THE REPUBLIC OF UGANDA,

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

HCCS NO 47 OF 2012

1. **SOLOMON BAGANJA}**
2. **MABEL NANSUBUGA}.....PLAINTIFFS**

VS

HENLEY PROPERTY DEVELOPERS LTD}.....DEFENDANT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

JUDGMENT

The Plaintiffs initially filed this action by way of a specially endorsed plaint by summary procedure under Order 36 rule 2 of the Civil Procedure Rules for recovery of US$26,000, general damages, interests and costs of the suit. The Defendant applied in Miscellaneous Application Number 63 of 2012 for unconditional leave to defend the suit and for costs of the application to be provided for.

On 21 March 2012 when the suit came for hearing, the applicant/Defendant was represented by Counsel Andrew Munanura while the respondent/Plaintiff's were represented by Counsel Edmund Kyeyune when the parties agreed before the court through their Counsel that the applicant/Defendant agreed to pay the contractual sum of US$26,000 plus 1% as penalty fees. There was no agreement on the question of costs as well general damages claimed in the summary suit. An order was issued for the payment of US$26,000 by the Defendant in addition to 1% of the decreed sum as penalty fees. Furthermore the applicant/Defendant was granted conditional leave to file a defence in respect to the issues remaining of general damages, interest and costs.

At the hearing of the suit on the remainder of the issues Counsel Edmund Kyeyune represented the Plaintiff while Counsel Michael Mafabi represented the Defendant. In the joint scheduling memorandum the following facts are the agreed facts of the dispute namely:

a. The Plaintiffs made a booking/deposit on purchase price for Mall space (shop unit number 112 and 113 in respect of the Defendants Mall which was yet to be constructed its plots 60, 63, 64 and 66 Nakivubo road, Kampala.

b. The Plaintiff made a deposit payment of US$26,000 in respect of the said units.

c. Due to unforeseen delays in commencement of construction and delivery of the project, the Plaintiffs sought a refund of the sum deposited.

d. The Defendant informed the Plaintiffs that the refund of the sum of US$26,000 including a penalty fee of US$260 would be paid to them by 29 February 2012 at very latest.

e. The Plaintiffs filed civil suit number 47 of 2012 on 7 February 2012 before the refund was made.

f. The sum of US$26,260 was refunded to the Plaintiffs.

The agreed issue is **whether the Plaintiffs are entitled to general damages, interest and costs of the suit?**

The first Plaintiff testified on behalf of the Plaintiffs while Mr Richard Mubiru, a director of the Defendant testified on behalf of the Defendant. Thereafter the court was addressed in written submissions.

Submissions of the Plaintiff's Counsel:

The Plaintiff's Counsel submitted that the Plaintiffs suffered damages due to the breach of contract executed between them and the Defendant. The Plaintiff expected to earn a livelihood upon occupying shops number 112 and 113 they had booked from the Defendant. They further made a down payment of US$26,000. PW1 testified in cross examination that it was a business investment. A loss of expected income was inflicted upon the Plaintiff by the Defendant and as such injustice was caused to the Plaintiffs. Because the project was not executed due to the Defendant's breach of trust, the Plaintiff's investment plans were not actualised. Because the Plaintiffs money was tied up, the Plaintiff wrote to the Defendants on 5 February 2012 that due to the tie up of the monies, and despite making a demand for a refund, which refund was not made in due time, they suffered inconvenience and lost out on other business opportunities that they had intended to enter into not to mention further monies (expenses) they incurred while contacting the Defendant either in person or through phone calls at least once a week.

Furthermore according to paragraph 10 of exhibit P4 it was stipulated that a sales agreement would be executed between the Plaintiff and the Defendant within 15 weeks of acknowledging receipt of the initial down payment or a future date to be brought to the Plaintiff's notice that this was not deliberately done by the Defendant. During cross-examination PW1 confirmed that the onus was on the Defendant to make available for execution the sales agreement. The Defendant denied the Plaintiff access to any right of title for the service agreement and further denied them their hopes of earning any income from the proposed building project.

In a letter dated 23rd of January 2012 the Defendant insisted that the refund was planned to be made by 29 February 2012. Exhibit P2 was never received by the Plaintiff since the same had no communication received acknowledgement provision and is not even signed by either of the Plaintiffs.

Furthermore exhibit D1 cheque No. 000107 dated 9th of February 2012 was made up to a different payee from the account details and currency transfer form from the Plaintiff's exhibit P2 which was in possession of the Defendant. This meant

that the Plaintiff's could not bank or cash this cheque anywhere. It also meant that the Plaintiff required a fresh start in requesting for a refund. The Defendant demonstrated unwillingness to make payment even after being served. It was only with the court's intervention on 21 March 2012 that payment of the refund of US$26,260 was made by telegraphic transfer into the first Defendant's bank account number 220 11 6223 with Kenya Commercial Bank. The Defendant continued putting the Plaintiff to great inconvenience regardless of the hoax project erection coupled with the incessant demands to a refund being made by the Plaintiffs which went unanswered.

Counsel relied on the case of **Dr Dennis Lwamafa versus Attorney General HCCS 79 of 1983 (1992) KALR 21** where it was held that the Plaintiff who suffers some damage due to the wrongful act of the Defendant must be put in the position he would have been had he not suffered the wrong. Secondly it was held that the valuation would be at the time of judgement. Counsel further relied on **Kibimba Rice Company Ltd versus Umar Salim SCCA number 7 of 1998 (1991) ULSLR 132** and **Zimbiha versus Attorney General HCCS 0109 of 2011** that for general damages to be awarded, the litigating party has to prove to court that inconvenience was suffered or visited upon him or her.

The Plaintiff's Counsel submitted that PW1 proved court that indeed they were inconvenienced by the actions of the Defendant by the Defendant holding onto the Plaintiffs monies even with the constant demand for a refund to enable the Plaintiffs make a timely investment elsewhere. The inconvenience visited upon the Plaintiffs by the Defendants can only be well remedied by putting into perspective the lost business opportunities and the fact that the refund was delayed. Counsel relied on the case of **Kabona Bros versus TUMPECO Ltd (1981) HCB 74** on the question of lost business opportunities or profits. Secondly Counsel relied on the case of **Matiya Byabalema and others versus UTC SCCA No. 10 of 1993** in which honourable justice Benjamin Odoki JSC held the view that courts ought to assess the amount of damages taking into account the current value of money in terms of what goods and services it can purchase at the present.

Secondly the most recent decisions of the courts of Uganda provide the best guide and ensure conformity in the level of awards which should be maintained.

The Plaintiffs were inconvenienced when the Defendant failed to make good on the promise of erecting the said Mall in order for the Plaintiff to take up occupancy and embark on their business as envisioned. Counsel further prayed that the Defendants are punished in proportion to the damage caused to the Plaintiffs and the same should act as a deterrent to prevent future occurrences.

In the submissions in reply, the Defendants Counsel relied on the facts agreed in the joint scheduling memorandum. Secondly he submitted that the facts after the filing of the suit are that the Defendant filed HCMA No. 63 of 2012 for leave to appear and defend the suit on 17 February 2012 in which conditional leave was granted to the Defendant. Subsequently a sum of US$26,260 was fully paid to the Plaintiffs. The case was tried on the reserved issues of general damages, interest and costs of the suit.

The Defendant's Counsel proposed to resolve the first issue under different heads.

General Damages:

On the question of general damages, the Defendants defence is that the Plaintiffs are not entitled to any. The relationship between the Plaintiffs and the Defendants was governed by specific standard terms and conditions contained in the Mall payment receipt agreed and admitted as exhibit P4. Secondly in cross examination PW1 confirmed that exhibit P4 was the only binding document between the Plaintiffs and the Defendant. He further confirmed in cross examination that he understood the agreement between the parties to be that in the event of failure to deliver, the Plaintiff would be entitled to a refund inclusive of 1% interest. The only remedy in the event of failure to deliver the premises by the Defendant was the refund and payment of 1% on top of the refund which was compensatory in nature for the failure of delivery of the premises.

The Plaintiffs were fully refunded their money inclusive of US$260 classified as interest under clause 2 of the standard terms and conditions of the Mall space payment receipt. It was compensation for non-delivery of the premises to the Plaintiff's which the Plaintiffs claim was a breach of contract on the part of the Defendant. The interpretation of clause 2 of the Mall space payment receipt exhibit P4 which is binding on both parties provides for the consequences of non-delivery of the premises to the Plaintiffs. The consequence was a refund of the deposit plus interest at 1% per annum on all monies deposited with the Defendant for the purchase of the unit. PW1 agreed with this interpretation in cross examination. According to DW1 the nature of the 1% refund was to compensate the buyers in recognition of the fact that the project was not delivered.

Counsel relied on **HCCS 118 of 2008, Coptcot EA Ltd versus Godfrey Sentongo and another** for the holding 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.

The Defendant's Counsel submitted that the parties contracted on the consequences for none delivery under clause 2 of the standard terms and conditions of the Mall Space payment receipt. The right was invoked by PW1 when he sought refund of US$26,000. In the case of **Excel Construction Ltd versus Attorney General Civil Suit Number 3 of 2007** the court cited with approval the principle expounded in Halsbury's Laws of England 4th edition reissue volume 12 that the rate of interest agreed to will be the measure of damages no matter what inconvenience the Plaintiff has suffered from the failure to pay on the due date. Counsel maintained that the Plaintiff cannot claim any more damages than the 1% agreed upon. He contended that the Plaintiffs are only entitled to damages in the measure of interest as agreed. Counsel further relied on **Suisse Atlantique Société D' armament Maritime SA versus NV Rotterdamsche Kolen Centrale [1966] 2 All ER 61** for the holding that such a contractual clause is enforceable irrespective of the adequacy of the amount stipulated in the contract and the

Plaintiff cannot claim for more than what is provided for. In the premises Counsel maintained that the Plaintiff is not entitled to any more damages.

Furthermore the Defendants Counsel contends that according to clause 7 of the terms and conditions, the permissible delayed delivery allowance period from the due date of delivery was 365 days. Secondly PW1 testified that delivery would only occur after the signing of the sale agreement. Counsel contended that to the extent that the sale agreement had not been executed, the arrangement between the parties as regards the money to be refunded was that the Defendant held that the money only as a deposit with the result that the Plaintiffs only entitlement was a refund of the deposit as stipulated under clause 2 (supra).

Regarding the Plaintiff's evidence that he suffered loss of income on the ground that the money was paid up, PW1 admitted during cross-examination that there was no evidence of such loss. No cogent or empirical evidence was ever brought by Counsel or PW1 to show any loss besides the mere allegation by PW1 in re-examination that the purchase of the units was a commercial investment. No evidence of the commercial nature of the purchase was ever presented to the court.

The Defendant's Counsel relies on the case of **Robert Coussens versus Attorney General Supreme Court Civil Appeal Number 8 of 2009** for the holding that an estimate of prospective loss must be based in the first instance on the foundation of the facts; otherwise it is not an estimate, but a guess. It was therefore important that evidence should be given to the court of as many solid facts as possible. In **civil suit number 118 of 2008 Coptcot EA Limited versus Geoffrey Sentongo** and another Honourable Lady Justice Helen Obura held that there must be a basis and justification for an award of general damages. The Defendant's Counsel contended that in this suit there was no basis or justification for an award of general damages.

He further submitted that any alleged inconvenience suffered by the Plaintiffs was duly compensated for as a matter of contract and the Plaintiffs were refunded 1% interest on the money deposited. The Plaintiff knew and understood the risks

involved in the industry including delays, risks and other events by the time he signed the terms and conditions.

In rejoinder the Plaintiff's Counsel submitted that the prayer for general damages is borne out of the inconvenience that was occasioned to the Plaintiffs by the Defendant. He contended that this and damages are injuries resulting directly from an action or the failure to take action by the Defendant according to **Black's Law Dictionary**. Secondly he submitted that damages are a pecuniary compensation or indemnity which may be recovered in the courts by a person who has suffered loss, detriment, or injury, whether to his person, property rights through unlawful acts or omissions or negligence of one. The Plaintiff's Counsel relies on the testimony of PW1 for the evidence about the inconveniences suffered. He submitted that for the prayer for general damages to succeed one need to prove to court that there was inconvenience on the aggrieved party either through pain and suffering, loss of amenities and/or emotional harm.

The Plaintiff's Counsel further relied on the case of **Uganda Revenue Authority versus David Kitamirike Civil Appeal Number 43 of 2012** that general damages are awarded by the court at large and after due court assessment. They are compensatory in nature in that they should offer some satisfaction to the injured Plaintiff. He contended that the Defendant having caused great inconvenience to the Plaintiffs, the award of general damages would best compensate the Plaintiff's for this loss despite the Defendant's submission that a 1% interest surcharge adequately compensates the Plaintiff in this case.

Interest:

Counsel relies on section 28 (2) of the Civil Procedure Act cap 71 laws of Uganda for the submission that the Plaintiff’s paid US$26,000 on 12 January 2011. Since the payment of these monies nothing was done towards construction of the building. It was stipulated in paragraph 2 of exhibit P4 that should the project failed to take off then there would be a refund of the monies had and received from the Plaintiff's with a further surcharge of only 1% interest.

Paragraph 2 of exhibit D4 is structured in such a way that regardless of the time taken for the refund to be made the Defendant would still be liable to the charge of only 1% interest in the amounts had and received. It should be noted that exhibit P4 was only presented after the Plaintiff had lost control of the monies by depositing it to the Defendants account first. The transaction was designed not to be fair from the beginning. In cross examination of DW1 about what would happen if the Defendant held onto the Plaintiff's monies for a period of up to 15 years, he testified that the liability would be limited to a refund of the monies had and received inclusive only of the 1% surcharge.

In this the Defendants intended to avoid reasonable liability by not even putting into consideration the financial projections of those had intended to do business with since the agreement was a clear "slap on the wrist punishment". Had the Plaintiffs fixed the monies in the prevailing commercial interest rate then they would obtain profits on the same. However by the Defendant holding onto this money for a long period of time, despite demands for a refund, the Plaintiff were denied the use of the monies on other prospective business ventures while these same rights and benefits accrued and/or were assumed by the Defendant.

Counsel submitted that the award of interest is discretionary as held in **Stahlco Holdings limited versus Messieurs Aviation Fellowship Europe CACA 2/2001**. Counsel also relied on **ECTA (U) Ltd versus Geraldine Namubiru and Josephine Namukasa SCC a 29/1994**. It was further held that a distinction must be made between awards of a commercial transaction which would normally attract a higher interest and awards of general damages which are mainly compensatory. The Plaintiff's Counsel submits that the transaction was of a commercial nature. Relying on the case of **Premchandra Shenoi vs. Maximov Oleg SCCA 9/2004 (2001 – 2004) 2 HCB 26,** and interest of 20% was more appropriate than the court rate of 6%. Furthermore under section 98 of the Civil Procedure Act, the court has jurisdiction to make orders to mete out punishment or other relief. He contended that the court should exercise this power to deter the Defendant from ever drafting agreements that are only to their benefit fully aware that theirs is a commercial transaction oriented business. Lastly Counsel prayed that the court

should find an award of interest at 25% per annum on the monies had and received by the Defendant from 12 January 2011 until payment in full.

The Defendants Counsel generally submitted that the claim for interest must fail because it is not supported by any evidence. Secondly it is not a proper case for the court to exercise discretion to award interest. An award of interest would be made if the Defendant knowingly kept the Plaintiff out of his money, and having had the use of it himself according to the case of. **Harbutts Plasticide Ltd versus Wayne Tank and Pump Company Ltd [1970] 1 QB page 447.**

The money in issue was paid to the Defendant as deposit on the purchase of units. PW1 voluntarily signed the standard terms and conditions which is the only binding contract between the parties. There is no evidence to suggest that the Defendant made use of the deposit made by the Plaintiffs. DW1 testified that they always undertake to ensure that people do not lose out on the money that they deposit with them. He testified that although they lost money in the project, they ended up refunding everything plus interest as agreed.

The Defendants Counsel further reiterated submissions on the basis of clause 2 of the agreement exhibit P4 that interest was contractually fixed at 1% by both parties and under the above principles there can be no award of further interest.

In rejoinder the Plaintiff's Counsel reiterated submissions on the basis of section 28 (2) of the Civil Procedure Act for the submissions that in holding onto the Plaintiffs monies and not carrying out the purpose for which it was advanced, and that 1% interest would be adequate compensation regardless of the time and money is spent, falls short of the principles of commercial transactions. He contended that the court is seized with the power to award interest under the said provision at its own discretion. He further reiterated that the award of interest is discretionary and compensatory depending upon the various circumstances of the case and the court may award what is fair and reasonable according to the case of **Stahlco Holdings Limited versus Aviation Fellowship Europe (supra**). According to PW1 the sole purpose for the investment was to make some financial gains which investment plan never come to pass owing to

the Defendant's actions. In those circumstances interest should be awarded at the discretion of the court to compensate the Plaintiffs for the lost business opportunities brought about by the Defendant's wayward conduct.

Costs

The Plaintiff's Counsel submitted that on the question of costs he relies on section 27 (2) of the Civil Procedure Act that costs should follow the event unless the court or judge shall for good reason otherwise order. He submitted that it was only the intervention of the court on 21 March 2012 that compelled the Defendant to make payment of the decretal sum of US$26,000.

In reply the Defendants Counsel submitted that according to exhibit D2, the Defendant wrote to the Plaintiffs in a letter dated 23rd of January 2012 confirming that the Defendant shall refund the deposit of US$26,260 by 29 February 2012 at the very latest. He contended that the Plaintiffs were in possession of this letter at the time the suit was filed on 7 February 2012. That is why the letter is annexed to the plaint. In so doing, the Defendant's Counsel submitted that the Plaintiffs acted in bad faith because there was a promise and in fact an assurance by the Defendant to refund the monies on a stipulated date. In those circumstances the suit was filed prematurely and the Plaintiffs are not entitled to costs. Furthermore the Defendant's Counsel noted that PW1 conveniently purported to deny receipt of the letter during cross-examination and re-examination because the letter did not have a signature in acknowledgement of receipt. At the same time the Plaintiff attached a letter to the pleadings. There is reasonable inference that the Plaintiffs were aware of this letter when the filed this suit. If this were not so, they would not have attached it to the pleadings. Furthermore there is no evidence to show that the Plaintiff never rejected the letter which contained a timeline within which the refund was to be made. In the premises the prayer for costs ought to be denied.

In rejoinder the Plaintiff's Counsel further reiterated the provisions of section 27 (2) of the Civil Procedure Act. He submitted that there was no bad faith on the part of the Plaintiffs in seeking the intervention of court to compel the Defendant

refund the monies had and received as was agreed under clause 2 of exhibit P4. Furthermore it was noteworthy that the purported refund in exhibit D1 was still not in the names of the actual claimant of the monies albeit the fact that the Defendant had the bank account details of the first Plaintiff who had actually made the payment. Counsel relied on the case of **Uganda Development Bank versus Muganga Construction Company Ltd (1984) HCB 35** for the holding that costs should follow the event unless the court orders otherwise. He reiterated submissions that it was only after this matter was brought to court that the Defendant did make payment and therefore the prayer for costs are well founded. Finally the Defendants Counsel reiterated prayers in the plaint and written submissions that judgement be entered for the Plaintiffs against the Defendant on the issues submitted upon.

Judgment

I have carefully considered the Plaintiff's suit as well as the Defendant's defence, together with the submissions of Counsel which I have reproduced above as well as the authorities cited for either side. The Plaintiff's suit was originally filed as a summary suit under the provisions of Order 36 rule 2 of the Civil Procedure Rules for recovery of US$26,000, general damages, interests and costs of the suit. Subsequently the Defendant applied for unconditional leave to defend the action in HCMA No. 63 of 2012. When the application came for hearing on 21 March 2012, both Counsels for the parties in the presence of the representatives of the Plaintiff and the Defendant agreed that partial judgement is entered against the Defendant for a sum of US$26,000 and additionally a 1% penalty fees be awarded against the Defendant. Thereafter conditional leave was granted to the applicant/Defendant to file a defence in respect of the remainder of the suit to try the issues of general damages, interests and costs.

In paragraph 4 of the plaint it is averred that on the 3 January 2011 the Plaintiff entered into an agreement with the Defendant for the purchase of shops number 112 and 113 at a consideration of US$67,200 in a shopping Mall situated at plots 60, 62, 64 and 66 Nakivubo road which was yet to be constructed by the Defendants. The Plaintiff further avers that on 12 January 2011 the Plaintiff made

a down payment of US$26,000 to the Defendant towards the purchase. It was further averred that ever since the Plaintiffs made the payment on 12 January 2011 to the Defendant no works have been done on the prescribed site for the premises. Thereafter the Plaintiff approached the agents of the Defendants to have the Defendants refund the Plaintiffs monies. The Plaintiff relied on e-mail correspondence which was attached to the plaint. The Plaintiff further avers that despite several reminders/requests by the Plaintiffs, for a refund of the deposited sums, the Defendants did not refund the money or neglected to do so by the time of filing the suit on 7 February 2012. In the plaint and paragraph 5 thereof the Plaintiff further avers that the Defendant's actions are meant to frustrate, bring financial loss to or amounts to breach of contract. The Plaintiff sought general damages, interest at 25% per annum on the monies had and received by the Defendant from 12 January 2011 until payment in full; costs of the suit and any other relief that this honourable court may deem fit to grant.

In the written statement of defence filed with the leave of court, the Defendant averred that the Plaintiffs are not entitled to general damages considering that under clause 7 of the Mall Space payment receipt terms and conditions, (hereinafter referred to as the receipt terms and conditions), the permissible delayed delivery period for the project was a maximum period of 365 days from the date of delivery which was agreed in the sale agreement. Secondly the Defendant contended that a sale agreement had not been signed between the parties and the Plaintiffs was not inconvenienced in any way or at all and are not entitled to claim for general damages. They were only entitled to the amount deposited which had already been paid to them. Secondly as far as the claim for interest is concerned, interest was fixed at 1% under the receipt terms and conditions which the Plaintiffs were already paid. In the premises the Plaintiffs are not entitled to any further interest. As far as costs are concerned the Defendant averred that the Plaintiffs claim for costs should be disallowed because the suit had been filed prematurely. Furthermore the intention of the Plaintiffs in filing this suit was unjust enrichment.

The Defendant further averred that the suit was filed in bad faith because the Plaintiffs knew that the payment for refund was due on 29 February 2012 (this suit was filed on 7 February 2012). That it was filed in total disregard of the due date of the refund and therefore proceeding to institute a suit was in bad faith.

After the testimony of the Plaintiffs witness PW1, the first Plaintiff Mr Solomon Baganja and the Defendant's witness DW1 Mr Richard Mubiru, a director of the Defendant Company, the respective parties closed their cases.

The brief testimony of PW1 is as averred in the plaint. In paragraph 4 of the written witness testimony PW1 testified that for a period of one year the Defendant had not even started on the construction works on the proposed site which forced the Plaintiffs into seeking a refund of the monies had and received by the Defendant. Secondly when the Plaintiffs realised that there was not going to be any construction of the proposed shopping centre, the Plaintiffs contacted the Defendant through its various officers to have their monies refunded to them. There were endless and fruitless pleas made by the Plaintiffs which were met with empty promises or not even attended to. Because of the state of affairs, the Plaintiff filed this suit on 7 February 2012 and on admission of the Defendants the court order ordered on 21 March 2012 that the Defendant remits to the Plaintiff US$26,000 together with interest of 1% proposed by the Defendant. Furthermore the Plaintiffs had their monies trapped in a project that did not only fail to take off but caused them further loss of income elsewhere since the monies were paid up and could not be used by them. As a consequence the Plaintiffs suffered great financial inconvenience and loss at the expense of the Defendant since the Defendants refused to refund the money because the Defendant had failed to complete the project to enable the Plaintiffs earn an income from the proposed shops.

At the hearing it was agreed that the document having the floor plan of the proposed shopping mall is admitted as exhibit P1. The document is not in dispute and is not necessary for resolution of the agreed issues. Secondly documents with regard to payment of the deposit by the Plaintiffs to the Defendant are not in dispute and do not have to be considered. The main document relied upon by the

Defendant to exclude payment of damages and interest is exhibit P4 which is the receipt standard terms and conditions which will be considered in detail. Furthermore the Plaintiff relied on the e-mail between the first Plaintiff and one of the directors of the Defendant Company dated 5th of February 2012 exhibit P5. For the Defendants the cheque of Standard Chartered bank number 070 1074 US$26,260, exhibit D1 was admitted. Secondly a letter dated 23rd of January 2012 from the Defendant to the Plaintiff, exhibit D2, was also admitted.

PW1 Mr Solomon was cross examined about the transaction. He agreed that he signed exhibit P4 which is the receipt terms and conditions. In paragraph 7 of the terms and conditions delivery was supposed to be after signing the sale agreement. On the issue of whether before execution of the sale agreement there could be no delivery, PW1 disagreed. Specifically PW1 was cross examined about paragraph 2 of exhibit P4 which is stipulated that the Defendant shall refund all payment with an interest of 1% per annum in case of failure to deliver. He also admitted that he had received the refund stipulated in clause 2 of the payment terms and conditions. The agreed delay permissible period was 365 days. In re-examination he further testified that he was not presented the sale agreement within 15 weeks. Furthermore he used to contact the Defendant for the refund.

On the other hand the Defendant's case as contained in the testimony of DW1 Mr Richard Mubiru agrees with the basic facts of the contract and testified that due to unforeseen events and the commencement of construction and delivery of the project, the Plaintiffs exercised their right to demand a refund of the money deposited as provided for under the deposit agreement. He relied on clause 2 of the receipt terms and conditions referred to above. Furthermore by a letter dated 21st of January 2012 the Defendant wrote to the Plaintiffs informing them that the amount of US$26,000 inclusive of interest or penalty fee of US$260 representing 1% agreed to by the parties would be paid to the Plaintiffs by 29 February 2012. Prior to obligation to the Plaintiffs the Defendants officials had discussed and agreed to the refund in principle to be made to the Plaintiffs by the end of February 2012. Consequently the Defendant was surprised to be served the plaint and summons on 14 February 2012 before the refund could be made in

accordance with the agreement. On the same day the Defendant through their lawyers corresponded with the Plaintiff's lawyers informing them that the suit had been filed prematurely because the agreed date of payment had not been reached and forwarded a cheque to the Plaintiffs with the full amount of US$26,260 which the Plaintiffs rejected through their lawyers. Subsequently the Plaintiffs accepted the payment but are now demanding an additional payment of Uganda shillings 120,000,000/= from the Defendant. In cross examination, DW1 testified that he wrote to the Plaintiff on 23 January 2012. Furthermore he agreed that there was no agreement that was signed within a period of 15 weeks in terms of paragraph 10 of exhibit P4. The agreed delivery period was supposed to be stipulated in the agreement to be executed between the parties. Furthermore he testified that money was to be refunded within 365 days. Furthermore the dates are reckoned from the date of the sales agreement which had not been executed and therefore time had not begun to run.

It was only the Plaintiff who was affected because there were 38 other players involved and their monies were refunded. By the time each of the parties executed exhibit P4, they knew that there was a possibility of the project not taking off. He testified that they undertook to insure that the buyers do not lose their money and ended up in funding everything plus interest. Furthermore the Defendant had a reputation to protect and was trying to mitigate loss. The rationale for refund was to recognise that in case the project is not delivered the buyers do not lose their capital and the 1% was compensatory in nature.

The only issue for determination is **whether the Plaintiffs are entitled to general damages, interest and costs of this suit**?

In the written submissions, the issues were split into three sub issues and I will follow the order in which they are discussed in the said submissions. That notwithstanding the question of whether the Plaintiff is entitled to damages, interests and costs of the suit flow from the same arguments and the grounds advanced in support of the Plaintiff or in defence.

General damages:

In **Halsbury's laws of England fourth edition reissue volume 12** (1) paragraph 812 general damages are defined as those losses, usually but not exclusively non-pecuniary, which are not capable of precise quantification in monetary terms. They are those damages which will be presumed to be the natural or probable consequence of the wrong complained of; with the result that the Plaintiff is required only to assert that such damage has been suffered. This principle is also approved in the East African Court of Appeal case of **Dharamshi vs. Karsan [1974] 1 EA 41** where they held that the basic principle to be applied in a claim for general damages is the common law doctrine of *restitutio in integrum* which means that the Plaintiff has to be restored as nearly as possible to a position he or she would have been had the injury complained of not occurred.

The first question to be determined is therefore whether the Plaintiffs suffered a wrong at the hands of the Defendant? Secondly if so whether as a result of the wrong complained of, the Plaintiffs suffered damages? The basis for establishing whether there was a wrong committed is the written agreement of the parties executed on 12 January 2011.

The basic instrument for the submission of the Defendant that it is not liable to pay general damages, interest and costs as earlier noted is exhibit P4 which was admitted by agreement of the parties. The Defendants Counsel submitted that the suit was premature and secondly that only the damages stipulated in the agreement for late delivery is the damages payable which has already been paid. That the Plaintiff is only entitled to 1% of the amount deposited with the Defendant under clause 2 of the agreement. The agreement is entitled "Pearl Central Mall" as the headed document and, "Kisekka, Mall Space Receipt/Order Confirmation", as the heading of the agreement. The agreement acknowledges receipt of US$26,000 paid by the Plaintiffs for the purchase of specified square meters and office/shop space and shop numbers 112 and 113 to be constructed at specified plots and address. The agreement also stipulated that the balance of US$42,200 would be payable in accordance with the terms of the sale agreement to be executed between the parties.

I have considered the address of Counsels on clauses 2, 7 and 10 of the agreement. It is noteworthy that the agreement was executed on 12 January 2011 by the Plaintiffs and the representative of the Defendant who received the money and this suit was filed by way of an action under summary procedure on 7 February 2012 about one year later. The entire contract has to be considered in resolving this controversy. As far as the clauses submitted on are concerned, clause 2 of the agreement stipulates as follows:

> "HPDL shall be liable to refund all monies paid to HPDL by the buyer in the event of failure to deliver the space to a buyer. In addition to the said refund of any monies made to HPDL, an interest of 1% per annum shall be paid on all monies deposited with HP DL for the purchase of the Space (s)."

Clause 7 of the agreement stipulates as follows:

> "The parties agree that the person admissible delayed delivery allowance shall be a maximum of 365 days from the due date of delivery agreed to in the sales agreement there shall be signed subsequently. Any delay beyond the permissible timeframe shall attract a penalty of one percent of the space value per month of continued delay that shall be paid by HP DL to the Buyer (s)."

Thirdly clause 10 of the agreement stipulates as follows:

> "The Sales and Common Facilities Management Agreement shall be signed within 15 weeks of executing this order confirmation or such other period as may be advised to the buyer."

I have carefully read the whole agreement comprising of 12 paragraphs. Clause 2 clearly makes the Defendant liable to refund all monies paid to the Defendant by the buyer in the event of failure to deliver the space to a buyer. Secondly it makes the Defendant liable to pay an interest of 1% per annum on all monies deposited for the purchase of the space.

Firstly the agreement did not only deal with the deposit of money to the Defendant but also acted as an order confirmation for the shop space. This is

evident from clause 3 of the agreement which provided that the receipt shall be prima facie proof of commitment from the buyer to the Defendant for the purchase of the spaces. Secondly the buyer shall be liable for the payment of the balance of the consideration as indicated in the manner and mode that shall be stipulated in the sale agreement.

Further clauses makes it clear that the parties agreed to a definite space and plot number and indeed exhibit P1 gives a diagram of available spaces on the first floor of the Kisekka Mall.

On the basis of clause 7 of the agreement it was argued on behalf of the Defendant that the parties agreed that the permissible delayed delivery allowance period would be a maximum of 365 days from the due date of delivery agreed to in the sales agreement that shall be signed subsequently. No sales agreement was ever executed between the parties. Because time is reckoned from the due date of delivery agreed to in a sales agreement which was never executed, the Defendant suggested that there was no delay. What is significant about clause 7 is that any delay beyond the permissible timeframe attracted a penalty of 1% of the space value per month of continued delay to be paid by the Defendant to the Plaintiffs/buyers. The simple question is if there was no delay in terms of clause 2 of the agreement exhibit P4, why then was the refund of the plaintiffs deposit made to them?

The delay envisaged in the agreement and particularly clause 2 is delay in the delivery of the space to the buyer. The submission that the permissible delayed delivery allowance period is a maximum of 365 days from the due date of delivery agreed to in the sales agreement introduces some complexity in this dispute.

The evidence about the Plaintiffs concerns can be discerned from paragraph 4 of the written testimony of PW1 that after a period of one year the Defendant had not even started any construction works at the proposed site which forced the Plaintiff's to seek a refund of the monies had and received by the Defendant. Secondly no sales agreement was executed between the parties as envisaged in clause 10 of the agreement. There is complexity is in the wording of clause 10 of

the agreement. Clause 10 makes it clear that the agreement envisaged is the sales and common facilities Management agreement which was to be signed within 15 weeks of executing the order confirmation until otherwise advised to the buyer. With reference to clause 9 of the agreement exhibit P4 it is stipulated that on the payment of the initial deposit, the buyer agrees to execute a sales agreement and common facilities management agreement with the Defendant that shall detail inter alia the payment mode of the balance of the consideration; the management of common facilities attached to the space sale until the said agreements are signed. Furthermore it is stipulated that the order confirmation shall be treated as a temporary binding contract. Upon the signing of the sale agreement and common facilities management agreement, the receipt or order confirmation shall constitute an integral part thereof.

On the other hand clause 4 stipulates that in light of the fact that the Defendant is constructing the facility on a turnkey basis, the Defendant shall not refund the buyers any payment or deposit made in the event of the buyer opting to cancel the order confirmation for the space. Furthermore it stipulates that any order of cancellation shall result into the buyer forfeiting the entire down payment deposited with the Defendant. Furthermore clause 5 stipulates that the booking and payment for the space is transferable.

Did the buyer cancel the order confirmation for the space? Secondly when was the construction supposed to commence? Thirdly were the buyers advised and by whom about the signing of the sale agreement and common facilities management agreement?

A review of the evidence and particularly paragraph 5 of the written testimony of PW1 is that the Plaintiffs realised that there was not going to be any construction of the proposed mall and therefore decided to contact the Defendant through its various officers to have the monies refunded to them. The crucial question therefore is whether the property was going to be constructed? When did the Plaintiff realise that it was not going to be constructed?

There is no clear evidence as to when construction works was to commence. The only particular document on the matter is an e-mail from the first Plaintiff to Mr Raval, of the Defendant Company. As far as the dates of commencement are concerned, paragraph 3 of the e-mail dated 5th of February 2012 is pertinent and provides as follows:

> "I have been unable to secure the funding I thought using the letter you attached to me (in your e-mail sent on Monday 30th of January 2012) because the potential lender is aware that I have been pursuing this refund since April of 2010 and they said that there was little certainty that I would get the money on the promised date since this payment has been actively postponed on a number of different occasions. He remembered that from July to December last year (when it became pretty evident that the project would not take off as planned), whenever I called, I preferred to have the money back without the 1% interest promised or have the exchange-rate fixed so that you could pay me back in Uganda shillings since had to buy the dollars using shillings anyway. You will appreciate that at the time of transferring this money to your company's account the exchange rate was higher than it is right now and when you consider the inflation in the shillings over the last 13 months I have lost a lot of money."

Furthermore exhibit D2 is a letter dated 23rd of January 2012 addressed to the Plaintiffs in which the defendant wrote that the Defendant foresees undue delay in commencing the construction and consequently delivery of the project. Furthermore it is written that the Defendant confirms payment to the Plaintiff by 29 February 2012 at the very latest.

PW1 denied having received exhibit D2. Exhibit D2 is the Defendant's document and confirms from the Defendant's point of view that there was going to be undue delay in commencing the construction and consequently delivery of the project. In other words the parties were corresponding on either a variation or the avoidance of the agreement.

A further scrutiny of clause 2 of exhibit P4 which stipulates for the refund of the money is pertinent. The first sentence of clause 2 provides that: "HPDL shall be liable to refund all monies paid to HPDL by the buyer in the event of failure to deliver the space to a buyer."

The narrow question to be considered is whether there was failure to deliver the space to a buyer. An argument that there was no delay as stipulated by clause 7 in the delivery is at cross purposes with a submission that there was delay in delivery of the space. Furthermore there cannot be any delay in the delivery of the space in the circumstances and on the grounds given below. There was no commencement of the works according to the Defendants own document exhibit D2. The Defendant agreed to revoke the arrangement because of a foreseeable undue delay. In my humble opinion clause 2 envisages a failure to deliver after commencement of the works. It does not envisage a failure to deliver due to non-performance. The Plaintiff has proved on the balance of probabilities that there was no sign of construction and a fundamental term of the contract had been breached. Secondly no sale agreement and common facilities management agreement was ever executed in terms of clause 9 within 15 weeks which is approximately 3 months and three weeks in terms of clause 10 of the agreement exhibit P4. If such an agreement is not executed then one cannot invoke clause 7 which commences and gives an allowance of delay by 365 days from the date of signing the agreement in clauses 9 and 10. If the agreement is never executed the defendant would never be in delay and could even keep the money for as long as no remedy is sought i.e. for five years without breaching the literal terms of clause 7 of exhibit P4.

By the Defendant agreeing to refund the money not due to failure to deliver but due to a foreseeable undue delay, clause 2 of the agreement is rendered inoperative and inapplicable because there was no event of failure to deliver the space to the buyer but a failure to perform the agreement by failure to commence. In other words the contract was not going to be performed in due time. That being the case, the applicable provision would have been clause 7 which deals with permissible delays. Strangely the Defendant agrees but also

submits that the Defendant was within the permissible delayed period which had not yet commenced because there was no execution of the sale agreement and common facilities management agreement with the Defendant.

In the circumstances the contract came to an end because the Plaintiff was frustrated by the delay and sought a refund of his monies and the Defendant finally agreed to refund the money. However the Defendant purported to refund the money under the terms of the agreement. There was however no provision for this in the contract. The grounds for the termination of contract is that the Plaintiff had reason to believe that the project was uncommonly delayed because construction had not commenced one year after depositing the amount stipulated in exhibit P4. On the other hand the Defendant agreed to refund the Plaintiffs deposit and relied on a document which clearly indicated that the Defendant expected that the construction was going to be unduly delayed.

Both parties relied on the ground of the construction not taking off within time. In the premises the Plaintiff's case is that the construction of the premises had delayed and the Defendant seems to have agreed with this view. The Plaintiff's case is that he (PW1) on behalf of both Plaintiffs was greatly inconvenienced.

In the circumstances it is my finding that the delay of one year before commencing construction or even signing the envisaged sales and common facilities management agreement within 15 weeks as stipulated in clause 10 of the agreement was in breach of the agreement itself as to time of performance. It was clearly within the contemplation of the parties that construction work would commence within a short time and a management agreement would be signed within 15 weeks. After seven months, the period envisaged in clause 10 would have been delayed by another period of about three months and a half. Thereafter the Plaintiff became impatient and requested for a refund. This was by July of 2011 (not 2010). In other words, after about seven months, the Plaintiff had given up and wanted a refund of his monies. The refund was delayed for a further six months until the Defendant agreed in exhibit D2 which is the Defendant's document that the construction of the space was going to be unduly delayed. DW1 further testified that the delay affected other buyers and it is only

the Plaintiffs with whom they had an issue on the refund. In other words the contract was not going to be performed as contemplated in exhibit P4. On being cross examined about why the sales and management contract had not been executed, DW1 testified that it was intimated to the Plaintiff that they would be a delay in signing. This testimony presumably applies clause 10 of the agreement exhibit P4 which stipulates that the sales and common facilities management agreement shall be signed within 15 weeks of executing the order confirmation or such other period as may be advised to the buyer. The provision does not indicate who is to advise the buyer. No concrete written evidence of the advice to the buyer about a period for the signing of the agreement is in evidence.

Subsequent evidence shows that the contract was going to be delayed unduly. In the re-examination DW1 further testified that it was not only the Plaintiff who was affected but 38 buyers were involved and the Defendant refunded their money. He further testified that they undertook to always ensure that the buyers do not lose their money. He further testified that 1% interest which was included in the refund was compensatory in nature.

As I have held above, the Defendant could not rely on the contract because it had come to an end due to inability of the Defendant to perform within an anticipated period hence the refund of the money of 38 buyers. It was not within the contemplation of the parties to have the money refunded for non-performance by the Defendant. In the premises the Defendant cannot rely on clause 2 of the agreement or even clauses 7 and 10 of the agreement. As far as the doctrine is concerned, the question is whether there was a substantial failure by the Defendant so as to give the Plaintiffs a right to treat the contract as having ended.

It is my further finding that failure to commence construction for a period of one year was a breach of a fundamental nature. In such circumstances it is not a question of delay to finish but failure to commence after receiving monies from the Plaintiff. It was not a mere breach of a condition but a fundamental breach borne out by the fact that the Defendant agreed to refund the money. However by the time the Defendant agreed to refund the money, the Plaintiff had already considered the contract as having ended and the Plaintiffs had requested for

refund and kept on knocking on the doors of the Defendant for the refund. A similar question was discussed by Devlin J in the case of **Universal Cargo Carriers Corporation v Citati [1957] 2 All ER 70 at page 78**. Devlin J held in a similar situation on the question whether the delay was of such period as to go to the root of the contract so as to give a right to the injured party to repudiate the contract for anticipatory breach to depend on a number of factors:

> "How long is a ship obliged to remain on demurrage, and what are the rights of the owner if the charterer detains her too long? Translated into the terms of general contract law, the question is: Where time is not of the essence of the contract—in other words, when delay is only a breach of warranty—how long must the delay last before the aggrieved party is entitled to throw up the contract? The theoretical answer is not in doubt. The aggrieved party is relieved from his obligations when the delay becomes so long as to go to the root of the contract and amount to a repudiation of it. The difficulty lies in the application, for it is hard to say where fact ends and law begins. The best solution will be found, I think, by a judge who does not try to draw too many nice distinctions between fact and law, but who, having some familiarity both with the legal principle and with commercial matters and the extent to which delay affects maritime business, exercises them both in a common-sense way. This is the sort of solution which, on the supposition that it was acceptable to business men, the Commercial Court was created to provide."

From the facts and circumstances, failure to commence the construction for a period of about a year give the Plaintiffs the right to treat the contract as having been fundamentally breached by the Defendant and to seek to be relieved of their obligations under the contract in circumstances where they could not bring the contract to an end through cancellation without forfeiture of the deposited money. For emphasis I do not agree with the Defendant's submissions that this suit was prematurely filed. The delay of more than eight months before commencing construction works went to the root of the contract because the Defendants had received money from the Plaintiff to commence the works. The

Plaintiffs had committed themselves by paying about one third of the contract price to secure space in the anticipated construction. Moreover the contract clearly stipulated in clause 4 that the buyer could not cancel the order of confirmation for the space and any order of cancellation shall result in the forfeiture of the entire down payment. However in practical terms, the buyer could not cancel the contract and had to beg the Defendant for a refund. The Defendant waived the right to insist on the forfeiture of the refund if it maintains that the contract was cancelled by the Plaintiff. The Defendant waived a right to insist on the terms of the contract exhibit P4. There was waiver and estoppels. In the case of **Kamins Ballroms Co Ltd v Zenith Investments (Torquay) Ltd [1970] 2 All ER 871** at 894 per Lord Diplock held that:

> "The second type of waiver which debars a person from raising a particular defence to a claim against him, arises when he either agrees with the claimant not to raise the particular defence or so conducts himself as to be stopped from raising it"

Firstly the Defendant conceded that commencement of construction would be unduly delayed in exhibit D2. Secondly the Defendant agreed to refund the money of the Plaintiffs paid according to exhibit P4. Finally when the Defendant agreed to refund the money by February 2012, the Plaintiffs had lost patience and had filed an action in this court. The refund was made after the action commenced and the agreement to refund was recorded in court on 21 March 2012 while the suit had been filed on 7 February 2012. If the Defendant had promised to pay by the end of February 2012 according to exhibit D2, why did the Defendant not come to court after having paid by 21 March 2012 when the application for leave to defend came for hearing? Even though a cheque was admitted in evidence as exhibit D1, there is no evidence that the cheque had been received and deposited by the Plaintiffs. It was unnecessary to agree for the payment to be made on 21 March 2012 before the court if payment and as a matter of fact been made and received by the Plaintiffs. The conclusion is that no payment had been made by the time consent to refund was reached in court and therefore the suit was not prematurely filed.

Furthermore because the delay in the commencement of construction went to the root of the contract and the Defendant even confirmed in exhibit D2 that there would be undue delay in commencing construction and consequently delivery of the project, the Plaintiffs had grounds to treat the contract as having come to an end and seek a refund. PW1 testified that he had sought a refund for a long time before the suit was filed and used to contact the Defendant every week at least once for the refund. The plaintiffs were greatly inconvenienced by the fact that the construction works was going to be delayed.

In the circumstances the contract was treated as having come to an end by reason of the Defendant's failure to perform by commencement of works within time and the Plaintiff is entitled to damages. The failure to perform in time was a fundamental term. The principles relied upon by the Defendant in **Excel Construction Ltd versus Attorney General Civil Suit Number 3 of 2007** where the court applied the principle in Halsbury's Laws of England 4th edition reissue volume 12 that the rate of interest agreed to will be the measure of damages no matter what inconvenience the Plaintiff has suffered from the failure to pay on the due date and also the case of **Suisse Atlantique Société D' armament Maritime SA versus NV Rotterdamsche Kolen Centrale [1966] 2 All ER 61** to the same effect are inapplicable because the contractual terms cannot apply. It was not within the contemplation of the parties for the contract to come to an end due to failure to commence construction works by the Defendant. Whereas in the above authorities, what occurred was envisaged in the contract itself and the contract stipulated the measure of damages for the occurrence.

In the premises the Plaintiffs are entitled to general damages for monies kept by the Defendant without any performance for a period of one year when the Plaintiffs could have used the same amount for something else. Secondly the Defendant breached a fundamental term by failure to commence performance in time. The Plaintiffs are awarded general damages representing 20% of US$26,000 amounting to US$5200.

The Plaintiffs having been awarded US$5200, they are not entitled to claim interest from the date of deposit to the date of filing of this suit.

The Plaintiffs are however entitled to and are awarded interest at 20% per annum from the date of judgement till payment in full.

As far as costs are concerned, costs shall follow the event and the Plaintiffs are awarded the costs of the suit.

Judgment delivered in open court on 13 February 2015.

Christopher Madrama Izama

Judge

Judgment delivered in the presence of:

Michael Mafabi for the Defendant

Edmund Kyeyune for the Plaintiffs

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

13th February 2015