THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

COMMERCIAL COURT DIVISION

HIGH COURT CIVIL SUIT NO. 106 OF 2011

LILIA K. MRIMUBI::PLAINTIFF

VERSUS

1. **ONGEZA GENERAL SERVICES LTD }**
2. **JAMES KAWUMA }**
3. **IRENE MATOVU }::::::::::::::DEFENDANTS**

BEFORE HON. LADY JUSTICE HELLEN OBURA

JUDGMENT

The plaintiff brought this action against the defendants jointly and severally. She sought recovery of Ushs. 48,200,000 (Uganda Shillings Forty Eight Million, Two Hundred Thousand) as the sum due to her, arising out of several investment agreements executed by the 1st defendant and guaranteed by the 2nd and 3rd defendants. The plaintiff also claimed contractual interest of Shs. 92,656,000/= on the principle sum as at 7th March 2011, additional interest of 8% per month on the principal sum, general damages and costs of the suit.

The plaintiff contended that the defendants failed to repay the plaintiff under all the investments agreements executed between them as they became due thereby depriving the plaintiff of the use of her monies. Consequently, it is averred that the plaintiff suffered and continues to suffer from loss of income.

The defendants were served with summons to file a defence by way of substituted service but did not respond to them. The plaintiff then applied for and obtained a default judgment from this court. After that the suit was set down for formal proof.

The plaintiff was the only witness who adduced evidence to prove her claim. She testified that she was introduced to the 1st defendant company by a friend. Further, that at that time the company was operating like a micro-finance institution which was taking deposits and lending to people and at the same time had a savings scheme under which it would take money from people and pay back with an agreed interest.

She further testified that she entered into three investment agreements with the 1st defendant company at different times. The first agreement was for Shs. 5,200,000/= for a period of one year at an agreed interest of 10% per month payable on every 6th day of the month failure of which a penalty of 1% would be imposed. As proof of that transaction, she tendered into evidence Exhibit P1 being an investment agreement they signed on 6/08/2008, a receipt issued by the 1st defendant for the money (exhibit P2) and a photocopy of an undated cheque of Shs. 5,200,000 (which was marked for identification as P1D3).

The second agreement was signed on 07/02/2009 for a sum of Ushs 7,000,000/= at an interest rate of 8% per month. This agreement was admitted in evidence and marked Exhibit P3. The original receipt issued by the 1st defendant in respect of that amount was marked Exhibit P4.

The third agreement was signed on 30/03/2009 for the amount of Shs. 30,000,000/= for a period of one year at an interest rate of 8% per month. An original copy of the agreement was admitted in evidence as Exhibit P5 and the receipt issued by the 1st defendant was admitted and marked Exhibit P6.

The plaintiff referred to clause six of the respective agreements which stated that the 2nd and 3rd defendants and a one Olive Ntundubaire personally guaranteed the agreements.

She testified that the 1st defendant paid her the monthly interest on all the amounts deposited with it promptly for over one year but in December 2009 they started defaulting and she went to ask whether she could date and bank the cheques to recover the principal amount under the first agreement which had expired on 6th August 2009.

It was her testimony that the defendants kept stopping her from banking the cheque until she was forced to date and bank the same and it was returned to her with an endorsement "Refer to Drawer". She then opened a case with the police at the Central Police Station. Photocopies of Police Form 2B and Police Form 17A were admitted for identification as PID1 and PID2 respectively.

The plaintiff further testified that when she realized that payments were no longer forthcoming from the defendants, she requested them to confirm the amounts she had invested in the company. She was favoured with a response in writing which was admitted in evidence as Exhibit P7. The total amount invested as stated in that letter was Shs. 48,200,000/= and the interest at the time was Shs. 6,000,000/=. It is noteworthy that the plaintiff testified that the amount of Shs. 48,200,000/= included a sum of Shs. 6,000,000/= invested by her but whose agreement she had misplaced.

She also tendered in evidence a document (Exhibit P8) which she claimed was given to her by the 1st defendant to confirm the total interest due as at 13th October 2009. She went on to testify that when she sensed that things were going wrong she wrote a letter (Exhibit P9) to the defendants requesting for a refund of the principal amount she had invested. She had decided to forfeit the accrued interest.

The plaintiff concluded her evidence by stating that the defendants later moved from the office where they were located and her efforts to trace them failed. She then approached Synergy Solicitors & Advocates (her current lawyers) in December 2010 and they wrote a letter dated 10th January 2011 (exhibit P10) to the 1st defendant. That letter was responded to by the lawyer for one of the guarantors Ms. Olive Ntundubaire (Exhibit P11).

She reiterated that her claim is for the Shs. 48,200,000/= she had invested as well as the accrued interest having last received interest in November 2009.

Counsel for the plaintiff filed written submissions in which he addressed court on three issues, namely;

1) Whether the investment agreement between the plaintiff and the defendants are valid.
2) Whether the defendants breached the investment agreement and if so who is liable to pay the plaintiff.
3) What remedies are available to the plaintiff?

From the documents relied upon by the plaintiff, especially the investment agreements (Exhibits P1, P3 and P5), and the receipts issued to the plaintiff by the 1st defendants (Exhibits P2, P4 and P6) together with photocopies of the cheques issued to the plaintiff by the 1st defendant (PID3), there is no doubt that the plaintiff entered into investment agreements with the 1st defendant.

As regards the first issue on validity of the investment agreements, ***Black's Law Dictionary 7th Edition*** defines an agreement as *a mutual understanding between two or more persons about their relative rights and duties regarding past or future performances; a manifestation of mutual assent by two or more persons.*

Black's Law Dictionary (supra) also defines an investment contract as

> ***"A contract in which money is invested in a common enterprise with profits to come solely from the efforts of others; an agreement or transaction in which a party invest money in expectation of profits derived from the efforts of a promoter or other third party..".***

I have looked at the three investment agreements and they all appear to have been signed by the parties and witnessed. The 1st defendant agreed to pay the plaintiff some profits in the form of agreed interest. To my mind in the absence of any evidence showing factors that vitiate a

contract, I find that they pass the test of a valid agreement. In any case, correspondences from the 1st defendant (particularly Exhibit P7) confirmed that the plaintiff indeed invested some money with the 1st defendant. In the circumstances, this court has no reason to doubt the validity of the agreements the parties entered into. For that reason, the first issue is answered in the affirmative.

On the second issue which I will consider concurrently with the issue of remedies available, it is the plaintiff's case that the 1st defendant breached the agreements by failing to pay the agreed interest and refunding the principal amounts after the contract period expired.

A breach of contract was defined in the case of ***Haji Asadu Lutale v Michael Ssegawa HCT-OO-CC-CS-292-2006*** as *"a breaking of the obligation which a contract imposes, which confers a right of action for damages on the injured party. It also entitles him to treat the contract as discharged if the other party renounces the contract or makes performance impossible, or totally or substantially fails to perform his promises"*.

The plaintiff testified that the 1st defendant did not pay interest as agreed and did not also refund the principal amounts invested when they fell due. She however testified that interest was paid on all the principal amounts until December 2009 when the 1st defendant started defaulting. She later contradicted herself by stating that she last received interest in November 2009. I will deal with the issue of breach of payment of interest later in this judgment.

However, I am satisfied that a case of breach of the investment agreements has been proved in so far as payment of the principal amounts on the 1st, 2nd and 3rd investments are concerned. The money invested by the plaintiff should have been refunded to her after the expiry of the one year contract period. This was not done. I therefore find that the plaintiff has proved on a balance of probability that the 1st defendant breached the investment agreements by failing to repay on the due dates the amounts she invested under Exhibits P1, P3 and P5.

Consequently, the plaintiff is now entitled to recover the sums invested from all the defendants jointly and severally. This is because under clause 6 of the respective agreements the 2nd

defendant, the 3rd defendant and a one Ms. Olive Ntundubaire, who for unknown reason was not joined as a defendant, were named as guarantors whose liability would rank *pari passu* (proportionally) with that of the company jointly and severally.

However, I wish to point out that the amount claimed being special damages can only be awarded upon passing the test on the well established principle as laid down in a number of authorities that special damages must be pleaded and strictly proved by the claimant. See: ***Eladam Enterprises Ltd v S.G.S (U) Ltd & Others Civil Appeal No. 20 of 2002 [2004] UGCA 1*** as per Byamugisha JA.

The plaintiff pleaded that she invested a total of Shs. 48,200,000/= under four separate agreements but at the trial she stated that an agreement and other documents in respect of Shs. 6,000,000/= had been misplaced. She was therefore only able to strictly prove that she invested the sum of Ushs. 42,200,000/= which I find that she is entitled to recover from the defendants jointly and severally.

As regards the alleged investment of Shs. 6,000,000/= whose documents are said to have been misplaced, this court is not at all convinced that all the documents relating to an investment of Shs. 6,000,000/= could just be misplaced like that and the plaintiff would not bother to secure a copy of the documents especially the agreement from the 1st defendant when they still had a good working relationship. For that matter, I would reject that claim.

On the allegation of breach of the terms of the agreement on payment of interest, the plaintiff in her pleadings sought for recovery of a total interest of Ushs. 92,656,000/= as at 7th March 2011. However, counsel for the plaintiff submitted that the plaintiff was entitled to interest for 50 months which he calculated from the date the contracts were signed up to the time he filed his submissions. The total interest then according to his calculation amounted to Shs. 200,360,000/=.

I find that this was a serious departure from the terms of the contract and the plaintiff's pleadings which this court cannot allow. The contracts, as I will later elaborate on in this

judgment, were strictly for a period of one year. This court cannot therefore allow interest beyond the contract period.

I am fully persuaded by the decision in the case of ***Westlink Uganda Limited v Magezi Charles H.C.C.S No. 140 of 2007*** which came up for formal proof before ***Bamwine J***. (As he then was) after a default judgment had been entered like in the instant case. The plaintiff sought to recover interest of 20% per month beyond the agreed contract period of one month and the learned Judge while disallowing the interest stated as follows:

> ***"…., it is clear to me from the records that the loan transaction had a specific period within which to be paid with interest. The parties agreed that for a period of one month the defendant would pay interest on the loan amount at the rate of 20%. This in practical terms means that one month after the loan transaction the plaintiff was entitled to a refund to him of the Shs. 2,000,000/= with a profit of Shs. 400,000/=. In those circumstances, the plaintiff's claim which includes purported interest beyond the contractual period cannot be accepted as at the end of the contract period of one month the contract elapsed and the plaintiff was entitled to sue for breach of contract of the loan amount……..if the plaintiff wants interest beyond the contract period, the solution lies in including a penalty clause in the loan agreement for delayed payments…".***

In the instant case, the agreed interest was to be within the contract period of twelve months (one year). However, clause 2 (a) of the agreements provided that the investment sums were to be repaid to the plaintiff at the end of the contract period *together with charges thereon, commission and all other expenses, including a penalty fee of 1% on top of the monthly charge on the total installment due (principal and charges) in arrears of more than seven days*.

The import of this provision is not at all clear to me as the construction of that clause was rather vague. This is because as stated in that clause, the penalty fee of 1% was to be charged *on top of the monthly charge on the total installment due which is composed of principal and*

charges. In the first place the monthly payment of interest as agreed in clause 3 (a) of the respective agreements that could be referred to as installments did not include the principal amount. So which installment was being referred to? I really do not quite understand what the penalty fee of 1% was being charged on and following the principles that govern interpretation of contracts, this court cannot fill in the gaps by assuming or dictating what the parties could have agreed.

For, as cautioned by ***LS Sealy & RJA Hooley*** in their book, ***TEXT AND MATERIALS IN COMMERCIAL LAW, Butterworth's*** at page 391:-

> ***"In commercial transactions, the duty of the court is simply to give effect to the contract, and not to dictate to the parties what the court thinks they ought to have agreed, or what a person (reasonable or otherwise) might have agreed if he had read the contract and addressed his mind to the problem which, in the outcome has arisen".***

In accordance with this principle, this court is under a duty to give effect to what the parties agreed and not what court thinks should have been agreed. Unfortunately, I am unable to comprehend what they meant in this particular clause because it is vague and contradicts the provisions of the other clauses which are clearer.

In addition, the claim for penalty fee was never pleaded although the plaintiff alluded to it in passing in her evidence. Counsel for the plaintiff did not also address court on it but just chose to argue without any basis that interest continues to accrue till payment in full.

In the premises, I am unable to conclude from that provision that interest plus a penalty fee of 1% per month was to run until payment in full as that was not expressly provided for in the agreement. The more clear provision is that the facility would be available for duration of 12 months and the interests were payable within that period.

In any event, if at all the plaintiff wanted to enforce that clause on penalty fee it should have been specifically pleaded and strictly proved because it falls under special damages. Since it was never pleaded, I decline to consider it.

In the premises, the submission by the plaintiff's counsel for the payment of interest for 50 months is rejected as it lacks any basis. I will in the circumstances only consider contractual interest for the agreed period of 12 months.

Under Exhibit P1 an interest rate of 10% per month was to be applied on Ushs 5,200,000/= for a period of one year with effect from 6th August 2008. The defendants were supposed to pay the plaintiff interest of Ushs. 520,000/= every month. The interest payable under Exhibit P1 for a period of 12 months was supposed to be Ushs. 6,240,000/=. It is the plaintiff's evidence that the interest under Exhibit P1 had been paid up to the time when the agreement expired in August 2009. Due to my earlier finding and conclusion that there was no requirement for payment of interest beyond the contract period, I find that there is no interest due to the plaintiff under that agreement. In the premises there was no breach of payment of interest under the 1st investment agreement.

Under Exhibit P3 an interest rate of 8% per month was to be applied to Ushs 7,000,000/= for a period of 12 months with effect from 7th February 2009. The defendants were supposed to pay the plaintiff interest of Ushs. 560,000/= every month. The interest payable under Exhibit P3 for a period of 12 months was supposed to be 6,720,000/=. However, as I have already noted above, the plaintiff's evidence on when exactly the 1st defendant stopped paying interest was quite contradictory.

Be that as it may, Exhibit P9 that was written by the plaintiff on 1st December 2009 indicates that she was already complaining of non-payment of the accrued interest as at that date. In view of that exhibit, I will take it that interest was paid up to November 2009 as opposed to December 2009. That means interest was paid for a period of 9 months leaving the agreed interest outstanding for a period of 3 months. The plaintiff would be entitled to recover interest for the remaining 3 months which would be Shs. 560,000/= p.m. x 3 = 1,680,000/= and it is awarded to her.

Under Exhibit P5 an interest rate of 8% per month was to be applied on Ushs. 30,000,000/= for a period of one year with effect from 30th March 2009. The defendants were supposed to pay the plaintiff interest of Ushs. 2,400,000/= every month. The interest payable under Exhibit P3 for a period of 12 months was supposed to be Ushs. 28,800,000/=. It was PW1's evidence that interest was paid up to November 2009. That means interest was paid for 8 months and what remains to be paid is interest for 4 months only. For that reason, I would allow interest for the 4 months which is a sum of Ushs. 9,600,000/= derived by multiplying 2,400,000 by 4 months.

The plaintiff also prayed for interest of 8% per month on the principal amount. I have considered the general principle for award of interest as laid down in ***Sietco v Noble Builders SCCA No. 31 of 1995*** which is premised on the fact that the defendant has taken and used the plaintiff's money and ought to compensate the plaintiff for the same.

Based on that principle, I agree that in the instant case the 1st defendant being in the business of money lending where presumably it made profits on the plaintiff's money should compensate her.

Be that as it may, I find the interest rate of 8% per month prayed for by the plaintiff harsh and unconscionable and I decline to award it. I will instead award the plaintiff interest on the principal amount at the rate of 25% per annum from the date the suit was filed until payment in full.

The plaintiff also sought for general damages for breach of the contracts. From the plaintiff's evidence, she no doubt suffered inconveniences and hardships in trying to recover her money. At one occasion the cheque she had been given as security was dishonored when she presented it for payment and she had to commence criminal proceedings which did not yield any result as the case was dismissed for want of prosecution.

However, taking into account the fact that I have already awarded some interest for the contract period and from the date the suit was filed till payment in full, I find an award of

nominal damages of Shs. 5,000,000/= just and fair in the circumstances and it is awarded to the plaintiff.

Interest of 8% per annum is awarded on the nominal damages from the date of this judgment until payment in full.

In the result, judgment is confirmed for the plaintiff against the defendants jointly and severally with orders that:-

(a) Ushs. 42,200,000/= being the principal amount invested with the 1st defendant be paid to the plaintiff.

(b) Accrued interest under the 2nd and 3rd investment agreements within the contract period amounting to a total of Ushs. 11,280,000/= be paid to the plaintiff.

(c) Interest of 25% p.a on (a) above be paid to the plaintiff from the date this suit was filed till payment in full.

(d) Ushs. 5,000,000/= be paid to the plaintiff as nominal damages.

(e) Interest at 8% per annum be paid on (d) above from the date of this judgment until payment in full.

(f) Costs of the suit are awarded to the plaintiff.

Before I take leave of this matter, I wish to point out that this court took note of the rate of interest of 8% p.m. the parties agreed to which ordinarily in my view would be harsh and unconscionable since it translates to 96% p.a. This court is aware of the discretion given to it by the provision of section 26 of the Civil Procedure Act Cap. 71 (CPA) which provides that where an agreement for the payment of interest is sought to be enforced and the court is of the opinion that the rate agreed to be paid is harsh and unconscionable and ought not to be

enforced by legal process, the court may give judgment for the payment of interest as it may think just.

This court is also aware of the case of ***Attorney General v Sam Semanda Supreme Court Civil Appeal No. 8 of 2006*** where *Tsekooko, JSC* noted that under section 26 of the Civil Procedure Act, unless interest is provided by agreement and is not harsh and unconscionable, courts exercise discretion in awarding interest.

However, it must be noted that I deliberately chose not to exercise my discretion to reduce the interest rate because the 1st defendant had paid the plaintiff interest at the same rate over a period of time and the interest that I allowed were for only a few months. I therefore did not see any reason why I should reduce the same since that appeared to be fair in the circumstances of this case. I would have had a different view if the 1st defendant had not paid any of the interest or if I had allowed interest for a longer period of time.

Dated this 6th day of November 2012.

Hellen Obura
JUDGE

Judgment delivered in chambers at 3.00 pm in the presence of Mr. Ronald Tusingwire for the plaintiff who was also present.

JUDGE
06/11/12