THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)

CIVIL SUIT NO. 0742 OF 2022

SAM BAHATI :: PLAINTIFF

VERSUS

BAMULANZEKI ISAAC SAMUEL :: DEFENDANT

(Before: Hon. Justice Patricia Mutesi)

JUDGMENT

Brief facts

1. On 13th October 2019, the above parties entered into a 3 months' contract wherein the plaintiff agreed to invest money in the defendant's forex trade, and in exchange, he was to receive a refund of his principal investment after the lapse of the contract plus returns therefrom at the rate of 30% of the principal investment per week for the 3 months.

2. Before signing the contract, the plaintiff invested USD 6,000 which the defendant acknowledged by signing the contract. The plaintiff alleges that on 19th November 2019, his associate, a one Mugala Joshua, took out a bank loan of USD 3,000 on his instructions and sent the same to the defendant, thereby increasing his principal investment to USD 9,000.

3. Despite the lapse of the contract, the defendant has never paid the principal investment or any of the weekly returns. As a result, the plaintiff brought this suit seeking the recovery of USD 30,600 being the principal investment plus all accrued weekly returns, special damages arising from the loan his associate took out to increase his principal investment, general damages, interest and costs of the suit.

4. After filing the suit, the plaintiff made several attempts to serve the defendant with the summons to file a defence personally but all in vain. Eventually, the plaintiff secured an order for substituted service from this Court vide Misc. Application No. 1544 of 2022 requiring him to serve the

summons to file a defence upon the defendant by advertising the same in newspapers. The summons was advertised in the Daily Monitor, but the defendant still failed to file a defence. This Court entered an interlocutory judgment against the defendant and in favour of the plaintiff. The suit was then set down the suit for formal proof.

Issue arising

5. The Court is now called upon to determine the following issue:

    1. Whether the plaintiff is entitled to the remedies sought.

Representation and hearing

6. At the formal proof hearing, the plaintiff was represented by Mr. Kiiza Simon and Mr. Kabali Edward from M/S Ayebazibwe – Makorogo & Co. Advocates. The plaintiff also appeared in person.

7. The plaintiff was the first witness to testify (**PW1**). He told the Court that in the contract, the defendant was enjoined to manage his capital on the Hot Forex Platform. He confirmed that before signing the contract, he paid USD 6,000 in cash to the defendant and that the defendant's signature on the contract constituted an acknowledgment of receipt of that money. He added that on 19th November 2019, he instructed his associate, a one Mugala Joshua, to take out a bank loan of USD 3,000 and to hand over the same to the defendant in order to increase his principal investment to USD 9,000 which was promptly done.

8. The plaintiff further testified that under the contract, the defendant guaranteed him a 30% weekly return on his principal investment for the duration of the contract. Finally, the plaintiff told the Court that despite the lapse of the contract and the several reminders he has sent to the defendant, the defendant remains adamant and has refused to repay his principal investment along with the weekly returns, which entitles him to all the remedies sought.

9. The second witness to testify in support of the plaintiff's case was Mugala Joshua (**PW2**). He confirmed that he knows both the plaintiff and the defendant very well and reiterated the genesis of the contract. He told the Court that upon the instructions of the plaintiff, he took out a bank

loan of USD 3,000 on 19th November 2019 on the plaintiff's behalf. He said that he sent the entire USD 3,000 to the defendant through his blockchain account, thereby increasing the plaintiff's investment to USD 9,000. Lastly, he confirmed that the defendant acknowledged receipt of the USD 3,000 through Whatsapp messages but later informed him that he will never pay the plaintiff's money.

Determination of the issue

Issue 1: Whether the plaintiff is entitled to the remedies sought.

10. I have carefully considered the materials on record, the submissions of the plaintiff's counsel and the laws and authorities they cited. Although counsel for the plaintiff made submissions on the defendant's breach of the contract, I find those submissions to be redundant. It is trite law that once a court of law enters an interlocutory judgment against a defendant under Order 9 rule 8 of the Civil Procedure Rules S.I. 71-1, all questions on the defendant's liability are settled.

11. In dealing with a similar issue, the late Justice Arthur Oder, JSC (as he then was), writing for the majority of the Supreme Court in **Hajji Asuman Mutekanga v Equator Growers (U) Ltd, SCCA No. 7 of 1995**, stated that:

> ***"… the only issue before the learned trial Judge was the quantum or assessment of damages (if any). An interlocutory judgment having been entered in favour of the appellant, when the suit came on for formal proof hearing on 5/9/1994, breach of the agreement was no longer in issue …"***

Therefore, at this stage, it is no longer necessary for this Court to delve into an analysis of whether the defendant breached the contract since an interlocutory judgment has already been entered against him. This Court can only assess the damages due to the plaintiff, if any.

12. Additionally, despite securing an interlocutory judgment, a plaintiff still has the burden to adduce evidence at the formal proof hearing to prove, on a balance of probabilities, the damages he or she is entitled to as a result of the defendant's unlawful action or omission (See **Section 101**

and 103 of the Evidence Act Cap 6). In **Hajji Asuman Mutekanga v Equator Growers (U) Ltd (supra)**, the Supreme Court cautioned that:

> ***"… An interlocutory judgment does not entitle the plaintiff, in whose favour it has been entered, to sit cross-legged and wait to be fed on a silver plate. He has a duty to show on the balance of probability that he is entitled to the relief claimed in the plaint …"***

I quote the above dictum with approval as a correct restatement of the position of the law on the burden and standard of proof to be borne by a plaintiff in a formal proof hearing following the entry of an interlocutory judgment in his or her favour. I will now deal with the remedies sought by the plaintiff in the plaint.

(a) Recovery of the principal investment and weekly returns

13. The plaintiff adduced the contract and his own oral testimony in proof of the USD 6,000 payment. In the contract, the defendant was referred to as the "1st party" while the plaintiff was referred to as the "2nd party". Clauses 1 and 2 of the contract provide:

> ***"1. The 2nd party hereby contracts the 1st party for the purpose of trading in forex markets to open, trade and manage the 2nd party's capital on Hot Forex Platform which is a property of Hot Forex Markets.***
>
> ***2. In furtherance to the above, the 2nd party has paid $6,000 (Six thousand USD only) which shall be at the disposal of the 1st party to trade with at the 1st party's sole discretion."*** Emphasis mine.

The contract was duly signed by both the plaintiff and the defendant on 13th October 2019.

14. In my view the contract sufficiently corroborates the plaintiff's oral testimony on the deposit of the principal investment of USD 6,000. By signing the contract, the defendant confirmed the contents of Clause 2 thereof which are that the plaintiff had already paid USD 6,000 to him as the principal investment. I, therefore, find that the plaintiff paid a principal investment of USD 6,000 with the defendant on or before 13th October 2019.

15. However, I am not convinced that the plaintiff paid an additional USD 3,000 to the defendant as claimed. The plaintiff failed to adduce any evidence of acknowledgement of receipt of the said additional funds from the defendant. There was no corroborative documentary proof of the transfer from PW2's blockchain account. PW2 testified that the defendant acknowledged receipt of the additional funds through Whatsapp messages but the printouts of those messages were not brought before the Court. The plaintiff did not adduce any addendum amending the contract to raise his principal investment to USD 9,000. Worse still, paragraph 4(c) of the plaint did not specify the bank which provided the loan. There is also no loan offer letter or loan account statement confirming that the loan was indeed obtained and the purpose for which it was obtained. Accordingly, the Court rejects the plaintiff's claim that he paid an additional USD 3,000 to the defendant and finds that the plaintiff only paid USD 6,000 to the defendant.

16. I will now deal with the plaintiff's claim that the principal investment was supposed to be refunded. There is some ambiguity in the contract as far as the refund of the principal investment is concerned. I reiterate that Clause 2 of the contract provides that by the time the contract was signed, the plaintiff had paid USD 6,000 which was to be at the disposal of the defendant to trade with at his sole discretion. Additionally, Clauses 3 and 4 of the contract provide that:

> ***"3. The 1st party shall use the best strategies to ensure profitability of the 2nd party's capital and guarantees to a return on investment of 30% weekly.***
>
> ***4. The payments to the 2nd party shall be paid every week to a designated bank account which the 2nd party will provide below: Stanbic Bank."*** (Emphasis mine.)

The contract does not expressly state whether the payments in Clause 4 would be in respect of the principal investment or the weekly return. I have not found any other provision in the contract which deals with the principal investment except Clauses 7 and 8 thereof.

17. Clauses 7 and 8 of the contract provide that:

"7. In the event that the 2nd party terminates the contract, the 1st party shall stop performing and shall only pay <u>the balance of the principal</u> and/or principal and 10% of the principal amount or deposited amount.

8. The parties undertake to execute their work with honestly and integrity. In furtherance thereto, the company <u>shall avail to the investor updates to the movement of the investment</u>." Emphasis mine.

18. Although the contract did not expressly enjoin the defendant to refund the plaintiff's principal investment, I am convinced that the obligation to refund the principal investment is implied in the contract following the true construction of Clauses 1 – 8 as reproduced above. The rules governing the determination of whether or not a term is implied in a contract are been well settled. In the often cited case of **Southern Foundries (1926) Ltd v Shirlaw [1939]2 KB 206**, MacKinnon, L.J. wrote:

> *"For my part, I think that there is a test that may be at least as useful as such generalities. If I may quote from an essay which I wrote some years ago, I then said:* ***"Prima facie, that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if, while the parties are making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common "Oh, of course!"*** *At least it is true, I think, that, if a terms were never implied by a judge unless it could pass that test, he could not be held to be wrong."* Underlining mine for emphasis.

The above decision established the officious bystander test which has since been adopted and applied by the courts as the relevant threshold for determining whether or not a term is implied in a contract.

19. In the instant facts, it is clear that the parties anticipated in Clause 7 of the contract that if the plaintiff was to terminate the contract, the defendant would stop trading and then pay to the plaintiff the balance of the principal and, or, the principal and 10% of the principal. In Clause 8 of

the contract, the parties anticipated that the defendant would provide regular updates to the plaintiff about the "movement of the investment". In Clause 2 of the contract, the parties also expressly referred to the principal investment as "the 2nd party's capital".

20. I am convinced that the parties understood that the plaintiff's principal investment remained his and that it would be refunded upon the lapse of the contract. in my view, the specific provision for refund of the "balance of the principal" at the point of termination of the contract in Clause 7 of the contract further implies that the principal was to be regularly repaid and reduced in instalments such that if the contract is abruptly terminated, there would only be a balance of the principal. As quoted above, the parties referred to the principal investment as the plaintiff's capital and not as the defendant's capital/money. I am satisfied that the present facts satisfy the officious bystander test for implied terms since the parties appear to have anticipated that the principal investment would remain the plaintiff's money throughout the duration of the contract. The defendant, therefore, had a duty to refund the principal investment.

21. In any case, the law on unjust enrichment would still not allow the defendant to keep the principal deposit because it appears that there was a total failure of consideration on his part. This Court has already found that the plaintiff paid USD 6,000 to the defendant as the principal investment. The plaintiff severally demanded for repayment of his principal investment along with the weekly returns thereon as agreed, but the defendant remained adamant and has even refused to participate in these proceedings. It is trite law that where there is a total failure of consideration in relation to a particular sum, the equitable right to sue for the recovery of that amount arises. Since a person would have taken the benefit of another's consideration without giving his own consideration as agreed, equity would not bear such a wrong to be without a remedy.

22. In **Gerald Nsubuga v Petwa Rwomushoro, CACA No. 102 of 2012**, the Court of Appeal dealt with a case in which the appellant had sold 3 acres of land out of a 75-acre parcel of land to the respondent who paid the full agreed consideration. Later, a third party successfully challenged the

appellant's ownership of the land from which the 3 acres had been parcelled. The respondent was forced to pay that third party fresh consideration in order to keep the land. The respondent then sued the appellant seeking to recover the consideration. The High Court allowed the recovery but the appellant appealed. On appeal, the Court of Appeal had this to say:

> ***"… A failure of consideration occurs if sufficient consideration was contemplated by the parties at the time the contract was entered into, but either on account of some innate defect in the thing to be given, or non-performance in whole or in part of that which the promisor agreed to do, nothing of value can be or is received by the promisee.***
>
> ***…***
>
> ***The evidence on record shows that the respondent did not get quiet possession as was agreed in the sale agreement. Whereas her name was re-instated on the certificate of title, it was after she made another payment to the rightful owner of the suit land. In the case of Joseph Muliita v Katama Silvano, SCCA No. 11 of 1999, court stated that if a party pays consideration and does not receive anything in return, then he is entitled to a refund of the money. It is not in doubt that the appellant received 70 million with a clear intention to sale to the respondent plots 2857 and 3870 but the respondent did not receive quiet possession of the land she had purchased …"*** Underlining mine for emphasis.

23. in the instant case, the plaintiff paid USD 6,000 to the defendant. The defendant neither refunded that principal investment nor paid any of the weekly returns therefrom as agreed. The equitable principles prohibiting unjust enrichment dictate that the plaintiff should be allowed to recover his principal investment from the defendant.

24. Finally, the last arm of the plaintiff's claim under this part is for the recovery of weekly returns on his principal investment. There is hardly any controversy on this item. Clauses 3 and 4 of the contract, as reproduced above, clearly stipulate that the defendant guaranteed that he would pay

to the plaintiff returns on a weekly basis equal to 30% of his USD 6,000 principal investment. These returns were never paid and the plaintiff is entitled to recover them.

25. From the above findings, the Court concludes that the plaintiff is entitled to the Uganda Shillings equivalent of his principal investment of USD 6,000 along with the accrued weekly returns on that investment. The duration of the contract was 3 months from 13th October 2019 to 12th January 2020. There was a total of 13 weeks during this period. The plaintiff earned returns of USD 1,800 per week (30% of USD 6,000). This implies that by the time the contract lapsed after 13 weeks, his returns had accumulated to USD 23,400. Therefore, the plaintiff is entitled to a total of USD 29,400 from the defendant being the total sum of his principal investment and the accrued weekly returns.

26. According to the Bank of Uganda Major Exchange Rates archive at https://www.bou.or.ug/bouwebsite/bouwebsitecontent/ExchangeRates/scripts.MajorExchangeRates/index.jsp, on 13th January 2020, $1 (USD 1) was selling for UGX 3,680. Therefore, this Court finds that the Uganda Shillings equivalent of the total sum which the plaintiff is entitled to is **UGX 108,192,000** (Uganda Shillings One hundred and eight million, One hundred and ninety two thousand only).

(b) General damages

27. The award of general damages is in the discretion of court in respect of what the law presumes to be the natural and probable result of the defendant's breach. Like most types of damages, general damages are rooted in the understanding that a plaintiff who suffers damage or injury due to the wrongful act or omission of the defendant must be put in the position he or she would have been in if he or she had not suffered the damage or injury. In assessing general damages, the Court must take all the relevant circumstances into account and reach an intuitive assessment of the loss which it considers a claimant to have sustained. Evidence has to be called, usually at a trial, to prove the general damages so that the Court to reach that intuitive assessment. (See **Gloria Kubajo & Anor v Francis Drate, HCCS No. 0889 of 2020**.)

28. Counsel for the plaintiff submitted that in keeping the plaintiff out of the use of his money by failing to make weekly payments of returns on the principal investment as agreed, the defendant caused the plaintiff general inconvenience including loss of business, being sued in courts of law for failure to meet his financial obligations to his creditors, embarrassment and mental anguish. Counsel for the plaintiff proposed that this Court awards the plaintiff general damages of UGX 50,000,000 for the inconvenience occasioned to him.

29. I have noted that counsel attempted to place additional evidence onto the court record by attaching to their submissions the alleged demands and court warrants said to have been made against the plaintiff by his creditors. This conduct contravenes the established legal position that evidence should be adduced through witnesses at the trial and not through counsel at the bar (See **Ssembatya Bumbakali & Anor v Eco Petro Uganda Ltd, HCMA No. 199 of 2015**). Consequently, the Court rejects the plaintiff's alleged demands and warrants because they should have been adduced at the formal proof hearing and not at the bar.

30. In paragraph 11 of his witness statement, the plaintiff told the Court that that despite incessant reminders and demands to the defendant, the defendant has refused, failed, and, or, neglected to settle the claim. He added that the defendant's conduct has caused him severe economic loss for which he is entitled to general damages. PW2 corroborated the plaintiff's testimony through paras. 9 and 10 of his witness statement. He stated that due to the defendant's actions, the plaintiff failed to settle the bank loan obligations which has put them into financial problems and risks of being dragged into Court.

31. I am persuaded that the plaintiff suffered severe financial loss following the defendant's refusal to pay the principal investment and the returns therefrom. It can only be expected that as a consequence, the plaintiff also suffered mental anguish and distress from the several demands he made to the defendant for payment which all fell on deaf ears. However, the proposal for an award of general damages of UGX 50,000,000 by counsel for the plaintiff appears excessive. The Court finds that an award

of general damages of **UGX 30,000,000 (Uganda Shillings Thirty million only)** is more reasonable and fair in the circumstances.

(c) Special damages

32. In paragraph 6 of the plaint, the plaintiff specifically pleaded for special damages of UGX 17,000,000. In paras. 8 – 10 of his witness statement, the plaintiff told the Court that he instructed PW2 to take out a loan of USD 3,000 which was later added onto his deposit with the defendant. He stated that he failed to repay this loan owing to the defendant's default in paying him the trading proceeds and that the bank has had to restructure the loan to a sum of UGX 17,000,000. PW2 corroborated this testimony in paras. 6 – 9 of his witness statement.

33. In the case of **Stanbic Bank Uganda Ltd v Hajji Yahaya Sekalega t/s Sekalega Enterprises, HCCS No. 185 of 2009**, this Court restated the law on the award of special damages to an injured plaintiff. Court reiterated that special damages must be specifically pleaded and proved, but that strict proof does not mean that that proof must always be documentary evidence. In that case, this Court found that the plaintiff therein had specifically pleaded special damages and availed documents showing that USD 38,586 had been transferred to the defendant's account. Since the defendant therein had also admitted to receiving the money and under-delivering on what was expected of him, the Court allowed the prayer for special damages.

34. In the instant case, the plaintiff specifically pleaded for special damages. What remains to be settled is whether or not he specifically proved those special damages. I am in agreement with the decision in **Stanbic Bank Uganda Ltd v Hajji Yahaya Sekalega (supra)** that, in principal, specific proof of special damages need not be documentary in nature and that it may also be through oral testimony. However in my opinion, that position is more relevant and appropriate in dealing with special damages arising out of informal transactions. Where special damages are claimed to arise from a formal transaction involving a great deal of signing and exchanging of paperwork between the parties, Court should remain interested in receiving and reviewing that paperwork before awarding those special damages.

35. In the present case, I reiterate that paragraph 4(c) of the plaint omitted to name the bank which gave out the said loan. The plaintiff's and PW2's testimonies also failed to name that bank. The plaintiff did not present the loan offer letter in evidence to prove the loan amount and the purpose of the loan which was disclosed to the bank. He also failed to adduce his loan account statement in evidence to prove the outstanding balance on the loan. In such cases where special damages are claimed in respect of outstanding loan balances owed to banking institutions, the Court would in all fairness, expect to receive and review the loan documents to confirm that the loans were actually disbursed and what the outstanding balances due are. The plaintiff did not provide this Court with any explanation as to why these loan documents and related information were not adduced in evidence.

36. The Court remains unconvinced that the plaintiff obtained a loan of USD 3,000 through his associate and that this loan was restructured to the tune of UGX 17,000,000. Accordingly, the plaintiff's prayer for special damages is rejected.

(d) Interest on (a) and (b) above at the rate of 28% p.a. from the date the cause of action arose until payment in full

37. In the plaint, the plaintiff prayed for interest on the sums in (a) and (b) at the rate of 28% from the date the cause of action arose until payment in full. The prayer in (a) was for a refund of his principal investment plus accrued returns therefrom while the prayer in (b) was for general damages. Relying on Section 26 of the Civil Procedure Act and the decision in **Crescent Transportation Co. Ltd v Bin Technical Services Ltd, CACA No. 25 of 2000**, counsel for the plaintiff submitted that where no interest rate is provided, the rate is fixed at the discretion of the Court. They argued that, in the present case, taking into account the fact that the dispute arose from a commercial transaction and that the defendant has held the plaintiff's money for a long time since the agreement was entered into, interest at 28% p.a. is appropriate for the principal sum while 24% p.a. is appropriate for the general damages.

38. The position of the law and the practice of the courts as far as interest is concerned, is that in all cases where the payment of a just debt has been

improperly withheld, it is fair, just and equitable that the party in default is ordered to pay that debt along with some interest. To this end, interest is a sum of money over and above the principal debt which cater for the deprivation of the money constituting the debt from the time it ought to have been paid to the time it is actually paid in full.

39. In determining a just and reasonable rate of interest, courts also take into account the ever-rising rate of inflation and the attendant regular drastic depreciation of the currency. Therefore, a successful plaintiff is entitled to interest at a rate which would not neglect the prevailing economic value of money but which would also insulate him or her against further economic vagaries, like inflation and depreciation of the currency, in the event that the money ordered to be recovered is not paid promptly when it falls due. (See the decision in **Mohanlal Kakubhai Radia v Warid Telecom Uganda Ltd, HCCS No. 0224 of 2011**.)

40. This Court has awarded UGX 108,192,000 to the plaintiff for his principal investment and accrued weekly returns. The Court has also awarded UGX 30,000,000 to the plaintiff in general damages for the defendant's breach of the contract. Considering the above legal position on interest and all the relevant circumstances of this case, the Court deems it fair and just to award interest to the plaintiff on the UGX 108,192,000 at the rate of 16% per annum from 12th January 2020 when the contract lapsed until payment in full. Court also deems it fair and just to award interest to the plaintiff on the UGX 30,000,000 at the rate of 12.5% per annum from the date of this judgment until payment in full.

(e) Costs of the suit

41. Under Section 27(1) of the Civil Procedure Act Cap 71, costs are awarded at the discretion of court. In subsection (2) thereof, costs follow the event, unless for some reasons court directs otherwise. It is also trite law that a successful party can only be denied costs if it is proved that, but for his or her conduct, the litigation could have been avoided (see **Uganda Development Bank v Muganga Construction [1981] HCB 35**). In the present application, I have not found any special reason to justify denying the applicant the costs of this application. The costs of this suit shall follow the event and they are hereby awarded to the plaintiff.

Reliefs

42. Consequently, I make the following orders:

i. The defendant shall pay **UGX 108,192,000 (Uganda Shillings One hundred and eight million, One hundred and ninety two thousand only)** to the plaintiff being the total sum of the plaintiff's principal investment and his accrued weekly proceeds under the contract.

ii. The defendant shall pay **UGX 30,000,000 (Uganda Shillings Thirty million only)** to the plaintiff being general damages for the defendant's breach of the contract.

iii. The defendant shall pay interest on the sum of UGX 108,192,000 at the rate of 16% per annum from 12th January 2020 until payment in full.

iv. The defendant shall pay interest on the UGX 30,000,000 at the rate of 12.5% per annum from the date of judgment until payment in full.

v. Costs of the suit are awarded to the plaintiff.

Patricia Mutesi

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Patricia Mutesi

JUDGE

(31/01/2024)