANT TO COUNTERCLAIM/COUNTERCLAIMANT

AND

HAULMART KENYA LIMITED …….……. 1ST
DEFENDANT

ORIENTAL COMMERCIAL BANK LIMITED ……..……..…. 2ND
DEFENDANT

(BY WAY OF FURTHER COUNTERCLAIM)

JUDGMENT

The Plaintiff's Case

1. This case was commenced by the plaintiff ("Haulmart") who sought an injunction restraining the defendant ("Tata Africa") from repossessing 8 tractors and 2 cane loaders registration numbers KTCB 313N, KTCB 314N, KTCB 316N, KTCB 309N, KTCB 315N, KTCB 311N, KTCB 312N, KTCB 310N, KHMA 199G and KHMA 843G (collectively referred to as "the Units"). Haulmart claimed that it had purchased the Units from Caneland Limited ("Caneland") and had fully paid for them through a credit facility from Oriental Commercial Bank Limited ("the Bank"). Since Tata Africa had not been paid by Caneland, it threatened to repossess the Units causing Haulmart to move the court for injunctive relief.

Defendant's Case

2. Tata Africa filed an amended defence and counterclaim. In the defence, Tata Africa averred that Caneland did not have a right to sell the Units after the sub-dealership was terminated. It stated that after the sub-dealership between it and Caneland was terminated, Caneland refused to return the Units in its possession. It accused Caneland, Haulmart and the Bank of colluding and fraudulently registering the Units in the names of Haulmart and the Bank to its detriment.

3. As regards the Counterclaim, Tata Africa stated that Caneland expressed the intention, through the Local Purchase Orders ("LPO's") dated 30th January 2015 and 6th March 2015, to purchase the Units. Tata Africa released the registration documents for the Units to Haulmart to enable it secure finances from the Bank to facilitate the purchase. In the meantime, Caneland issued post-dated cheques for Kshs. 47,000,000/- to Tata Africa as payment for the Units. Caneland requested Tata Africa not to present the cheques as it awaited funds from the Bank. Ultimately, Caneland paid only Kshs. 6,993,000/- leaving a balance of Kshs. 40,007,000/-. Tata Africa further averred that a director of Haulmart undertook to pay the balance of the purchase price for the Units due from the Caneland.

4. Tata Africa prayed for judgment for Kshs. 40,007,000/- together with interest at 18% from 30th January 2015 from the Caneland and Haulmart.

1st Defendant to Counterclaimant's Case

5. Caneland filed a defence to the counterclaim against it by Tata Africa and also made a counterclaim against Haulmart and the Bank. Caneland admitted that the Units were in its possession when the sub-dealership was terminated but denied that it refused to hand over the Units after the dealership came to an end or that it converted or fraudulently registered them in the names of Haulmart and the Bank.

6. Caneland also contended that Tata Africa gave it verbal and written consent to sell the Units to Haulmart as the Bank would finance the purchase and Caneland would transmit the purchase price to Tata Africa. Caneland only received Kshs. 20,000,000/- from the Bank leaving a balance of Kshs. 27,000,000/-. Caneland remitted Kshs. 6,993,000/- to Tata Africa and retained Kshs. 13,000,000/- on account of commissions due to it by Tata Africa.

7. Caneland also admitted that it issued cheques totaling Kshs 47,000,000/- to Tata Africa as comfort to Tata Africa as the Bank completed registration of the Units as security and as it waited for the Bank to release the money for onward transmission to Tata Africa.

8. In its counterclaim against Haulmart and the Bank, Caneland claimed Tata Africa wrongfully released the registration documents to Haulmart. While registration was proceeding, Caneland issued postdated cheques amounting to Kshs 47,000,000/- as comfort on the understanding that Tata Africa would be paid upon receipt of money by Caneland from the Bank.

9. Caneland averred that although Tata Africa subsequently presented some cheques for payment, the Bank never remitted Kshs 27,000,000/-. It averred that a director of Haulmart approached Tata Africa and

undertook verbally and in writing to pay Tata Africa all sums owed by Caneland. It prayed for a declaration that Haulmart and the Bank are jointly and severally liable for payment of outstanding sum due and owing to Tata Africa. It also sought an order that Tata Africa render a true and full and comprehensive account in respect of all accounts between them.

2nd Defendant to Further Counterclaimant's Case

10. In its defence to the counterclaim by Caneland, the Bank stated that it advanced Haulmart Kshs 47,000,000/- to purchase the Units. It created a debenture over the Haulmart's assets. The Units were registered in the joint names of the Bank and Haulmart as securities. The Bank averred that it remitted Kshs 20,000,000/- to Caneland on instructions from Haulmart and that it had no contractual relationship with Caneland.

Agreed facts

11. After the pleadings closed, the parties agreed on the following statement of agreed facts;

i. There existed a sub-dealership contract between Tata Africa and Caneland for the marketing and sale of John Deere Machinery, including the Units, in the Nyanza sugar-belt area.

ii. That the sub-dealership contract was terminated while the Units were still in Caneland's possession.

iii. That Caneland sold the Units to Haulmart at a price of Kshs. 47,000,000/-

iv. That the Bank financed the purchase of the Units which are now registered in the names of Haulmart and the Bank.

v. That Caneland paid Tata Africa Limited Kshs 6,993,000/- for the Units and a balance of Kshs 40,007,000/- is outstanding.

vi. The Units are in possession of Haul Mart.

Agreed issues for determination

12. The parties also agreed on the following set of issues for determination;

i. Whether Caneland had the authority and or consent of Tata Africa to transfer and or dispose of the Units.

ii. Whether Caneland neglected and or refused to return the Units to Tata Africa after the termination of the sub-dealership contract that existed between them.

iii. Whether Caneland had any proprietary rights over the Units.

iv. Whether Caneland acted fraudulently and in bad faith in transferring the Units to Haulmart and the Bank.

v. Whether the Bank was obligated to remit Kshs. 47,000,000/- to Caneland on behalf of Haulmart being payment for the Units. If the answer is in the affirmative, how much was remitted and what is the remaining balance.

vi. Whether Haulmart is an innocent buyer for value.

vii. Whether Tata Africa owed Caneland any money in form of commission on sale of units under the sub-dealership contract that existed between them.

viii. Whether the Bank disbursed to Haulmart the entire value of the Units.

ix. Whether Haulmart expressly agreed and admitted liability to Tata Africa for settlement of the debt and hence whether Haulmart should be held liable for the payment.

x. Which party should bear the costs of the suit and Counter claim?

13. Three witnesses testified; Bhalvinder Singh Pandal also called Rumi (PW 1) on behalf of Haulmart, Dennis Ogola Musungu (DW 1) on behalf of Tata Africa and Wifred Mashini (DW 2) on behalf of the Bank. The parties also produced documents. It is clear from the statement of facts and agreed issues that the matter for determination concerns the nature of the legal relationship between the parties and its implication on the Units. I shall therefore refer to the parties' testimony when necessary to resolve any contested issue. I also to point out that the parties did not dispute any of the documents produced and it is on this basis that I shall consider the matter.

14. From the facts I have outlined, the relationship between the parties is basically one for sale of goods. In the absence of express contract provisions, the law applicable is the ***Sale of Goods Act (Chapter 31 of the Laws of Kenya)*** ("***SGA***"). Before I answer the questions framed for trial, I shall disassemble the relationship between the parties within the context of the ***SGA*** and the understandings between the parties.

Relationship between Tata Africa and Caneland

15. At the heart of this matter is the relationship between Tata Africa and Caneland. After their sub-dealership agreement collapsed, Caneland expressed the intention to purchase the Units in its possession. It issued the LPO's dated 30th January 2015 and 6th March 2015 and in turn Tata Africa issued a total of 10 invoices dated 2nd February 2015 for the Units.

16. Counsel for the Tata Africa submitted in terms of **section 3** of the ***SGA*** was applicable in so far the price for the Units had not been paid and the property in the goods had not been transferred. **Section 3** of the ***SGA*** states as follows;

Sale and agreement to sell

3(1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price.

(2) There may be a contract of sale between one part owner and another.

(3) A contract of sale may be absolute or conditional.

(4) Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale; but, where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell.

17. **Section 3** of the ***SGA*** only states what a sale of goods contract is. In terms thereof Caneland made an offer to purchase the Units through issuing the LPO's and Tata Africa accepted the offer by issuing invoices which confirmed the price of the Units. That the price was not paid does not necessarily mean that there was no agreement as the ***SGA*** provides for the remedies for an unpaid seller at **Part V** of thereof.

18. I find and hold that the exchange of LPO's and invoices consummated the sale agreement between Caneland and Tata Africa and since the Units were already in the possession of Caneland, the element of delivery of the goods was duly satisfied.

19. Counsel for Tata Africa urged that the property in the Units had not passed to Caneland thus entitling it to repossession. If property in the units had not passed to Caneland, then Caneland could not pass title to Haulmart. According to Tata Africa, no party could acquire a good title by reason of **section 23(1)** of the ***SGA*** which embodies the *nemo dat quod non habet* principle in the following terms:

> *23(1) Subject to the provisions of this Act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.*

20. Transfer of property is governed by **section 19** of the ***SGA*** which states as follows;

> *19. Property in specific or ascertained goods passes when intended to pass*
>
> *(1) Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.*
>
> *(2) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.*

21. When the contract of sale is not clear on when property will pass, **section 20** of the ***SGA*** provides rules for ascertaining the parties' intention. The subject of the agreement between the parties was for specific and ascertained goods hence **section 20(a)** was applicable and it provides as follows:

> *20. Rules for ascertaining intention as to time when property passes*
>
> *Unless a different intention appears, the following rules apply for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer—*
>
> *(a) where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery or both be postponed;*
>
> *(b) where there is a contract for the sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until that thing be done, and the buyer has notice thereof;*
>
> *(c) where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until that act or thing be done, and the buyer has notice thereof;*
>
> *(d) when goods are delivered to the buyer on approval or "on sale or return" or other similar terms, the property therein passes to the buyer—*
>
> *(i) when he signifies his approval or acceptance to the seller or does any other act adopting the transaction;*
>
> *(ii) if he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of that time, or, if no time has been fixed, on the expiration of a reasonable time;*
>
> *(e) (i) where there is a contract for the sale of unascertained or future goods by description, and goods of that description, and in a deliverable state, are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer; and assent may be express or*

implied, and may be given either before or after the appropriation is made;

(ii) where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee or custodier (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract. [Emphasis mine]

22. As I have found, the agreement between the parties was embodied in the exchange of the LPO's and invoices and parting with possession of the Units. There was no evidence that Tata Africa intended to reserve the title to the goods which, in any event, were already in possession of Caneland. By issuing the invoices to Caneland, Tata Africa expected to receive the full price. Furthermore, the agreement of sale between Caneland and Tata Africa was not conditional on anything or subject to the happening of an event. I therefore find and hold that the property in the goods passed when the agreement was between Tata Africa and Caneland was concluded by the exchange of LPO's, invoices and possession of Units by Caneland.

23. It follows that under **section 39(1)(a)** of the ***SGA***, Tata Africa became the unpaid seller. Under this provision a seller is deemed to be an unpaid seller, *"When the whole of the price has not been paid or tendered."* Since the property in the goods had passed, the remedy for Tata Africa is an action for the price of the goods under **section 49 (1)** of the ***SGA*** which states:

Where, under a contract of sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods.

24. That the parties intended that the property passed on conclusion of the sale agreement is confirmed by the fact that Tata Africa sought relief for the price of the Units and not the Units themselves in its counterclaim against Caneland. This is further confirmed by the fact that Caneland issued and Tata Africa accepted post-dated cheques for Kshs 47,000,000/- representing the price of the Units.

25. I therefore find and hold that Caneland is liable to pay Tata Africa the purchase price for the Units. Since property had passed Tata Africa could not repossess the Units from Haulmart as it had threatened to do. It could only look to Caneland for the price. I now turn to the relationship between Caneland and Haulmart.

Relationship between Caneland and Haulmart

26. The agreement between Caneland and Haulmart was a contract for sale of goods governed by the ***SGA***. As I have held the property in the Units had already passed to Caneland. Caneland therefore had a right to sell the Units. In fact, there was an implied warranty as to title as against Haulmart. **Section 14** of the ***SGA*** provides as follows:

14. In a contract of sale unless the circumstances of the contract are such as to show a different intention, there is-

(a) An implied condition on the part of the seller that in the case of a sale he has right to sell the goods, and that in the case of an agreement to sell he will have a right to sell the goods at the time when the property is to pass.

(b) An implied warranty that the buyer shall have and enjoy quiet possession of the goods.

(c) An implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party, not declared or known to the buyer at the time when the contract is made.

27. Caneland admitted that it sold the Units to Haulmart and in order for Haulmart to pay it took out credit facilities from the Bank. Counsel for Caneland accepted that it issued invoices to Haulmart for the

Units which required to it pay the entire price to Caneland. Thus Caneland was the unpaid seller in terms of **section 39(1)(a)** of the ***SGA*** when it was not paid.

28. Counsel for the Caneland submitted that in terms of **section 39(1)** and **(2)** and **40** of the ***SGA***, Caneland had a lien over the units notwithstanding that property in the Units had passed to Haulmart. Under **section 40** of the ***SGA***, the unpaid seller is entitled to a lien on the goods notwithstanding property had passed and is entitled to retain the goods until the price is paid. A lien depends on possession. It is agreed by the parties that the Units were in possession of Haulmart hence Caneland could not exercise the lien of an unpaid seller. Its remedy, like that of Tata Africa, is to claim the price from Haulmart. In this instance, Haulmart through its director, PW 1, admitted that Haulmart owed Caneland Kshs 28,000,000/-.

Relationship between Haulmart and the Bank

29. I now turn to the relationship between Haulmart and the Bank. It is agreed that the Bank financed the purchase of the Units and registered them in the name of the Bank and Haulmart.

30. The position taken by Caneland is that the Bank ought to have known that the Units belonged to Caneland and it ought to have created a chattels mortgage in accordance with standard banking practice to ensure that Caneland, as the dealer, was paid. It accused the Bank of violating the Central Bank of Kenya Prudential Guidelines, Guideline 3.2.4 which prohibits any institution from granting or advancing any facilities or entering into any contract or transaction in a fraudulent and reckless manner. Counsel for Caneland submitted that the Bank colluded with Haulmart to ensure that Caneland and Tata Africa were not paid and that the facilities were in effect fraudulent.

31. The credit manager at the Bank, DW 2, testified that in November 2014, the directors of Haulmart approached the Bank and requested for credit facilities to enable them purchase the Units for Kshs. 48,500,000/-. Haulmart presented invoices from Caneland and CMC Motors Group. The Bank accepted the proposal and the Bank granted a term loan of Kshs. 48,000,000/- secured by an all assets debenture and a specific charge over the Units and corporate and directors guarantees. The Bank also insisted on the logbooks for the Units being registered in the name of the Bank and Haulmart. After complying with all the terms of the facility, the Bank, upon request from the Haulmart, credited its account with Kshs. 5,000,000.00 on 11th June 2015, Kshs. 1,500,000.00 on 7th July 2015, Kshs. 2,500,000.00 on 5th August 2015, Kshs. 1,000,000.00 on 19th August 2015, Kshs. 10,000,000.00 on 20th August 2015, Kshs. 1,700,000.00 on 26th August 2015 and Kshs. 22,800,000.00 on 8th September 2015. On 25th August 2015 and 8th August 2015, Haulmart applied to transfer Kshs. 5,000,000.00 and Kshs. 15,000,000.00 respectively from its account to Caneland account by RTGS and the instructions were duly effected.

32. It is clear that the Bank did not have any contract with Caneland. The only legal relationship is between Haulmart and the Bank grounded on the credit agreements supported by securities. Since there is no privity of contract between the Bank and Caneland, no obligation can arise and non can be enforced by Caneland against the Bank.

33. Counsel for Caneland and Haulmart submitted that the Bank ought to have created a chattel mortgage over the Units in order to ensure that the dealer, Tata Africa, was paid for the Units as is the general practice. In my view, the nature of the loan facilities and securities are matter for contractual agreement between the Bank and its customer. I do not think the CBK Prudential Guidelines create implied terms on the relationship between the Bank and its customer in relation to credit arrangements and at least in this case.

Relationship between Haulmart, Tata Africa, Caneland and the Bank

34. Contrary to the averments by Tata Africa and that the transaction resulting in Haulmart and the Bank owning the Units was laced with fraud and collusion and was intended to deny it of their value, the evidence and conclusions I have set out above shows otherwise.

35. The reality of the matter is that Caneland purchased the Units from Tata Africa with the expectation that it would sell them to Haulmart who would then secure a loan to enable it make the payment. Tata Africa knew of these transactions and facilitated them by accepting post-dated cheques for the purchase price from Caneland and by giving PW 1 the documents necessary for registration of the Units. When cross-examined, DW 1 stated that the registration documents were released after receiving the post-dated cheques. DW 1 also accepted that Tata Africa did not deal directly with the Bank except when it forwarded the duly filled *Application for the Registration and Licence of Motor Vehicle or Trailer* (Form A) to the Bank on instructions from Caneland.

36. When the anticipated transactions did not go through as expected, Tata Africa expressed anxiety that it was not being paid. In the exchange of emails and meetings between PW 1 and DW 1 and other officers, Haulmart undertook to clear the outstanding debt. This fact is evidenced by an email dated 1st February 2016, where PW 1 wrote to DW 1 as follows;

> *Dear Dennis,*
>
> *As per our discussions in the meeting we had in your office I had agreed to clear the spares account and I am making arrangements for funds so that one issues can be settled.*
>
> *Regarding the outstanding on tractors we had agreed on 60 days though I will remit some accounts earlier as my funds come in. On the bank guarantee I did not agree to it. Kindly recall out discussions in the meeting.*
>
> *My commitment is to clear all accounts within 60 days and I will honour the same*
>
> *Rgds*
>
> *Rumi Singh*

37. When cross-examined, PW 1 also admitted that at the meeting of 31st March 2016, he agreed that Haulmart would clear the debt due to Tata Africa. This was confirmed by minutes of the meeting produced in evidence.

38. In light of this clear evidence of the undertaking communicated in the emails and confirmed at the meeting of 31st March 2016, Haulmart agreed to settle the balance of the purchase price. PW 1 admitted in cross-examination that none of the directors of Caneland were present during the discussions or meetings. I therefore hold that this admission did not discharge Caneland from its obligation to pay the balance of the price. It only means that Tata Africa can look to both parties for its money; to Caneland on the basis of the sale agreement between it and Tata Africa and to Haulmart on the basis that it undertook to pay the balance of the purchase price.

Determination of the issues

39. It is in light of the analysis and findings I have made that I shall now proceed to answer the questions or issues framed for trial.

40. *Whether Caneland had the authority and or consent of Tata Africa to transfer and or dispose the Units.*

Since the property in the Units had passed to Caneland following the agreement of sale evidenced by the exchange of LPO's, invoices and parting with possession, Caneland was entitled to dispose of the Units by sale to Haulmart.

41. *Whether Caneland neglected and or refused to return the Units to Tata Africa after the termination of the sub-dealership contract that existed between them.*

The termination of the sub-dealership was superseded by the agreement of sale of the Units and since property in the Units had passed, Caneland could not return the Units.

42. *Whether Caneland had any proprietary rights over the Units and whether Caneland acted fraudulently and in bad faith in transferring the Units to Haulmart and the Bank.*

Having purchased the Units from Tata Africa, Caneland had the right to sell them to Haulmart. Since Haulmart had acquired the Units from Caneland, it could offer them as security to the Bank,

43. Whether the Bank was obligated to remit Kshs. 47,000,000/- to Caneland on behalf of Haulmart being payment for the Units. If the answer is in the affirmative, how much was remitted and what is the remaining balance.

There was no privity of contract between the Bank and Caneland hence the Bank had no obligation to remit Kshs. 47,000,000/- to Caneland. The Bank could only act on instructions from Haulmart as its customer.

44. *Whether Haul Mart is an innocent buyer for value.*

Haulmart is an innocent buyer as it purchased the Units from Caneland which had a right to sell them.

45. *Whether Tata Africa owed Caneland any money in form of commission on sale of units under the sub-dealership contract that existed between them.*

Caneland did not call any witness to prove the relationship between it and Tata Africa and although no evidence was raised, Caneland alluded to it cross-examination of the DW 1. As Counsel for the Bank submitted, since Caneland did not call any witnesses to support the counterclaim, it must fail (see ***Charterhouse Bank Limited (Under Statutory Management) v Frank N. Kamau*** **NRB CA Civil Appeal No. 87 of 2014 [2016]eKLR**). I therefore find and hold that Caneland did not prove any form of commission due to it under the sub-dealership agreement.

46. *Whether the Bank disbursed to Haulmart the entire value of the Units.*

The Bank disbursed all the monies under the loan facility between it and Haulmart for the purchase of the Units.

47. Whether Haul Mart expressly agreed and admitted liability to Tata for settlement of the debt and hence whether Haul Mart should be held liable for the payment.

Haulmart, through its director, PW 1, agreed or accepted liability to pay for the Units. However, there was no agreement between Caneland and Tata Africa discharging from liability for paying the balance of the purchase price.

Reliefs

48. Haulmart prays for a permanent injunction restraining Tata Africa from repossessing the Units. Since the Units are security for advances made to it by the Bank and are registered in the name of the Bank and Haulmart, Tata Africa cannot make a claim against the Units hence the case for injunction is made out.

49. As regards the Counterclaim between Tata Africa, Caneland and Haulmart, Tata Africa seeks judgment for the sum of Kshs. 40,007, 000/- together with interest thereon at 18% from 30th January 2015 until payment in full. The parties admitted, "*That Caneland paid to Tata Africa Limited Kshs 6,993,000/- for the Unit and a balance of Kshs 40,007,000/- is outstanding."* As I have found, the remedy for Tata Africa against Caneland is the price for the Units. I have further held that Haulmart agreed to pay the balance of Kshs. 40,007,000/- outstanding. I therefore enter judgment for that amount against Caneland and Haulmart jointly and severally. As the amount has been outstanding, Tata Africa is entitled to interest

thereon from 30th March 2015 when payment on the invoices was due. No justification was provided for claiming interest at 18% pa hence interest shall be at court rates. Accordingly, the Counterclaim against Haulmart is dismissed.

50. For the reasons I have set out elsewhere in the judgment, I decline to grant the declaration sought by Caneland that Haulmart and the Bank are liable to pay the amount owed to Tata Africa. I also dismiss the claim for a declaration that Tata Africa should provide a true, full and comprehensive account in respect of all accounts between Tata Africa and Caneland as there was no evidence to back the claim.

51. The issue that now remains is that of costs. The general principle is that costs follow the event. Since the Haulmart has succeeded in its claim for injunction and the case had been brought about as Haulmart after Tata Africa had threatened to repossess the Units, it entitled to costs against Tata Africa.

52. Tata Africa has succeeded in its claim against Caneland and Haulmart and is entitled to costs against for the Counterclaim. The Further Counterclaim by Caneland is dismissed hence it shall pay the costs of Tata Africa and the Bank.

Disposition

53. For the reasons I have set out above, I now make the following orders:

(a) The Defendant be and is hereby restrained by way of a permanent injunction from repossessing or otherwise interfering with the possession of 8 tractors and 2 cane loaders registration numbers KTCB 313N, KTCB 314N, KTCB 316N, KTCB 309N, KTCB 315N, KTCB 311N, KTCB 312N, KTCB 310N, KHMA 199G and KHMA 843G (collectively referred to as "the Units").

(b) The Defendant shall pay the plaintiff's costs of the original action.

(c) Judgment be and is hereby entered for the Defendant/Counterclaimant against the Defendants to the Counterclaim jointly and severally for the sum of Kshs. 40,007,000.00 together with interest thereon at 12% p.a from 30th March 2015 until payment in full together with costs thereon.

(d) The 1st Defendant's to the Counterclaim Counterclaim against the 1st and 2nd Defendant to the Further Counterclaim is dismissed with costs to the 2nd Defendant to the Further Counterclaim.

DATED and **DELIVERED** at **KISUMU** this **19th** day of **October 2017**.

D.S. MAJANJA

JUDGE

Ms Onyango instructed by Otieno, Ragot and Company Advocates for the plaintiff.

Mr Muma instructed by Muma Nyagaka and Company Advocates for the defendant.

Mr Menezes instructed by L. G. Menezes and Company Advocates for the 1st defendant to the Counterclaim.

Mr Konosi instructed by Konosi and Company Advocates for the 2nd defendant to the further Counterclaim