

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL SUIT NO. 348 OF 2012

JAFFERY FOREX BUREAU (U) LTD:.....PLAINTIFF

VERSUS

ABDUL KARIM ALI & 2 OTHERS:.....DEFENDANTS

BEFORE THE HON. MR JUSTICE HENRY PETER ADONYO

JUDGMENT

1. Brief Facts:

The plaintiff rendered financial services to the defendants to the tune of Uganda Shillings Two Billion Fifty Million Nine Hundred Fifty Thousand (Ug. Shs 2,050,950,000). The plaintiff and defendants have had a long business relationship where among others; the plaintiff could help the defendants send money to various destinations. The plaintiff further used to sell forex to the defendants particularly ***1: Judgment on forex transactions arising from the normal course of business: per Hon. Mr. Justice Henry Peter Adonyo: January 2015***

United States Dollars. The mode of payment for the financial services was either cash upon receipt of the Dollars. The mode of payment for the financial services was either cash upon receipt of the Dollars, issuance of postdated cheques, security cheques and unsigned cheques which could either be banked and honored in the event of dishonor, the plaintiff would communicate the incident to the and defendants were upon the defendant would either pay cash for the dishonored cheques or deposit money on the plaintiff's account or issue fresh cheques to the plaintiff. As evidence of payment, the plaintiff would return back to the defendants the dishonored cheques. The parties created a running account around 2010, the defendant's indebtedness to the plaintiff was to the tune of Shs. 1,200,000.000/= (Shillings One Billion Two Hundred Million Only) and the plaintiff used to hold cheques for funds advanced to the defendant. The plaintiff took as further security a certificate of title in the names of the first defendant. Upon presentation of the above said cheques by the plaintiff, the same were dishonored and the plaintiff was advised to refer to the drawer. The plaintiff demanded that the defendants pay the face value of the cheque but some delays occurred on the part defendants forcing the plaintiff report the defendants to the police under Ref. No. E/377/2010 and eventually the instituting of this suit.

The defendants, however, state that they owe no money to the plaintiff having paid back all what was due to the plaintiff who in return surrendered the original

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cheques to the them. While the plaintiff states that it returned the original certificate of title for land comprised in LVR 3926 Folio 22 land at Buziga–Konge, the defendant on the other hand states that the plaintiff did not do so but informed them that the certificate of title had been misplaced and could not be traced and this was forced the defendants process a special certificate of title.

Meanwhile, the plaintiff demanded that the defendants pay and it received Uganda Shillings Eight Hundred Ninety Five Million (Ug. Shs. 895,000,000). On the balances ,, the plaintiff did not get anything and thus was aggrieved and sought to recover its due through the instant suit.

Upon the filing of this matter upon, it was referred to a mediator. That process failed basically due to the non appearance of the defendants even when they were properly informed of the process. The matter was thus referred for trial. At the scheduling conference, two issues were agreed to by the parties to enable the determination of this matter by this Honourable Court and they are as indicated herein after below.

The parties' legal representatives were Mr. Alfred Jaabo together with Mr. Kanya Dennis of M/s KMT Advocates, Suite 2 Kati House, Kyaggwe Road, Kampala for the plaintiff and Mr Swabur Manjuk of M/s Lwere, Lwanyaga and Company Advocates, 3rd Floor Annex, Impala House, Kampala, for the defendants. They had

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replaced the original counsels M/s Rugambwa, Gadala Advocates of 3rd Floor, Raja Chambers, Plot 3, Parliament Avenue, Kampala who had at first represented the defendants.

2. Issues:

- 1) Whether the plaintiff is entitled to sums claimed from the defendants
- 2) What remedies are available to the parties?

During the hearing of this matter, the plaintiff presented two witnesses in the names of Mr. Asim Morvi and Mr. Hasnain Farishta, the Managing Director and the Operations Manager respectively. The defendants meanwhile presented four witnesses, namely Mr. Abdul Karim Ali, Mr. Ogen Mungu, Mr. Friday Tinkamanyire and Ms. Justin Nabakooza. All their testimonies are on record and have been taken into account in the resolution of this matter which I proceed to resolve as follows.

3. Is the plaintiff is entitled to the sums claimed in this suit from the defendants:

The plaintiff presented Mr. Asim Morvi (PW1) in support of its claim. This witness's testimony was to the effect that he is the Managing Director of the plaintiff company which has been in operation for the last nineteen (19) years. He testified further that in addition to owning the plaintiff company he also owned a number of other businesses which included SASA properties which dealt in real

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estate and Amafh Farms Limited in Mityana District which dealt in agriculture produce. In regards to the matter before court, this witness informed court that the defendants and the plaintiffs had had a cordial business relationship spanning a period of over five (5) years during which the two engaged each in the business of buying and the selling of foreign exchange predominantly United States dollars with sometimes making the use of telegraphic money transfers and this was done on a number of occasions. This fact was similarly testified to by Mr. Hasnain Farishta (PW2) as well as, Mr. Abdul Karim (DW1) and Mr. Friday Tinkamanyire (DW3). It was therefore undisputed and was appropriately corroborated. As regards to fact of the issuance of cheques both Mr. Asim Morvi (PW1) and Hasnain Farishta (PW2) testified to the fact that the 2nd and 3rd defendants Green Skyway Agencies Limited and Phoenix Petroleum Limited, all companies belonging to the first defendant did issue to the plaintiff cheques totaling to the sum of Ug. Shs. 2,050,950,000 but that all these cheques were returned to them dishonored by their bank. Additionally these two witnesses testified that on top of depositing of the cheques, the 2nd and 3rd Defendants also deposited with the plaintiff on 1st October 2010, a certificate of title for the 1st defendant's land in upper Konge-Buziga measuring approximately 0.709 acres. The defendants' do not deny the depositing of the cheques but state that deposited cheques only amounted to Ug. Shs. 1,200,000,000 and were issued on dates of the 5th, 7th, 8th, 11th, and 12th

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of October 2010. However, the plaintiff opposed this facts and urged this court to find that this assertion by the defendants was false testimony since it not only contradicted paragraph 3(a) of the plaintiff's reply to the amended written statement of defense but the defendants witnesses' own admission during cross examination which admission was not rebutted during re-examination that the defendants issued cheques for the values which were indicated as follows;

- a) On the 5th day of October 2010, the 2nd defendant issued cheques of Ug. Shs. 20,000,000.
- b) On the 6th day of October 2010, the 2nd defendant issued cheques of Ug. Shs. 100,000,000.
- c) On the 7th day of October 2010, the 2nd defendant issued cheques of Ug. Shs. 480,000,000; while the 3rd defendant issued cheques of Ug. Shs. 15,000,000.
- d) On the 8th October 2010, the 2nd defendant issued cheques of Ug. Shs. 495,000,000.
- e) On 11th October 2010, the 2nd defendant issued cheques of Ug. Shs. 420,000,000; while the 3rd defendant issued cheques of Ug. Shs. 15,000,000.
- f) On 12th October 2010, the 2nd defendant issued cheques of Ug. Shs. 495,000,000.

With all these cheques having been drawn as against the 2nd defendant's account Number 3500085890 with the DFCU Bank, Kimathi Avenue Branch and the 3rd defendant's account Number 1165720007 with Bank of Africa and all they all totaled to Ug. Shs. 2,040,000,000 thus disproving the defendants claims that they only issued cheques of Ug. Shs. 1,200,000,000.

In addition, the Plaintiff urged this court to note the fact that even out of those cheques which were issued , a number of them were returned dishonored yet the plaintiff ended up in receiving a total amount of Uganda Shillings Eight Hundred Ninety Five Million only (Ug. Shs. 895,000,000) from the defendants and no further payments have ever since been made in respect to the cheques listed below;

- (a) Ug. Shs. 475,000,000 through DFCU Bank on the 12th day of October 2010,
- (b) Ug. Shs. 300,000,000 through Stanbic Bank on the 1st day of February 2011
,
- (c) Ug. Shs. 100,000,000 through Stanbic Bank on the 11th day of July 2011,
and
- (d) Ug. Shs. 20,000,000 through Stanbic Bank on the 4th of October 2011.

When this allegation is considered together with evidence of Mr. Lawrence Ogen Mungu (DW2), a Detective Assistant Superintendent of Police, I find that there is ample corroboration of the nonpayment of the alluded cheques in that this

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particular witness who had no interest in the matter and was an independent as regards the dispute between the two parties, I am convinced that indeed the said cheques were tendered by the defendants and remained unpaid. This particular witness testified to the fact of receiving a criminal complaint lodged by the plaintiff's Managing Director at the Criminal Investigations Department at Kibuli in late October 2010 whereby a police inquiry file referenced number E/377/2010 was opened and that he himself recorded in that file the complaint of the defendants having issued a number of cheques to the plaintiff which had all been dishonored with their face value amounting to Ug. Shs.1, 625,000,000. That out of those cheques there were 79 cheques with each having a face value of Ug. Shs. 20,000,000 and totaling to Ug. Shs. 1,580,000,000 drawn on the 2nd defendant's account with DFCU Bank and other 3 cheques each with a face value of Ug. Shs.15, 000,000 totaling to Ug. Shs. 45,000,000 drawn from the 3rd defendant's account with Bank of Africa. This witness's testimony was corroborated by that of Justine Nabakooba (DW4) and all of them together are taken into account with those which had been issued on the 12th day of October 2010 totaling to Ug. Shs. as attached to the pleadings and the trial bundle and admitted by DW1, then the total amount by face value of all the cheques certainly amount to over Uganda Shillings Two Billion (U. Shs. 2,000,000,000) and in my opinion would disprove the defendant's testimony which trended to show that fewer cheques of lesser amounts

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had been issued by them. In fact, I find that when all these are taken into account together with the defence own rebuttal which appears incoherent and full of holes for DW1 having admitted to having received a demand for the sum of Ug. Shs. 1,200,000,000 as outstanding amount owed to the plaintiffs and relates this to his contradicting statements in this regard asserting that the claim for Ug. Shs.1,200,000,000 which was reported to the police was paid off the debt yet in re-examination he contradicts this position and goes on to claim that what was reported was a claim for Ug. Shs. 1,500,000,000 and on top of his other unsupported claim of having made payments in cash to the tune of over Uganda Shillings One Billion (Ug Shs. 1,000,000,000) which could not be verified goes on to prove a ploy hatched to defraud the plaintiff of its money.

Basing myself from the clear evidence adduced before me by the plaintiff, I find the plaintiff's claim to be consistent in that it proved how it made its claim for unpaid amounts of Ug. Shs. 1,200,000,000 which arose out of cheques issued to it which were dishonored and what was paid to it amounting to only Ug. Shs. GX 895,000,000. From the above, I find that the plaintiff's claim is more likely to be believed than those of the defendants since they are more coherent and clearly made thus believable since they show that indeed not only were cheques issued by the defendants but that out of the totals issued only some were paid and some remained unmet making the unmet cheques which remained unpaid to qualify to be

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considered as bills of exchange as was the consideration had in the case of **In Naris Byarugaba v Shivam M.K.D Limited [1997] HCB 71** where it was held that a bill of exchange constituted prima facie evidence of the sum of money printed on it and due to the person in whose favour it is drawn with such a debt only being discharged when the bill of exchange is honored yet the balance of the cheques were dishonored after being presented in compliance with Section 46 of the Bills of Exchange Act and thus the plaintiff is entitled to the value on their face as was held in the case of **Kotecha v Mohammed [2002]1 EA 112** and that of **Redfox Bureau de Change v Anke Alemayehu & Another [1997-2001] UCLR 359.**

The fact of presentation of the cheques and their returning unsettled by themselves ordinarily would give the plaintiff a cause of action against the defendants since cheques by their very nature are unconditional as was held by Justice Irene Mulyagonja Kakooza in the case of **Sembule Investments Ltd v Uganda Baati Limited HCMA 0664 of 2009.**

Thus upon their returning unsettled, the only recourse for the plaintiff is that to file a suit to recover its face value since cheque constitutes a promise to pay and the defendant becomes liable to make good the amount written on the cheque. Thus since this is the

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position here in the instant matter and I find that the defendants cannot escape liability as they even did not disputed having issued all the cheques in question which in the terms of the above cited decisions ought to be construed as cash as even DW1 testified to the fact that by issuing those cheques he was bound to make a payment. Further still, as pointed out during the DW1's cross examination on his **Annexure D1** on the details, debit and the balance column, the 2nd defendant's account had clearly insufficient funds most of the time indeed pointing to the fact that even when those very cheques which were issued, they were done so to defeat the plaintiff's interests.

Therefore, basing myself on the *ratio decidendi* in the above cited authorities, I would find that indeed the defendants' liability as to the plaintiff having been properly established and thus would hold that the plaintiff is entitled to its just funds as can even be construed from the evidence of PW1 and PW2 who testified to the effect that upon the defendants having made payments of Ug. Shs. 895,000,000, the original cheques earlier issued to it by the defendants were returned to the first defendant but held onto his original certificate to title which in their opinion and in the understanding of the parties was of the value approximately the outstanding amount Shs. 1.2 billion indicating that the parties were well aware of their obligations under the transactions.

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Therefore, this went on to defeat the defendants' claim that they issued cheques for Ug. Shs. 1,200,000,000 yet the attached cheques admitted by both parties amounted to Ug. Shs. 2,040,000,000 and of these the only evidence attached were proof of payment to the tune of Ug. Shs. 895, 000,000 and so the claim that the outstanding balance of Ug Shs. 205,000,000 was paid in cash as claimed in paragraph 5(j) of the amended written statement of defense would remain unsupported.

To compound the unreliability of the defendants' evidence, there was the insinuation that cash in return for the dishonoured cheques were paid to plaintiff's "authorized agents" who were unfortunately neither mentioned by names nor even identified leaving serious doubt in the mind of the court as to the veracity of the allusion. Even the averment that Ug. Shs. 895,000,000 and Ug. Shs. 205,000,000 were paid to the plaintiff would still only total to Uganda Shillings One Billion One Hundred Million (Ug. Shs. 1,100,000,000) instead of Ug. Shs. 1,200,000,000 leaving of Ug. Shs. 100,000,000 not accounted for.

Worse still when DW1 was tasked to explain why he did not have any receipts from the plaintiff to prove that cash payments had been made in lieu of the dishonoured cheques, his answer was unsatisfactory in that he pointed out that the said cash had been paid by Friday Tinkamanyire (DW3) who was his accountant and that this witness would have the evidence of the cash payment. Unfortunately, this witness

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denied ever being an accountant for the 2nd and 3rd defendants as was stated by DW1 when this issue was put to him during examination in chief that though he confirmed on oath of having worked as the Operations Manager of the defendants with the major job being to deposit cheques with the plaintiff and in turn carry United States Dollars (USD) and sometimes Uganda Shillings (USHS) from the plaintiff to the defendants. He even offered further evidence to the fact that the plaintiff would bank the cheques to complete the transaction between itself and the defendants and that when any of the cheques were dishonoured, he would carry other replacement cheques or in other instances actually deposit cash money on to the plaintiff's account to signify the completion of the transactions between the two parties. He agreed that where a dishonoured cheque was not reimbursed with cash transaction, then that transaction was not being completed signifying that the defendant still had the obligation to make good the same thus confirming further the claim of the plaintiff. This witness testimony was believable in that it actually corroborated the plaintiff's accounts having had on it deposited Ug. Shs. 895,000,000 only and no further evidence was adduced to show that any other monies other than this were ever deposited on the said account. The conclusion to be had from this very telling evidence is that the defendants must be held liable for the issuance of the dishonored cheques to the plaintiff as this is even an admitted fact considering the plaintiff's assertion that the defendants issued to it cheques

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totaling to Ug. Shs. 2,050,950,000 and the said cheques are attached to the pleadings only but amounting to Ug. Shs. 2,040,000,000 leaving a shortfall of only Ug. Shs. 10,950,000 yet the defence could only come up with a total repayment of Ug. Shs. 895,000,000 making the defense's assertion that cash payments of over Shs 1,200,000,000 having been made in regards to the dishonored cheques to extremely appear remote, unreliable and cannot be taken as truthful since this fact is neither supported nor corroborated by any evidence on record. Additionally, the evidence of Ogen Mungu (DW2) goes on to confirm the indebtedness of the defendants to the plaintiff so that even if the claim that Ug. Shs. 1,625,000,000 was said to have been the amount transacted upon as DW2's witness's testimony would tend to show, DW1's evidence only covered transactions from the 5th to the 11th day of October 2010 yet other transactions took place on the 12th day of October 2010 amounting to Ug. Shs. 495,000,000 and if that sum added to the deficit of Ug. Shs. 730,000,000, the implication would be that that the defendants were still indebted to the plaintiff to a tune of Ug. Shs. 1,225,000,000 and if the amount admitted by the plaintiff has having been received of Ug. Shs. 895,000,000 that would still leave an outstanding amount of Ug. Shs. 730,000,000. Yet even this would not have taken into into account the fact that the defendants had issued cheques worth Ug. Shs. 495,000,000 on the 12th day of October 2010! In my view, all these would tend to prove that indeed the plaintiff gave services to the

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defendants but the defendant failed to honour their part of the bargain hence making the plaintiff's claim to be more believable and since that is my view that I arrive at then I would find that the plaintiff's has proven its claim on a balance of probability that it is owed the sum of Ug. Shs.1, 200,000,000 by the defendants who therefore are held accountable accordingly.

4. Remedies Available to the Parties:

Having found that the plaintiff has proved on a balance of probability that the defendants owed it the sum of Ug. Shs. 1,200,000,000, the logical conclusion would be first and foremost to award the said sum to the plaintiff as the principal amount due to it from the defendants. The basis of this conclusion is grounded in the testimonies of Mr. Asim Morvi (PW1) and Mr. Hasnain Farishta (PW2) which were to the effect that due to the intransigence of the defendants leading to the nonpayment of the plaintiff's due monies, their action had such serious negative effect on the plaintiff's business such that the plaintiff was forced to go to the extent of borrowing other resources to keep its business afloat as the large sums of money owed to it by the defendants had had a destabilizing effect on the normal flow of business . When such huge sums owing and not paid is taken into, it would apparently had telling effect on one's business and as such I am convinced that the plaintiff had to lose to some degree its business as a result of the failure of the defendants to repay it what was due thus creating certain business loss with the

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plaintiff additionally having to contend with the fact of repayment of borrowed monies with interests as well as trying to rebuild its business reputation which situation would have not arisen had the defendants been reliable partners in the transactions.

The end result of this would lead to the consideration of whether the plaintiff would deserve the grant of general damages having regard to the fact that the principle to be considered for grant such an award long since having been laid down by the East African Court of Appeal in the case of **Dharamshi v Karsan [1974]1 EA 41** in which the fundamental common law doctrine of *restitution in integrum* was followed.

In making this conclusion, I take note of the fact that **Halsbury's Laws of England, Fourth Edition reissue volume 12 (1) paragraph 812** clearly makes distinction between general damages and special damages where it describes that general damages as those losses usually but not exclusively non pecuniary which can be calculated in financial terms and whereas special damages are those losses which can be calculated in financial terms, with general damages presumed to be the natural or probable consequence of a wrong complained of and the plaintiff's only requirement is to assert that such a damage had been suffered and the court would consider so. When this clear proposition of the law is applied to the instant matter it is clear to me that indeed the plaintiff was deprived of its monies which it

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should have at all times been available to it to for used to boost its business thus the failure of the defendants to make good their obligations would call for consideration that such denial to repay back what was rightfully belonging to another at the time when that person needed it most would make a convincing case for the court to consider an award of general damages. In this instant matter considering that a huge amount of money was with the defendants and thus created an unfathomable deficit in the plaintiff's business for such a long period of time would convince me that a modicum of redress would suffice and therefore, in my opinion, an award of general damages amounting to Uganda Shillings Sixty Million would commensurate the pain the plaintiff had to suffer in seeking to recover what was lawfully belonging to it. I would also think that the imposition of such a sum would be a wakeup call to the defendants to always handle business matters with such transparency and honesty so as avoid in future taking for granted the trust needed in the conduct of business. I therefore order that the defendants pay Uganda Shillings Sixty Million only as general damages.

The plaintiff also prayed for interest on the principle sum at court rate. It is trite law that the award of interest is a discretionary act of the court. In the instant matter, I note with concern that the cause of action against the defendants arose way back in 2010 making it nearly five (5) years since the plaintiff made its demand known to the defendants who by and large ignored and did not heeded to

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the same. This shameful act to say the least for the plaintiff's could have used its monies to grow its business which was stifled by the defendants' uncooperative attitude. This predicament is convincing enough to show that the plaintiff deserves to be compensated for the non use of its monies which for all this period was in the hands of the defendants. In the premises, I am of the opinion that the plaintiff deserved to be an awarded interest on its monies having been kept out of use of it noting that this was business money. I therefore would grant interests on the said amount at the commercial rate of 21% per annum the time the cause of action arose till payments in full.

As regards to costs, it is trite that it normally follows the event and since my finding on all issues where to the effect that the plaintiff is the successful party in this matter, I would be constrained to award it the costs of this suit having noted that the plaintiff had to seek recourse in court proceedings to get what was due to it arising yet it should not have been so in the first place when consideration is had to the fact the parties before the court had had an amicable business relationship for a long period of time but were it not for the negative intentions of the defendants who took advantage of such cordial relations and wanted to fleece the plaintiffs of its hard earned resources.

5. Orders:

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In conclusion therefore, I would enter judgment in the favour of the plaintiff as against the defendants, jointly and severally in the following terms;

- a. The defendants are condemned to refund to the plaintiff the sum of Ug. Shs. 1,200,000,000
- b. I order the defendants, jointly and severally to pay interests on the above amount at the rate of 21 % per annum when the cause of action arose till payments in full.
- c. I order the defendants, jointly and severally, to pay to the plaintiff general damages of Ug. Shs. 60,000,000/ which will attract interests at the rate of 6% per annum from date of delivery of this judgment till payment in full,
- d. I do condemn the defendants, jointly and severally to pay the reasonable costs of this suit as incurred by the plaintiff.

These orders are made at the High Court Commercial Division, Kampala this 22nd day of January, 2015.

Henry Peter Adonyo

Judge

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