

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**(COMMERCIAL COURT DIVISION)**

**HCT-00-CC-CA-7-2013**

- 1. WILLIAM ALFRED KISEMBO GUNN**
- 2. PENNINAH KISEMBO GUNN                    :::::::::::::::APPELLANTS**

**VERSUS**

**KIIZA RWAKAIKARA IVAN::::::::::::::::::::::::::RESPONDENT**

**BEFORE: HON. LADY JUSTICE HELLEN OBURA**

**JUDGMENT**

This is an appeal against part of the judgment of the trial magistrate awarding the respondent Ug. Shs. 10,000,000/= as general damages.

The background to this appeal is that the respondent sued the appellants at Mengo Chief Magistrate's Court in Civil Suit No. 10 of 2009 for recovery of a sum of Ug. Shs 14,800,000/= as special damages, general damages, interest and costs of the suit. The suit was heard and judgment delivered thereafter in favour of the respondent to the effect that the appellant pays him special damages of Ug Shs. 13,800,000/= being the amount paid for the loan and Shs. 300,000/= being the legal fees he paid to his lawyers, general damages of Ug. Shs 10,000,000/=, interest on all the awards at court rate from date of filing the suit till payment in full as well as costs of the suit. The appellants were dissatisfied with part of the judgment and hence this appeal.

When this appeal came up for hearing on 05/12/2013, the appellants were represented by Mr. Patrick Alunga who held brief for Mr. John Kabandize while the respondent's representatives were absent. This court then directed both parties to file written submissions which they did and form the basis of this decision. The sole ground on

which this appeal is premised is that: **“The learned trial magistrate erred in law and in fact when she awarded the respondent excessive general damages of Ug. Shs. 10,000,000/=”.**

In his submissions on the above ground, counsel for the appellants argued that the award of general damages of Ug. Shs 10,000,000/= with interest at court rate from the date of filing the suit is excessive and should be reassessed by this Court. It was contended for the appellants that the appellate court can interfere with the lower court’s decision in the award of damages if that decision was based on wrong principles of law or if the award was excessive as was held in the case of ***Crown Beverages Ltd vs Sendu Edward Civil Appeal No. 01 of 2005***.

The appellants counsel argued that the governing principle on the award of general damages is that they are compensatory in nature and should be awarded so as to put the plaintiff in the position they were in before the wrong was committed. Counsel for the appellants cited the case of ***Security Group Uganda Limited vs Xerodoc Uganda Limited Civil Suit No. 572/2006*** and argued that the trial magistrate in awarding the general damages of Ug. Shs 10,000,000/= in a case where the subject matter was Ug. Shs 14,800,000/= was unnecessary, excessive and intended to enrich the respondent rather than compensate him since the respondent had already been awarded special damages of Ug. Shs. 13,800,000/=.

Counsel for the respondent agreed with the general principle that general damages are compensatory in nature as was decided in the case of ***Visram and Kassan vs Bhait (1965) EA 769*** but submitted that the respondent proved the loss suffered and inconvenience that was caused by the appellants upon which the lower court in its own discretion awarded the respondent general damages that were not excessive considering the loss suffered and inconvenience caused by the appellants to the respondent.

Counsel for the respondent argued that the respondent in the lower court had the duty, as per Sections 101 and 102 of the Evidence Act to prove that he suffered loss or inconvenience as a result of the appellant’s conduct and this burden was discharged since evidence was led by the respondent to prove his claim relating to award of general damages for inconveniences, mental suffering, anguish and loss of income when the respondent lost his property owing to the appellants’ refusal to fulfil their loan obligations and transferring to their daughter’s name the only property they had promised to give the respondent.

It was submitted for the respondent that the award of general damages is at the discretion of Court as observed in the case of ***Robert Coussens vs Attorney General SCCA NO. 08 of 1999*** and since the respondent was greatly affected by the appellants' actions the trial magistrate did not exceed her jurisdiction to make the award of Ug. Shs. 10,000,000/= as general damages. It was argued that the award of general damages does not depend on the principal sum of special damages as submitted by counsel for the appellants but on the loss suffered and inconvenience caused by the opposite party.

According to counsel for the respondent various cases referred to by the appellants' counsel differ from the facts of this appeal and hence were inapplicable to this case.

I have carefully considered the submissions of both counsel and the authorities referred to but before I determine the substantial ground of appeal, I will first deal with the respondent's contention that the appeal should be dismissed because the essential steps were not taken as required by law. Counsel for the respondent faulted the appellants for neither serving the record of appeal nor extracting the order that is appealed against. It was argued for the respondent that the appellants ought to have filed the record of appeal and served it onto the respondent to enable this Honourable Court determine this appeal. The case of ***Makula International vs His Eminence Cardinal Nsubuga & Anor CA No. 4 of 1981*** was cited for the position that this court should not sanction what is illegal once it is brought to its attention. The appellant's counsel made no response to the above objection.

With due respect, the respondent's counsel did not state the legal provisions that the appellants had breached so as to render this appeal illegal. I have perused the entire Order 43 of the Civil Procedure Rules which governs appeals to this Court. I noticed that under those rules an appellant is not required to file a record of appeal as contended by the respondents. Order 43 rule 10 is instructive on this matter. It provides:

***“10. High Court to give notice to court where decree appealed from.***

- (1) When a memorandum of appeal is lodged, the High Court shall send notice of the appeal to the court from whose decree the appeal is preferred.*
- (2) The court receiving the notice shall send with all practicable dispatch all material papers in the suit, or such papers as may be specially called for by the High Court.”*

My understanding of rule 10(2) above is that it puts the responsibility of giving notice of appeal with a view of calling for the records from the trial court on to the High Court. There is no mention of the appellant's role beyond filing the Memorandum of Appeal and so I do not know the basis of the respondent's contention.

The appellants in this case filed a Memorandum of Appeal in this Court on the 13<sup>th</sup> May 2013 and on the 3<sup>rd</sup> of July 2016 the Deputy Registrar of this Court, in compliance with rule 10(2) above wrote to the Chief Magistrate of Mengo Chief Magistrate's Court requesting that the case file be forwarded to this Court for easy management of the appeal. In response to that request the Chief Magistrate wrote to the Deputy Registrar forwarding the case file on 20<sup>th</sup> August 2013. Therefore the case file from the lower court is already before this Court and the records therein have been considered in determining this appeal.

Secondly, this Court is alive to the previously strict view that required an appellant to extract a decree before appealing. However, this is now done as a matter of prudence because the Court of Appeal in the case of ***Standard Chartered Bank (U) Ltd vs Grand Hotel (U) Ltd [1999] KALR 577*** held that it is no longer a requirement to accompany the appeal with a formal order or extracted decree. The High Court echoed the same legal proposition in the case of ***Patrick Nkoba vs Rwenzori Highlands Tea Co. & Another, High Court Civil Appeal No. 5 of 1999 reported in [1999] KALR 762***. For the above reasons I overrule the objection raised by the respondent for lack of merit.

Turning to the merits of this appeal, I am aware of the duty of a first appellate Court which is to subject the entire evidence on record to an exhaustive scrutiny, re-evaluate it and come to its own conclusion. ***See: Father Nasensio Begumisa & 3 Others vs Eric Tibebaga SCCA No. 17 of 2002 reported in [2004] KALR 239; Uganda Breweries Ltd vs Uganda Railways Corporation SCCA 06/2001.***

Whereas a trial court has discretion to award general damages, there are certain circumstances under which the appellate court can interfere with the exercise of that discretion. In the case of ***Mbogo & Another vs Shah [1968] EA 93*** Sir Charles Newbold P. held that a Court of Appeal should not interfere with the exercise of the discretion of a Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice.

An appellate court will also interfere with an award of damages by a trial court if it acted upon wrong principle of law or the amount is so high or so low as to make it an entirely erroneous estimate of the damages to which the plaintiff was entitled. This principle was stated in the case of ***Crown Beverages Ltd vs Sendu Edward*** (supra) as per Oder JSC (RIP).

Similarly, in the case of ***Haman Dass vs John Corbine & Another [1959] 1 EA 834 (CAN)*** it was held that a Court of Appeal may properly interfere with a trial court's assessment of the quantum of damages if satisfied that, the Judge in arriving at his assessment, cited or may have cited some wrong principle of law.

It was the evidence of the respondent that after disappearance of the 1<sup>st</sup> appellant, the money lender sold the respondent's land fraudulently although he was able to recover it later. It was also the evidence of the respondent that later on the money lender sued him in this Court for recovery of the money lent since the appellants had disappeared and in order to settle the suit, he sold his plot of land at a giveaway price and paid the money lender the sums due. He further testified that as a disabled person he has been terribly inconvenienced since 2000 to date.

The respondent also testified that the appellants pledged to him their Certificate of Title marked Exhibit PE5 for property comprised in LRV 3025 Folio 22, Plot 17 Lugard road Fort Portal in accordance with a Memorandum of Understanding (MoU) marked Exhibit PE1 he entered into with the 2<sup>nd</sup> appellant as security and guarantee for the power of attorney he had granted the 1<sup>st</sup> appellant. He told Court that contrary to the MoU, the appellants transferred the ownership of the property to their daughter.

During cross examination the 1<sup>st</sup> appellant told Court that he knew the MoU and consent he had entered with the respondent and that he sold the land to their daughter when she cleared a loan owed to Kagga Ltd.

From the evidence on record highlighted above, the respondent was undoubtedly inconvenienced when the appellants reneged on their promise to pay the loan and also to secure property comprised in LRV 3025 Folio 22, Plot 17 Lugard Road Fort Portal to him and yet he had met his part of the bargain as required by Exhibit PE1. He had granted powers of attorney to the first appellant to obtain a loan using his property, the appellant obtained a loan worth 8,000,000/= as stated in the MoU but the appellants

changed their mind with regard to their obligations. This amounts to breach of contract for which the respondent would be entitled to damages. However, the only issue now is whether the award made by the trial magistrate is so high that it would be an erroneous estimate of the damages to which the respondent/plaintiff was entitled.

***In Security Group Uganda Limited vs Xerodoc Uganda Limited (supra)*** it was held that general damages for breach of contract are compensatory for the loss suffered and inconveniences caused to the aggrieved party so that the aggrieved party is put back in the same position as he would have been had the contract been performed, and not a better position.

In view of the above authorities and the evidence on record, I have considered the trial magistrate's reason for awarding general damages of Ushs. 10,000,000/= and I find that she properly addressed her mind to the principle of law on award of general damages. However, I do find that she did not properly exercise her discretion in determining the quantum. She should have taken into account the fact that she had already awarded the respondent special damages of Ug. Shs. 13,800,000/= being money that the respondent had paid to the lender plus lawyers costs of Shs. 300,000/= with interest on both at court rate from the date of filing the suit till full payment. If she had properly addressed her mind to that fact she would not have awarded the Ug. Shs. 10,000,000/= in general damages which is excessive in the circumstances of this case.

In the premises, I find that the appeal has merit. I would therefore allow it and reduce the amount of general damages awarded by the trial magistrate to the respondent from Ug. Shs. 10,000,000/= to Ug. Shs 5,000,000/= plus interest at court rate from the date of judgment until payment in full.

In the result, the judgment and orders of the trial magistrate on general damages is substituted with the following orders:

1. General damages of Ug. Shs. 5,000,000/= is awarded to the respondent.
2. Interest is awarded on the general damages at court rate from the date of judgment until payment in full.
3. Costs of the appeal is awarded to the appellants but it shall be taxed on the basis of the Shs. 5,000,000/= which they succeeded to have reduced from the general damages.

I so order.

Dated this 26<sup>th</sup> day of March 2014.

Hellen Obura

**JUDGE**

Judgment delivered in chambers at 3.00 pm in the presence of:

1. Mr. John Kabandize for the appellants.
2. Mr. Ronald Mugisa for the respondent.
3. Mr. Kizza Rwakakara Ivan – respondent.

**JUDGE**

26/03/14