

When the cheques issued by the Defendants reached their due date, the Plaintiff presented them for payment but they were dishonoured and returned endorsed with the words “**Account Closed**”.

5 The Plaintiff contends that the Defendants issued the cheques well knowing that their account was closed, with the sole intention of depriving him of his property and money.

10 The suit was filed on the 22.05.14, and summons to file a defence were issued. By affidavit of service dated 09.07.14, it is asserted that the summons were served upon the Defendants on 02.06.14, at the office of the 1st Defendant. The summons and all documents attached thereto were received by the Defendants as indicated by the signature of the 3rd Defendant thereon and on the Plaintiff and mediation notes.

However, by 13th August, 2014, the Defendants had not filed their defence as required by law. Whereupon Counsel for the Plaintiff applied for default judgment to be entered against them under O.9 r.10 Civil Procedure Rules and the suit set down for formal proof under O.9 r. 11 (2) Civil Procedure Rules.

15 Judgment was accordingly entered on 25th August, 2014.

The suit was called for hearing on 27.10.14, whereupon the Defendant testified. He went through the facts of the case as already set out herein, adding that the 2nd Defendant had needed the money from the Bank to import vehicles from Japan.

20 Further that when the Defendants failed to repay the loan, the Bank called him and told him that they were going to sell his house, unless he paid the arrears then amounting to Shs. 17,000,000/- He began paying in May, 2012.

25 The Bank did not sell the house as threatened, and the Plaintiff is still paying off the debt on account of Kabugo James (2nd Defendant) in Equity Bank where the money was borrowed from. He was required to pay Shs. 5,900,000/- per month, although the sum was later reduced to Shs. 2,950,000/-.

In the process of payment the Defendant contends that, he has had to sell some of his properties. Adding that whenever he failed to pay the required installments he would borrow the money. The bank slips were tendered in as evidence of payments made to Account No. 1042200607423 in the names of the 1st Defendant. – Exhibit P3 to the Plaintiff.

30 Some of the deposits would be made by the Defendant himself, while others were made by people he sent. The Defendants made one month’s deposit of Shs. 2,950,000/- but kept the bank slip.

As earlier mentioned, by the time of filing the suit Shs. 83,890,000/- had been paid. At the time of hearing, he had paid a total of Shs. 123, 250,000/-.

35 The Plaintiff prayed court to enter judgment against the Defendants and grant him the reliefs’ sought in paragraph 8 of the Plaintiff.

In his submissions, Counsel for the Plaintiff gave the background to the suit, and set out issues no. 2 and no.3 for determination by the Court. Issue no. 1 was added by Court.

1. **Whether there was a valid contract between the parties.**
- 5 2. **Whether there was breach of contract by the Defendants.**
3. **What remedies are available to the Plaintiff?**

Whether there was a valid contract:

In respect of the first issue, Counsel submitted that a contract is defined under **S. 10 (1) of the Contracts Act**, and stated that **under S.10 (2) of the said Act**, the contract may be oral or written or partly oral and partly written or may be implied from the conduct of the parties.

He asserted that as per the evidence of the Plaintiff, it is clear the parties entered into an oral contract and intended to be bound by their duties and obligations there under. That, by their failure or refusal to repay the loan, the Defendants breached the contract thereby forcing the Plaintiff to pay the loan to his detriment.

Without any other evidence to the contrary, court finds that there was an oral contract between the parties to use the Plaintiff's property comprised in Freehold Register, Volume 435, Folio 8, Plot 579, Land at Kawempe, as security for a loan of Shs. 110,000,000/-. The loan was offered by Equity Bank Uganda Ltd to the 1st Defendant.

As indicated in the Special Resolution, the 1st Defendant acknowledged and accepted the power of attorney given by the Plaintiff to pledge and use his above described land as security for the loan.

The 2nd and 3rd Defendants offered their personal guarantees to create security in favour of Equity Bank as per the terms and conditions of offer and to execute all or any documents as would be required by the bank for such purpose. The resolution bears the signatures of the 2nd and 3rd Defendants as Directors and Secretary of the 1st Defendant Company.

This finding is further fortified by Exhibits P1 and P2 respectively, which the Plaintiff asserts were given to him as security and as consideration for offering his land to be used as security for the acquisition of the loan by the Defendants. The two cheques are in the names of the 1st Defendant Company.

All the essential elements of a contract were established by the above evidence. That is, there was offer by the Defendants, which was accepted by the Plaintiff in consideration for the sum of Shs. 6,000,000/-It is also evident that there was intention to create legally binding relations between the parties, otherwise the special resolution would not have been passed by the Defendants, and the cheques for security and consideration respectively would not have been issued.

Whether the Defendants breached the contract: It is also the uncontroverted evidence of the Plaintiff that, the loan was to be repaid by the Defendants within 15 months and not later than 11th October, 2012. However that, the Defendants failed to meet their obligations as a result of which the Bank threatened to sell the Plaintiffs property unless he paid the arrears that had accrued on the loan. The payments are evidenced by Exhibit P3- the bank slips on which payment was made.

When the Plaintiff presented the Cheques issued to him by the Defendants for payment, both were returned unpaid endorsed with the words “**Closed Account**”.

By failing to meet their obligations for repayment of the loan thereby forcing the Plaintiff to repay in order to save his property, and by issuing cheques that bounced when presented for payment, the Defendants breached their contract with the Plaintiff.

What remedies are available to the Plaintiff? - The Plaintiff sought several remedies set out in paragraph 8 of his plaint.

It is the evidence of the Plaintiff that he had repaid the loan as of 20th October, 2014, to the tune of Shs. 113,250,000/- being the principal sum and interest on the loan’, of which only Shs. 2,950,000/- was paid by the Defendants. The Plaintiff is accordingly entitled to the refund of Shs. **110,300,000/-**

The Plaintiff is also entitled to the Shs. 6,000,000/- offered as consideration by the Defendants for the use of his property as security for the loan they obtained from Equity Bank.

Interest: The Plaintiff sought interest on the above sums at the commercial rate of 25%. He relied on S. 26 (3) of the Civil Procedure Act.

However, no evidence was led as to why the Plaintiff wanted interest at that rate as there is nothing to show that the parties agreed on that rate. Neither was evidence led as to what the ruling rate of interest was at the time of hearing. That leaves the rate of interest payable to the discretion of the court. I am fortified in my decision by the case of **Shah Vs Guilders International Bank Ltd [2002] 1 EA 269 (CAK)** where the court held that “**Where the parties to a dispute had not agreed on the rate of interest payable, section 26(1) of the Civil Procedure Act, conferred upon the court the discretion to award and fix interest rates with regard to decrees for the payment of money. Where the rate of interest had been agreed, the court was obliged to enforce the agreed rate unless it was illegal, unconscionable or fraudulent**”.

In the present case, court will exercise its discretion to award interest at the rate of 21% per annum from the date of filing the suit until the date of judgment. This decision is fortified by

the principle established by decided cases that ***“in commercial transactions it is recognized that any sums due attract higher interest rates unlike general damages”***.

But even then, court is mindful of the principle that in exercising its discretion, ***“the rate of interest awarded must be reasonable”***. See **Kibwana & Another Vs Jumbe [1990 – 1994] 1 EA 223 (CAT)**

In the present case, court finds that the 25% rate interest sought by the Plaintiff would be harsh and unconscionable.

General Damages: The Plaintiff sought general damages for the inconvenience, waste of time and anguish occasioned to him by the Defendants.

10 It is an established principle of law that ***“general damages are such damages as the law presumes to be the direct natural or probable consequence of the act complained of”***. – Refer to the case of **Stroms Vs Hutchinson [1905] AC 515**

Neither the Plaintiff nor his Counsel suggested any figure as to how much general damages should be awarded; totally ignoring the fact that it was their bounden duty to provide the
15 court with proper guidance relating to the inquiry of Damages generally. In so doing, they left me with nothing to depend on except judicial discretion. I was placed in the same dilemma as Justice Ogoola found himself in, in the case of **Bhadelia Habib Ltd Vs Commissioner General of URA [1997-2001] UCL 202**

This court, taking into account the circumstances of this particular case, and mindful of the
20 established principle that ***“in cases of breach of contract the aggrieved party is only entitled to recover such part of the loss as was at the time of the contract reasonably foreseeable as liable to result from the breach. Damages may, however, be awarded from disappointment arising out of the breach”***- **Bank of Uganda Masaba & Others [1999] 1EA**, where the case of **Chande and others v East African Airways Corporation [1964] EA 78** was considered;
25 awards the Plaintiff the sum of Shs. 2,000,000/- as general damages with interest at 6% from the date of judgment till payment in full.

In awarding the said figure, court has also taken into account the assertion of decided cases that ***“where the Plaintiff claims general damages, while he does not have to prove the specific amount lost, nevertheless if he does not lead some evidence which would assist the
30 court, he has no-one but himself to blame if the amount actually awarded by the court is not sufficient to compensate him for any loss which he actually suffered”***. – Refer to the case of **Haria Industries Vs JP Products Ltd [1970] 1 EA 367 (CAN)**

Punitive Damages: The Plaintiff also sought punitive damages on the ground that the actions of the Defendants were done without any remorse, with intention breach the contract
35 and to deprive the Plaintiff of his interest in his property.

Punitive damages are generally referred to as ***“exemplary”*** damages. They have been defined by decided cases to mean ***“damages for examples sake”***. - See **Butterworth Vs Butterworth & another [1920] P 126**

Courts have established 3 categories of cases in which exemplary damages are awarded, that is:

- Where there has been oppressive, arbitrary , or unconstitutional action by the servants of the Government, and
- 5 ▪ Where the Defendant’s conduct has been calculated by him to make profit which may well exceed the compensation payable to the Plaintiff, and
- That some law for the time being in force authorizes the award of exemplary damages.

10 In addition, when courts are considering the award of exemplary damages, they ought to bear the following in mind:

- Plaintiff cannot recover exemplary damages unless he/she is the victim of punishable behavior,
- The power to award exemplary damages should be used with restraint, and
- The means of the parties are material in the assessment of exemplary damages.

15 Refer to the case of **Rookes Vs Barnard [1964] ALL ER 367**, which has been cited with approval in the following cases inter alia **Kiwanuka Vs Attorney General (1965) 19EACA**, **Ntagoba Vs Editor-in-Chief of the New Vision & Another [2004] 2 EA 234**, **Bhadelia Habib Ltd Vs Commissioner General URA (Supra)**; and **Frederick Zaabwe Vs Orient Bank & Others SCCA No. 04/2006**

20 It has been emphasized by Courts *that “exemplary damages should not be used to enrich the Plaintiff, but to punish the Defendant and deter him/her from repeating his conduct. The award should therefore not be excessive”*.

The above principles have been borne in mind in deciding this issue. The Plaintiff was convinced by the Defendants to hand in his title for use as security. This kind of agreement is
25 in my view based on trust. The consideration promised him was never paid by the Defendants and neither did they meet their obligations in repayment of the loan with Equity Bank. The cheques given to the Plaintiff as security for the payment of the sums also bounced when presented for payment, as the account on which they were to be drawn was “**closed**”.
According to the Plaintiff’s evidence which was not disputed, all his pleas to the Defendants
30 came to nought. The Plaintiff, faced with the predicament of losing his home, had no choice but to repay the loan of the Defendants.

Notwithstanding, when the Plaintiff filed this suit and served the Defendants, they chose not to defend the suit, leading to the only reasonable conclusion that they had no plausible explanation for acting as they did.

35 For all those reasons, court finds that the Defendants deliberately ignored the Plaintiff and failed on their obligations in order to benefit themselves at the expense of the Plaintiff. He is accordingly entitled to exemplary damages. While the Plaintiff was granted general damages, court is inclined to grant the exemplary damages in order to show displeasure of the act of the Defendants. They breached the trust of the Plaintiff and exposed him to the risk of losing his

property. The sum of Shs. 1,000,000/- is granted to the Plaintiff as exemplary damages. I am guided in my decision by the case of **Haria Industries Vs PJ Products Ltd (Supra)**

Costs: Under S. 27 of the Civil Procedure Act “**costs are in the discretion of the court and the Court has full power to determine by whom and out of what property and to what extent those costs are to be paid**”. But as pointed out by Counsel for the Plaintiff and rightly so, courts have repeatedly asserted that “**Costs follow the event and a successful party must be awarded costs unless for good cause court directs otherwise**”.

For those reasons, the Plaintiff is granted costs of the suit.

Judgment is entered for the Plaintiff against the Defendants jointly and severally in the following terms:

1. The sum of Shs. **110,300,000/-** being the principal sum and interest repaid by the Plaintiff to Equity Bank.
2. The sum of Shs. 6,000,000/ being the consideration that was agreed to be paid to the Plaintiff by the Defendants for use of his title as security for the loan.
3. Interest on nos. 1 and 2 above at the rate of 21% per annum from the date of filing the suit to the date of judgment.
4. General damages in the sum of Shs. 2,000,000/- with interest at the rate of 6% from the date of judgment until payment in full.
5. Exemplary damages in the sum of Shs. 1,000,000/- together with interest at the rate of 6% from the date of judgment until payment in full.
6. Costs of the suit.

FLAVIA SENOGA ANGLIN

JUDGE

27.03.15