

**THE REPUBLIC OF UGANDA**

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

**(COMMERCIAL DIVISION)**

**HCT - 00 - CC - CA - 29 - 2010**

**(Appeal from the Decree of His Worship Duncan Sande Magistrate Grade 1 at the Entebbe Chief Magistrates Court in Civil Suit No 60 of 2009)**

**NATIONAL MEDICAL STORES ..... APPELLANT**

**Versus**

**PENGUINS LTD. .... RESPONDENT**

**BEFORE: THE HON. MR. JUSTICE GEOFFREY KIRYABWIRE**

**J U D G M E N T**

This appeal arises from the decree passed by the Entebbe Chief Magistrate's Court in Civil Suit No. 60 of 2009 on 26<sup>th</sup> November 2010 by His Worship B.N D Sande Magistrate Grade one.

The brief background to this appeal is that the respondent in this case (as Plaintiff) filed a suit against the appellant (as Defendant) at Entebbe Chief Magistrate's Court in Civil Suit No. 60 of 2009 for the sum of Ushs 13,914,088/= being unpaid Value Added Tax (VAT) under a clearing agency agreement.

The respondent denied the said claim on the ground that the said amount was not charged with the invoices to which it related and as thus was not due or payable.

A decree was passed against the appellant in the said suit on 26<sup>th</sup> November 2010 in which the appellant was ordered to pay special damages of Ushs 13,914,088/=, general

damages of Ushs 25,000,000/= interest at the rate of 25% p.a on both the general and the special damages, costs and Ushs 200,000/= as a refund on security for costs paid by the respondent in MA No. 63 of 2010 arising from the said suit.

The appellant appealed to this court against the said decree on the following grounds;

1. The Learned trial Magistrate erred in law and fact in awarding the aggregate sum of Ushs 59,535,362/= special damages, general damages and accrued interest as at the date of judgment in excess of his pecuniary jurisdiction.
2. The learned trial Magistrate erred in law and fact in awarding the sum of Ushs 13,914,088/= special damages, which was not proved.
3. The learned trial Magistrate erred in law and fact in awarding the excessive sum of Ushs 25,000,000/= general damages without proof thereof.
4. The learned trial Magistrate erred in law and fact in awarding interest at the very high rate of 25% p.a. on special damages.
5. The learned trial Magistrate erred in law and fact in awarding interest on the sum of Ushs 25,000,000/= at the very high rate of 25% p.a. and from the date of filing until payment in full.

At the hearing of this appeal, the appellant was represented by Mr. Albert Byamugisha while the respondent was represented by Mr. Akampulira.

I will consider ground one and ground three of this appeal together as they relate to jurisdiction.

It is clear from the record that the magistrate was a Grade one Magistrate. Counsel for the appellant submitted that S. 207(1) (b) of the Magistrates Courts Act (MCA) as amended by Act No. 7 of 2007 provides that the pecuniary jurisdiction of a Grade one magistrate is limited to Ushs 20,000,000/= and therefore, by awarding Ushs 59,535,362/= as special damages, general damages and accrued interest, as at the date of judgment, the trial Magistrate exceeded his pecuniary jurisdiction.

Counsel for the appellant relied on the case of **MAKULA INTERNATIONAL V HIS EMINENCE CARDINAL NSUBUGA & ANOR** CA NO. 4 OF 1981 (CA) and submitted that a court of law cannot sanction what is illegal. Counsel prayed that the court should set aside the award as it was illegal.

Counsel for the appellant further submitted that the interest is taken into account in computing the sum in the decree. He relied on the case of **ABBEY SEMAKULA V ELDAD TUBARENZYA** [1996] 2 KALR 22 for that submission. Counsel however submitted that even if the interest which had accrued at the date of judgment is to be excluded, the award of Ushs 38,914,088/= for special damages and general damages is in excess of the pecuniary jurisdiction.

On this ground, counsel for the respondent submitted that the respondent in its plaint claimed Ushs 13,914,088/= as special damages and therefore, that amount as at the time of filing the suit falls within the pecuniary jurisdiction of the Magistrate. He submitted that the appellant misconstrued the law when it confused pecuniary jurisdiction with excessive damages.

Counsel for the respondent further submitted that objection to jurisdiction should be made at the commencement of the trial. He relied on S. 16 of the Civil Procedure Act and argued that in order to succeed on this ground; the appellant must show that he objected to the jurisdiction before the trial court and that there was a resultant failure of justice occasioned.

Counsel for the respondent also submitted that the general damages at the time of trial were unknown and as such could not form part of the value of the subject matter. In addition to this, counsel submitted that Interest cannot be considered in law as part of the subject matter for purposes of pecuniary jurisdiction. Counsel cited the authority of **UGANDA COMMERCIAL BANK LTD V YOLAMU TWALA** [HCCS NO 16 OF 1998 REPRODUCED IN (1999) KALR 929 AT 933] WHERE **Tinyinondi J** (as he then was) held that interest on the decretal sum is not part of the subject matter for the purposes of determining pecuniary jurisdiction and filing fees.

Counsel for the respondent, submitted in the alternative that, should the court be inclined to find that the damages were excessive; the court has powers to reduce the damages to the level that would adequately compensate the respondent.

I have considered the submissions of both counsel and the authorities cited in relation to both grounds for which I am grateful.

The issues for determination raised by these grounds of appeal are; whether the trial Magistrate had powers to award damages and interest over and above the pecuniary jurisdiction, and secondly, whether the damages awarded by the Magistrate were excessive.

I will first consider whether the Magistrate, considering the subject matter of the suit, had the jurisdiction to try the suit in the first place.

The principle of law is that jurisdiction is a creature of statute. In the case of **BAKU RAPHAEL OBUDRA & ANOR V AG** (SCCA No. 1 of 2005), the Supreme Court found that courts are established directly or indirectly by the constitution and that their respective jurisdictions are accordingly derived from the constitution or other laws made under the authority of the constitution.

Furthermore, in the case of **ATHANANSIAS KIVUMBI V HON. EMMANUEL PINTO** (Const Pet No.5 of 1998), the court found that a court can not confer jurisdiction upon itself and where a court that has no jurisdiction entertains the matter, any proceedings arising therefrom are a nullity.

Section 207(1) (b) MCA [as amended by Act No. 7 of 2007] provides for the pecuniary jurisdiction of a Magistrate Grade 1 as follows;

*“(1) Subject to this section and any other written law, the jurisdiction of magistrates presiding over magistrates courts for the trial and determination of causes and matters of a civil nature shall be as follows—  
(b) a magistrate grade I shall have jurisdiction where the value of the subject matter does not exceed twenty million shillings;”*

In addition to this, S. 4 of the Civil Procedure Act (Cap 71) provides as follows;

*“Pecuniary jurisdiction.*

*Except insofar as is otherwise expressly provided, nothing in this Act shall operate to give any court jurisdiction over suits the amount or value of the subject matter of which exceeds the pecuniary limits, if any, of its ordinary jurisdiction.”*

In paragraph 3 of the plaint it is stated that,

*“The plaintiff brings this suit, inter alia to recover Ushs 13,914,088/= (thirteen million, nine hundred fourteen thousand eight shillings only) from the defendant plus general damages arising out of breach of contract, interest thereon and costs.”*

*The plaintiff, in the plaint also prayed for; special damages as claimed in paragraph 5 of the plaint, general damages, interest on the decretal amount at the rate of 25% per annum from the date of judgment till payment in full and any other relief court deems fit.*

I agree with counsel for the respondent that the general damages were not quantified and therefore, could not be used as a basis for calculating the value of the subject matter. The value of the subject matter as noted in the plaint was the sum of Ushs 13,914,088/= which fell within the pecuniary jurisdiction of the Magistrate Grade one. I therefore find that the trial magistrate had the jurisdiction to entertain the suit.

What is left for determination is whether the award made by the Magistrate was in excess of his pecuniary jurisdiction.

The magistrate made the following orders in the judgment,

- a) Special damages of Ushs 13,914,088/=*
- b) .... general damages of Ushs 25,000,000/= would suffice*

- c) Interest rate of 25% per annum on (a) above from 25<sup>th</sup> October 2007 till payment in full is awarded.
- d) Interest rate of 25% per annum on (b) above from 25<sup>th</sup> October 2007 till payment in full is awarded.
- e) Costs of the suit to be paid by the defendant to the plaintiff
- f) Ushs 200,000/= being security for costs paid in MA No. 63 of 2010 to be refunded to the representative of the plaintiff.”

It is a settled principle of law is that costs are not considered in determining the pecuniary jurisdiction (**ABBEY SEMAKULA v. ELDAD RUBARENZYE** [1996] 2 KALR 22).

With regard to damages on the other hand, the law is that a magistrate cannot award damages over and above the pecuniary jurisdiction. In the case of **JOSEPH KALINGAMIRE V. GODFREY MUGULUSI** [2003] KALR 408, at 410, **Musoke-Kibuuka J** found as follows,

*“It follows, therefore, that when a Grade one magistrate makes an order awarding general damages the sum of which exceeds the monetary jurisdiction of Ushs 2,000,000/= (now Ushs 20,000,000/=) set by the law in S. 219 of the Magistrate’s Court’s Act 1970 (now S. 207(1) (b) MCA as amended by Act No. 7 of 2007), such magistrate would be exercising jurisdiction not vested in him.”*

The learned Judge further found that,

*“In **MUBIRU & ORS V KAYIWA** (1979) HCB 212 (CA), the Court of Appeal of Uganda held that, “an order made without jurisdiction is a nullity”. In the instant case, since the order of the trial magistrate awarding general damages in the sum of Ushs 2, 400,000/= to the plaintiff was made without appropriate jurisdiction. It was a nullity ab-initio.”*

Basing on the authority above, the order of the trial magistrate awarding general damages of Ushs 25,000,000/= in excess of the pecuniary jurisdiction of a grade one magistrate was erroneous in law and, is a nullity. Ground one of this appeal therefore succeeds.

Having found that the award of general damages of Ushs 25,000,000/= was erroneous, it follows that the general damages awarded were excessive.

**Ground two;** *the learned trial Magistrate erred in law and fact in awarding the sum of Ushs 13,914,088/= special damages, which was not proved*

In relation to this ground, counsel for the appellant submitted that, at the scheduling, the parties agreed that they would rely on tax invoices and photocopies of the same were produced as agreed documents, and relying on the case of ADMINISTRATOR GENERAL V BWANIKA JAMES & 9 ORS [2005] 1 ULSR 184, counsel submitted that the contents of the tax invoices disposed of the issue at trial; *“whether the plaintiff rendered VAT invoices and for what amounts for the defendant to pay”*.

Counsel appellant further submitted that indeed the Magistrate rightly found that the defendant was invoiced to pay, in fact demanded to pay with VAT component as by agreement, but instead chose to pay the invoices without a VAT component.

Counsel for the appellant submitted that, the trial magistrate however erred when he found that,

*“Upon demand of Ushs 27,870,314, the defendant paid Ushs 13,956,226/= and the balance due was Ushs 13,914,000/= the plaintiff should recover this unpaid amount from the defendant...”*

Counsel for the appellant argued that this finding was wrong because it was not borne out of facts.

According to counsel for the appellant, VAT was only payable under a VAT invoice rendered by the plaintiff to defendant and that it was the unchallenged testimony of Edith Malyanti Kakuba (DWI) that, after reconciliation, the total invoiced amount was 204,874,492/=, the appellant had paid Ushs 190,918,225/= and the difference was 13,956,226/= which amount was later paid. Counsel for the appellant thus submitted that the trial magistrate erred in awarding special damages that were not proved.

Counsel for the appellant further submitted that the magistrate erred in relying on a VAT assessment which attached a VAT audit report (Exhibit P2). According to counsel, Hannington Katarikawe (PW1) testified that he would invoice the appellant in order to get paid for services rendered. Counsel for the appellant submitted that according to S. 29(1) of the VAT Act, VAT is only payable on an original tax invoice rendered at the time of supply, and that the VAT audit report was not such a tax invoice but was evidence of the respondent's income tax and VAT liability as at 18<sup>th</sup> July, 2007. Furthermore, that the respondent pleaded that it would produce copies of tax invoices to prove special damages but none were produced.

Counsel for the appellant argued that the VAT computation included months of August 2002 and September 2002, which accrued before the date of the agreement (28<sup>th</sup> January 2003). Furthermore, that the VAT audit report's credibility is doubtful due to the fact that Mwesigwa Deborah (PW2) testified that the plaintiff's returns were not correct and that it is correct to say that the plaintiff was evading tax by not declaring all the income, that the total figure of tax due included what he was not declaring. Counsel for the appellant thus submitted that the award of special damages on the basis of the VAT audit report should have been rejected for having been brought by a tax evader. This is a strong allegation but I need to point out that the evidence on which counsel for the appellant is relying for this submission is not on the record.

In reply, counsel for the respondent submitted that the agreement between the appellant and respondent was clear in that the appellant was to pay Vat of 18% on the agency fee charged and this position was never disputed at trial. Furthermore, that an audit carried out between 26<sup>th</sup> June 2007 and 10<sup>th</sup> July 2007 found that all the money that the respondent received from the appellant was exclusive of VAT, and that as a result, the respondent demanded for a sum of Ushs 13, 914,088/=, which was the balance of the total sum of Ushs 27,870,310/=, that represented the total outstanding amount in tax arrears.

Counsel for the respondent further submitted that the evidence of Mwesigwa Deborah an employee of URA was clear that according to the audit findings, the plaintiff used to invoice the defendant but the defendant would pay the invoice value without VAT and



therefore, the magistrate was justified in awarding the special damages of Ushs 13, 914,088/=.

I have considered the arguments put forward by counsels, the evidence and the authorities in relation to this issue for which I am grateful.

The trial Magistrate in resolving the issue of “*Whether the plaintiff rendered VAT invoices to the defendant and for what amount*” relied heavily on the evidence of PW1 who testified that the plaintiff did issue original invoices to the defendant company for payment, and on the invoices which were paid without a VAT component (Exhibit D3). The magistrate found that the defendant chose to pay the invoices (Exhibit D3) without a VAT component.

With due respect, it is not true as submitted by counsel for the appellant, that the magistrate relied exclusively on the VAT audit report (Exhibit P2) which was not a tax invoice and whose credibility was doubtful to determine the amount due to the plaintiff from the defendant. The trial Magistrate from the record in his finding in relation to this issue clearly relied on the invoices which were paid without a VAT component (Exhibit D3), that were adduced in evidence by the defendant (the current appellant). This ground of appeal therefore fails.

Both parties argued ground four and five together, and therefore, I will also consider them in the same manner. Counsel for the appellant submitted that, the trial magistrate erred in law and fact in awarding interest at a very high rate of 25% p.a. on both special and general damages. Counsel relied on the case of **CAIRO INTERNATIONAL BANK V SADIQUE M. JANJUA** (SCCA No. 3 of 2010) and submitted that the award of interest at the rate of 25% p.a. was without evidence to justify it and so was erroneous.

Counsel for the appellant also submitted that in the plaint, the respondent prayed for interest on the decretal sum at the rate of 25% per annum from the date of judgment until payment in full. That the trial magistrate erred in awarding interest on special damages from the 25<sup>th</sup> of October 2007 until payment in full, yet the pleadings had not been amended. Counsel submitted that in law, the award of interest on general

damages is from the date of judgment. Counsel cited the case of **MUKISA BISCUIT MANUFACTURING CO. LTD V WEST END DISTRIBUTORS LTD (NO.2)** [1970] EA 469.

Counsel for the appellant submitted that the respondent did not prove its entitlement to damages. Furthermore counsel for the appellant submitted that, the breach if any was remedied before the suit was filed and therefore, the respondent was at best entitled to nominal damages with interest at court rate from 26<sup>th</sup> November 2010.

In reply to this ground, counsel for the respondent submitted that, under S. 26(2) of the Civil Procedure Act, the award of interest is a matter of discretion of the trial court. Counsel referred to the authority of **MILLY MASEMBE V SUGAR CORPORATION AND KAGIRI RICHARD** (SCCA No. 1 of 2000) in this regard.

Furthermore, the counsel for the respondent also referred to the case of **URA V. STEVEN MABOSI** (SCCA No. 26 of 1995) where Karokora JSC (as he then was) found that interest at the rate of 30% was found not to be excessive. Counsel also submitted that an appellate court will not interfere with the discretion of a trial court in awarding damages unless it is satisfied that the trial court acted on wrong principles of law or misapprehended the facts or has made an estimate of damages that was wholly erroneously. He relied on the case of **SIMON LOBIA V MUTWALIBI MUKUNGU** (CACA NO.36 OF 1999) reported in [2000] KALR 598 for this position of the law.

The law relating to interest on damages is well settled. Section 26(2) of the Civil Procedure Act provides for the power of the court to award interest. According to that section,

*“Where and insofar as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.”*

The award of interest is a matter of discretion of the court. This principle is laid down in several authorities. In the case of **HARBUTT'S 'PLASTICINE' LTD V WAYNE TANK & PUMP Co. LTD** [1970] 1 QB 447, **Lord Denning** found that,

*“An award of interest is discretionary. It seems to me that the basis of an award of interest is that the defendant has kept the plaintiff out of his money; and the defendant has had the use of it himself. So he ought to compensate the plaintiff accordingly.”*

In the case of **DIPAK EMPORIUM V BOND'S CLOTHING** [1973] EA 553 (CA) **Sir William Duffus** at 558 found that,

*“...our law on interest is based only on S. 26 of the civil Procedure Code (now S.27 CPA). This section does, undoubtedly, give the trial court a very wide discretion in awarding interest and our judgments in the Prem Lata case and in the Mukisa case do not cover all the possible situations that might arise. They do however lay down certain principles which should be followed.*

*In this case, with respect, the trial judge nowhere considered the question of interest and it appears possible that his award of interest on damages as from the date of the filing of the plaint may have been done per incuriam. The judge made no findings in his judgment on damages nor did he decide on what principles these were to be assessed... this is the type of case where the plaintiff's may have been able to prove a definite, fixed and ascertainable loss which may have justified an award of interest as from the plaint was filed but there were no findings in the judgment to support such a decision. In my view, the award of interest on damages as from the date the plaint was filed was wrong and can not be supported either from the finding in the judgment nor from the ascertained facts on record.”*

I agree with the finding of the court in that case. Considering the judgment of the trial magistrate in this case, and the facts on record, there is no finding made by the Magistrate to support or justify the award of interest at such a high rate of 25% per

annum, and therefore, in my view, the rate is too high given the commercial banking interest rate pertaining at that time.

In addition to this, the position of the law in relation to interest on special damages is that interest is awarded from the date of filing of the suit until payment while interest on general damages is awarded from the date of judgment until payment. This position of the law has been considered in several cases. In the case of **MUKISA BISCUIT MANUFACTURING CO. LTD V WEST END DISTRIBUTORS LTD (NO.2)** [1970] EA 469, where Spry V-P at pg 475 found that,

*“the principle that emerges is that where a person is entitled to a liquidated amount or to specific goods and has been deprived of them through the wrongful act of another person, he should be awarded interest from the date of filing suit. Where, however, damages have been assessed by the court, the right to those damages does not arise until they are assessed and therefore interest is only given from the date of judgment.”*

Furthermore, in the case of **HIRJI V MODESSA** [1967] EA 724 (CA), Law JA found that,

*“The position is covered by the decision of this court in **Prem Lata V. Peter Musa Mbiyu** [1965] EA 592. In the case of general damages awarded in personal injury cases, interest should not be awarded for the period between the filing of the suit and the date of judgment. The position is different. In the case of special damages, where the amount claimed has been actually expended or incurred at the date of filing the suit. Had the learned judge properly directed that there be judgment for the plaintiff for Ushs 20,000/= general damages with interest at the court rates from the date of judgment until payment and for Ushs 500/= special damages interest at seven percent from the date of filing suit until judgment.”*

In the premises, the award of interest at the rate of 25%p.a. on the sum of Ushs 25,000,000/= general damages from 25<sup>th</sup> October 2007 (date of filing), when the judgment was made on the 26<sup>th</sup> of November 2010 was erroneous. The interest on the general damages should have been awarded from the date of judgment until payment. Ground four and five of this appeal therefore succeed.

This appeal therefore succeeds in part and the decree passed by the trial magistrate is set aside and substituted as follows;-

- a) The finding as to specials damages of Ushs 13,914,088/= stands.
- b) General damages of Ushs 4,000,000/= being about 10% of the sum claimed would be reasonable in the circumstances of this case.
- c) I award interest at 21%p.a. on the special damages from the date of filing the suit until payment in full and 8%p.a. on general damages from the date of the judgment in the Court below until payment in full.
- d) The other awards as costs and security for costs remain unchanged
- e) I award the appellant half the costs of this appeal.

.....  
Justice Geoffrey Kiryabwire  
JUDGE

Date: 03/05/2012

03/05/2012

9:45

Judgment read and signed in open Court in the presence of:

- A. Byamugisha for Appellant

In Court

- Apollo Mwesigye Corp. Secretary of Appellant

- H. Katarikawe MD of Respondent

- Rose Emeru - Court Clerk

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Geoffrey Kiryabwire

**JUDGE**

**Date: 03/05/2012**