**THE REPUBLIC OF UGANDA,**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**(COMMERCIAL DIVISION)**

**CIVIL SUIT NO 268 OF 2008**

1. **GROFIN EAST AFRICA FUND LLC }**
2. **DFCU BANK LIMITED } …….…….. PLAINTIFFS**

**VERSUS**

1. **JOAN TRADERS }**
2. **HELLEN KAKYO } …….. DEFENDANTS**

**BEFORE HON. JUSTICE CHRISTOPHER MADRAMA**

**JUDGMENT**

This judgement arises from an agreement between the second plaintiff and the defendants embodied in a consent judgment executed as a partial resolution of the suit by the parties on 11 June 2012 and filed on court record on 20 June 2012. Paragraph 3 of the consent judgement provides that the issue of whether "interest is payable to the second plaintiff on the principal sum under the loan agreements shall be decided by the court on its merits on 13 July 2012." On the 24th of May 2012 when the suit came for further mention, it was reported that the parties failed to agree on whether interest was payable. It was also reported to court by counsels that the first plaintiff had waived its claim for interest on the decreed principal sum. The second plaintiff's counsel had nothing to present for consideration of its Board as a basis for waiving interest. Consequently and by consent of counsel it was agreed that they would address the court in written submissions on the remaining issue of whether the defendant should pay interest to the second plaintiff.

The second plaintiff's written submissions were filed on court record on 10 July 2012 with a covering letter suggesting that they would serve the submissions on counsel for the defendants as well on 10 July 2012. The defendants counsel did not file submissions but came to court on 13 July 2012 for judgment as stipulated in the consent judgement. The judgment could not be delivered within such a short time and without submissions of the defendants. The defendants counsel was advised to file his submissions on behalf of the defendants for final determination of the agreed issue. On 3 September, the plaintiff's counsels filed a letter dated 29th of August 2012 addressed to the Registrar, the High Court of Uganda, and Commercial Division. In the letter Counsel wrote:

> ***"… We request that you bring this letter to the attention of Justice Christopher Madrama.***

***This matter was set down for written submissions on the second plaintiff's entitlement to interest on the principal sum under the loan agreements entered into with the first defendant. We filed the plaintiffs written submissions on 10th of July 2012. Written submissions were filed on behalf of the defendants on 21st of August 2012.***

***We wish to confirm that will not file a reply to the defendant's submissions and accordingly request that this matter proceeds to judgement."***

The file was accordingly forwarded to me in September 2012. The court could not in the circumstances comply with the written consent of the parties that judgement is delivered on 13 July 2012.

The background of this judgment is that the plaintiff's counsel applied for judgement on admission pursuant to the joint scheduling memorandum of the parties where some facts were admitted by the parties. The court delivered judgment on admission on the 10th of May 2011. In the judgment of the court the question of liability of the defendants was determined. What remained to be determined was the amount outstanding on the loan. It was agreed that the amount would be determined through a reconciliation of accounts between the parties. The question of costs and interest were reserved. Subsequently on the 11th of June 2012 the parties executed a consent agreement in which the following terms of settlement of were entered as judgment of the court.

1. That the defendants, jointly and severally, owe and shall pay the first plaintiff Uganda shillings 190,701,803.5/= being the outstanding balance of the principal sum lent to the first defendant.
2. That the defendants, jointly and severally, owe and shall pay the second plaintiff Uganda shillings 190,701,803.5/= being the outstanding balance of the principal sum lent to the first defendant.
3. That the issue of whether interest is payable to the second plaintiff on the principal sum under the loan agreements shall be decided by court on its merits on the 13 July 2012.
4. That the defendants shall jointly and severally pay costs of the suit to the plaintiff.

The parties did not call any witnesses and the suit was resolved by consent of the parties. The parties agreed on some facts and documentary evidence in the joint scheduling memorandum. Additionally, on 3 May 2011, learned counsels for the parties clarified on the admitted facts. Among the agreed facts was that the first defendant on or about the 19th of May 2006 executed a loan agreement by which it borrowed a sum of Uganda shillings 740,000,000/= from the first plaintiff. The sum was financed in equal proportions by the first and second plaintiffs in the respective sums of Uganda shillings 370,000,000/= each. The defendants provided property comprised in Kyadondo block 185 plot 2746 and 2747 as security for the said loan but the second defendant attempted to sell without the knowledge and consent of the first plaintiff. It was also agreed that the loan would attract interest at 22% per annum and was to be utilised as

working capital. Additionally it was agreed that the second defendant executed a deed of suretyship by which she guaranteed the obligations of the first defendant under the loan arrangement. At the time the parties agreed to file written submissions on the remaining question of whether interest should be paid, the plaintiff was represented by Ecimu Nicholas and Michael Mafabi while the defendants were represented by Muwanga Ahmed. It was agreed that the parties failed to resolve the question of interests on the principal sum agreed and the court would decide whether interest was payable and how much. The parties put in written submissions.

**The plaintiff's written submissions**

The plaintiff counsel submitted that the Plaintiffs entered into a co investment agreement on the 1st March 2006 in which the first and second plaintiffs agreed to co- finance in equal proportions proposed debt investments as approved by the Fund Finance Committee and DFCU Credit Committee. The defendant borrowers were a beneficiary to a credit facility of Uganda shillings 740,000,000/= lent solely by first plaintiff and the first plaintiff was the sole lending party to the credit facility documents. By a deed of accession dated 19th of June 2006, the second plaintiff assumed 50% of the lending commitments amounting to Uganda shillings 370,000,000/= as well as other consequential obligations. The deed of accession was signed by directors of Joan Traders Limited, the first defendant.

Learned counsel submitted that the basis for the demand of interest is a contractual entitlement contained in the deed of accession that the defendants are a party to. Clause 3 of the deed of accession provides that "***All right inherent in the lending commitments as stipulated under the loan agreement shall be assumed by DFCU to the extent of the proportion of the lending commitment taken up by DFCU."***

A literal reading of clause 3 reads to the unimpeachable conclusion that as a result of DFCU was assuming 50% of the lending commitment, DFCU would acquire 50% of all rights contained in the loan agreement. This included the right to interest on the sums the second plaintiff committed to the facility and which were received by the first defendant and guaranteed by the second defendant under a deed of suretyship. Counsel submitted that clause 7.1 of the loan agreement provides that the loan shall bear interest at the rate of 22% per annum and which rate could be increased from time to time in accordance with the standard loan conditions. Learned counsel contended that the agreement in its proper construction can lead to no other conclusion other than that it was the intention of the parties that the first plaintiff and DFCU were to contribute 50% each to the lending commitment. Secondly that there would be repaid proportionate interest according to their contribution.

Counsel submitted that in construing contractual provisions, the object of the court is to give effect to what the contracting parties intended. Counsel referred to **Bank of Credit and Commercial International S.A. (in liquidation) versus Ali [2001] 1 All England 96**. The above case was cited with approval by Justice Geoffrey Kiryabwire in **High Court civil suit**

**number 819 of 2004 Agricultural Management Agency Ltd versus Kayonza Growers Tea Factory Ltd and Another**. Quoting from Lord Bingham of Cornhill that:

> ***"In construing contractual provisions, the object of the court is to give effect to what the contracting parties intended. To ascertain the intention of the parties, the court reads the terms of the contract as a whole, giving the words he uses the natural and ordinary meaning in the context of the agreement, the party's relationship and all the relevant facts surrounding the transaction so far as known to the parties."***

The defendants were aware that the second plaintiff's assumption 50% of the lending commitment would entitle it to repayment of the loan amounts advanced with interest thereon. The comprehension of these facts was particularly important for the defendants for without the financial contribution of the second plaintiff, the defendants would not have been able to take the benefit of the full sum of lending commitment of Uganda shillings 740 million, they needed for their business. Referring to **J Beatson** in **Anson's Law of Contract**, at page 495 – 496 a deed of accession involves a definite alteration of contractual obligations by mutual agreement of both parties. The defendants accepted to pay 50% of the borrowed sum and 50% of the interest chargeable to the second plaintiff under no duress, coercion, misrepresentation and incidents of fraud and illegality.

Counsel submitted that the defendants are barred by equity from appropriating and reprobating. They cannot take the benefit of the accession funds and repudiate the obligation to pay interest on the borrowed sums as provided for under the very same deed of accession. He relied on **high court miscellaneous application number 634 of 2010 Stephen Seruwagi Kavuma versus Barclays Bank Uganda Limited** where Justice Irene Mulyagonja cited with approval the judgment by Scrutton LJ in **Verschures Creameries Ltd versus Hull and Netherlands Steamship Company Limited (1921) 2 KB 708 at page 612** for the principle that one cannot approbate and reprobate all at the same time.

Concerning the right of the second plaintiffs to charge interest, the second plaintiff is a licensed commercial bank empowered by the second schedule of the Financial Institutions Act 2004 and section 39 (1) (d) of the Bank of Uganda Act Cap 50 to provide short to medium-term loans and impose interest rates within the parameters provided for by the Central Bank. He prayed that the court finds that the second plaintiff contractually assumed an unfettered entitlement to the percentage of interest at 11% commensurate to its lending commitment under the deed of accession.

**Submissions of the defendants in reply**

Learned Counsel for the defendant submitted that the defendant did obtain the said monies for their business. However, the parties had thought that the contract would be workable. The defendants did borrow the alleged sums for the purpose of recapitalising their business.

Counsel submitted that though the monies were received, some unforeseen events occurred that rendered the business not feasible. The performance of the contract was rendered impossible and the contract between the parties ought to have been dissolved in the first instance. Unforeseen events occurred before the goods could arrive in Uganda. There were strikes at the port of unloading in Durban, South Africa and offloading in Mombasa Kenya which facts are within the knowledge of the plaintiffs. Some of the items were expired and the Uganda National Bureau of Standards preferred criminal charges against the defendants for having brought expired goods into the country. Despite the above, the Uganda Revenue Authority went ahead to demand its taxes for the goods.

Learned counsel submitted that since the defendants acknowledged the principal amounts, the court be pleased to look at the circumstances surrounding the whole contract and most importantly, as to whether it was workable. He submitted that the contract was frustrated and therefore, interest should be forfeited. Learned counsel relied on the case of **Krell versus Henry [1903] 2 KB page 740**. He contended that though the facts were different from the present case, it explains the circumstances under which a contract may not be enforceable against a party. Counsel invited the court to look at the above case and try to review the situation from all the facts of the case.

***Judgment***

I have carefully considered the written submissions of learned counsels in support and opposition of the agreed question for determination by the court namely whether interest is payable to the second plaintiff on the principal sum under the loan agreements.

The defendants counsel does not dispute the liability of the defendant to pay interest had the situation been normal. His contention is that the contract was frustrated. He submitted that the performance of the contract was substantially impossible because unforeseen events occurred before the goods could arrive in Uganda. There were strikes at the port of unloading in Durban South Africa and offloading in Mombasa Kenya which facts are within the knowledge of the plaintiff. Some of the items imported were expired and Uganda National Bureau of Standards confiscated the goods.

I must say that the submissions of the defendant ought to have been preceded by testimonies of a witness or witnesses in support of the above assertions of fact in support of a defence of frustration. Whereas, the alleged occurrences affecting the defendant's goods were the subject of discussion during the preliminary hearing of the suit before me, no particular evidence was adduced. On the other hand, the plaintiff has not deemed it fit to file a rejoinder to the assertion of the defendant based on questions of fact. The correspondence which is admitted in the joint scheduling memorandum filed in the year 2010 does not include the alleged facts on which the defendant relies.

Be that as it may, there is no dispute that the foundation of the contract is a loan agreement executed between the first plaintiff and the defendants on the 19th of May, 2006. Clause 5 of the loan agreement provides that the purpose for which the loan is granted is the business known and trading as Joan Traders Limited and the nature of the business is wholesale. Clause 6 provides that the composition and utilization of the loan is for working capital only. Paragraph 12 of the specific stipulations/requirements under the loan agreement provides in clause 12.1.1 that if further investigations reveal any material discrepancy in the information provided by the client for purposes of the financing application, the lender shall not be obliged to advance the loan or any portion thereof. The lender was also not obliged to advance the loan or any portion thereof if the lender had reason to believe that the business is not as viable as presented in the financing application. In other words, there was a financing application which specifies the feasibility of the wholesale business. This has not been adduced in evidence. What can be inferred is that the loan was advanced on the basis of the viability of the applicants business. The standard conditions for the loan annexure A to the loan agreement under clause 2 thereof imposes an obligation on the borrower to disclose certain relevant information. Under clause 2.1 the borrower declared that it had disclosed to the lender all relevant information that may influence the granting of the loan. It can be properly supposed that this included the financing application which spelt out the feasibility of the wholesale business. Additionally clause 2.2 imposed on the borrower a duty to disclose to the lender all information regarding altered circumstances which may in future arise and which may have an impact on the borrower's ability to repay the loan. Under clause 3 thereof the borrower was obliged to provide the lender with shipments, financial schedules, and financial and other information as determined in clause 10 of the loan agreement. Under that clause the borrower was to satisfy the lender on all the relevant conditions which are to be fulfilled to the satisfaction of the lender before accessing the loan. The borrower was obliged to provide the lender with any other information in connection with its business, including financial statements covering any interim period of its financial year. Clause 9 further provides that the amount of the loan is to be utilised only for purposes set out in clause 6 of the loan agreement. The lender reserved the right to make payment of the whole or any part of the loan to a third party/third parties on behalf of the borrower. Under clause 10 the borrower was charged not to materially change the type or nature of business in respect of which the loan was granted without the prior written consent of the lender. Under clause 11 it is stipulated that the loan was granted only as working capital and could only be paid out to the extent that the lender is satisfied that the need thereof has arisen.

Under clause 24 the borrower was obliged to take out and maintain short-term insurance on all objects of the lender security for the loan. Such insurance was not supposed to lapse without notice to the lender. The borrower ceded all rights, title and interest in and to the policies including proceeds thereof to the lender and authorised the lender to inform the insurance company of such cession and to receive the proceeds under the policies and to apply the proceeds in its discretion in the reduction of any amount owing by the borrower to lender or to repair or replace the objects concerned.

Last but not least the term sheet attached to the loan agreement specifically provided that the short-term insurance cover was against fire, theft and allied perils, including political riots over the assets or the business. Clause 3.35 of the term sheet provided for the submission of the distribution agreement between L'OREAL South Africa (PTY) Ltd and Joan Traders.

From the above provisions it is evident that the lender had a supervisory power over the management of the business and knew what the business was. The lender also had the agreement for the distribution of products, the subject matter of the wholesale business. The loan agreement was marked as exhibit P1. Attached to the loan agreement is annexure "A" to the agreement which is the standard conditions quoted above. The term sheet was admitted in evidence as exhibit D1.

I have great sympathy for the submissions of learned counsel for the defendant as far as the contention that the business was frustrated is concerned. In as much as representations were made during the preliminary hearing that the defendant's goods were eventually condemned by the Uganda National Bureau of Standards and therefore lost, it is doubtful whether such representations can properly be used in final submissions. I have reviewed the Constitution (Commercial Court) (Practice) Directions, wherein it is provided that the ordinary rules of the High Court shall apply to all commercial actions subject to modifications set out in the Practice Directions (see rule 5). The powers of a commercial court judge are limited. Rule 5 (1) of the Practice Direction (supra) provides that the procedure in and progress of the commercial action shall be under the direct control of the commercial judge who will, to the extent possible, be proactive. The rule restricts the powers of direct control of the commercial judge to the procedure and progress of the commercial action. Secondly rule 6 (2) of the Practice Direction applicable to the commercial court quoted above provides that a preliminary hearing may be held whose aim would be to achieve a serious discussion of the issues in the cause and the steps necessary to resolve them. Such steps necessary to resolve the issues in the cause include the need to amend the pleadings of the parties as discussed in the preliminary hearing. Whereas during the preliminary hearing the question of the loss of the defendant's goods or destruction by Uganda National Bureau of Standards was mentioned, the parties opted to negotiate for settlement and no further amendments of the written statement of defence were sought.

It was agreed that there was an outstanding amount to be paid by the defendants to the plaintiff before Justice Lameck Mukasa. The outstanding amount was supposed to include interest since it comprised of a computation of instalment payments. Along the way Counsel Henry Kyalimpa counsel for the defendants who made the representation before Justice Lameck Mukasa stopped having conduct of the case. The defendants were initially represented by Mugarura, Kwarisiima and company advocates. After the consent agreement on 10 June 2012 the conduct of the defendant's case was taken over by Ssekaana Associated Advocates and Consultants who did file written submissions in support of the defendant's case. In their written submissions, the do not challenge contractual interest liability but submit that the contract was frustrated. In the written statement of defence of the defendants frustration had not been specifically pleaded as a defence

to the contract or any part of the contract. It is a cardinal rule of pleading that parties are bound by their pleadings. Order 6 rule 7 of the Civil Procedure Rules provides as follows:

> ***"No pleading shall, not being a petition or application, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with a previous pleading of the party pleading that pleading."***

Paragraph 9 of the amended written statement of defence avers as follows:

> ***"IN FURTHER REPLY to paragraph 6 of the amended plaint the purported loan agreement was a business development fund whereupon the first plaintiff was to appoint a business development manager to oversee the business which he failed and upon collapse, by implication both parties were to suffer losses proportionately."***

Paragraph 9 is the only paragraph which mentions collapse of the business and pleads that the parties should share responsibility for loss proportionally. During the preliminary hearing, had counsel sought trial of the action and reliance on frustration as a defence, he ought to have done two things. Firstly, he should have sought an amendment of the written statement of defence. Secondly, he ought to have adduced evidence in support of the facts that the defendant's goods were condemned by the Uganda National Bureau of Standards or any other frustrating event.

The defence of frustration comes against a background where the suit was initially handled by honourable Justice Lameck Mukasa. The learned trial judge initially conducted the scheduling conference. On 9 April 2009 the record shows Nicholas Ecimu appeared for the plaintiff while Henry Kyalimpa appeared for the defendants. The second defendant and director of the first defendant was present. The court noted that both lawyers were of the view that there was a need for a reconciliation of accounts. The court directed that a meeting takes place between the parties and fixed the suit for a scheduling conference on the 28th of May 2009. On the 28th of May 2009 the parties agreed to join DFCU Bank as a co - plaintiff and the court ordered that DFCU Bank be joined as a co – plaintiff. The suit was fixed for the 3rd of September 2009 for a scheduling conference. On 3 September 2009, the defendant's advocate represented to court that it is true that the defendant borrowed Uganda shillings 740,000,000/= out of which 223,326,363/= was paid to the first plaintiff and another 110,000,000/= was to be credited to the first plaintiffs account. This left a balance of shillings 407,000,000/= which was admitted as outstanding balance due to the plaintiff. It was also represented that the defendants were ready to pay that. The defendant's proposed that they pay shillings 5 million per month but the plaintiff's counsel disagreed. Thereafter it was proposed that the issue be referred to a mediator. By consent of the parties the dispute was referred to the mediator attached to the court. Mediation was not successful. Thereafter the parties agreed to file a joint scheduling memorandum wherein the issue of admission would be taken care of. On 9 September 2010 and by consent of the parties judgment on admission was entered for a sum of Uganda shillings 407,000,000/= against the first

defendant in favour of the first plaintiff. The suit was fixed for hearing on 30 November 2010. Soon thereafter Justice Lameck Mukasa was transferred to another division of the High Court.

After honourable Justice Lameck Mukasa was transferred to another division of the High Court, the suit was reallocated to me for hearing. The first concern is whether there is sufficient evidence of the basis of calculations used by the parties in arriving at a judgement on admission for 407,000,000/= Uganda shillings when the matter was still handled by honourable Justice Lameck Mukasa. Judgement on admission was delivered subsequently on the 10th of May 2011 but did not deal with the question of quantum of damages but resolved the issue of liability of the defendants. Thereafter in accordance with the agreement of the parties the outstanding amount due to the plaintiffs were supposed to be established through a reconciliation exercise. The reconciliation of accounts resulted in another partial consent judgement dated 11th of June 2012 which established the principal sum due to both plaintiffs. It was agreed that the question of the interest payable on the agreed principal sum would be determined by the court on merits.

As far as the claim in the plaint is concerned, the second amended plaint was a claim of Uganda shillings 1,125,994,303/=. The said amount claimed included interest up to June 2009 and is specifically mentioned in paragraph 5 of the second amended plaint lodged in court on 24 March 2011. The prayers paragraph (a) thereof is for the outstanding loan amount mentioned above. In paragraph (b) there is a prayer for interest on the outstanding loan amount at 22% per annum from the date of filing the suit and till the date of judgement. The original plaint was filed on 20 October 2008. Finally on 11th of June 2012 the issue of the outstanding principal sum was determined. The first defendant's representative, who is also the second defendant, represented to court that the defendants were unable to pay because the remainder of the goods were condemned by Uganda National Bureau of Standards as being unfit for human use.

Section 55 of the Evidence Act Cap 6 Laws of Uganda (revised edition) provides that no fact of which the court will take judicial notice need to be proved. Section 56 of the Evidence Act gives the facts on which the court must take judicial notice. However section 55 is wide enough to include other facts which are not mentioned in section 56 of the Evidence Act. In my opinion section 55 of the Evidence Act is wide enough to include facts which are notorious of which the court may take judicial notice. According to Halsbury's laws of England volume 17 (1) paragraph 573:

> ***"The court takes judicial notice of matters with which persons of ordinary intelligence are appointed, whether in human affairs, including the way in which business is carried on, or human nature, or in the relation to natural phenomena.***
>
> ***In order to equip himself to take judicial notice of a fact, a judge may consult appropriate sources, or he may hear evidence. He may also act upon his general knowledge of local affairs, but it has generally been held that he may not import into a case his own private knowledge of particular facts, even if those facts have been proved***

***in previous proceedings. There is, however, authority to the effect that a judge hearing proceedings in the County court against a local housing authority for compensation for breach of a repairing covenant and for a mandatory order to carry out remedial work is entitled to take judicial notice of how the authority has conducted itself in the relation to undertakings given in similar cases, since that conduct, even if not notorious or clearly established, is clearly susceptible of demonstration by reference to court records of those occasions when the authority give undertakings and was brought back to court at the behest of an aggrieved claimant."***

There is representation of the second defendant to the court on 24 March 2012 on a point of fact that she had consulted Uganda Revenue Authority concerning the goods which had been confiscated. She was told to take the stock that had not expired but that little stock was rejected by Uganda National Bureau of Standards. Counsel Pius Olaki the legal representative of the second plaintiff observed that the second defendant was unable to pay and that a ruling on the matter might be a waste of time. Finally in the joint scheduling memorandum of the parties, exhibit P6C which is an agreed document indicates that there were problems at the port of Mombasa which greatly affected the sales of the defendants. The products were imported from South Africa and the first plaintiff understood the predicament of the defendants who were unable to pay for seven months and accumulated arrears on the instalment payments. The issue that the goods of the defendants had been confiscated was discussed by Counsel Henry Kyalimpa during preliminary hearings/scheduling conference and remained unchallenged by the plaintiff's advocates.

Furthermore the defendants all along admitted the contract and obligations to pay but maintained that it was impossible to do so due to what had happened to the goods. The inference of fact from all the circumstances of the case is that the defendants are unable to fulfil their obligations under the loan agreement because they were out of business. It must be emphasised that it was a contractual term that the loan was advanced solely for the wholesale business of the first defendant. Secondly, the distribution agreement under which goods were supposed to be conveyed from South Africa under the general supervision of the first plaintiff has been proved by documentary evidence. Lastly, there is overwhelming circumstantial evidence that the goods were confiscated and eventually condemned by Uganda National Bureau of Standards.

It is implied by a reading of the terms in the loan agreement that the borrower would earn money and that interest would accrue from the profit of the business undertaking for which the loan was advanced. This is because it would be illogical to imply that the principal sum paid would be used to pay back the instalment payments in any business undertaking. The loan agreement terms which have been summarised above clearly provide that the loan was advanced for the wholesale business. It is further implied that the wholesale business was supposed to be feasible and to make a profit. It is a term of the loan agreement summarised above that the first plaintiff would not disburse the loans if it established that the business was not profitable/feasible. It follows therefore that the plaintiff is deemed to have known the purpose for which the loan was

disbursed. In fact the plaintiff was not supposed to disburse any loans unless and until it was satisfied that the business undertaking was feasible/profitable. Additionally the loans were not disbursed at once but in stages as stipulated in the agreement. It followed that the last transaction which ran into trouble was entered into with the knowledge and blessing of the plaintiff.

It is the question of fact that the defendant's goods were lost/confiscated/or condemned and would not fetch any money. The defendants have to look for money to refund the principal amount which is the amount stipulated in the consent judgment of the parties. The plaintiffs cannot be expected to have made profits in an undertaking, where the wholesale business undertaking envisaged by the parties was condemned by Uganda National Bureau of standards. Interest would only accrue from monies made over and above the money disbursed by the plaintiff. Loans were disbursed as capital to enable the defendant purchase goods for sale in the wholesale venture of the first defendant. This was contractually the purpose for the disbursement of the loan. The goods that were purchased were not available for sale in wholesale. No profit could be made from it and the question is whether the venture to earn interest was frustrated.

As far as the authorities are concerned, counsel for the defendant relied on the case of **Krell vs. Henry [1903] 2 K.B. Page 740**. It was a decision of the court of appeal. The appeal was from the decision of Darling J who had dismissed the plaintiff's action for enforcement of the contract to rent a room. The court found that the foundation of the contract was that the defendant wanted to watch the Coronation procession which had been fixed for a particular date. However, the Coronation was postponed and the defendant refused to pay for the room. The defendant had paid a deposit but did not take up the room. The judge held that the plaintiff was not entitled to recover the balance of the rent fixed by the contract. He relied on the case of *Taylor versus Caldwell* (1863) 3 B. & S 826. On appeal to the Court of Appeal Vaughan Williams L.J. discuss the principle in Taylor versus Caldwell at page 748:

> ***"where from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless, when the time of the fulfilment of the contract arrived, some particular specified thing continued to exist, so that when entering into the contract they must have contemplated such continued existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be considered a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor."***

His Lordship goes on to note at page 751 that in the present case where the rooms were offered and taken, by reason of this peculiar suitability from the position of the rooms for a review of the Coronation procession:

***Surely the view of the Coronation procession was the foundation of the contract, which is a very different thing from the purpose of the man who engaged the cab – namely, to see the race – being held to be the foundation of the contract. Each case must be judged by its own circumstances. In each case one must ask oneself, first, what, having regard to all the circumstances, was the foundation of the contract? Secondly, was the performance of the contract prevented? Thirdly, was the event which prevented the performance of the contract of such a character that it cannot reasonably be said to have been in the contemplation of the parties at the date of the contract? If all these questions are answered in the affirmative (as I think they should be in this case), I think both parties are discharged from further performance of the contract."***

Though the case of **Krell versus Henry** (supra) has been distinguished in several other cases, I am persuaded by the above questions. Was the payment of interest predicated upon the wholesale business? Secondly, was the performance of the contract prevented? Was the condemnation or confiscation of the goods in contemplation of the parties at the time of executing the loan agreement? As to the first question, I have already suggested that provision for interest presupposes the making of profit in the circumstances of this case. This is based on the contractual terms giving the plaintiff company as a lender, supervisory control over the defendant. Before the loan is disbursed, the defendant had to disclose what the money was being taken for and that the project was feasible. In the review of facts we established that the distribution contract with the South African company was part of the material for consideration for the disbursement of the loan. Additionally, the lender reserved the right to decline disbursement of the loan if facts emerged tending to show that the venture was not feasible. Lastly, the loan was disbursed in instalments and the lender reserved the right to pay third parties on behalf of the borrower to ensure that obligations of the borrower are fulfilled. This gives an implication that the lender wanted to ensure that its money was secure, and that it would be paid both the principal and interest on its investment. Lastly, the agreement ensured that the lender was covered by an insurance policy in the short term, which insurance policy was supposed to be taken up by the borrower. The first question is therefore answered in the affirmative. On the second question as to whether the performance of the contract was prevented, I have already established that it is a question of fact admitted by the plaintiffs, that the borrower's goods meant for the wholesale business, and bought with capital borrowed from the lender for the purpose of the wholesale business, run into problems and ended up being condemned by Uganda National Bureau of Standards. It follows that if the capital which is the borrowed money was used to purchase the wholesale goods and the goods were not sold, the performance of the contract in terms of returns on the capital (borrowed money) was frustrated or prevented. Thirdly, apart from insurance cover, the impounding of the goods and its subsequent condemnation by the authorities was not within the contemplation of the parties in their written contract. In as much as it can be said that the particular transaction was frustrated and that the parties would have been discharged from further performance of the contract, the principle in Krell versus Henry (cited above) has been distinguished by the House of Lords as far as the remedies available are

concerned. This was in the case of **Fibrosa Spolka Akeyjna vs. Fairbairn Lawson Combe Barbour Ltd [1942] 2 All ER 122**.

In the Fibrosa case (op cit), the House of Lords considered the rule in **Chandler versus Webster [1904] 1 KB 493**. This rule is described by Lord Russell as the rule "that in cases of frustration loss lies where it falls, or that where a contract is discharged by reason of some supervening impossibility of performance, payments previously made and legal rights previously accrued according to the terms of the contract, will not be disturbed, but the parties would be excused from further liability to perform the contract. His Lordship went on to hold that there are situations in which the party who paid the money may be able to recover his money. At page 133 he said:

> "***There was a total failure of the consideration for which the money was paid.***
>
> ***In those circumstances, why should the appellants not be entitled to recover the money paid, as money had and received to their use, on the ground that it was paid for a consideration which has wholly failed? I can see no reason why the ordinarily law, applicable in such a case, should not apply. In such a case the person who made the payment is entitled to recover the money paid. This is the right which in no way depends upon the continued existence of the frustrated contract. It arises from the fact that the impossibility of performance has caused a total failure of the consideration for which the money was paid. In his judgement in Chandler versus Webster, Sir Richard Collins MR states that the right to recover monies paid for a consideration which has failed only arises where the contract is "wiped out altogether," by which expression I understand him to mean void ab initio. This is clearly in misapprehension on his part. The money was recoverable under the common indebitatus count, as money received for use of the plaintiff. Their rights or to recover money paid for a consideration which had failed did not depend on the contract being void ab initio. … Chandler versus Webster was accordingly, in my opinion, wrongly decided. The money paid was recoverable, as having been paid for a consideration which had failed. The rule that on frustration the loss lies where it falls cannot apply in respect of monies paid in advance when the consideration moving from the payee for the payment has wholly failed, so as to deprive the payer of his right to recover monies so paid as moneys received to his use; but, as I understand the grounds upon which we are prepared to allow this appeal, the rule will, unless altered by legislation, apply in all other respects."***

The rule that the loss falls where it falls is further distinguished by Lord Wright at page 141:

> ***"But I think it is clear both in English and Scots law that the failure of consideration which justifies repayment is a failure in the contract performance. What is meant is not consideration in the sense in which the word is used when it is said that in executory contracts the promise of one party is consideration for the promise of the other. No***

***doubt in some cases the recipient of the payment may be exposed to hardship if he has to return the money though before the frustration he has incurred the bulk of the expense and is then left with things on his hands which became valueless to him when the contract fails, so that he gets nothing and has to return the repayment. These and many other difficulties show that the English rule of recovering payment the consideration for which has failed works a rough justice. It was adopted in more primitive times and was based on the simple theory that a man who has paid in advance for something which he has never got ought to have his money back.…"***

Basing on the above two authorities I am persuaded that the contract was frustrated because the defendant's goods ended up condemned. The first defendant was unable to carry out its wholesale business as far as the particular transaction considered in this matter is concerned. The money had been lent as capital for the wholesale business. Since the goods were unavailable, money could not be received back. However, this was not in all the transactions. It is an admitted fact that the defendant's business had collapsed. The plaintiffs instituted measures to recover the security mortgaged under the facility. They have also sought to rely on the contract of surety ship by which the second defendant was bound to make good the payments under the contract. Notwithstanding the frustration of a particular transaction, I am persuaded by the case of **Fibrosa** (cited above) that the plaintiffs are entitled to recover the money that they paid to the first defendant as capital for its wholesale business. This money was disbursed before the frustrating event occurred. The plaintiffs are however not entitled in the circumstances to claim additional interest, the first defendant's business having collapsed due to facts within the knowledge of the plaintiffs. It was within the contemplation of the parties at the time of execution of the loan agreement that interest would be paid from the profits that would be made from the wholesale business. Additionally the loan was secured by an insurance policy, mortgage of real estate and personal guarantees. The contract came to an end upon the occurrence of supervening circumstances which rendered it impossible for the first defendant to continue doing the wholesale business. Money will be recovered from the security and personal guarantees as far as the principal amount agreed upon in the consent judgement of the parties is concerned.

In the premises, the first defendant cannot be held liable to pay further interest on the principal sum. Each party will bear its own costs of the suit.

Judgment delivered on the 21st day of September 2012

Hon. Mr Justice Christopher Madrama

Judgment delivered in the presence of:

Alice Nalwoga for the plaintiff,

Muwanga Muhammad

Second defendant in court

Charles Okuni: Court Clerk

Sheila Catherine Abamu Research Assistant

Hon. Mr Justice Christopher Madrama

21st of September 2012