THE REPUBLIC OF UGANDA,

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO 218 OF 2013

(CORAM: KIRYABWIRE, MUHANGUZI, MADRAMA JJA)

ANATOLI BATABANE} .....APPELLANT

VERSUS

SURGIPHARM LTD} .....RESPONDENT

(Appeal from the judgment of His Lordship Benjamin Kabiito dated 27th March 2013 in High Court Civil Suit No 121 of 2008)

JUDGMENT OF CHRISTOPHER MADRAMA IZAMA, JA

The appellant filed this appeal against the decision of his Lordship Justice Benjamin Kabiito dated 27th March, 2013 in which he held that the contract of employment upon which the plaintiff sued was frustrated.

The background to the appeal is that on 11th February, 2008, the respondent made a job offer to the plaintiff. On 15th February, 2008, the defendant appointed the plaintiff as its Commercial/Finance Manager and the appointment was to commence on 25th of March 2008. Prior to the commencement of the appointment, the defendant terminated the contract. The issues agreed upon were firstly, whether the termination of the plaintiff's contract of employment, prior to its commencement was lawful. Secondly, whether the plaintiff is entitled to the remedies sought. The plaintiff brought the suit against the defendant for damages for unlawful termination of contract of employment before he could commence duty. On the first issue the learned trial Judge held that the contract had been frustrated and he disallowed the plaintiff's claim that the termination of the contract was calculated as a grand scheme or deceit or fraud. He further held that the defendant had offered to pay up to Uganda shillings 2,000,000/= to the plaintiff has one-week pay in lieu of the notice which the plaintiff should take up as a way of mitigating his losses. On the second issue of whether the plaintiff is entitled to the damages sought in the plaint, the learned trial Judge held that the contract was frustrated and made no order as to general damages and interests with each party to bear his/its own costs in the suit.

The appellant being aggrieved lodged this appeal on six grounds of appeal namely:

1. The learned trial Judge erred in law and fact by holding as he did that the contract between the appellant and the respondent was frustrated.

2. The learned trial Judge erred in law and fact by ignoring the fact that the cause of action against the respondent was in deceit and misrepresentation and as a result arrived at an incorrect decision.

3. The learned trial Judge erred in law and fact when he failed to hold that the termination of the plaintiffs contract of employment prior to its commencement was unlawful, when he had actually found as a fact that the order that the orally agreed familiarisation visit were ambiguous, did not specify dates and there was no *consensus ad idem* on the issue.

4. The learned trial Judge erred in law and fact when he admitted and took into account oral evidence regarding the plaintiff's familiarisation visits that sought to vary, add or contradict the terms of the written contract of employment thereby offending the parole evidence rule.

5. The learned trial Judge erred in law and fact when he held that the plaintiff should have taken Uganda shillings 2,000,000/= as one-week's pay in lieu of notice when actually the performance of the contract had not commenced.

6. The learned trial Judge erred in law and fact by holding as he did that the appellant was not entitled to any remedy.

At the hearing of the appeal learned counsel Mr Lawrence Tumwesigye appeared for the applicants while learned counsel Mr Sembatya Earnest appeared for the respondent. With the leave of court, the written submissions of the lawyers filed for and against the appeal on record were accepted as the submissions of the parties.

Submissions of the appellant

Mr. Lawrence Tumwesigye submitted on the brief facts that the appellant was gainfully employed with the company known as ZK Advertising Ltd as the Head of Finance and Administration on a gross pay of Uganda shillings 5,800,000/= per month together with

other benefits. In January 2008 the appellant was approached by the respondent, through another person called Narvin Popat, for another bigger employment opportunity of a Commercial Finance Manager in the respondent company. The appellant was made to do interviews which he passed. He was offered the job with a monthly salary of Uganda shillings 6,500,000/=. He was given time to resign from his former employment first and he indeed resigned on 18th February, 2008. The appellant signed an employment contract with the respondent on 15th February, 2008 with the commencement date stated therein as 15th March, 2008.

After signing the contract with the respondent, the appellant went upcountry to his home village of Buwenge in Jinja district as he prepared to take on the new appointment the following month. When the appellant returned from upcountry on 15th March, 2008, and reported to the respondent's office premises to acquaint himself with the new working environment as previously requested by the respondent. It is at this point that he was informed that the respondent had terminated his employment contract before its commencement date. The reason given was that the respondent had been trying to reach the appellant in his former office (where he had resigned) but to no avail.

Aggrieved by the respondent's decision, the appellant filed a suit in the High Court for damages for deceit, misrepresentation and negligence. The High Court made a finding that the appellant's contract was frustrated and both parties were to take the blame. No remedy was given either party, not even costs. The appellant being dissatisfied with the decision of the High Court, appealed to this court.

Ground 1 of the appeal is that the learned trial Judge erred in law and fact by holding as he did that the contract between the appellant and the respondent was frustrated.

Mr Tumwesigye submitted that the learned trial Judge misconceived the doctrine of frustration of contracts. He submitted that the doctrine of frustration applies where some catastrophic event occurred for which neither party is responsible and the result of the event is to destroy the basis of the contract so that the venture to which the parties now find themselves committed is radically different from that originally contemplated (see Lord Radcliffe in the case of **Davis Contractors Ltd v Fareham UDC [1956] AC 696**.) He submitted that in the instant case, there was no event that would frustrate the appellant's contract. The company was in existence and the post of Financial Manager to which the appellant had been appointed was still existent within the administrative

structure of the respondent company. In the premises he submitted that the learned trial Judge misdirected himself first when he framed "frustration" as an issue when it was never one of the agreed issues for determination. Secondly, he introduced the question of "intended familiarisation visits of the appellant" as frustrating events because the parties had not provided for them. He erroneously looked at the said familiarisation visits as an intervening event not previously contemplated by the parties that would cause frustration of the contract so that the parties are discharged of their obligation. He prayed that ground one of the appeal is allowed.

Ground 2: **the learned trial Judge erred in law and fact by ignoring the fact that the cause of action against the respondent was in deceit and misrepresentation and as a result arrived at an incorrect decision**.

Learned counsel for the appellant submitted that the trial Judge ignored the fact that the appellant's cause of action against the respondent as set out in the pleadings was based on deceit and misrepresentation which has an element of both contract and tort. The learned trial Judge opted to treat the plaintiff's cause of action as if it was based on a claim of employment rights, which was erroneous. The plaintiffs action had nothing to do with an employment contract because the employment contract had not commenced and therefore no employment rights had accrued to the appellant (see the case of **Doreen Rukundo v International Law Institute SCCA No 008 of 2005**). Counsel contended that that was why the appellant was not claiming that he would have earned from the respondent if the contract had not been terminated but rather what he lost/failed to earn from his former employment due to the respondent's deceit and/or misrepresentation that caused the breach of the contract. The case of the appellant was that the respondent represented to him that there was a vacancy and the applicant relied and acted on the respondent's representation and altered his position by resigning from his former employment. It later turned out that there was no vacancy which meant that the representation was false. The appellant could not go back to his former employment where he had resigned and therefore suffered damage.

The appellant's counsel contended that actions based on misrepresentation and deceit was authoritatively covered by the House of Lords Decision in **Derry v Peek (1886 – 90) All ER 1**. It sets out the general principles relating to liability arising out of misrepresentation and/or deceit in both contract and tort. All that the plaintiff needed to show was that the defendant made the statement knowing it to be false or without

belief in its truth or recklessly without caring whether it is true or false and this amounted to deceit.

On the proposition of the respondent that the respondent had no vendetta or malice aforethought against the appellant, or that the job existed in the administrative structure of the respondent and was occupied by one Nathan Prasad who had expressed a desire to leave the company, the question was why the respondent would hire a new person to the job when he had not declared the position vacant? The appellant's counsel submitted that the respondent had no reason to believe that the job existent and if not, he was reckless as to whether the job existed or not and consequently his misrepresentation caused damage to the appellant for which the respondent is liable. Furthermore counsel submitted that in **Derry v Peek** (supra), the misrepresentation was a mere statement collateral to the contract but in the appellants case, the misrepresentation was not merely collateral but a fundamental aspect of the contract. It was a promise upon which the contract was based and whose falsity constituted breach of contract. The respondent's contention in the scheduling memorandum that there must be intent to defraud was not applicable in the appellant's circumstances where there was a breach of promise.

Lord Bramwell said in Derry v Peek (supra) that to found an action for damages, there must be a contract and breach, or fraud. That meant that where there is no contract breached, where the statement was merely collateral, the plaintiff must prove fraud on the part of the defendant in order to succeed. He contended that if misrepresentation leads to breach of contract, the plaintiff does not have to prove fraud on the part of the defendant. All he needs to show is that there was a false representation made by the defendant with the intention that the plaintiff relies or acts on it and the plaintiff relied on and acted on it to his detriment. It was immaterial whether or not the respondent was fraudulent when it purportedly offered the vacancy to the appellant. According to David Howard in the book **"Text Book on Tort"** pages 273 and 274, if the defendant promises to do something and thereafter changes his mind, he should inform the plaintiff before the plaintiff acts on that promise. In that way it will not be actionable deceit. The appellant's counsel submitted that in the instant case, the respondent changed his mind and terminated the contract after the plaintiff had acted on it and this became actionable as deceit.

The appellants counsel further submitted that the respondent did not even give any reason for the change of mind. According to an article entitled "Fraud and Negligent

Misrepresentation" found in www.lawgame.com true statements can form the basis of false representation if they were made in a manner designed to create a false impression and were so acted upon. The deceit may consist of a false promise, made without the intention of performing it. Fraud or false promise is a subspecies of an action for deceit grounded on the notion that the promise to do something necessarily implies an intention to perform. Furthermore, the misrepresentation in issue must be material enough to the circumstances that if it had not been made, the transaction or other activity undertaken by the plaintiff would not have occurred. Further, a defendant may be liable for deceit without actual knowledge that the representation was false, if the plaintiff can prove that the deed was reckless and in disregard of the truth. The appellant's counsel concluded that the respondent was reckless in regard to the existence of the job. The vital element of the claim is the defendants intentionally induced action by another person in response to a misrepresentation. Such intent may be established by inference from acts of the parties because direct proof of intent for fraud may be impossible (see **Rosa Nathanson v May Murphy (Court of Appeals of California, 1995**).

Grounds 3 and 4: **The learned trial Judge erred in law and fact when he failed to hold that the termination of the plaintiff's contract of employment prior to its commencement was unlawful, when he had actually found as a fact that the orally agreed familiarisation visits were ambiguous, did not specify dates and there was no *consensus ad idem* on the issue**. Further, **the learned trial Judge erred in law and fact when he admitted and took into account oral evidence regarding the plaintiff's familiarisation visits that sought to vary, add or contradict the terms of the written contract of employment thereby offending the parole evidence rule**.

The appellant's counsel submitted that the above two grounds were related in as far as they both deal with the issue of "familiarisation visits" which was the respondent's basis for repudiating or terminating the appellant's contract. He submitted *inter alia* that the familiarisation visits were never part of the contract between the appellant and the respondent. The contract was signed on 15th February, 2008. Thereafter the appellant resigned his former position at present ZK Advertising on 18th February, 2008 and informed the respondent accordingly. On 23rd February, 2008, the respondent sent an e-mail to the appellants saying that they have been attempting to call him on the office line but there was no response and threatened to cancel the job offer if the appellant did not contact Mr Kinny Nayer, the Managing Director. The appellant never received

this e-mail because he had resigned from his former job and had gone to the village where he had no Internet services and had gone to rest until 23rd March, 2008 in order to come back and start on the new job. On 25th February, 2008, the respondent sent another e-mail to the appellant indicating that his job had been cancelled. Once again the appellant did not receive this e-mail because he was still in the village awaiting commencement of his job on 23rd March, 2008. It is only after the appellant returned on 10th March, 2008 that he went to the respondent's office to acquaint himself with the job as earlier requested by the respondent but found that his contract had been terminated.

The respondent's evidence on the other hand was that it had been agreed that prior to the commencement of the plaintiff's employment, he was required to sit in the company premises for purposes of familiarising himself with the new office. However in cross examination he admitted that the familiarisation visits were a verbal and not written term and it was left open to the plaintiff to revert to the respondent at his convenience. It was further agreed that the plaintiff would come in for some time to appreciate what was going on before the handover was done. However, there was no date and time when the said familiarisation visits would be carried out. Indeed on 10th March, 2008 the appellant turned up for the familiarisation visits but found that his job had been terminated. The learned trial Judge also held that the parties did not specify the dates for the familiarisation visits which he held was a crucial aspect of the engagement and that it was not documented and was ambiguous. Having found so, the appellant's counsel submitted that it was erroneous for the trial Judge to again base his decision on the familiarisation visits. Finally he submitted that under section 91 and 92 of the Evidence Act, oral evidence could not be admitted to contradict the terms of the written agreement.

Ground 5

Ground 5 of the appeal is that **the learned trial Judge erred in law and fact when he held that the plaintiff should have taken Uganda shillings 2,000,000/= as one week's pay in lieu of notice when actually the performance of the contract had not commenced**.

The appellant's counsel submitted that the provisions of the Employment Act could not apply to the situation of the appellant because he had not commenced employment. Since the performance of the contract of employment had not commenced, no

employment rights had accrued to the appellant. It followed that the provisions of the act regarding termination notice for a probationary contract were not yet applicable because the probationary period had not started. Counsel relied on the general principles of contract law as held in the case of **Doreen Rugunda v International Law Institute** (supra). The plaintiff/appellant was entitled to claim damages incurred as the result of the breach on the respondent and by terminating the contract. Damages should be assessed for breach of contract.

Ground 6

The learned trial Judge erred in law and fact by holding as he did that the appellant was not entitled to any remedy.

The appellant's counsel relied on the Textbook on Tort by David Haworth for the proposition that the deceit must have led to loss which may include, and indeed usually does include, economic loss. The defendant should be held liable for all loss including unforeseeable loss which flows directly from the deceit (see **Rose Nathanson versus Mary Murphy** (supra) for the proposition that one who wilfully deceives another with intent to inducing him to alter his or her position to his/her injury or risk, is liable for any damage which he or she thereby suffers.). He submitted that the appellant was employed on a permanent basis with a gross pay of Uganda shillings 5,800,000 per month. 31 months was remaining on the 3 years and he was entitled to Uganda shillings 179,800,000/= as special damages.

As far as general damages are concerned, the appellant suffered disappointment when he tried his best to look for alternative employment elsewhere including registering with a recruitment bureau for three years without success. It was not until the year 2011 when he got the position of Finance Manager with Busoga Forestry Company Jinja at a monthly pay of Uganda shillings 4,500,000/= only, less than what he was getting before his resignation at ZK Advertising. In addition the appellant had to struggle to service the salary loan he had obtained from DFCU bank which had put intense pressure on him with threats of recovery from the bank. The appellant seeks for general damages of Uganda shillings 50,000,000/=.

Furthermore, the appellant prays for interest on special damages at the simple rate of 20% per annum from the date of resignation on 18th February, 2008 until payment in full which in 14 years amounts to Uganda shillings 358,000,000/=.

Furthermore, the appellant prays for costs of the suit in this court and in the court below.

Submissions in reply of the respondent:

The respondent's counsel on the other hand did not agree with all the facts but agrees that the appellant was offered a job by the respondent, whose effective date was 25th February, 2008. The parties agreed that the appellant would prior to the commencement date undertake familiarisation with the respondent's operations. This was alluded to by the appellant himself. The appellant did not turn up for the familiarisation and the contract was repudiated before its commencement. Thereafter the appellant instituted a suit in the High Court contesting the repudiation of the contract and contending that the respondent was deceitful. The suit was dismissed and the appeal is against the dismissal of the suit.

Having set out the six grounds of appeal, the respondent's counsel submitted that there were three issues that flow from the six grounds of appeal namely:

1. Whether the trial Judge erred in holding that the contract of employment was frustrated (this covers grounds 1, 3, and 4 in the memorandum of appeal).
2. Whether the learned trial Judge did not consider deceit and misrepresentation as a cause of action and in so doing erred. (This covers grounds 2 in the memorandum of appeal)
3. Remedies.

On issue number 1 which covers grounds 1, 3 and 4 in the memorandum of appeal, the respondent's counsel submitted that the appellant's contract of employment was repudiated and accordingly frustrated. The respondent's argument is that the appellant was offered a job by the respondent with the effective date indicated above and the parties agreed that the appellant would prior to the commencement date undertake familiarisation with the respondent's operations. This was alluded to in paragraph 22 of the appellants witness statement as well as in cross examination of the appellant. It was agreed that before the commencement date, the appellant would be introduced to the operations of the defendant. The appellant did not turn up for the familiarisation and the contract was repudiated before its commencement.

Learned counsel submitted that under clause 4 of the appellant's contract of service with the respondent, the appellant was supposed to serve a probationary period of six

months from 25th March, 2008. He further relied on section 67 (4) of the Employment Act which provides that the contract for a probationary period of service may be terminated by either party by giving notice of not less than 14 days of termination or by payment by the employer to the employee of the seven days in lieu of notice. Secondly, the respondent's counsel relied on the case of **Doreen Rugunda v International Law Institute SCCA No 08 of 2005** where the appellant in that case had executed a fixed term contract with the respondent. She was offered 4 days at the respondent's premises and undertaking a familiarisation with the respondents operations. On 29th of August 2000, the respondent wrote to the appellant informing her that her services were no longer required. She then sued the respondent and the Supreme Court in interpreting section 24 (1) of the Employment Act applied the period of notice therein. The respondent's counsel further relied on **Vine v National Dock Labour Board (1956) QB 658** where Jenkins LJ said that:

> "It has long been well settled that if a man employed under a contract of personal service is wrongfully dismissed, he has no claim for remuneration due under the contract after repudiation. His only money claim is for damages for having been prevented from earning his remuneration. His sole money claim is for damages and he must do everything he reasonably can to mitigate them."

The respondents counsel further relied on the dictum of Salmon LJ in **Decro - Wall International SA v Practitioners in Marketing Ltd [1971] 1 WLR 361** for the proposition of law. He submitted that in the appellant's case, the contract of employment was terminated long before the date of its due performance. The appellant was supposed to commence employment on 25th March, 2008 but the respondent repudiated the contract on 25th February, 2008 one month prior to its commencement. This is a period of 28 days before commencement which is more than 14 days prescribed by section 67 (4) of the Employment Act.

Issue 2 on whether the learned trial Judge did not consider deceit and misrepresentation as the cause of action and in so doing erred.

The respondent's counsel submitted that no evidence was adduced before the court to warrant the consideration of deceit and misrepresentation as a cause of action. The appellant alleged that the respondent's conduct was deceitful and listed the various grounds to support this allegation. He submitted that the allegations of deceit were totally devoid of merit and no evidence to prove it was ever adduced. To support an

allegation of deceit, the appellant had to adduce evidence to prove that the position which he had been offered was non-existent in the respondent's employment structure and that he had been offered and non – existent position. Additionally the appellant had to adduce evidence of the ill motive or ill will on the part of the respondent. The respondent's evidence was that the job which was offered was existent in the administrative structure of the respondent. Secondly, it was occupied by one Nathan Prasad who had expressed a wish to leave the company. Furthermore, he contended that there was no basis for alleging any misrepresentation of deceit on the part of the respondent as the respondent had no malice aforethought in offering the job and thereafter repudiating the contract.

Furthermore, the respondent's counsel contended that in **Derry and others v Peek [1886 – 90] ALL – ER 1** it was held by the House of Lords that to sustain an action for deceit, there must be proof of fraud and nothing short of that will suffice. Fraud is proved when it is shown that a false representation has been made.

Counsel further submitted that Salmond and Heuston on the law of Torts stated that:

> "The tort of deceit consists in the act of making a wilfully false statement with intent that the appellant shall act in reliance on it, and with the result that he does so act and suffers harm in consequence.... There must be a false statement of fact, (2) the representation must be made with knowledge of its falsity; (3) it must be made with the intention that it should be acted on by the plaintiff, or by a class of persons which includes the plaintiff, in the manner which resulted in damage to him (4) it must be proved that the plaintiff has acted upon the false statement, and has sustained damage by so doing."

The respondent's counsel further submitted that in the appellant's case no evidence was adduced by the appellant to prove that the job offer made by the respondent was false or that the respondent was aware of its falsity and had no intention whatsoever of hiring the appellant. Thirdly, it had not been proved that the respondent did not care whether or not the job offer to the appellant was actual. He submitted that on the contrary DW1 who is the respondent's managing director stated that he had offered the appellant a job with the intention of giving it to him and had made numerous futile attempts to contact him in furtherance of this intention. He submitted that accordingly there were no facts to support a deceit.

Issue 3: Remedies

The respondent's counsel submitted that general damages are such as the law would presume to be the direct consequence of the act complained off. He relied on several authorities that need not be repeated here. He submitted that in light of the authorities the appellant has not suffered any immediate, direct proximate loss or damage as a result of the repudiation of his contract one month before it was commenced. Consequently a claim for general damages should be disallowed.

Further, the respondent's counsel submitted that the appellant prays for an award of special damages being the salary he would have earned from ZK Advertising of Uganda shillings 5,800,000/= per month for a period of 31 months and the total amount being Uganda shillings 179,800,000/=. He submitted that in the case of **John Nagenda v Sabena World Airlines, Civil Suit No 1408 of 1998 (1992) KALR 13** it was held that special damages must be strictly proved.

He contended that the appellant's contract of employment with ZK Advertising Ltd does not provide for its duration. In cross-examination, the appellant clearly stated that his contract was an open ended contract. He attempted to rely on these recommendations later on as a basis for the claim of his salary for 31 months but in cross examination he stated that clause 2 of the letter was a letter of recommendation and not a guarantee. It follows that the appellants claim for salary for 31 months is wholly speculative.

In the premises the respondent's counsel prayed that the appellants appeal is dismissed with costs.

Resolution of appeal

I have carefully considered the facts of this appeal, the proceedings of the High Court, the submissions of counsel and the law. This is a first appeal arising from a decision of the High Court dismissing the appellant's suit with each party to bear its own costs. Principally, the learned trial Judge held that having found that the contract was frustrated; he would make no order as to special or general damages and interest.

The power of the Court of Appeal in an appeal from a decision of the High Court in the exercise of original decision is to subject the evidence adduced to fresh scrutiny and to reach to its own conclusions on all issues of fact and law. The Justices of the Court of Appeal should caution themselves that they have not heard nor seen the witnesses testify (See Rule 30 (1) of the Rules of this court). This jurisdiction was discussed in

Peters v Sunday Post Limited [1958] 1 EA 424, by the then East African Court of Appeal when they held at page **429** that:

> "An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution: it is not enough that the appellate court might itself have come to a different conclusion."

(See also the decision of the Supreme Court in **Kifamunte Henry v Uganda; Supreme Court Criminal Appeal No. 10 of 1997).**

I have accordingly scrutinised the evidence and come to my own conclusions. I will also generally evaluate the facts and circumstances before resolving the grounds of appeal. The appellant's claim in the High Court in paragraph 3 of the plaint against the respondent is for special and general damages arising out of alleged deceit, misrepresentation and negligence, interest and costs of the suit. The facts are sufficiently stated in the appellant's submissions. The appellant's case in the High Court as stated in the Plaint is that he was at all times gainfully employed at ZK Advertising Ltd as the Head of Finance and Administration on an open ended confirmed/non probationary contract that commenced on 16th July, 2007 according to a copy of an employment letter attached. It is averred that the appellant used to earn Uganda shillings 5,800,000/= and other benefits. Sometime in January 2008 the plaintiff was made to understand through one Narvin Popat that the respondent was interested in having a person in the position of Commercial Finance Manager. He accordingly submitted his CV as requested and subsequently after being interviewed was offered employment in the respondent. He was to be paid salary of Uganda shillings 6,500,000/= and other benefits per month. This compelled him to resign his post in his former employment at ZK Advertising Ltd while awaiting deployment in the new appointment. The parties further signed an employment contract on 15th February, 2008, under which the appellant was to commence work on 25th March, 2008. However, when the plaintiff reported for work, he established that his contract had been terminated on 25th February, 2008 shortly after he had resigned his employment from ZK Advertising Ltd. He further alleged that the respondents officials knew about his employment before offering him the new job. The appellant pleaded particulars of negligence and misrepresentation.

In the written statement of defence, the respondent averred that they would at the commencement of the suit raise a preliminary objection on the ground that the High Court has no original jurisdiction to entertain the suit, which under the Employment Act, was supposed to be adjudicated upon by the Labour officer in the first instance. Secondly, without prejudice, the defendant/respondent contended that it had appointed the plaintiff/appellant as the Commercial and Financial Manager under a contract that was effective on 25th March, 2008. The letter of appointment indicated that during the probationary period, either party would have the right to terminate the contract on giving seven days' notice of termination. Most importantly they averred that it was also agreed by the parties that the plaintiff would prior to the commencement of employment familiarise himself with the defendant's operations but the plaintiff did not undertake any familiarisation of the defendant's operations. Therefore on 25th February, 2008, a period of 30 days prior to the commencement date, the defendant terminated the plaintiff's employment. Furthermore, the defendant averred that the respondent would contend that the plaintiff had not accrued any rights under the contract of employment because its performance had not yet commenced and as such he was not entitled to damages. The defendant denied any deceit or misrepresentation as alleged and further denied any negligence.

The first issue agreed to for resolution of the suit in the High Court was whether the termination of the plaintiff's contract of employment, prior to its commencement was lawful. Secondly, whether the plaintiff is entitled to the remedies sought.

I have carefully considered the submissions of the parties and I am of the view that the main contention is whether the appellant enjoyed any rights under the contract of employment prior to its commencement. The way the first issue was framed does not specifically deal with the issue as to whether it was an offer or a contract of employment. Secondly, it is a major contention of the respondent that the termination was of a probationary contract. The issue of whether the termination of the appellant's employment was the termination of the probationary contract can easily be resolved by establishing whether the contract signed by the parties was a probationary one. Was there a probationary contract in place at the time of termination or was there a repudiation of a contract intended to take effect in future?

I have accordingly considered the written contract signed by the parties. In exhibit P7 at page 70 of the record, the respondent received a letter of appointment dated 15th February 2008. In paragraph 1 it is indicated that the commencement date of the

employment contract shall be 25th March, 2008 and the gross monthly salary would be Uganda shillings 6,500,000/= payable at the end of each calendar month less statutory deductions that are applicable. The plaintiff would also be entitled to other allowances or other benefits at company rates applicable from time to time. Paragraph 4 of the contract is pertinent and provides as follows:

> "You will initially be on probation for a period of 6 months before management confirmation to a permanent employee basis. During the probationary period either party may terminate employment by giving one week's notice or one week's pay in lieu of notice."

The appellant accepted the contract by endorsing it on 15th February, 2008. The major question we are to determine is how a contract can be said to be a probationary or employment service contract before it commences?

The learned trial Judge noted at page 2 of his judgment that outside the written contract, the parties orally agreed that the plaintiff would call at the defendant's premises before the commencement date of the contract for familiarisation with the operations of the defendant. Secondly, the parties did not agree on a specific date when the plaintiff would come for the programme of familiarisation. The plaintiff left an e-mail address and formal contact prior to leaving for the village in Jinja district. There was no subsequent communication from the plaintiff and all attempts by the defendant to get into contact with him in respect of the programme for familiarisation were futile. A message was sent to the plaintiff by e-mail on 23rd February, 2008 asking him to contact the respondent's officials by 25th February, 2008 otherwise his employment offer would be cancelled. This message was not responded to. Thereafter the defendant decided to cancel the employment by e-mail dated 25th February, 2008. The learned trial Judge held at page 3 of his judgment that:

> "The parties, however, did not specify the dates for the familiarisation visits. This very crucial aspect of the engagement between the parties was not documented and was ambiguous. There was no *consensus ad idem*, that is, meeting of the minds on this issue at all, in respect of the date or time or duration of the programme."

The learned trial Judge further held that the respondent expected the defendant at the premises within a reasonable time once he had executed the contract. The plaintiff only showed up at the defendant's premises on 11th March, 2008 to take on the

familiarisation visits and this was two weeks after the date of repudiation of the contract and two weeks before the commencement date of 25th March, 2008. There was no direct communications between the parties. He therefore framed another issue as to whether the contract of employment was frustrated by the failure of the parties to provide for the intended visits.

With due respect to the learned trial Judge, the issue of whether the contract was frustrated by the failure of the parties to provide for the intended visit does not deal with the express wording of the contract of employment. We agree with the appellants counsel that the written terms of a contract most times override any oral agreement between the parties such as would vary the terms of the written agreement. Such oral agreements are inadmissible. Section 91 of the Evidence Act Cap 6 provides that:

> "91. Evidence of terms of contracts, grants and other dispositions of property reduced to form of document.
>
> When the terms of a contract or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence, except as mentioned in section 79, shall be given in proof of the terms of that contract, grant or other disposition of property, or of such matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.
>
> *Exception* 1.—When a public officer is required by law to be appointed in writing, and when it is shown that any particular person has acted as such officer, the writing by which he or she is appointed need not be proved.
>
> *Exception* 2.—Wills admitted to probate in Uganda may be proved by the probate.
>
> *Explanation* 1.—This section applies equally to cases in which the contracts, grants or dispositions of property referred to are contained in one document, and to cases in which they are contained in more documents than one.
>
> *Explanation* 2.—Where there are more originals than one, one original only need be proved.

Explanation 3.—The statement, in any document whatever, of a fact other than the facts referred to in this section shall not preclude the admission of oral evidence as to the same fact.

The law is very clear that where the terms of any contract have been reduced in writing, no evidence, except as mentioned in section 79, shall be given in proof of the terms of that contract except the document itself. In other words, the document speaks for itself and the terms of the document are admissible as reflecting what the parties agreed to. Section 79 of the Evidence Act is inapplicable because it deals with presumptions as to document produced as record of evidence. Furthermore, where the written contract has been proved, no evidence of any oral agreement or statement shall be admitted as between the parties to such instrument or their representatives in interest which would have the effect of contradicting or varying the terms of the written contract. Section 92 of the Evidence Act provides that:

"92. Exclusion of evidence of oral agreement.

When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 91, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to or subtracting from its terms; but—

(a) any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto, such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration or mistake in fact or law;

(b) the existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this paragraph applies, the court shall have regard to the degree of formality of the document;

(c) the existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved;

(d) the existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property may be proved, except in cases in which that contract, grant or disposition of property is by law required to be in writing or has been registered according to the law in force for the time being as to the registration of documents;

(e) any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description may be proved if the annexing of the incident would not be repugnant to, or inconsistent with, the express terms of the contract;

(f) any fact may be proved which shows in what manner the language of a document is related to existing facts."

There are several exceptions to the rules to exclude oral evidence where a written contract has been proved as stated under section 92 of the Evidence Act. In this particular case, there is no challenge to the validity of the written contract. I therefore considered the exceptions to the exclusion of oral evidence under section 92 of the Evidence Act to vary the terms of a written contract. Starting with section 92 (b) of the Evidence Act, it is permissible to orally prove the existence of a separate oral agreement as to any matter on which the document is silent and which is not inconsistent with its terms. The first question to be considered under this exception is whether the familiarisation requirement with the respondent's operations was a condition precedent to the commencement of the contract of the appellant. In the facts and circumstances of this case, the document which is the written contract of the parties expressly provides for a commencement date but is silent about familiarisation by the appellant before the commencement date. An oral agreement cannot make the commencement date conditional on the fulfilment of another condition.

Exhibit P7 is quite clear. It is entitled a letter of appointment. Secondly, the appellant was offered the position of Commercial Finance Manager on the terms which are expressly provided for including the commencement date of 25th March, 2008. Clause 4 of the terms and conditions expressly provides that the appellant would initially be on probation for a period of six months before management confirmation to a permanent employee basis. It further gives the right to terminate with one week's notice or one week's pay in lieu of notice. The initial period when the appellant was supposed to be on probation would commence on 25th March, 2008. It is admitted by the respondent in

the written statement of defence paragraph 5 thereof that the contract never commenced. Paragraph 5 of the written statement of defence reads as follows:

> "5. The defendant shall contend that the plaintiff had not accrued any rights under the contract of employment as its performance had not yet commenced, and as such the plaintiff is not entitled to any damages, and that in any event the plaintiff voluntarily terminated his employment with his former employer, for which the defendant cannot be held liable."

The defendant is bound by the pleading that the contract of employment or its performance had not yet commenced. In other words any performance including any familiarisation could not have commenced before the commencement date and the express wording of paragraph 5 of the written statement of defence. The defendant could not have accrued rights before the commencement of the contract when the plaintiff also had not. If paragraph 5 of the written statement of defence is anything to go by, then the rights of the parties and the performance of the contract only commenced on 25th March, 2008. I have however, considered the fact that in paragraph 4 (iii) of the same written statement of defence, the defendant averred that:

> "(iii) It was also agreed by the parties that the plaintiff would prior to the commencement of employment familiarise himself with the defendant's operations, however the plaintiff did not undertake any familiarisation with the defendant's operations."

On the above pleading, there is a clear finding of the learned trial Judge, which finding was not appealed that the parties did not agree on the specific date when the plaintiff would come for the programme of familiarisation. Secondly, it was the finding of the learned trial Judge that the plaintiff/appellant reported on 11th March, 2008 two weeks before the commencement date. There was therefore no factual basis to find that the contract was frustrated because the appellant failed to familiarise himself with the operations of the respondent. There is no agreement written or oral that had been presented to the effect that a date had been agreed upon for the familiarisation by the appellant. The fact that written messages were sent to the appellant on an e-mail address which the appellant had not read did not have any agreement written or otherwise. It is the finding of the learned trial Judge as quoted above that the parties however did not specify the dates for the familiarisation visits. This very crucial aspect of

the engagement between the parties was not documented and was ambiguous. He then said:

> "There is no *consensus ad idem*, that is, meeting of the minds on this issue at all, in respect of dates or time or duration of the programme."

What is not provided for cannot be frustrated. A frustrating event should frustrate performance of terms of a contract that has been proved in evidence. I agree with the respondent's submission that the respondent repudiated the contract before the commencement date which date has been proved by the written agreement indicating the date of commencement of the performance of the contract.

I have further considered section 92 (c) of the Evidence Act which gives the exception for the proof of the existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property. No condition precedent had been proved and in any case the appellant reported two weeks prior to the commencement of the contract. By the time he reported, the contract had been repudiated by the respondent two weeks earlier which is approximately one month before 25th March, 2008, which was the date of commencement. The rest of the exceptions under section 92 of the Evidence Act are not applicable to the facts and circumstances of this appeal. The additional issue framed by the learned trial Judge at page 4 of his judgment is that:

> "The issue is whether the contract of employment was frustrated by the failure of the parties to provide for the intended visits."

It is therefore a finding of the learned trial Judge that there was failure by the parties to provide for the intended familiarisation visits. I agree with the submissions of the appellant's counsel in ground one of the appeal that the learned trial Judge erroneously applied the doctrine of frustration to the facts before him. Frustration only applies when there is a supervening factor making performance impossible. Subsequent impossibility of performance as a consequence of intervening factors is a question of fact and as to whether the fact or event frustrated performance of the contract depends on the facts and circumstances of each case. In **Krell v Henry [1903] 2 K.B. Page 740,** a decision of the Court of Appeal of England, the appellant had appealed the decision of Darling J who had dismissed his action for enforcement of a contract to rent a room. The court found that the foundation of the contract was that the defendant wanted to watch a 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 v Caldwell (1863) 3 B. & S 826**. On appeal to the Court of Appeal, Vaughan Williams L.J. discussed the principle in **Taylor v 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."

At page 751:

> "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."

In the facts of this case, the contract was not frustrated but repudiated by the respondent before the commencement date thereof. Ground one of the appeal is allowed.

Ground two of the appeal is superfluous because the learned trial Judge did not deal with the issue of deceit and misrepresentation but held that the contract was frustrated. It cannot be said in the circumstances that he ignored anything. Only two issues had been agreed upon and the first issue being whether the termination of the plaintiffs

contract of employment, prior to its commencement was lawful. That is the issue which the learned trial Judge determined. Secondly, the learned trial Judge determined the question of whether the contract had been frustrated. This ground is covered by other grounds and I would strike it out.

Ground 3 and 4 of the appeal deal with the crux of the appeal and I have already substantially dealt with it above. The question of whether there was a contract at all was the root of the issue of whether it could be frustrated. We have fully considered the holding of the learned trial Judge that the performance of the contract was frustrated as a result of the failure of the parties to clearly provide the terms of the familiarisation visits.

Among other findings in the background the learned trial Judge found that the contract under clause 4 provided for termination of employment during the probationary period. There was no probationary period because the contract had not commenced and was repudiated before performance. A probationary contract is specifically defined by the Employment Act 2006 in the following words:

> "Probationary contract" means a contract of employment, which is not of more than six months duration, is in writing and expressly states that it is for a probationary period.

The contract that the appellant signed with the respondent was only subject to a probationary period but was not entirely a probationary contract. Furthermore, section 67 of the Employment Act provides for probationary contracts in the following terms:

> "67. Probationary contracts
>
> (1) Section 66 does not apply where a dismissal brings to an end a probationary contract.
> (2) The maximum length of the probationary period is six months, but it may be extended for a period of not more than six months with the agreement of the employee.
> (3) An employer shall not employ an employee and a probationary contract on more than one occasion.
> (4) A contract for a probationary period may be terminated by either party giving not less than 14 days' notice of termination, or by payment, by the employer to the employee, of seven days' wages in lieu of the notice."

The contract exhibit P7 is very clear that the probationary period was for six months and commenced on the date of commencement of the contract. The probationary period under the contract had not commenced by the time the respondent repudiated the plaintiff's contract. Ground 3 of the appeal is couched in the negative and cannot be resolved in the terms in which it was phrased namely that **the learned trial Judge erred in law and fact when he failed to hold that the termination of the plaintiff's contract of employment prior to its commencement was unlawful**. The learned trial Judge only held that the contract had been frustrated. However I agree that having held that there was no *consensus ad idem* on the issue of familiarisation with specific reference to the date when they were supposed to take place, it was erroneous for the learned trial Judge to hold that failure to familiarise himself by the plaintiff frustrated the contract and in effect justifying the repudiation of the contract by the respondent. As I have held above there was no frustration because there was no agreed date when the plaintiff would familiarise himself with the operations of the respondent company. Secondly, I have found that the plaintiff reported two weeks earlier before commencement of the performance of the contract. Ground 3 of the appeal is partially allowed to the extent that the learned trial Judge erred in law to find that the contract was frustrated by failure to provide for familiarisation visits since familiarisation visits was still possible by the time the appellant reported. By that time, the respondent had already repudiated the contract by e-mail which e-mail had not been read by the appellant.

As far as ground 4 is concerned, I have already held that the provisions of sections 91 and 92 of the Evidence Act were applicable to bar the admission of oral evidence as would contradict the written agreement between the parties on the date of commencement and on the condition precedent of the alleged familiarisation of the plaintiff/appellant with the operations of the defendants/respondents operations prior to commencement. The evidence does not even indicate that it was a condition precedent that that the plaintiff was supposed to familiarise himself before taking up the job. Ground 4 of the appeal is allowed.

Ground 5 of the appeal is that the learned trial Judge erred in law and fact when he held that the plaintiff should have taken Uganda shillings 2,000,000/= as one weeks' pay in lieu notice when actually the performance of the contract had not commenced.

Ground 5 of the appeal is allowed because the contract had not commenced and had been repudiated. Particularly, the issue should have been whether the repudiation of the

contract was in breach of the appellant's rights. According to the **Oxford Dictionary of Law 5th Edition** "repudiation" is:

> "An anticipatory breach of contract"

The matter ought to have proceeded on the premises of whether the respondent was entitled to repudiate the contract in the circumstances.

Finally ground 6 of the appeal is that the learned trial Judge erred in law and fact by holding as he did that the appellant was not entitled to any remedy.

As a matter of fact, the learned trial Judge held as follows:

> "Having found as I have that the contract was frustrated; I make no order as to special or general damages and interest. Each party to bear his/its own costs in the suit.

Indeed the learned trial Judge found no need to assess any damages because of the holding that the contract was frustrated. It was the logical flow of this holding that each party should bear its own loss because the contract was frustrated. Having found that the contract had not been frustrated, and that the contract had been repudiated by the respondent before it could commence, what is the remedy of the appellant?

The learned trial Judge never addressed his mind on the issue of damages and we therefore cannot consider it as a matter on appeal other than the principle in which he erred in finding that the contract had been frustrated. In most cases, it has often been held that where a contract has been frustrated, the parties would be discharged from further performance of the contract. It was therefore the premises upon which the learned trial Judge proceeded on for which he could be faulted. In **Fibrosa Spolka Akeyjna v Fairbairn Lawson Combe Barbour Ltd [1942] 2 All ER 122**, the House of Lords considered the principle that the loss lies where it is based on a rule of law in **Chandler v Webster [1904] 1 KB 493** by Lord Russell 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.

According to **WORDS AND PHRASES legally defined Third Edition Volume 4** the word "repudiation" means:

'Repudiation of a contract may mean that, having admittedly made the contract, you decide to break it and break it in such a way that you intend not to proceed with it. Another use of the word "repudiation" is where you say: "there never was a contract at all between us." If it turns out that there was a contract, the act of one party denying the existence of it is to repudiate it; but supposing it turns out that he was right and there never was a contract, then "repudiation" is used in a different sense from that in which it would be used when an existing contract is broken by a refusal to perform.' *Taller v Law Accident Insurance Society Ltd* [1936] 2 All ER 952 at 956, CA, per Greene LJ

'The word "repudiation" has... Led to difficulties because it is an ambiguous word constantly used without precise definition in contract law. I do not attempt an exhaustive list of the senses in which the word has been used, but I may give some instances. Repudiation of the contract is sometimes used as meaning that the defendant denies that there ever was a contract in the sense of an actual *consensus ad idem*... Short of this, one party, though not denying that there was the appearance of assent, might claim that the consent was vitiated by fraud or duress or mistake or illegality, and in that sense it is often said that he repudiated the contract... There is, however, a form of repudiation where the party who repudiates does not deny that the contract was intended between the parties, but claims that it is not binding because of the failure of some condition or infringement of some duty fundamental to the enforceability of the contract, it being expressly provided by the contract that the failure of condition or the breach of duty should invalidate the contract... Another case to which the word repudiation is applied is when the party, though not disputing the contract, declares unequivocally that he will not perform it and, admitting the breach, leaves the other party to claim damages... But perhaps the commonest application of the word "repudiation" is to what is often called the anticipatory breach of a contract where the party by words or conduct evinces an intention no longer to be bound and the other party accepts the repudiation and rescinds the contract. In such a case, if the repudiation is wrongful and the recession is rightful, the contract is ended by the rescission but only as far as concerns future performance. It remains alive for the awarding damages either for previous breaches for the breach which constitutes the repudiation...

> The difference between repudiating the contract and repudiating liability under it must not be overlooked. It is thus necessary in every case in which the word repudiation is used to be clear in what sense it is being used. *Heyman v Darwins Ltd* [1942] AC 356 at 378, 379, per Lord Wright."

I have carefully considered the evidence and it is clear that the respondent admits that there was a contract. Secondly the respondent repudiated the contract and the main reason being that the appellant had not undertaken the agreed familiarisation with the operations of the respondent company before commencement of the contract. I have already held that repudiation was wrongful because there was no clear agreement as to the time and schedule for the familiarisation of the appellant with the operations of the respondent company. Having rescinded the contract, what remained was the assessment of damages.

Exercising powers of the original court under section 16 of the Judicature Act; our duty is to assess damages for the first time instead of sending it back to the trial court for the assessment of damages. The suit was decided on 27th March, 2013 and the appellant's action in the High Court had been filed in 2008. The plaint is dated 30th May, 2008 and was filed in the High Court registry on 5th June, 2008. The written statement of defence of the defendant was lodged in the High Court registry on 25th June, 2008. It is now May 2019 more than 10 years later. It would prolong the litigation if we sent the suit back to the High Court for assessment of damages. Section 11 of the Judicature Act Cap 13 laws of Uganda 2000 provides that:

> "For the purpose of hearing and determining an appeal, the Court of Appeal shall have all the powers, authority and jurisdiction vested under any written law in the court from the exercise of the original jurisdiction of which the appeal originally emanated."

While the appellant's counsel addressed the court as if there was an error of law, and phrased ground 6 of the appeal that **the learned trial Judge erred in law and fact by holding as he did that the appellant was not entitled to any remedy**, we shall consider the matter as an original court in the exercise of original jurisdiction and the submissions of the counsel as submissions which could have been made before the High Court Judge.

The appellant claimed 31 months' salary at the rate of Uganda shillings 5,800,000/= per month giving him a sum of Uganda shillings 179,800,000/= as special damages. The

respondent opposes this claim on the ground that special damages have to be strictly proved. The respondent's counsel submitted that there was no evidence that the remaining contract was 31 months and that the contract was for an indefinite duration.

The crux of the matter is that the appellant resigned his job because of having signed another contract of employment which was to commence on 25th March 2008. He was gainfully employed by that contract and resigned but the employment contract he resigned for which was signed was repudiated before he could perform under it. He subsequently got another job in the year 2011 at a pay of Uganda shillings 4.5 million.

The appellant pleaded special damages of Uganda shillings 179,800,000/=. The particulars of special damage were loss of earnings at ZK Advertising Ltd. The defendant denied any knowledge of the plaintiffs/applicants previous employment. The matter proceeded by way of witness statements. In cross examination the plaintiff testified that it was an open ended contract. He relied on exhibit P2 that the period of 36 months was granted by his employers. He had applied for a loan which his former employer guaranteed. DW1 testified in cross examination that they had obtained information from the plaintiff about his previous position and the remuneration. They did not cross check with the plaintiff's previous employers, the job terms. The respondent was therefore aware that the plaintiff was gainfully employed elsewhere. The plaintiff did not get alternative employment for about three years according to his testimony which was not discredited. The plaintiff proved that he was earning Uganda shillings 5,800,000/= per month as salary. However, the plaintiff had a duty to mitigate his loss upon repudiation of his new employment contract. He testified that he tried to get alternative employment and did not succeed. In the circumstances, I would allow the claim for special damages claimed and discount 50% thereof because he would be paid in a lump sum. The plaintiff is awarded Uganda shillings 89,900,000/= as special damages for loss of earnings.

The plaintiff further claimed general damages for breach of contract. He lost his job and had to look for alternative employment. He was inconvenienced and never got another alternative employment until three years later. I would award the plaintiff a sum of Uganda shillings 25,000,000/= as general damages.

The above awards would attract reasonable interest as if the plaintiff deposited the money at a bank on a fixed deposit account at the rate of 14% per annum from 27th March, 2013 till payment in full.

As far as costs are concerned, under section 26 (2), of the Civil Procedure Act, costs follow the event and the appellant is awarded costs in this court and in the High Court.

Dated at Kampala the 7th day of ~~May~~ June, 2019

Christopher Madrama Izama

Justice of Appeal

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL No 218 OF 2013

(Coram: Geoffrey Kiryabwire; Ezekiel Muhanguzi; Christopher Madrama JJA)

ANATOLI BATABANE .....APPELLANT

VERSUS

SURGIPHARM LTD .....RESPONDENT

(Appeal from the Judgment of His Lordship Benjamin Kabiito dated 27th March 2013 in High Court Civil Suit No 121 of 2008)

JUDGMENT OF GEOFFREY KIRYABWIRE, JA

I have had the opportunity of reading the Judgment of The Hon. Mr Justice Christopher Madrama, JA in draft and I agree with it and have nothing more useful to add.

Dated at Kampala This 7th day of June, 2019

Justice Geoffrey Kiryabwire

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(Coram: Kiryabwire, Muhanguzi & Madrama, JJA)

CIVIL APPEAL NO. 218 OF 2013

ANATOLI BATABANE.....APPELLANT

VERUS

SURGIPHARM LTD.....RESPONDENT

JUDGMENT OF EZEKIEL MUHANGUZI, JA

I have had the benefit of reading in draft the judgment of my learned brother Hon. Mr. Justice Christopher Madrama, JA.

I agree with the reasons advanced and the orders proposed by him and have nothing more useful to add.

Dated at Kampala this 7th day of June ...2019.

.....

Ezekiel Muhanguzi
Justice of Appeal