THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

HCT - 00 - CC - CS - 0805 - 2007

JIMA PROPERTIES LTD ::: PLAINTIFF

VERSUS

KAMPALA DISTRICT LAND BOARD ::::::::::::::::::::::::: DEFENDANT

BEFORE: THE HON. JUSTICE DAVID WANGUTUSI

J U D G M E N T:

Jima Properties Limited herein after referred to as the Plaintiff sued Kampala District Land Board and Kampala Capital City Authority for recovery of Ugx 141,232,489/= as money received by the Defendants in respect of premium and ground rent and property plan fees. It also claims US$ 150,000- against the Defendant being the cost of architectural plans paid for by the Plaintiff when it was leased Plot 19 Bombo Road, hereinafter called 'the Property'.

In addition to the foregoing, the Plaintiff also claims general damages in respect of loss of bargain and prospective profits.
Lastly the Plaintiff prays for costs of this suit.

The facts that formed the background of this claim which emerged from the pleadings and submissions of counsel are that in the year 2004, the Plaintiff applied for a lease in respect of Plot 19 Bombo Road from the 1st Defendant.

On 7th October 2004, the 1st Defendant issued a lease offer in favour of the Plaintiff for an initial term of 5 years which would on completion of building be extended to a full term of 99 years. Accepting the lease offer, the Plaintiff paid the assessed lease dues of Ugx 108,403,350/=. A lease was then executed between the Plaintiff and the 1st Defendant which was registered under LRV 3348 Folio 6 as Plot 19 Bombo Road.

This certificate was issued on 10th March 2005. Having drawn the building plans, the Plaintiff on 22nd December 2005 paid submission fees of the same to the 2nd Defendant in the sum of Ugx 32,829,139/=.

The construction of the building was however not to be because soon thereafter, the 1st Defendant wrote to the Plaintiff with a copy to the 2nd Defendant informing them that the lease for Plot 19 Bombo Road that had been acquired by them was executed and granted in error. This was followed by the cancellation of the Plaintiff's Certificate of Title to the property. On the 5th October 2007, the Plaintiff sued the Defendants seeking recovery of Ugx 141,232,489/= it had paid to the Defendants and US$ 150,000- as the cost of preparation of the building plans. They prayed for general damages for loss of bargain, prospective profit and they sought interest on the special damages at 25% per annum and on general damages at 20% per annum. Costs were part of its prayer.

The matter went through mediation followed by several discussions in a bid to settle it. These discussions were not in vain because on 17th January 2012, both Defendants conceded that they were not the owners of the freehold interest in the property and therefore it could not be leased by the 1st Defendant to the Plaintiff.

The 2nd Defendant also agreed to refund to the Plaintiff the monies it had received namely; Ugx 100,000,000/= as premium, Ugx. 3,335,350= as ground rent and Ugx. 32,829,139= as submission fees for the Building plans. This totaled to Ugx. 136,164,489/=.

The Defendants also agreed to pay the Plaintiff's interest on the foregoing sums of money but left the determination of the rate to this court. It was also agreed amongst the parties that the remaining claims would be tried and determined by the Court. This consent order and filed and endorsed by court on 17th January 2012.

The foregoing having been executed, the issues that remained before Court for determination were:

1. Whether the Plaintiff could recover the US$ 150,000- for preparation of the building plans?
2. General damages for loss of bargain and prospective profit.
3. What rate would the interest be on the decretal sum?

The issue on recovery of expenses for building plans was however settled on 7th May 2014 when both parties agreed that the Defendants would pay 70% of the US$ 150,000- which was accepted by the Plaintiff. It is this Court's finding therefore that the Defendants are indebted to the Plaintiffs to the tone of US$ 105,000- as money

due and owing from the claim of expenses for the preparation of building plans.

This therefore now leaves only two issues, namely; general damages and interest. The Plaintiff prayed for general damages for loss of bargain and prospective profit.

General damages are such as the law will presume to be the direct natural probable consequence of the act complained of. The character of the acts themselves, which produce the damage, the circumstance under which these acts are done must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much, certainty and particularity must be insisted on, both in pleading and proof of damage; as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles and to insist upon more would be in vain **Storms Bruks Aktie Bolay V John & Peter Hatarison [1905]AC 515**

Black's Law Dictionary 8th Edition Page 416 defines loss of bargain as those damages a breaching party to a contract must pay to the aggrieved party equal to the amounts that the aggrieved party would have received including profits, if the contract had been fully performed.

During the hearing, Counsel for the Defendant submitted that the contract between he Plaintiff and the 1st Defendant was voidable as

the 1st Defendant did not have interest in the property and could therefore not pass good title.
Further that in light of this, the Plaintiff could only recover the expenses he had incurred. He relied on Halsbury's Laws of England 3rd Edition Volume 23 Paragraph 1076 which states:

> "Where the landlord cannot fulfill his obligations becaue of a defect in title, the tenant cannot recover damages for loss of bargain but only the expenses and liabilities which the tenant has necessarily incurred."

This rule derives its history from the early case of **Flureau V Thornhill (1776)2 WM B1 1078** where it was first enunciated and later affirmed in **Bain V Fothergill (1874) L.R.7 HL 158**.

Counsel for the Plaintiff submitted that the rationale of the rule in **Bain V Fothergill (1874) L.R.7 HL 158** (supra) was not applicable in the instant case as Uganda practiced the Torrens System of land registration enshrined in the Registration of Titles Act Cap 120 and therefore a claim for loss of bargain could stand. He relied on **McGregor on Damages 15th Edition Paragraph 888 at Page 566** and **AVG Management Science Ltd V Barwell Developments Ltd et al [1979] 25 CR 43.**

The major premise upon which the House of Lords based its decision in **Bain V Fothergill** was the difficulty in determining whether or not a particular person held good title to a specific piece of real property. **J.H Café's Ltd V Brownlow Trust Ltd [1950 I All ER 894**.

The difficulty in showing good title to land in England arose, atleast in part, from the land transfer system which existed in England when **Bain V Fothergill** was decided. Under that system, the ascertaining of title to a specific piece of property entailed a physical search of all instruments which pertained to that land; it often involved a search of instruments executed some 40 or 60 years prior to the actual search; there was a real possibility that an instrument might be misinterpreted. These among other reasons suggested to the House of Lords in 1874 that the fairest resolution of a dispute involving title matters would be to place the parties to the agreement in the position in which they would have found themselves if the agreement had never existed. **Law Reform Commission of British Columbia: Report on the rule in Bain V Fothergill LRC 28 1976 Pg 14**

Reform in the land registration system, that is, adoption of the Torrens system of certification of title have led numerous Judges to conclude that, in light of the rationale of the rule, the limitation on the availability of damages should no longer apply, **AVG Management Science Ltd V Barwell Developments Ltd (supra)**

This was succinctly illustrated in **Wroth & Anor V Tyler [1973] I All ER 917** where Megarry J stated:

> *"This is all the more striking in the case of registered land, where the operation of the rule in **Bain V Fothergill** might be expected to be minimal; for the main purpose of the Land Registration Acts is to simplify titles and conveyancing."*

Further Section 59 of the Registration of Titles Act provides that a Certificate of Title is conclusive evidence of title. Moreover in this particular case, the Defendants are the controlling authorities who should have known what they owned, they are the ones who had authority to allocate the land and therefore allocating land which was not theirs fully knowing the effect of such allocation certainly deprived them of the limitations in **Bain V Fothergill**.

In view of the foregoing, it is the Court's finding that the rule in **Bain V Fothergill** does not apply and that the Defendant is liable to pay damages to an innocent applicant who should have been advised by them. If the rule does not apply, what then is the measure of damages?

Relying on **Wroth V Tyler (supra)** where it was stated that the normal rule is that the general damages to which a purchaser is entitled for breach of contract for the sale of land are basically measured by the difference between the contract price and the market price of the land at the date of the breach. Counsel for the Plaintiff submitted that the Plaintiff was entitled to the difference between 5.4 billion being the market price of the land as per the valuation report Exh. P.13 and 136 million being premium and rent. This difference amounted to over 5 billion.

Counsel's submission gives little help to Court in how much money. According to **Wroth V Tyler (supra)** the two important incidences are the value of the property at the time of contract and value of the property at the time of breach. Exhibit P.13 which Counsel relies on gives us values of the land as at 2013 because the land was

inspected on 25th April 2013. The report therefore does not tell us the value of land as it was in October 2004 when the land was offered and paid for. Neither does it tell us the value of the land as at 20th October 2009 when the Secretary of Kampala District Land Board wrote to the Town Clerk with a copy to the Plaintiff informing them of the error in allocation of land to the Plaintiff and suggesting refunds or allocating them alternative land. There is very little research on the rate at which the value of land appreciates. Steven. W. Giddings in his research **The Land Market in Kampala, Uganda & its effect on settlement patterns, 2009**. Discusses the rate at which the value of land appreciates in Kampala. He was of the view that land in prime areas like where the property in question lies, appreciated four-fold between 2002 – 2008 which meant that a plot of 1 million would cost 4 million in 6 years.

Going by this research, a property of 5.4 billion in 2013 was most probably about 700 million in October 2004.

In my view, this same property appreciating at the pace described above was most probably 1.5 billion by October 2009. The difference therefore between the price at the time of contract and breach is 800 million=. These sums of money could have been less because of market forces by way of inflation or economic depression. Taking all these circumstances into consideration, I find an award of Ugx. 500 million appropriate as loss of bargain in the instant case.

The Plaintiff sought damages for loss of prospective profit.
For a Plaintiff to recover damages, he must show that his loss was one which resulted from a breach of contract by the Defendant. The

Defendant might have no protection by pleading that the intervening act was by a third party.

In the instant case, the intervening party was the Uganda Land Commission which claimed ownership of the property. It is well recognized that a third party causing the loss to the Plaintiff or aggravating the loss caused by the Defendant's breach would not absolve the Defendant from liability if the intervening act was reasonably foreseeable. **Victoria Laundry (Windsor) Ltd V Newman Industries Ltd [1949] I All ER 997; The Heron II 1969 I AC 350**

In the present case, the 1st Defendant who was the Kampala District Land Board and therefore ought to have known the boundaries of the land under its jurisdiction and the 2nd Defendant which was the controlling authority should have reasonably foreseen that their act would attract the intervention of Uganda Land Commission. That being the case, there was a direct causal link between the Defendants and any loss that was occasioned to the Plaintiff. The types of damages that are recoverable in such a situation are two and these were clearly laid out in **Hadley V Baxendale (1849)9 Exch 341**. The first one being damages which would fairly and reasonably be considered to arise naturally from the breach, the second one being damages which would reasonably be supposed to have been in the contemplation of the parties as liable to result from the breach at the time of the contract.

The instant case can be reasonably said to fall under the second limb. From their relationship, which included submission of building plans of a hotel, the Defendants were not only knowledgeable of the Plaintiff's intention to build a hotel but had also accepted the purpose

and intention of the Plaintiff. The purpose of the hotel could only have been to make profit.

The Plaintiff relied on a feasibility study and business plan; Exhibit P.11 dated September 5th which projected a net-profit of US$ 815,219- in 2007, US$ 1.69 million in 2009, US$ 2.79 million in 2012 and US$ 3.21 million in 2014.

They further relied on a report analysis of lost opportunities dated 20th June 2014 from Finance Services Ltd; Exhibit P.12 which concluded that the total economic opportunities lost by the Plaintiff for 2 years was US$ 1,602,662-.

Counsel for the Plaintiff relied on **Victoria Laundry (Windsor) Ltd V Newman Industries Ltd** where it was held that damages for loss of profit were recoverable if it was apparent to the Defendants as reasonable persons that the delay in delivery was liable to lead to such loss by the Plaintiffs.

It was submitted by Counsel for the Defendant that the transaction between the 1st Defendant and the Plaintiff was void ab initio as the 1st Defendant had allocated land which was not available.

Further that the effect of a void contract is that it is unenforceable and thus the Plaintiff cannot benefit from it. In this he relied on **Makula International V Cardinal Nsubuga [1982] HCB 11, Ocharm Plumbers & Associates Ltd V Drury (U) Ltd HCCS 723/2006 and UBC V Simba (K) Ltd & Ors CACA 12/14**

The instant case is distinguishable from **Ocharm Plumbers V Drury (supra)** in the sense that in Ocharm Plumbers, there was nothing

definite about the deal. An offer was made subject to contract and no final contract was executed. In the instant case however, a lease offer was made to the Plaintiff which was accepted, they made payments towards lease dues, a lease was executed and the Plaintiff was issued a certificate of title.

UBC V Simba (K) Ltd (supra) is also distinguishable from the present case in that in the former, the justices at the Court of Appeal found that the entire transaction from beginning to end was a well thought out and calculated fraud by all the parties involved and subsequently set aside the sale where as in the latter case, no fraud has been imputed on any of the parties; the 1st Defendant having merely erroneously allocated land under the jurisdiction to Uganda Land Commission, of which it had no authority to do so.

I have considered the documents relied on by the Plaintiff to support its claim for loss of profit and have addressed my mind to the vicissitudes attendant to the hotel business the Plaintiff intended to undertake. I have also considered it was impertinent on the 1st Defendant to ascertain that it had authority over the land it was offering which duty cannot be reasonably fostered upon the Plaintiff.

The Plaintiff had submitted a figure of US$ 1,602,662-. This is a figure that could be awarded if one was sure that the economy would remain smooth, with no interruptions, the number of people visiting the hotel would remain constant no new competitors would come on the market and the administration of the hotel would be such as to keep the responses of patrons favourable. As it is, there could have been a fall in business would lead to losses instead of profit.

The Plaintiff did not exhibit that he would have successfully guarded against all this. To award what he had claimed required such safeguards in place. Since none were given and the business world is full of pit falls. I would find an assessment of loss of prospective profit at 200 million- as appropriate.

The Plaintiff prayed for interest of 25% per annum from 15th December 2004 till payment in full on the conceded Ugx. 136,164,489= as money had and received by the Defendants and US$ 105,000- for expenses on preparation of building plans. They further prayed for interest on general damages at 20% per annum from the date of judgment till payment in full.

Counsel for the Plaintiff submitted that the Plaintiff paid money to the Defendants in 2004 and had since been deprived of its use which was only returned to them in May 2013. He relied on **Superior Construction & Engineering Ltd V Notay Engineering Industries (1981) Ltd [1992]3 KLR 24** where it was held that where the Defendant has been guilty of gross delay as in the instant case where the Defendant withheld money which to his full knowledge would be put by the Plaintiff to some other investment, the Plaintiff is entitled to interest which should neglect the current commercial value of money.

An award of interest is discretionary. In **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."

Turning to the present case, Court can do justice by looking at the lending rates during the period in question. Interest rates are not static. They certainly go up or down depending on inflation, greater demand for credit, tight money supply or due to higher reserve requirements for banks. See **Interest Rates Loan Portfolio Performance in Commercial Banks Stella Nakayiza Lahti University of Applied Sciences 2013**

The Bank of Uganda Report February 2006 showed that the commercial bank lending rate ranged from 16% - 21%. Other report indicated that as at 31st December 2008, it was 20.45% and a year later as at 31st December 2009 it was 20.86%. In the premises, it would seem putting the average lending rate at 18% reasonable. Taking into account that the Plaintiff was a business man who could have put his money to better use, an award of 18% per annum on the money refunded is appropriate in the circumstances.

This interest will be calculated in respect of the refunded money from the time the money was paid out by the Plaintiff to the Defendant, that is, December 2004 till its refund in May 2012.
As for money spent on structural designs, interest shall be calculated from June 2005 till payment in full.

Taking into account that a commercial rate interest has been awarded on the liquidated demands, interest on general damages is

awarded at 6% per annum. The Defendants will also pay the costs of this suit.

In conclusion, judgment is found for the Plaintiff in the following terms:

a) US$ 105,000 being 70% of expenses of building plans.
b) General damages of 700 million under the heads of loss of bargain and prospective profit
c) Interest on at Ugx. 136,164,489= as money earlier paid out to the Defendant at 18% per annum from December 2004 to May 2012.
d) Interest on (a) at 18% per annum from June 2005 till payment in full.
e) Interest on (b) at 6% per annum from date of judgment till payment in full.
f) Costs.

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David K. Wangutusi
JUDGE

Date: 18/12/2014