

2011 with a payment of UGX 5,600,000/= made to the defendant who acknowledged receipt of the same.

It is contended by the plaintiff that the defendant only delivered to the plaintiff a signed blank transfer form but went ahead to resale and transfer the suit land to a 3rd party thereby failing to deliver the duplicate certificate of title to the plaintiff. It is on that basis that the plaintiff filed this suit.

The summons to file a defence was served on the defendant on 16th December 2012 and an affidavit of service to that effect is on court record. However, the defendant did not file a defence and consequently the plaintiff obtained an interlocutory judgment against him. Thereafter the suit was fixed for formal proof.

Mr. Candia Alex represented the plaintiff and during the scheduling conference only one issue was framed for trial. The plaintiff was the only witness called to prove his case.

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

The plaintiff sought payment of UGX 57,000,000/=:, general damages, interest and costs of the suit.

(a) Claim for UGX 57,000,000/=

The plaintiff testified that he had had a previous successful land transaction with the defendant who in another transaction sometime in 2011 approached the plaintiff to buy one acre of land at an agreed purchase price of UGX 15,000,000/=. The parties executed a written sale agreement which was admitted in evidence and marked Exhibit P1.

It was the plaintiff's testimony that he paid the purchase price in three instalments of UGX 6,000,000/= which was acknowledged by the defendant in Exhibit P1, UGX 3,400,000/= which was paid on 6/7/2011 as per the defendant's acknowledgment admitted in evidence and marked Exhibit P2 and UGX

5,600,000/= which was paid to the defendant on 6/9/2011 as acknowledged in the final agreement the parties made upon that payment which was admitted in evidence and marked Exhibit P3.

The plaintiff also testified that the defendant failed to deliver to him the duplicate certificate of title and vacant possession of the land but only gave him a signed blank transfer form marked Exhibit P4, and passport photographs. He further testified that the defendant sold and transferred the land to another person. He stated that they had agreed that in the event of any defect in the title of the land or challenge by anybody, the defendant would give the plaintiff interest at a rate of 20% per month since the plaintiff is a business man.

Counsel for the plaintiff submitted that the plaintiff is entitled to a refund of his money since consideration for it has wholly failed and the defendant cannot be allowed to retain proceeds of unjust enrichment. For that submission counsel cited the case of *Muluta Joseph vs Katama Sylvano SCCA No. 11 of 1999* and *Sharif Osman vs Haji Haruna Mulangwa SCCA No. 38 of 1995*.

It was also submitted that the defendant agreed to pay interest of 20% monthly because the value of the land keeps appreciating daily and from June, 2011 to date it has appreciated significantly. It was submitted for the plaintiff based on the authority of *Sharif Osman vs Haji Haruna Mulangwa (supra)* that the interest rate agreed to by the parties is lawful and the courts respect the sanctity and notion of freedom of contract for which reason they do not make contracts for parties but only give effect to their clear intentions as gathered from the agreement.

I have considered the submissions as well as the plaint and its annexures. According to *Paragraph 812 of Harlbury's Laws of England Vol. 12(1)* special damages are losses which can be calculated in financial terms. The principle on special damages is that they must be specifically pleaded and strictly proved by the claimant as observed by Byamugisha JA, in *Eladam Enterprises Ltd v S.G.S (U) Ltd & Others Civil Appeal No. 20 of 2002 [2004] UGCA 1*.

In the instant case, the plaintiff claimed for UGX 57,000,000/= which is comprised of the purchase price of Shs. 15,000,000/= and accrued interest of Shs. 42,000,000/= calculated at the agreed rate of 20% per month for a period of 14 months from September 2011 when the money was fully paid to the defendant to November 2012 when the suit was filed. The sale agreement (Exhibit P1) was adduced in evidence to show the agreed terms, namely; the purchase price, mode of payment and the undertaking by the vendor to indemnify the plaintiff in case of any third party claims or encumbrances by paying him the purchase price, costs and interest at a rate of 20% per month. Duly signed acknowledgments by the defendant of payment by the plaintiff of the sum of UGX 15,000,00/= were also tendered in evidence as Exhibits P2 & P3.

Upon careful evaluation of the plaintiff's oral and documentary evidence, I am satisfied that the plaintiff has proved on a balance of probabilities that he paid the defendant a sum of UGX 15,000,000/= as purchase price for land which he was never given. He is therefore entitled to a refund of that sum of money because the defendant cannot be allowed to unjustly enrich himself upon failure to pass the consideration to the plaintiff. In the premises, the defendant is ordered to refund the UGX 15,000,000/= paid to him by the plaintiff.

As regards the claim for interest of 20% per month, this was agreed by the parties in case of a 3rd party claim. This court is mindful of the provisions of section 26 of the Civil Procedure Act Cap. 71 (CPA) to the effect 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.

Ordinarily an interest rate of 20% per month would be unconscionable. However, I have taken into account the peculiar circumstances of this case particularly the fact that the defendant purported to sell his land to the plaintiff and as stated in the pleadings and evidence, went behind the plaintiff's back and lodged a caveat on the same land then later sold and transferred it to another person. To my mind the defendant from the onset knew that the transaction would not go through but still went ahead to guarantee that he would indemnify

the plaintiff in case of any 3rd party claims or encumbrances by paying him the purchase price, costs and interest at a rate of 20% per month. He should therefore in my view indemnify the plaintiff as guaranteed since he deliberately breached the sale agreement well knowing the consequences. I would have been inclined to reduce the interest rate if the defendant had not deliberately and with impunity breached the sale agreement by selling and transferring land to another party instead of handing over the duplicate certificate of title to the plaintiff to facilitate transfer of the land to him.

I have verified the period for which the interest is claimed and I find that it was well calculated because the plaintiff completed payment of the purchase price on 6th September 2011 and instituted the suit on 28th November 2012. In between there is a span of 14 months which is the basis of the claim for accumulated interest of UGX 42,000,000/=. I am inclined to allow that interest and it is accordingly awarded to the plaintiff.

On the whole, I am satisfied that the plaintiff has on a balance of probabilities proved his claim and he is entitled to recover from the defendant the total sum of UGX 57,000,000/= being the purchase price and interest of 20% p.m. for a period of 14 months.

(b) General damages

It was the plaintiff's evidence that after instructing the surveyors to cut one acre from the land title for the plaintiff, the defendant changed instructions to cut and transfer the same land to another person. He also testified that the defendant fixed several meetings with the plaintiff to meet the surveyor but never honoured them. He further testified that the defendant caused the plaintiff to painfully look for him after suddenly and mysteriously changing his residence without notice to the plaintiff. It is the evidence of the plaintiff that the defendant has refused to meet him to date and is inaccessible either physically or on telephone.

Counsel for the plaintiff submitted that from the plaintiff's testimony the defendant's elusive behaviour after receiving the plaintiff's money was well calculated to defraud the plaintiff. It is the plaintiff's submission that an award of

damages is a matter within the court's discretion depending on the evidence adduced by the plaintiff. Mr. Candia also submitted that the losses, inconvenience and anguish the plaintiff was put through cannot be overstated.

According to *paragraph 811 of Harlbury's Laws of England Vol 12(1)* , in certain circumstances the court may award more than the normal measure of damages, by taking into account the defendant's motives or conduct. Such damages may be aggravated damages which are compensatory in that they compensate the victim of a wrong for mental distress or injury to feelings, in the circumstances in which that injury has been or increased by the manner in which the defendant committed the wrong of the defendant or the defendant's conduct subsequent to the wrong.

In the instant case, it appears from the evidence adduced by the plaintiff that the defendant had intentions to defraud the plaintiff. He executed this intention by receiving the plaintiff's money being the purchase price for land but instead sold and transferred the same land to another person. It is the plaintiff's evidence that his several attempts to meet with the defendant to resolve the matter were futile as his phone was permanently switched off. The plaintiff's visits to the defendant's residence also did not yield any result as the defendant was at all times reported to be on a trip to Sudan. According to the plaintiff's pleadings, the defendant's action exposed him to extreme loss, inconvenience, hardship and mental anguish.

I have no doubt in my mind that what the defendant did and his subsequent conduct could have subjected the plaintiff to inconveniences and mental anguish having parted with his Shs. 15,000,000/=. However, I do not agree with the submission and prayer of counsel for the plaintiff that Shs. 30,000,000/= should be awarded as general damages because in my view it would be excessive more especially given that the interest of 42,000,000/= has already been awarded to the plaintiff. I would instead award a sum of Shs. 5,000,000/= which in my well considered opinion would adequately compensate the plaintiff for the inconveniences and mental anguish he was subjected to as a result of the defendant's conduct.

(c) Interest

The plaintiff prayed for interest on the special damages at a rate of 30% per annum from 28th November 2012 until payment in full. He also prayed for interest at 10% per annum on the general damages from the date of judgment until payment in full. Counsel for the plaintiff submitted that an award of interest is discretionary under section 26(2) of the CPR. He argued that given the inflation and prevailing commercial rate of interest the rate of 30% pleaded by the plaintiff on UGX 57,000,000/= is appropriate. It was the plaintiff's submission also that considering all the circumstances of this case, the rate of 10% per annum on the general damages is appropriate.

The general principle for the award of interest is premised on the fact that the defendant has taken and used the plaintiff's money and benefited. Consequently the defendant ought to compensate the plaintiff for the money. See *Sietco vs Noble Builders SCCA No. 31 of 1995*.

In the instant case, the plaintiff testified that he is a real estate dealer who buys and sells land. From 6th September 2011 to date the defendant has kept the plaintiff's money and benefited. If it had been paid the plaintiff would have most likely put the money to use in his real estate business and earned a profit. Instead the defendant chose to hold on to the plaintiff's money without justification. In the circumstances, I award interest at the rate of 20% per annum on the special damages from the date of judgment until payment in full. Interest is also awarded on the general damages at 8% per annum from the date of judgment until payment in full.

(d) Costs of the suit.

Since costs follow the event and the plaintiff is the successful party, he is awarded costs of this suit. In the result, judgment is entered for the plaintiff against the defendant for orders that:-

- (a) UGX Shs. 57,000,000/= be paid by the defendant as special damages.

- (b) UGX Shs. 5,000,000/= be paid by the defendant as general damages.
- (c) Interest of 20% p.a is awarded on (a) above from the date of judgment till payment in full.
- (d) Interest of 8% p.a is awarded on (b) above from the date of judgment till payment in full.
- (e) Costs of the suit shall be paid by the defendant.

I so order.

Dated this 3rd day of December 2013.

Hellen Obura

JUDGE

Judgment delivered in chambers at 4.00 pm in the presence of Mr. Matovu Akram who was holding brief for Mr. Candia Alex for the plaintiff.

JUDGE

03/12/13