

**THE REPUBLIC OF UGANDA,
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
CIVIL SUIT NO 290 OF 2010**

**UGANDA DEVELOPMENT AGENCY FOR}
DEVELOPMENT (UGAFODE) LTD}.....PLAINTIFF**

VS

**1. DONGE HILDA}
2. MADWONGTHO GILBERT}
3. MUGUME LENNOX}.....DEFENDANTS**

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

JUDGMENT

The Plaintiff's action was filed on 4 August 2010 against the Defendants jointly and severally for recovery of **Uganda shillings 63,120,000/=** with interest on the principal sum.

The suit proceeded in the absence of the Defendants for reasons contained in the judgment and the Plaintiff's Counsel filed written submissions.

Plaintiff's written submissions

The Plaintiffs written submission inter alia is that the written statement of defence does not deny indebtedness as far as the first Defendant is concerned. The Plaintiff's Counsel contends that the only defence that was advanced on behalf of the first Defendant is that she was coerced into signing the agreement which forms the basis of the Plaintiff's claim. The first Defendant was an employee of the Plaintiff Company as a Credit Officer as averred in the plaint.

Upon the Plaintiff carrying out an audit of its two branches, it was discovered that large sums were unaccounted for or misappropriated and the first Defendant was solely responsible. She took responsibility and signed an agreement annexure "A" which is also exhibit P1 in which she accepted to refund **Uganda shillings 63,920,000/=** in instalments. However none of the instalments agreed to were paid by the first Defendant. The second and third Defendants guaranteed repayment of the money. The hearing proceeded ex parte and the Plaintiff's sole witness Mr Emmanuel Baganizi, relied on his written witness statement. The Plaintiff's Counsel

further relies on the scheduling conference notes setting out the agreed issues. The proposed issues in the scheduling notes are:

1. *Whether the memorandum of understanding between the Plaintiff and the first Defendant dated 18th of May 2009 was signed under duress by the first Defendant?*
2. *Whether the second and third Defendants are liable for the Plaintiff's claim?*
3. *Whether the Plaintiff is entitled to the remedies prayed for?*

Whether the memorandum of understanding between the Plaintiff and the first Defendant dated 18th of May 2009 was signed under duress by the first Defendant?

On this issue the Plaintiff's Counsel relies on exhibit P1 in which it is clearly indicated that the first Defendant was the Plaintiff's employee as a Credits Officer Lyantonde and Head of Loans Kyotera branch hereinafter referred to as the first branch and the second branch respectively. The Plaintiff agreed in the memorandum of understanding to pay **Uganda shillings 1,775,556/=** per month under clause 2 of the memorandum. The memorandum of understanding was executed on the 18th of May 2009 and was signed by her and some guarantors in the presence of an advocate Counsel Kuguminkiriza Moses. The representative of the Plaintiff also signed. Thereafter the first Defendant defaulted and did not even pay a single instalment. Clause 1 of exhibit P1 provides that: "the employee herein without undue influence, coercion or duress hereby undertakes full responsibility for the loss of the employer's funds totalling 63,920,000/=." According to the Plaintiff's Counsel this was evidence that the first Defendant was not coerced or signed the agreement while under undue influence.

Secondly whoever alleges a fact must prove it. The first Defendant has not provided any evidence to show that she signed the memorandum of understanding under duress. It is only pleaded in the written statement of defence filed on her behalf and the burden was on her to prove it. Counsel contended that all available opportunities in law were accorded to the Defendants who neglected or failed to turn up for the hearing. In the premises he prayed that the court finds the first Defendant liable for the payment of **Uganda shillings 63,920,000/=**.

Whether the second and third Defendants are liable for the Plaintiffs claim?

The submission of the Plaintiff's Counsel on this issue is that the second and third Defendants signed exhibit P1 as guarantors and furthermore signed exhibits P2 and exhibits P3 as separate guarantee agreements respectively. Upon the default of the first Defendant to honour her obligations, the guarantors became liable to make good the amount owing to the Plaintiff.

Whether the Plaintiff is entitled to the remedies prayed for?

The Plaintiff's case is that there is unchallenged testimony of PW1 as well as documentary evidence by way of exhibit P1, P2, P3, and P4 showing that **Uganda shillings 63,920,000/=** was not paid. The memorandum exhibit P1 placed liability on the Defendants to pay the said money.

PW1 testified that no payment has ever been received. He prayed that the court enters judgment against the Defendants jointly or severally for the payment of **Uganda shillings 63,920,000/=**.

Secondly interest on the claim is awarded at the discretion of court. Counsel submitted that this is a clear case where the court ought to exercise its discretion by awarding interest to the Plaintiff. According to the testimony of PW1 and exhibit P1 the Plaintiff is a commercial institution whose principal business is lending out money on interest. The Plaintiff has been denied the opportunity of lending out the sum of **Uganda shillings 63,920,000/=** since 2009 through failure by the Defendants to fulfil their contractual obligations. He prayed that the court awards interest at commercial lending rate of 30% per annum.

Finally Counsel prayed that the costs of this suit should be awarded to the Plaintiff who has incurred costs in prosecuting the suit.

Judgment

I have duly considered the pleadings, the evidence adduced as well as the written submission of Counsel.

It is averred that at all times the first Defendant was in the Plaintiff's employment as head of loans officer at the Plaintiff's Kyotera branch and Credit Officer at Lyantonde branch. It is alleged that as an employee of the Plaintiff, the first Defendant misappropriated/stole/or failed to account for **Uganda shillings 63,920,000/=**. Thereafter the first Defendant acknowledged her indebtedness and executed a memorandum of understanding on the 18th of May 2009 accepting to refund the money in agreed instalments. Since that time the first Defendant has failed or neglected or refused to comply with a payment schedule forcing the Plaintiff to file a suit for recovery of the entire sum. The Plaintiff avers that the second and third Defendants are guarantors who guaranteed payment by the first Defendant in case of her failure to pay the sums agreed upon and are equally liable to pay the plaintiff's money. Finally it is averred that the Defendants have no defence to the Plaintiff's claim.

Apparently the Defendants were served because there is a written statement of defence on behalf of all the Defendants filed by Messieurs Niwagaba and Mwebesa Advocates. There is however not affidavit of service on the main file. Summons to file a defence was issued on 4 August 2010. A defence was filed on 14 September 2010 with the presumption that summons to file a defence were served. That notwithstanding the defence admits the identity of the Defendants but denies the contents of the rest of the plaint. In the defence the first Defendant denies ever embezzling any sums from the Defendant save for the fact that she was treated unfairly and her employment terminated unfairly. Secondly the first Defendant avers in her written statement of defence that she signed the document in question under duress and after being removed from police cells where she had spent 14 days under unlawful detention but was just released to sign the agreement. Finally the Defendants aver jointly that the agreement (the memorandum of

understanding) is unenforceable Law in the absence of evidence of theft of the said sum which the first Defendant has denied strongly.

Subsequently no action was taken with a view to proceeding with the prosecution of the suit until a notice to show cause why the suit should not be dismissed was issued on 24 February 2014 for hearing on 27 February 2014. On 27 February 2014 only the Plaintiff's Counsel Moses Kuguminkiriza appeared. The Defendants were not served and the Plaintiff's Counsel submitted that the Plaintiff was a newly incorporated company which took over the Plaintiff's Company. The matter was adjourned to 11 March 2014 at 11:30 AM and the Defendant was directed to be present. Subsequently on the 27 of March 2014 Counsel Christine Tumuhairwe of Messrs Mwebesa and Niwagaba Advocates appeared in court on behalf of the Defendants and informed the court that they had lost touch with the Defendants. She prayed that the Defendants are served directly/personally and that they no longer represented the Defendants. The suit was again adjourned to 4 April 2014 at 10 AM to enable the Plaintiff's Counsel to trace and serve the Defendants. On 4 April 2014 the matter was adjourned for the Plaintiff's Counsel to file an application before the registrar for substituted service on the Defendants. Miscellaneous Application No. 285 of 2012 was filed on 23 April 2014 and was fixed for hearing on the 5th of May 2014. An order was granted for substituted service by way of advertisement of the hearing notice in a newspaper of wide readership by the Assistant Registrar. Subsequently an affidavit of service by Mr Kiwanuka Eriab was filed on court record on the 27th of May 2014 and it shows that hearing notice was advertised in the Monitor Newspaper according to the order of the court and was published on the 12th of May 2014. The record shows that the suit had been fixed for the 15th of May 2014 according to the advertisement annexure "C" to the affidavit of service. On the 15th of May 2014 the court issued an order for the suit to proceed ex parte under the provisions of Order 9 rule 20 (1) of the Civil Procedure Rules. Testimony in chief was admitted by written witness statement of the Plaintiff's sole witness on the 27th of May 2014. The Plaintiff's Counsel closed the Plaintiff's case after the testimony of PW1 and addressed the court in written submissions in support of the claim.

The suit presents a very unsatisfactory state of affairs where the Defendants have not been heard because of their absence. Several efforts were made to get the Defendant's on board. Efforts to get the Defendants through their Counsel on record did not yield any result as the Defendant's Counsel represented to court that they did not know the whereabouts of the Defendants. After several adjournments and notice in the newspapers by way of substituted service on the Defendants, Defendants never responded to the hearing notice advertised and the suit proceeded ex parte. Even after the suit proceeded ex parte by order of Court on the 15th of May 2014, no application was received to challenge the ex parte proceedings by the time of writing this judgment in July 2014.

The first issue is **whether the memorandum of understanding between the Plaintiff and the first Defendant dated 18th of May 2009 was signed under duress by the first Defendant.**

There is no evidence other than that of the Plaintiff in the matter. The Plaintiff's only witness testified that he joined the Plaintiff in July 2010 and became familiar with the case upon taking over the office of Operations Manager in 2010. In other words his knowledge of the case arises from the documents, which documents are available to the court.

The memorandum of understanding is dated 18th of May 2009. The recitals indicate that the first Defendant is an employee of the Plaintiff. Secondly it is indicated that as an employee and in the course of her employment the first Defendant was responsible for disbursement of loans to individuals and groups under the policy guidelines of the employer. While in the course of her duties she misappropriated/embezzled/misused/stole/failed to account for money in her possession amounting to **Uganda shillings 63,920,000/=**. The wording of clause 3 of the memorandum of understanding leaves a lot to be desired. It is not clear whether the first Defendant misappropriated or embezzled or misused or stole or failed to account for the money. All of the actions are bundled together and the Plaintiffs witness PW1 was not able to give further details in the matter. Under paragraph clause 4 (1) it is stipulated and I quote:

*"The employee herein without undue influence, coercion or duress hereby takes full responsibility for the loss of the employer's funds totalling **63,920,000/= Uganda shillings**, which was money supposed to be disbursed to groups as loans but in due cause were misappropriated/misused/stolen/unaccounted for by the employee and the said loss is categorised as hereunder..."*

Secondly the employee agreed to pay the money in instalments of **Uganda shillings 1,775,556/=** per month. It is an inference drawn from the clause that that as an accounting officer the first Defendant assumed responsibility for the loss. If the loss had been attributed to a client, she ought to have indicated which customer or group had not remitted the money. For that reason the duty and burden was on her to explain the loss or be held liable.

Under paragraph 4 the first Defendant was supposed to pledge all her properties both movable and immovable as security for payment of the money and also execute and sign post dated cheques for the instalments agreed upon in favour of the employer. Clause 6 further provides that the employer reserved the right to institute and continue criminal proceedings against the employee without prejudice to the agreement. On the face of it the agreement is signed by the first Defendant and secondly by the guarantors. The memorandum of understanding is drawn by Messieurs Kuguminkiriza and Company Advocates and is also witnessed by them.

Exhibit P2 is a document entitled guarantee. It is dated 27th of May 2009 and is executed by one Oryema Donge Isaiah. The guarantor mentioned therein guaranteed the payment of the money in the event that the first Defendant neglected or failed to pay the instalments stipulated in the memorandum of understanding. He further agrees in the guarantee contract that he executed the guarantee unconditionally and without any duress, collusion or undue influence whatsoever. It is witnessed by the employer as well as the first Defendant and the Plaintiff's Counsel. Though

Counsel Moses Kuguminkiriza appeared in this matter as the Plaintiff's Counsel there seems to be no breach of regulation 9 of **the Advocates (Professional Conduct) Regulations S.I. 267 – 2**, which forbids an advocate from appearing as Counsel in a matter where he required as a witness. He was not required to give evidence of the agreements where his personal stamp as an advocate shows that he witnessed all the exhibits namely exhibit P1, P2, P3 and P4. The plaint was signed by him and the written submissions are likewise under his hand.

Exhibit P3 is yet another guarantee document executed by the second Defendant Mr Madwongtho Gilbert containing the same words as the first guarantee exhibit P2. It was executed on the 18th of May 2009.

Exhibit P4 is a guarantee agreement by one Mugume Lennox dated 18th of May 2009 guaranteeing the payment and indicating in the same words that he executed the guarantee unconditionally and without any duress, collusion or undue influence whatsoever.

There is no other evidence as to whether the Defendant had been removed from police cells to sign the memorandum of understanding as averred in the written statement of defence. It is further averred in the written statement of defence that the agreement was unenforceable. In the case of **MTN Uganda Limited vs. Threeways Shipping Group Ltd HCCS No 503 of 2012** an agreement in the form of a memorandum of understanding not to pursue criminal proceedings and to ask the Director of Public Prosecutions to drop charges against officials of the Defendant for consideration was held to be contrary to section 104 of the Penal Code Act cap 120 as amounting to the compounding of a felony. Because the agreement violated the provisions of a statute forbidding such an agreement, the memorandum of understanding was struck out for illegality and unenforceability.

In the present suit the only evidence is that there is a memorandum of understanding which indicates that the exact cause of the loss to the employer is not specified. It is further stipulated in the agreement that the employee voluntarily agreed to take over responsibility for the loss of over Uganda shillings 62 million. Thirdly the Defendants have not come out to explain their own part of the story. In the premises the courts hands are tied and issue number one is answered in the negative as there is no evidence that the memorandum of understanding between the Plaintiff and the first Defendant dated 18th of May 2009 was executed by the first Defendant under duress.

Whether the second and third Defendants are liable for the Plaintiffs claim?

The resolution of the first issue means that the memorandum of understanding is an enforceable agreement in the absence of evidence of any duress or illegality. The evidence of PW1 is that the first Defendant defaulted in paying all the instalments agreed upon. Exhibit P3 which is the guarantee instrument of the second Defendant is an instrument undertaking to pay the Plaintiff in the event of default of the first Defendant. The only evidence of PW1 is that the first Defendant

defaulted consequently exhibit P3 is enforceable against the second Defendant by the Plaintiff. The second Defendant is liable to pay for the indebtedness of the principal debtor namely the first Defendant. This is based on the wording of the guarantee document exhibit P3 which stipulates in part that: "(the Plaintiff)... "

*"...in the event that the said **DONGE HILDA** fails/neglects/refuses to pay the instalments as stipulated thereon and in so doing Uganda Agency for Development Ltd (Ugafode) is at liberty to recover the said money with interest and costs from me by all means at its disposal including but not limited to distressing upon my property both movable and immovable."*

The same goes for the third Defendant who executed exhibit P4 which has the same wording as exhibit P3. The third Defendant is jointly liable with the other Defendants to pay **Uganda shillings 63,920,000/=** together with interest and costs as stipulated in the agreement.

Whether the Plaintiff is entitled to the remedies prayed for?

This issue is subdivided into three issues to deal with whether the Defendants are liable to pay the principal sum dues; secondly whether interest should be awarded on the sum and finally whether costs should be awarded.

Whether the Plaintiff is entitled to the principal sum?

The undisputed evidence is that the first Defendant is indebted to the Plaintiff to the tune of **Uganda shillings 63,920,000/=** according to exhibit P1. The second and third Defendants guaranteed repayment of the sum and agreed to be liable to pay the said sum according to the instrument of guarantee exhibit P3 and P4.

In the premises the Defendants are jointly and severally liable to pay the Plaintiff the liquidated sum of **Uganda shillings 63,920,000/=** which is hereby awarded to the Plaintiff.

Whether the Plaintiff should be awarded interest on the principal sum?

The Plaintiff further seeks payment of interest at the rate of 30% per annum. In the plaint the Plaintiff's prayer is for interest at bank lending rate from the due date till payment in full.

This suit was filed on 4 August 2010. Since that time the Plaintiff did not take any steps to cause the suit to be heard and only woke up after the court gave notice to the Plaintiff to show cause why the suit should not be dismissed. The notice was issued on the 4th of February 2014 for hearing on 27 February 2014. Thereafter the Plaintiff showed cause by submitting through PW1 Mr. Emmanuel Baganizi, its Operations Manager, that the Plaintiff was keen on recovering its money the subject matter of the suit. He further informed the court that there are two guarantors whose address they have and the suit may proceed expeditiously.

Where an action for a liquidated sum of money due under a contract is filed in the commercial Court Division, it is to be handled expeditiously as mandated by rule 2 (2) of **The Constitution (Commercial Court Division) (Practice) Directions S.I. Constitutional 6** which provides that the commercial court should provide to the business community an efficient system of administration of justice which is expeditious and cost effective. Delays escalate costs and the duty is on the Plaintiff to proceed expeditiously with the suit. Moreover where there is a liquidated demand on contract it could have been filed as a summary suit or in the least heard within a period of not more than one year. In any case **Order 17 rule 2 of the Civil Procedure Rules** gives the court discretion to have the suit dismissed after notice to show cause if no step is taken within twelve months from the last adjournment. From the filing of the suit in August 2010 to February 2014 is a period of 3 years and about 6 months without any action. In those circumstances I am constrained to award interest for a reasonable period during the pendency of the suit and not for the entire period. In any case the delays before the suit was heard are deemed to have been caused by the Plaintiff who ought to have taken the necessary steps to have the suit heard expeditiously. Delays escalate costs by way of lawyer's fees and interest. In the premises the court will award reasonable interest in terms of section **26 (2) of the Civil Procedure Act**. It provides that:

"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 such other earlier date as the court thinks fit."

Clause 7 of the memorandum of understanding provides that the Plaintiff reserves the right to charge interest on the amount if the employee fails to abide by the terms of the agreement. Under clause 2 of the memorandum of understanding it is stipulated that the first instalment shall be paid on or before the 29th of May 2009 and thereafter other instalment shall fall due on every 30th day of the month except the February instalment shall be paid on the 28th of the month. In other words interest is payable on arrears. The principal sum is **Uganda shillings 63,920,000/=** and instalment payments are monthly at **Uganda shillings 1,775,556/=** giving a total of 36 monthly instalments. The Employer is entitled under clause 3 to recover all amounts due where the employer fails or refuses or neglects to pay any one instalment which is due.

The testimony of PW1 is that the first Defendant did not pay any instalment and as a consequence she was relieved of her duties. Consequently the Employer was entitled to recover the entire principal sum in any manner that was lawfully possible as stipulated under clause 3 of the memorandum of understanding. Given a reasonable period interest would be chargeable from the 30th of July 2009.

The Plaintiff's action was filed on the 4th of July 2010 and therefore interest is awarded to the Plaintiff for a period of one year prior to the filing of the suit at the rate of 21% per annum.

Additional interest is awarded for a period of one year during the pendency of the suit at the rate of 21% per annum. The rest of the period caused by delay of the suit is excluded, since the delay is attributed to failure of the Plaintiff to prosecute the suit in a timely manner.

Further interest is awarded at 21% per annum from the date of judgment till payment in full.

Whether the Plaintiff should be awarded costs?

Costs follow the event unless otherwise ordered by the court under **section 27 (2) of the Civil Procedure Act** which provides that:

“The fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of the powers in subsection (1); but the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

The Plaintiff instructed Counsel and incurred costs including costs to serve the Defendant through a Newspaper of wide circulation according to the order of the Assistant Registrar dated 6th May 2014. Under those circumstances costs shall follow the event and the costs of the suit are awarded to the Plaintiff.

Judgment delivered in open court the 25TH day of August 2014

Christopher Madrama Izama

Judge

Judgment delivered in the presence of:

Counsel Moses Kuguminkiriza for the Plaintiff

No representative of the plaintiff

Defendants are absent.

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

Decision of Hon. Mr. Justice Christopher Madrama

25th August 2014