

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**[COMMERCIAL DIVISION]**  
**CIVIL SUIT No.31 OF 2014**

5 **AFRO-KAI LIMITED** ::: **PLAINTIFF**

**VERSUS**

**UGANDA DEVELOPMENT BANK LTD** ::: **DEFENDANT**

**BEFORE: HON. JUSTICE B. KAINAMURA**

**JUDGMENT**

10 On the 20<sup>th</sup> August, 2012, the plaintiff applied to the defendant for an agricultural credit fund loan of UGX 4,700,000,000/= in order to expand and modernize its grain processing and trading business. The defendant's Board of Director's approved the application but advised that the loan be split into a term loan component of UGX 3,732,559,200/= and a working capital component of UGX 660,000,000/=. The plaintiff accepted the terms of the working capital  
15 component of UGX 660,000,000/= and accordingly paid the loan application fee of UGX 100,000/= and the 2% appraisal fee of UGX 13,200,000/=. By letter dated 6<sup>th</sup> November, 2012, the defendant also made a conditional offer of a term loan of UGX 3,732,559,200/= to the plaintiff subject to Bank of Uganda's approval of the defendant's application for refinancing.

By letter dated 18<sup>th</sup> April, 2013, the defendant communicated to the plaintiff that it was unable to  
20 proceed with the processing of the term loan facility of the UGX 3,732,559,200/= and, therefore, the offer of 6<sup>th</sup> November, 2012, was automatically revoked.

The plaintiff instituted a suit against the defendant for damages for breach of contract and loss of projected profits on allegations that failure by the defendant to disburse the term loan was in breach of contract.

25 On the other hand, the defendant contended in its written statement of defence that despite all its efforts to procure approval of the term loan, Bank of Uganda did not approve the Loan and that the plaintiff was duly informed.

At the scheduling conference, the following issues were agreed upon by the parties;-

1. *Whether there was a contract between the parties.*
2. *If so, what were the terms.*
3. *Whether the revocation of the term loan facility by the defendant amounted to*  
5 *breach of contract.*
4. *Remedies, if any.*

However, I shall address issues 2 and 3 concurrently.

At the hearing of the suit, the plaintiff was represented by Mr. Nelson Nerima (counsel for the plaintiff) and the defendant was represented by Mr. Albert Byamugisha (counsel for the  
10 defendant).

In his written submissions in reply, counsel for the defendant raised an issue that the plaintiff did not disclose a cause of action against the defendant. I shall address this issue first.

In regard to the above issue, counsel for the defendant cited *Kibalama Vs Alfasan Belgie CVBA [2004] 2 EA 146*, where it was held that in suits based on contract, the plaintiff must allege the  
15 contract and its breach, it must state the terms of the contract, whether the contract was express or implied, whether it was oral or written and the names of the parties. Counsel contended that in the present case, the plaintiff did not allege any contract, the contract terms or the breach. Further, that the plaintiff did not have the contract attached to it, and that what was attached was a mere offer of the conditional term loan.

20 In view of the above, counsel for the defendant invited this Court to strike out the suit under **Order 7 rule 11(a) of the CPR.**

In reply, counsel for the plaintiff submitted that the above issue was not raised in the defendant's written statement of defence, nor was it raised at the scheduling conference; that it was not lawful to ambush the plaintiff at this stage.

25 Counsel further submitted that the plaintiff had pleaded offer and acceptance and fulfillment of the terms of the offer, and that the acceptance letter was attached to the plaintiff. Further, that the plaintiff also indicated that the defendant revoked the loan offer and that this amounted to breach of

contract. Counsel was of the view that whether or not the above allegations were true was a question of fact to be determined after the hearing.

I have carefully considered the above submissions of counsel in regard to the preliminary point of law raised by counsel for the defendant that the plaint does not disclose a cause of action  
5 against the defendant.

A cause of action is disclosed when it is pleaded by facts that the plaintiff enjoyed a right, the right has been violated and that the defendant is liable. See **Tororo Cement Co. Ltd Vs Frokina International Ltd; Civil Appeal No. 21 of 2001**. It is also trite law that in determining whether a cause of action was disclosed, the court looks at the plaint and the documents annexed, without  
10 necessarily considering the evidence adduced by the parties.

In the present case, the plaintiffs claim is for breach of contract arising out of the revocation of a conditional term loan offer by the defendant. Paragraphs 4 to 8 of the plaint read as follows:-

“4. On the 20<sup>th</sup> day of August 2012, the plaintiff applied to the defendant for an  
15 Agricultural Credit Fund Loan of Uganda Shs.4.7 Billion. The application letter is attached marked “A”.

5. By offer letters dated 6<sup>th</sup> November 2012, in response to the Application, the defendant offered two loan facilities to the plaintiff;

a. a term loan of UGX 3,732,559,200

b. a working capital facility of UGX 660,000,000

20 The offer letters are attached and marked “B1” and “B2”

6. The plaintiff accepted and fulfilled the following conditions of offer:-

i. Valuation of all assets chosen as security

ii. Comprehensive insurance covering all risks

25 iii. Payment of 20% commitment fees on the working capital component.

iv. Provision of drawings and bills of quantities

v. Supplier invoices for the equipment

7. *Performance of the loan offer conditions was done at considerable expenses to the plaintiff in the legitimate expectation of disbursement of the loans as promised by the defendant.*

8. *On 18<sup>th</sup> April, 2013, the defendant revoked the shs.3,732,559,200 billion offer, and only made available the working capital of UGX 660,000,000/=. The letter of revocation is attached marked “C”.*

From the reading of paragraphs 4 to 6 of the plaint, I find that the plaintiff pleaded the existence of a contract and that it had fulfilled the conditions of the offer. Copies of the conditional offer and acceptance were attached to the plaint. By virtue of the above contract, it is apparent that the plaintiff had accrued rights. Paragraph 8 of the plaint indicates that the defendant revoked part of the loan offer and paragraph 10 of the plaint stipulates that the failure of the defendant to disburse the said loan amounted to breach of contract. In my view, the above facts pleaded by the defendant were relevant/material facts to show that the plaintiff had a cause of action against the defendant.

In view of the above, I do not find merit with the above preliminary objection raised by counsel for the defendant.

I accordingly disallow the preliminary objection raised by counsel for the defendant.

***Issue 1: Whether there was a contract between the parties.***

The plaintiff led two witnesses who testified that there was a contract between plaintiff and the defendant.

PW1, Edmond Chiviru, testified that he was an Executive Business Consultant and that he was retained by the plaintiff to prepare a proposal to the defendant to borrow UGX 4,700,000,000 under the Agricultural Credit Facility. Further, that upon preparing the proposal, and upon review by the defendant’s senior officer called Charlotte Mucunguzi, the plaintiff submitted the proposal and the defendant offered the plaintiff a loan of UGX 4,700,000,000/=.

PW2, Chris Kaijuka, who was the plaintiff’s Managing Director, testified that in a bid to upgrade, modernize and expand its capacities in production, processing, storage and value addition, the plaintiff company approached the defendant for funding under the Agricultural

Credit Facility (ACF), which was set up by the Government of Uganda in partnership with Commercial Banks. Further, that on the 6<sup>th</sup> November, 2012, the plaintiff received communication from the defendant that the Bank's Board of Directors had approved the loan application, but had advised that the loan be split into a term loan component and a working capital component. The defendant offered a conditional term loan component of UGX 3,732,559,200/= and a working capital facility of UGX 660,000,000/= subject to fulfilling the conditions contained in the offer letters written to the plaintiff.

It was PW2's further testimony that the offer was accepted and the conditions contained in the offer letters were fulfilled by the plaintiff.

10 The defendant on the other hand led the evidence of Charles Orwothwun (DW1), who testified that he was an employee of the defendant Bank and that at the time when the plaintiff submitted its loan application, he was the Bank's Acting Director Development Finance. It was his testimony that when the plaintiff submitted its loan application in August, 2012, it was given a checklist (EXH D19) of items for loan application, which were the minimum requirements in order to proceed with the application.

Further, that upon the plaintiff presenting its application with the required documents, the defendant rejected the valuation report and the insurance policy was not submitted. By letter dated 12<sup>th</sup> September, 2012,(EXH D13), the defendant required the plaintiff to submit additional security because the available security was inadequate to cover the amount applied for; to value the securities using the defendant's approved valuers; to submit the latest management accounts and to provide explanation of the losses by the Company over a period of three years. In reply to the above, the plaintiff informed the defendant that it was working on obtaining additional security and it also submitted two Survey and Valuation reports. It was his further testimony that despite the advice of the defendant to the plaintiff for the regularization of the status of its security and to give additional security, it did not.

It was the further testimony of DW1 that by letter dated 6<sup>th</sup> November, 2012, the defendant offered the plaintiff a working capital facility of UGX 660,000,000/=, which the plaintiff accepted. Further, that by another letter dated 6<sup>th</sup> November, 2012, the defendant also made a

conditional offer of a term loan of UGX 3,732,559,200/= to the defendant, which was subject to Bank of Uganda's approval of UDBL's/defendant's application for refinancing.

Counsel on either side filed written submissions in support of and in opposition.

Counsel for the plaintiff relied on **Section 10(1) of the Contracts Act, 2010**, where a contract is defined as an agreement made with the free consent of parties with capacity to contract, for lawful consideration and with a lawful object, with the intention to be legally bound. Counsel also made reference to *Patel Vs Spear Motors Ltd, SCCA No.04 of 1991* and *K and V Limited Vs The Registered Trustees of Arya Practinidhi Sabha Eastern Africa, High Court Civil Suit No. 299 of 2011*, to submit on what constitutes a contract.

Counsel contended that in the present case, both the plaintiff's and the defendant's evidence indicated that the defendant issued offer letters to the plaintiff, and the plaintiff accepted the offers. Further, that neither party was alleging coercion and there was consent of both parties. It was counsel's further contention that the transaction being one of lending money, the consideration and object of the contract were both lawful. In counsel's view, there was a contract between the parties.

On his part, counsel for the defendant made reference to the evidence of PW1 and PW2 who both testified that no loan agreement had been signed between the parties. In counsel's view, this was an indication that there was no contract reached between the parties.

Counsel further submitted that one of the elements of a valid contract was that there must be consideration and that an agreement without consideration was void. He relied on *Vallabbhai P. Patel Vs Central African Commercial Agency [1959] E.A 903* to support the above submission. He then submitted that in the instant case, the plaint did not state the consideration.

It was the further submission of Counsel that the offer made by the defendant to the plaintiff was a conditional offer subject to the terms and conditions stated in the letter and one of the conditions was that:

*“The Company shall sign an agreement and other security documents containing the terms and conditions specified herein and further terms and conditions satisfactory to UDBL.”*

Counsel contended that the terms and conditions of the contract were supposed to be contained in a signed loan agreement, which was not done. In counsel's view, the parties did not come to an agreement on all the material aspects and that the defendant did not intend to be bound by the letter (EXH P3), and was therefore not so bound.

- 5 In rejoinder, Counsel for the plaintiff submitted that the rights and obligations of the parties were spelt out even in the absence of a formal loan agreement. Further, that the defendant offered the plaintiff loans with interest, and in Counsel's view that was sufficient consideration.

I have considered the submissions and the authorities relied upon by counsel for either side in support of and in opposition of this issue.

- 10 **Section 10(1) of the Contracts Act, 2010**, defines a contract as an agreement made with the free consent of parties with capacity to contract, for a lawful consideration and with a lawful object, with intention to be legally bound. *(Also see JK Patel Vs Spear Motors Ltd SCCA No.04 of 1991, Black's Law Dictionary, 7<sup>th</sup> Edition Page 318).*

- 15 In the present case, it is not disputed that the plaintiff approached the defendant for funding under the Agricultural Credit Facility (ACF) which was set up by the Government of Uganda, and on the 6<sup>th</sup> November, 2012, the plaintiff received communication from the defendant that its proposal had been approved. However, it was advised that the loan be split into a term loan component of UGX 3,732,559,200/= and a working capital component of UGX 660,000,000/=. The subject of this suit is the term loan component of UGX 3,732,559,200/=.

- 20 While the plaintiff contends that the letter of 6<sup>th</sup> November, 2012, amounted to an offer made by the defendant which the plaintiff, apparently, accepted, the defendant contends that the said letter was a conditional offer and that the plaintiff did not fulfill the conditions contained therein. I have carefully looked at the said conditional offer letter and it appears to me that the conditions which the plaintiff was obligated to fulfill, seem to be terms which were to be performed during  
25 the pendency of the contract and not initially. I find that the conditions such as: completion of legal documentation; provision of additional adequate security and the signing of an agreement and other security documents, were all intended to be fulfilled upon the plaintiff accepting the terms, which it did by its Directors appending their signatures on the last page of the conditional offer.

I find the decision in ***Gibson Vs Manchester Council [1978]1 W.L.R 520***, instructive; it was stated as follows:

5                   “...as I understand the law, there is no need to look for a strict offer and acceptance. You should look at the correspondence as a whole and at the conduct of the parties and see therefrom whether the parties have come to an agreement on everything that was material. If by their correspondence and their conduct you can see an agreement on all material terms- which was intended thenceforward to be binding – then there is a binding contract in law even though all the formalities have not been gone through.”

10   In the present case, from the spirit of the offer letter addressed from the defendant and accepted by the plaintiff, it is clear to me that the parties intended to create legal obligations with each other and that can be termed as contract. It was immaterial that the formal agreement had not yet been signed by the parties.

15   The defendant also contends that the plaintiff had not given any consideration to support the agreement. I accept the submission of counsel for the defendant that one of the elements of a valid contract is that there must be lawful consideration. However, from the reading of the conditional offer made by the defendant and which was accepted by the plaintiff, the plaintiff was to pay 10% interest per annum on the amount to be advanced. In my opinion, that was valuable consideration that was to be advanced by the plaintiff.

20   In view of the above, I find that there was a valid contract reached between the plaintiff and the defendant.

Accordingly, this issue is answered in the affirmative.

***Issues 2 and 3:                   Whether the revocation of the term loan facility by the defendant amounted to breach of contract.***

25   DW2, Chris Kaijuka, testified that upon accepting the conditional offer made by the defendant, the plaintiff fulfilled the conditions raised in the offer, which included the following:-



- a. Completion of legal documentation and fulfillment of all the pre disbursement conditions stipulated in the loan agreement to be executed between the plaintiff and the defendant,
- b. Provision of adequate security,
- c. Valuation of all the assets chosen by the bank as security,
- d. Comprehensive insurance covering all risks,
- e. Payment of 2% commitment fee on the working capital component,
- f. Provision of drawings and bills of quantities, and
- g. Supplier invoices for the equipment.

5  
10 It was DW1's further testimony that he thereafter made numerous follow-ups on the progress of the loan and on 15<sup>th</sup> April 2013, a letter was written to the defendant expressing the frustration for the lack of progress and feed back. It was his further testimony that on the 18<sup>th</sup> April, 2013, and in reply to the above letter, the defendant's Chief Executive Officer wrote a letter to the plaintiff (EXH P5) indicating that the defendant regretted the delay in providing feedback; that  
15 the delay was partly caused by delays in operationalizing a memorandum of understanding between Bank of Uganda and the Participating Financial Institutions; the defendant was unable to proceed with the processing of the term loan facility and revoked the offer of UGX 3,732,559,200/= and that the defendant was willing to continue processing the working capital facility of UGX 660,000,000/=. He further indicated that the letter from the Chief Executive  
20 Officer did not give any reason for the inability to proceed with the term loan facility.

DW1 further testified that subsequently, he came into possession of a letter dated 18<sup>th</sup> April, 2013, where the defendant made a communication to Bank of Uganda and withdrew the plaintiff's application and that the plaintiff had been so informed, which was not true. It was his contention that the defendant was in breach of contract and its duties as a banker when it  
25 withdrew the plaintiff's application and revoked the term loan offer.

On the other hand, DW1, testified that the plaintiff applied for a loan of UGX 4,700,000,000/= under the Agricultural Credit Facility and submitted audited financial statements for the years 2009, 2010 and 2011, and a valuation report dated 25<sup>th</sup> July 2011 in respect of land at Block 9, Plot 164, Kigumba Masindi. DW1 made reference to several  
30 correspondences between the plaintiff and the defendant where, apparently, the plaintiff was

asked to regularize the status of its current security and also make available additional security because the current security was not sufficient; however the plaintiff did not do so.

It was DW1's further testimony that although the plaintiff's status was wanting in material respects, the defendant bank endeavored to support it owing to the Government of Uganda's interest in funding Agriculture. The defendant then offered the plaintiff a working capital facility of UGX 660,000,000/=, and a conditional offer of a term loan of UGX 3,732,559,200/=. DW1 indicated that clause 3 of the conditional term loan offer stated that it was subject to Bank of Uganda's approval of the defendant's application for refinancing. By letter dated 9<sup>th</sup> November, 2012 [EXH D10], the defendant submitted the plaintiff's loan to Bank of Uganda for review and advice, and by letter dated 21<sup>st</sup> November, 2013, Bank of Uganda sought clarification before it could proceed with the formalities for loan approval, and the defendant provided the clarification.

DW1 further testified that on the 21<sup>st</sup> February, 2013, at the meeting held between the Bank of Uganda and the defendant, Bank of Uganda maintained that it was not satisfied with the project; the plaintiff was then informed about the requirement to address the concerns in order for its application to be processed but it did not do so. As a result, that the defendant withdrew the plaintiff's application.

In his written submissions, counsel for the plaintiff submitted that while the defendant had attributed the delay in communicating the decision from Bank of Uganda as being the delay in operationalizing a memorandum of understanding between Bank of Uganda and Participating Financial Institutions, however, there was no such delay and that there was no decision by Bank of Uganda rejecting the applicant's application. Counsel made reference to the Minutes of the meeting held between the plaintiff and Bank of Uganda and submitted that all that Bank of Uganda required was a response to the issues raised but was willing to keep the plaintiff's file open. Further, that there was no evidence that the defendant had communicated the queries raised by Bank of Uganda at the meeting held on 21<sup>st</sup> February, 2013, to the plaintiff.

Counsel further made reference to an investigative report [EXH P25] which was apparently arising out of an investigation ordered by the defendant to probe into the mismanagement of the plaintiff's application where it was indicated as follows:-

*“The bank failed in its duty to deliver on the customer service standards by giving honest and timely feedback. This as a result, costed the customer’s business in terms of lost time resources invested and confidence in the bank.”*

Counsel contended that the above report was relevant to the matters in issue in the present case and it was not important to the Court as to how the said evidence had been obtained. Counsel  
5 relied on ***Kuruma s/o Kaniu Vs Reginum (1955) 22 EACA 364***, to support the above submission.

Counsel submitted that the revocation of the offer by the defendant amounted to breach of contract.

10 In reply, Counsel for the defendant submitted that the plaintiff had falsely testified that it had fulfilled all the requirements for the loan application, which was not true. Further, that the offer of the term loan made to the plaintiff was subject to Bank of Uganda’s approval of the defendant’s application. However, that considering that the plaintiff did not fulfill all the conditions like payment of appraisal fees and provision of adequate security, Bank of Uganda  
15 raised issues and sought clarification, which, in counsel’s view was evidence that Bank of Uganda did not even commence with the relevant formalities for loan approval. Counsel contended that the defendant availed Bank of Uganda with the response made by the plaintiff to the queries raised, but Bank of Uganda was not satisfied. Counsel contended that without Bank of Uganda’s approval, the transaction could not be proceeded with.

20 It was Counsel’s further contention that Bank of Uganda did not proceed with the relevant formalities of loan approval and that the defendant had no option but to revoke the offer. Counsel indicated that the defendant’s case was that Bank of Uganda did not approve the application for refinancing.

In rejoinder, Counsel for the plaintiff submitted that if the plaintiff had not fulfilled the terms of  
25 the offer, the defendant would not have bothered to submit the application for refinancing to Bank of Uganda. Further, that even if some conditions had not been fulfilled by the plaintiff, the defendant can be taken to have waived them when it submitted the application to Bank of Uganda. That it was not true that Bank of Uganda declined the application for refinancing.

I have considered the submissions of Counsel and the evidence adduced by either party in regard to the issue that the defendant was in breach of contract when it revoked the offer made to the plaintiff.

The following authorities are instructive in defining breach of contract.

5 Black's Law Dictionary 9<sup>th</sup> Edition page 213 defines breach of contract to mean;

*“Violation of a contractual obligation by failing to perform one’s own promise, by repudiating it or by interfering with another party’s performance”.*

***Davies on Contract 10<sup>th</sup> Edition at page 287*** states that breach of contract occurs where a party fails to perform, or evinces an intention not to perform, one or more of the obligations laid upon  
10 him by the contract.

In the present case, it is not in dispute that the offer made by the defendant to the plaintiff [EXH P2], was based upon certain conditions, one of which was that:

*“UDBL reserves the right to cancel or review the terms of the loan offer hereunder, if for any reason, UDBL’s application for refinancing the said loan is denied by Bank of  
15 Uganda”.*

It was the defendant’s case that owing to the plaintiff’s failure to fulfill the requirements for the loan application, Bank of Uganda did not approve the application for refinancing, and as a result the defendant revoked the offer made to the plaintiff. On the other hand, the plaintiff contended that the defendant withdrew the application and that Bank of Uganda had not denied the  
20 application as alleged by the defendant. I find that in order to determine whether the defendant was in breach of contract as alleged by the plaintiff, it is instructive to state the facts following the conditional offer made by the defendant as I discern them from the evidence on record.

Upon the defendant’s conditional offer and acceptance by the plaintiff, by letter dated 9<sup>th</sup> November, 2012, the defendant submitted the plaintiff’s loan application to Bank of Uganda.  
25 However, by letter dated 21<sup>st</sup> November, 2012, [EXH D11] Bank of Uganda sought for further clarification, and the letter partly reads as follows:

*“We have reviewed the documents submitted and noted that although the intended activity is eligible for the 50% Government of Uganda (GoU) contribution under the ACF, there are some issues that we would like you to clarify on before we proceed with the relevant formalities of loan approval:*

- 5
- The audit report for the year ended 31<sup>st</sup> December 2011 casts doubt on the going concern of the company due to its loss making for the last three consecutive years. The auditor’s opinion is indicated as that of emphasis of matter which could have a bearing on the future of the company.*
  - Your internal appraisal report suggests that since the company is new, rather than risking Shs4.7billion exposure, it should be initially granted Shs660million working capital facility and the rest be given when UDBL is satisfied with the performance. In addition, the report gives an impression of the discomfort you have in giving the full amount as requested by the company in light of the challenges it is facing. We would appreciate it if you could confirm to us that the applicant cleared any overdue obligations and that you are comfortable sanctioning this facility.*
- 10
- 15

*In this regard, we request that you clarify on the above issues to enable us make an informed decision on the application...”.*

By letter dated 30<sup>th</sup> November, 2012, the defendant provided the clarification to Bank of Uganda and subsequently requested for a meeting with Bank of Uganda to further discuss the plaintiff’s project. The meeting was held on 21<sup>st</sup> February, 2013, and the minutes recorded indicated that Bank of Uganda further raised the issues where it needed clarification and the defendant made responses to the said issues. The last paragraph of the minutes taken at the said meeting states as follows:

20

25 *“The Chairman noted that this project was a good concept which falls within the spirit of the ACF but naturally if a situation arises where UDBL may need to withdraw the project, then advised that UDBL, should formally write a letter in that regard to withdraw the project otherwise BOU shall keep the file open”.*



Uganda. From the foregoing, it is apparent that the defendant indeed submitted the application to the Bank of Uganda. The defendant contends that due to the plaintiff's failure to fulfill the conditions precedent, Bank of Uganda did not approve the application.

5 From the above correspondences between the Bank of Uganda and the defendant, Bank of Uganda sought for clarifications from the defendant before it could proceed to make a decision on the project. While the defendant contends that it thereafter informed the plaintiff of the need to address the said concerns, no evidence was adduced in that regard as to such communication. It appears that from the time when the defendant made the application to Bank of Uganda to the time when the offer was revoked, no formal communication was made between the plaintiff and  
10 the defendant.

I have carefully perused the minutes of the meeting held between Bank of Uganda and the defendant and I have not found any indication by Bank of Uganda that it had denied the granting of the application. It only raised concerns which were expected to be addressed by the defendant before the Bank of Uganda could proceed to process the application. As I have indicated above,  
15 there is no evidence that upon Bank of Uganda raising the issues, the defendant informed the plaintiff of the need to address them and the plaintiff failed to do so.

While it is apparent from the correspondences between Bank of Uganda and the defendant and the minutes of the meeting held on the 21<sup>st</sup> February, 2013, that Bank of Uganda was still seeking for further clarifications in order to proceed with the formalities for loan approval, there  
20 is no evidence that Bank of Uganda made a decision in regard to the same. It was the defendant, which by letter dated 18<sup>th</sup> April, 2013, withdrew the application from Bank of Uganda. The clause in the offer which the defendant seeks to rely upon was very clear that the defendant had the right to cancel the offer if Bank of Uganda denied the defendant's application. I find that Bank of Uganda did not deny the grant of the application; it only advised the defendant on the  
25 requirements that ought to have been addressed.

I have taken into consideration the contention of the defendant that the plaintiff had not met the conditions of the offer and that those are the same issues which were raised by Bank of Uganda. It appears to me that indeed the plaintiff had been asked to provide additional security over and above the amount that was going to be advanced. However, I find that the defendant did not give

a deadline as to when the additional security was to be availed and did not inform the plaintiff to avail the said security when Bank of Uganda raised the issue.

I accept the submission of counsel for the plaintiff that the defendant was duty bound to support the application and endeavor to process the application. However, it withdrew the application,  
5 which in my view was a breach of its obligations under the contract.

In view of the above reasons, I find that the defendant was in breach of contract when it withdrew the application from Bank of Uganda and revoked the offer made to the plaintiff.

**Issue 4: Remedies available, if any**

**Special damages;**

10 DW2, Chris Kaijuka testified that the defendant occasioned loss to the plaintiff to the tune of UGX 37,331,345/=, being loan processing expenses. The said expenses were particularized in the plaint as follows:-

1. Loan application fees UGX 100,000/=
2. Valuation fees UGX 11,197,595/=
- 15 3. Insurance cover UGX 12,833,750
4. Appraisal fees for working capital facility UGX 13,200,000/=
5. Travel expenses UGX 5,000,000/=

Counsel for the plaintiff submitted that the above claims were supported by documentation and that the same were not challenged by the defendant in cross examination.

20 In reply, Counsel for the defendant submitted that with regard to the claim for loan application fees, the plaintiff on its own volition applied for the loan and one of the requirements was that it pays application fees. Further, and in regard to the claim for appraisal fees, Counsel submitted that the plaintiff rejected the offer of the working capital facility and could not therefore seek for refund of the fees paid there under.

25 With regard to the claim for the valuation fees, counsel invited court to reject the copy of the receipt considering that the plaintiff did not produce the original copy in court. Further, that the valuation was to be done at the plaintiff's own cost considering that it was part of the documents accompanying the loan application. For the claim for insurance cover, Counsel for the defendant



submitted that the offer letter required that the insurance policies would be endorsed with a clause naming the defendant as first loss payee. However, that the plaintiff did not submit the said insurance policies to the defendant nor did it produce the said insurance policies in evidence. In Counsel's view, the debit notes tendered in evidence by the defendant were not insurance  
5 policies.

It is trite law that special damages should be specifically pleaded and proved. (See **Adonia Tumusiime Vs Bushenyi District Local Government and AG HCCS No 32 of 2012**). I am also alive to the fact that proof of special damages depends on the circumstances of each case and in some instances, it might not be possible to prove the same with documentation. In **Gaaga Enterprises LTD Vs SBI International Holdings & NV Uganda & Anor Civil Suit No. 0019 of 2005**, it was held that;

“...Counsel for the plaintiff cited to this court the case of **Kyambadde Vs Mpigi District ADM.[1983] HCB 44** where Masika C.J, (as he then was) held that special damages must be strictly proved but need not be supported by documentary evidence in all cases. I agree with the above position of the law and  
15 add that it depends on the circumstances of the case and position of the party finds itself in.”

In the present case, the plaintiff adduced evidence that it paid application fees of UGX 100,000/=. I find that the plaintiff is entitled to the said application fees as special damages. With regard to the valuation fees, I note that the plaintiff did not adduce the original receipt in court. However, it is not in dispute that a valuation was indeed carried out. I am convinced that indeed the amount indicated in evidence and appearing on the copy of the receipt was indeed paid by the plaintiff. I find that the plaintiff is entitled to UGX 11,197,595 being the valuation fees paid by the plaintiff.

25 With regard to the appraisal fees for the working capital facility, I accept the submission of counsel for the defendant that it was the plaintiff who rejected the offer of the working capital facility. Therefore, I find that the plaintiff would not be entitled to compensation of loss suffered in regard to the said facility. Further, indeed the record does not show the insurance policies which were apparently obtained by the defendant. The plaintiff did not dispute the evidence that

the said policies were not availed to the defendant. In that regard, I find that the plaintiff has not proved this claim. No evidence was adduced in regard to the travel expenses.

Therefore, I find that the plaintiff has proved a claim of UGX 11,297,595/= as special damages.

**General damages.**

5 It was the testimony of DW1 that the defendant lost business opportunities as a result of new investors in the sector, increase in costs of borrowing, loss of opportunity to obtain funding at concessionary terms under the ACF and loss of opportunity to compete for big orders. Further, that the plaintiff suffered inconvenience, loss of business goodwill and loss of projected profits as follows:

- 10 a. UGX 3,095,411,204 for the year 2014
- b. UGX 4,152,484 for the year 2015
- c. UGX 5,389,115,380 for the year 2016
- d. UGX 6,841,226,295 for the year 2017

Further, that in a bid to mitigate its losses, the plaintiff transferred its assets to a South African  
15 grain Company for a 20% share holding.

Counsel for the plaintiff relied on *K & V Limited Vs The Registered Trustees of Arya Practinidihi Sabha Eastern Africa, HC Civil Suit No.299 of 2011*, and submitted that the plaintiff was entitled to an award of general damages. Counsel contended that the defendant did not cross examine the plaintiff's witnesses on the loss of projected profits and good will, the  
20 same evidence remained unchallenged and that they ought to be awarded as general damages.

In reply, Counsel for the defendant submitted that the plaintiff's application was not approved owing to the plaintiff's working capital constraints, losses for a period of 3 years and that the plaintiff's existence in the future was at stake. Further, that all the above was contained in its audited accounts for the year 2011. In that regard, Counsel submitted that it was therefore  
25 ridiculous for the plaintiff to claim that it suffered inconvenience, loss of business goodwill and loss of projected profits in the total of UGX 19,478,234,163/=.

The object of an award of damages is to give the plaintiff compensation for the loss he has suffered as a result of the defendant's actions, and are intended to place the aggrieved party in the same position in monetary terms, had the act complained of not taken place. (**See Robert Cuossens Vs Attorney General, SCCA No.8 of 1999**).

5 I find that indeed the plaintiff suffered inconvenience owing to the defendant's conduct of unreasonably withdrawing the loan application and the subsequent revocation of the offer made to the plaintiff.

With regard to the loss of projected profits and loss of good will, I find the decision in **K & V and Limited Vs The Registered Trustees of Arya Practinidihi Sabha Eastern Africa High**  
10 **Court Civil Suit No. 299 of 2011**, instructive. It was stated as follows:

15 *"...I am further fortified in my decision by the ruling of the Supreme Court that prospective loss cannot be awarded as special damages since it had not been sustained at the date of the trial. -Oder JSC in the case of **Robert Coussens -V- Attorney General, SCCA No. 8 of 1999**. The Honorable Justice explicitly stated that "Pecuniary loss of a business profit is capable of being arithmetically calculated in money even though calculation must sometimes be a rough one where there are difficulties of proof...; in case of future financial loss, whether it is future loss of earnings or expenses to be incurred in the future, assessment is not easy. This prospective loss cannot be claimed as special damages because it*  
20 *has not been sustained at the date of the trial. It is therefore awarded as part of general damages. The plaintiff could be entitled in theory to the exact amount of his prospective loss if it could be proved to its present value at the date of the trial. But in practice since future loss cannot usually be proved, the court has to make a broad estimate taking into account all the proved facts and probabilities*  
25 *of the particular case."*

In the present case, I have taken into consideration the cash flow projections prepared by PW1 and upon which the plaintiff bases to make claims under this head. However, from the evidence adduced by either side and as indicated in the plaintiff's audited accounts on record, the company had been making losses for the preceding 3 years and its future existence was at stake. There was

no evidence that it was probable that the plaintiff was going to be able to make the said profits as claimed. In my view, for the plaintiff to be able to claim for prospective loss of profits, it must be proved that the company had been making such profits or there was evidence that such profits were to be obtained by the plaintiff. In the present case, the calculations made by PW1 were not backed by any evidence and I am not convinced that they are sufficient for this Court to base its decision in granting the said prospective losses as general damages.

In the circumstances of this case, i find that the plaintiff is entitled to general damages of UGX 150,000,000/= for the inconvenience caused by the defendant's breach of contract.

In conclusion, the suit against the defendant succeeds and awards to the plaintiff are made as follows:-

1. Special damages UGX 11,297,595/=
2. General damages UGX 150,000,000/=
3. 12% Interest on the award (1) above from the date of filing the suit till payment in full.
4. Interest at court rate on award (2) above from the date of judgment till payment in full.
5. Costs of the suit.

It is so ordered.

20

**B. Kainamura**

**Judge**

**01.09.2016**