

**THE REPUBLIC OF UGANDA,
IN THE HIGH COURT OF UGANDA
AT KAMPALA
(COMMERCIAL DIVISION)
CIVIL SUIT NO 374 OF 2011**

GROFIN EAST AFRICA FUND LLC..... PLAINTIFF

VERSUS

- 1. JK INVESTEC (UGANDA) LIMITED}**
- 2. JAMES KATARIKawe}..... DEFENDANTS**
- 3. HARRIET KATARIKawe }**

BEFORE HON JUSTICE CHRISTOPHER MADRAMA IZAMA

JUDGMENT

The Plaintiff filed this application by way of a summary suit under the provisions of order 36 of the Civil Procedure Rules against the defendants jointly and severally for recovery of Uganda shillings 423,228,813.96/= plus interest on the sum at the rate of 18% per annum from the date of filing the suit until payment in full and costs of the suit.

The facts of the case are that by an agreement dated 6th of June 2006 and the 6 December 2007 the first defendant borrowed Uganda shillings 263,200,000/= and another Uganda shillings 50,000,000/= from the plaintiff. Under the agreements, the first defendant was supposed to periodically service the loans, each within 12 months from the date of disbursement of the money. By a deed of Surety ship dated 6th of June 2006 the second and third defendants personally guaranteed the loan and agreed to perform on demand the obligations of the first defendant under the loan agreement. Upon default of the first defendant on payment of the loan the plaintiff demanded payment and consequently the first, second and third defendants admitted liability and undertook to pay a negotiated and discounted sum of Uganda shillings 347,126,352/=. The undertaking is dated 23rd of January 2008. The plaintiff further through its lawyers demanded for payment from the defendants whereupon the defendant executed a deed of settlement dated 12th of March 2010 by which they acknowledged and agreed to pay the respective loans outstanding to the plaintiff. Subsequently the defendants paid Uganda shillings 100,000,000/= but neglected to pay the balance together with interest at the rate of 19% per annum. Finally the plaintiff pleaded that the defendants have no defence to the suit.

The defendants subsequently filed miscellaneous application number 45 of 2012 for unconditional leave to appear and defend the suit and for costs of the application be provided for.

The application came for hearing on 28 February 2012 whereupon the respondent/plaintiff's counsel conceded to the application and prayed for judgement on admission on the basis of paragraph 6 of the affidavit in support of the application. Leave to appear and defend the suit was granted. Judgment on admission was entered on the basis of paragraph 6 and 9 of the affidavit in support of the application wherein the court ordered as follows:

1. *Judgement is given for the plaintiff/respondent to the application for a sum of Uganda shillings 232,515,337/= in Civil Suit Number 374 of 2011 under order 13 rules 6 of the Civil Procedure Rules.*
2. *It is further ordered that the court is to determine where the plaintiff will realise this sum from in terms of the agreement of the parties dated 12th of March 2010.*

Paragraph 5 of the affidavits in support of the application was sworn by James Katarikawe wherein it is admitted in paragraph 5 that on the 12th of March 2010 a deed of settlement was signed where it was agreed between the parties that the total claim owing to the plaintiff was Uganda shillings 332,415,337/=. Upon execution of the deed of settlement the applicant paid the sum of Uganda shillings 100,000,000/= leaving an outstanding balance of Uganda shillings 232,415,337/=. Last but not least in paragraph 9 of the affidavit in support of the application for unconditional leave to defend the suit, Mr James Katarikawe deposes that the balance of Uganda shillings 232,515,337/= was supposed to be realised from the sale of property comprised in Busiro Block 364 Plot 103 held by the respondent/plaintiff and who had failed to account for the proceeds of the sale which was sufficient to discharge the applicant's liability. In the joint written statement of defence of all the defendants filed on court record on 5 March 2012, paragraph 6 thereof admits the claim in the following words:

"That since the execution of the said deed of settlement, the defendants have paid the sum of Uganda shillings 100,000,000/= receipt whereof was duly acknowledged by the plaintiff leaving an outstanding balance of Uganda shillings 232,515,337/=:, that was to be realised from the sale of property comprised in Busiro Block 397 plot 862, Busiro block 397 plot 863 that is being held by the plaintiff who to date has deliberately failed/refused to account for the said property which if disposed of would sufficiently discharge the defendants' liability."

On 26 February 2013 the defendants counsel indicated that they had lost touch with his clients whereupon the plaintiff's counsel applied for service of the next hearing date on the defendant through substituted service in the Newspapers. The application was granted and the defendants were served in the Monitor Newspaper of 7th of March 2013 at page 7 thereof. In the written statement of defence the defendant had admitted a sum of Uganda shillings 232,415,337/=. Counsel prayed for interest whereupon the suit was fixed for hearing on the 20th of May 2013 after default in appearance of the defendants and an order to proceed ex parte.

Subsequently the plaintiff called one witness Evelyn Mbabazi the Administrative Manager of the plaintiff. Her written witness statement was tendered in evidence as her testimony in chief. In the testimony in chief after giving the background to the loan agreements, she indicated that the honourable court entered judgement for the plaintiff on admission by the defendants with the sum of Uganda shillings 232,515,337/= on 4 April 2013. The plaintiff had been put out of its money from the date of default to the date of the hearing and prayed that the honourable court awards interest at the rate of 19% of the decretal sum from the date of default until payment in full. The rate of 19% per annum was justifiable because it was the rate agreed upon in the loan agreement and the undertaking signed by the parties. Furthermore the plaintiff sought general damages for breach of the loan agreement and undertaking given by the defendants and the suffering caused in pursuing the defendants for the plaintiff's money. She further sought for costs of the suit.

The plaintiff's counsel filed written submissions in support of the plaintiff's claims. Counsel submitted that the witness and proved that the plaintiff had been put out of the use of its money and suffered anguish in recovering the arrears inclusive of filing the suit. The plaintiff was therefore entitled to general damages. Secondly the plaintiff is entitled to interest on special damages. Under section 26 of the civil procedure act the court has discretion in awarding interest on the decretal sum. In the case of National Medical Supplies versus Penguins Ltd HCCS number 29 of 2012 the court upheld award of interest on a liquidated sum from the date of filing the suit until payment in full. Furthermore the court awarded interest on general damages from the date of judgement until payment in full. As far as costs are concerned, section 27 (2) of the Civil Procedure Act provides that costs should follow the event unless the court for good reasons orders otherwise. Counsel prayed that in this particular case costs should follow the event.

I agree that the plaintiff had been kept out of its money from the date of default and suffered loss as a consequence thereof. Because such loss cannot be quantified, the plaintiff would be awarded general damages as prayed at the rate of 14% of the amount of the judgement on admission. Judgement on admission was Uganda shillings 232,414,337/=.

As far as the claim for interest is concerned, PW1 the administrative manager of the plaintiff testified that interest was contractual and was 19% per annum. The loan agreements was admitted as annexure "A" to the witness statement of the plaintiff paragraph 7.1 thereof provides that the launcher their interests of 19% per annum which may be increased or decreased from time to time in accordance with clause 6.3 of the Standard Loan Conditions.

Section 26 (1) of the Civil Procedure Act 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 judgement for the payment of interest at such rate as it may think just. The provision envisages the enforcement of contractual interest unless the rate agreed upon is harsh and unconscionable and ought not to be enforced by legal process. In this case there is no evidence that the rate of

19% per annum is harsh and unconscionable. In my opinion the contractual rate of interest is reasonable and agreed upon by the parties to the agreement. In those circumstances, interest is awarded the plaintiff on the decreed sum of Uganda shillings 232,415, 377/= being the judgement on admission from the date of filing the suit until payment in full.

Additional interest is awarded on general damages at the rate of 14% per annum from the date of judgement till payment in full.

I agree with the submission that under section 27 (2) of the Civil Procedure Act, costs shall follow the event. Subsection 2 of section 27 of the Civil Procedure Act provides in part that course of any action, cause or matter will issue shall follow the event unless the court or judge shown for good reason otherwise order. For the court to order otherwise, good reason should be shown by costs should not follow the event. In this case there is no reason why costs should not follow the event and the plaintiff is awarded costs of the suit.

Judgment delivered in open court on the 31st of May 2013

Christopher Madrama Izama

Judge

Judgment delivered in the presence of:

Waniale Alan for the plaintiff

No representative of Plaintiff in court

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

31st May 2013