

-

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

HCCS NO. 271 OF 2015

EDEN INTERNATIONAL SCHOOL LTD ::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

EAST AFRICAN DEVELOPMENT BANK LTD ::::::::::::::::::::::: DEFENDANT

BEFORE: THE HON. JUSTICE DAVID WANGUTUSI

J U D G M E N T:

Eden International School Limited herein referred to as the Plaintiff brought this suit against East African Development Bank which shall be referred to as the Defendant in these proceedings. The Plaintiff's claim against the Defendant is for breach of contract, general and aggravated damages as well as a declaration that the interest upon interest and interest upon principal in arrears is illegal and unenforceable.

PW1 Hon. Kenneth Kakuru an advocate of the Courts of Judicature at that time together with his wife as directors of the Plaintiff were informed by a friend in July 2004 that the Defendant had been given money by Bank of Uganda to fund educational projects at low interest rates. This fund was called the Apex fund and it will herein after be referred to as the Fund. PW1 met with an employee of the Defendant in charge of the Fund and discussed the construction of a school hoping to benefit from the low interest rate of 3% above the Bank of Uganda rate.

The Defendant agreed with the Plaintiff's proposal and on the 10th of November 2004 it agreed to extend a loan of UGX 600,000,000/= to the Plaintiff payable within six years, **ExhP1**.

The purpose of the loan is provided for in Article 11 section 2.01(c) of **ExhP1** for the procurement of furniture and equipment, and the completion of buildings within the scope of the project.

PW1 told court that the school opened on 7th February 2007 but was unable to attract the projected enrollment as it progressively fell in arrears because it was facing competition from a similar project within the same municipality also funded by the Defendant. Because of the foregoing reasons the Plaintiff fell back on servicing of the loan and sought a rescheduling of the loan.

The two parties met on the 16th of October 2007 and agreed to reschedule the loan. On the 16th October 2007 the Defendant wrote to the Plaintiff approving the rescheduling of the loan on the following terms;

1. The first principal installment to start from February 2009.
2. The loan to be repaid within a period of six years from February 2009.
3. All outstanding interest arrears as at 15th June 2007 after adjusting the rate to comply with the rates charged under the EIB/BOU scheme to be cleared before 15th October 2007.
4. Interest to be charged on the loan on the basis of the rate advised by Bank of Uganda plus a percentage margin of 4%. The rate shall be annually adjusted.
5. The project to be monitored very closely by EADB(at least two times per school semester)
6. Other terms and conditions shall remain as per the original Loan Agreement dated 10th November, 2004.

On the 22nd October 2007 the Plaintiff agreed with the following terms and conditions for the rescheduling of the EADB's loan under the Loan Agreement dated 10th November 2004. PW1 stated that in a meeting with the Defendant on 3rd October 2014 he presented a written proposal **ExhP4** suggesting that payment of UGX 100,000,000/= could be made by the Plaintiff to complete service of the loan. There is no evidence to show that the Defendant was in agreement because the Plaintiff was notified on 8th October 2014 of the outstanding loan that was due to a sum of UGX 158,167,087.38/= however PW1 on behalf of the Plaintiff paid UGX 100,000,000/= **ExhP7** on 13th October.

The parties adjusted the maturity date of the loan on 15th October 2014 to enable the Plaintiff service the loan. The Defendant notified the Plaintiff on 20th October 2014 of the unpaid balance of UGX 58,167,087.38/= and intimated that the amount should be paid on or before May 2015 without interest or charges. Although I have not seen any document to that effect this testimony of PW1 was not challenged.

It is clear that the Defendant was to charge interest on the loan in accordance with lending rates applied to the Fund not exceeding 3% per annum above the Bank of Uganda rate but could revise them and notify the Plaintiff before they took effect. The Plaintiff avers that it was comfortable with the interest of 12.16% per annum between 2004 and 2007 and after the rescheduling of the loan from 2007 to 2013 interest was 12.82% however from 2013 to 2014 it more than doubled to 23.26% without the Defendant notifying the Plaintiff.

The Plaintiff contends that charging interest based on the revised rates without notification was illegal and all money paid above the known interest of 12.82% be refunded.

The Defendant was served but did not file a defence nor seek leave to file a defence out of time. The matter was fixed for hearing *ex parte* for 23rd August 2016. Interestingly on the morning of the hearing Mr. Barnabas Tumusinguze a senior counsel from Sebalu and Lule Advocates appeared and stated that he was appearing on behalf of the Defendant. He sought an adjournment so as to pursue a settlement with the Plaintiff. This was surprising because on the 9th August 2016 the said firm had written to court denying that they represented the Defendant. Counsel wrote;

“The record at the court file will show that we are not on record as representing the Defendant and that service had been accepted in error.”

The court had to issue fresh service to the Defendant. Notwithstanding the foregoing, when Mr. Tumusinguze appeared on 23rd August 2016 and said Sebalu and Lule represented the Defendant and that an adjournment be granted to enable them settle the matter, court granted the adjournment to 30th September 2016. On 30th September 2016 both advocates appeared. The settlement had failed. The Plaintiff's advocate prayed that the hearing proceeds. Again Mr. Tumusinguze said he had no instructions to proceed.

*“My instructions were only to propose a settlement. I do not know how much is owed. If there is to be a hearing I do not have instructions to proceed. I wish to take my leave.”
He said and left.*

Court concluding that the Defendant did not wish to defend the suit, allowed the Plaintiff to proceed.

The issues raised in the circumstances include;

- 1) Whether the Defendant can be sued?**
- 2) Whether the interest charged by the Defendant is in breach of the contract?**
- 3) Whether interest upon interest/penalty charged by the Defendant is harsh and unconscionable and therefore unenforceable?**
- 4) Whether the Plaintiff is entitled to the remedies prayed for?**

The first issue whether the Defendant can be sued arises as a question in this matter due to the immunities and privileges provided under The East African Development Bank Act Cap 52, 1985. Articles 49 and 52 of the Act which provides that the directors, alternates, officers and employees of the Defendant are immune from civil process with respect to acts performed by them in their official capacity unless this immunity has been waived.

The Act clearly protects the bank from legislative and executive action other than individuals and private companies.

In my view that is the most normal position because the bank enters with contractual responsibility with individuals and private companies. It would be most unfair to deny the bank's customers redress when the bank fails to meet its contractual obligation. There would be no redress to an individual or private company. A critical look at Article 53 of the Charter provides for interpretation and application of the Charter in these words;

“Any question of interpretation or application of the provisions of this Charter arising between any member and the bank or between two or more members of the bank shall be submitted to the board of directors for decision.”

Further in Article 54 which deals with arbitration provides;

“If a disagreement shall arise between the bank and a member or between the bank and a former member of the bank including a disagreement in respect of a decision of the Board of Directors under Article 53 of this Charter such disagreement shall be submitted to arbitration by a tribunal of three arbitrators. One of the arbitrators shall be appointed by the bank, another by the member or former member concerned and the third unless the parties otherwise agree, by the Executive Secretary of the Economic Commission for Africa or such other authority as may have been prescribed by regulations made by the Board of Directors.”

The foregoing provisions provide for dispute resolution between the bank and the members. The Charter does not provide for third parties. Article 44 of the Charter in my view which has often been mistaken to provide absolute immunity in my view restricts this application on only the member states former and current but does not prevent third parties who have entered contractual relationship with the Defendant from pursuing redress against the Defendant where they are aggrieved.

In my view the legislature could not have meant the immunity to be absolute. It could not have been intended to extend to transactions between the bank and a third party such as the Plaintiff. In the Supreme Court decision in **Concorp International Ltd vs. East and Southern Development Bank SC No.19 of 2010** where a similar provision “the bank shall enjoy immunity from every form of legal process” was held to restrict only those transactions between the Defendant and the member states but did not restrict third parties from pursuing their claims arising out of contractual relations between the Defendant and themselves.

It means that an aggrieved third party who had dealings with the bank has the right to sue the Defendant in a competent court. To hold otherwise would be contrary to public policy. Therefore I find that the Plaintiff could sue in regard to this matter.

In regard to whether the interest charged by the Defendant is in breach of the contract the Plaintiff contends that the interest rate could only be changed after notification and that in the absence of such notification the interest rate remained at 12.16% as at 22nd November 2007. The Plaintiff further contends that since the change of interest rate to 23.26% was not communicated to them all the sums that accrued based on the new interest rate were illegally obtained and should be refunded to the Plaintiff. From the communication dated 12th March 2015 **ExhP9** the

Defendant admitted that they indeed revised the interest rates from 8.82% to 19.26% on which they added 4% above the Bank of Uganda rate thus bringing it to 23.26%. Breach of a contract is a violation of a contractual obligation by failing to perform one's own promise; **Blacks Law Dictionary 8th Edition Page 222**. Section 3.02(c) of the Loan Agreement provided for interest as follows;

*“The company shall pay to EADB interest on the principal amount of the loan advanced and outstanding from time to time at a rate per annum equal to the EADB Base Rate for Uganda Shillings (to be conclusively determined and advised in writing by EADB from time to time plus a margin of 3%(three percent) per annum; PROVIDED that EADB may in its discretion and from time to time revise the interest loan applicable to the Loan and/or the formula for its determination, **and the Company shall, once notified by EADB of such revision, be bound to pay EABD interest at such revised interest rate.** Based on the foregoing formula, the indicative interest rate applicable to the Loan as of the Approval Date was 12.16 % (Twelve Decimal One Six percent) per annum. The interest shall be paid at school term intervals, on every tenth day following the official date of commencement of each secondary school term in Uganda, as per the directives of the Ministry of Education from time to time.”*

From the foregoing provision the operative words were **“once notified by EADB of such revision, be bound to pay EADB interest at such revised interest rate.”** By those words it meant that it was only after notification that a revised interest rate would bind the Plaintiff. I must also say at this stage that in the absence of express provision the notification could not operate retrospectively. Going by section 3.02(c) the Defendant was duty bound to inform the Plaintiff in writing of any change and it was only after such notification that the Plaintiff would be bound to such change in interest rate.

The foregoing is in line with paragraph 8 of the Bank of Uganda Financial Consumer Protection Guidelines, 2011 which provides for notice of change to terms and conditions.

Paragraph 8 obligates the financial services provider to notify its customers at least 30 days in advance before implementing any changes to the terms and conditions, fees or charges, discontinuation of services or relocation of premises of the financial service provider and immediately of any changes in interest rates regarding products and service.

The notification as I have stated above would only be operative on serving the Plaintiff a written advice by the Defendant of the changes in the interest rate applicable to the loan. There is no evidence on record even in the communications between the two parties that this was done. Even if the Defendant had done so using a different form of communication not stated in the security instrument it would have been in contravention of the Loan Agreement.

The purpose of the notice to the borrower was to enable him know as quickly as possible its changed liability. Using any other method was not in accordance with the contract between the parties and therefore did not affect the rate of interest in that facility. While the Defendant had a right to vary its rate of interest, such notice of variation had to be given to the Plaintiff in the terms of the Loan Agreement and in all circumstances the Loan Agreement which had been signed by all parties and whose provisions were reconfirmed in clause 6 of the loan scheduling document dated 22nd October 2007.

Any attempt therefore to apply the change in interest rate retrospectively from the date of notification was wrong in law in as much as it breached the Loan Agreement and could only be effected from the first day of the month next after notification as provided for under paragraph 8 of the Bank of Uganda Financial Consumer Protection Guidelines, 2011 herein first mentioned. Therefore the only interest the Plaintiff was liable to pay could only be based on 12.16% as agreed in **ExhP1**.

Turning to whether interest upon interest/penalty charged by the Defendant is harsh and unconscionable and therefore unenforceable it is necessary to determine what type of interest was agreed upon. Section 26(1) of the Civil Procedure Act permits the court to look at the facts and circumstances of each case and decline to enforce any harsh and unconscionable rate of interest. Therefore the Act permits the court to strike down any contracted interest for being harsh and unconscionable.

Halsbury's Laws of England fourth Edition Issue volume 12(1) paragraph 1065 at page 486 provides that;

“The parties to a contract may agree at the time of contracting that, in the event of a breach, the party in default shall pay a stipulated sum of money to the other. If this sum is a genuine pre-estimate of the loss which is likely to flow from the breach, then it

represents the agreed damages, called liquidated damages, and it is recoverable without the necessity of proving the actual loss suffered.”

The learned Judge in **Mohanlal Kakubhai Radia v Warid Telecom Uganda Ltd HCCS No.224 of 2011** stated that;

“A just and reasonable interest rate, in my view is one that would keep the awarded amount cushioned against the ever rising inflation and drastic depreciation of the currency. A Plaintiff ought to be entitled to such a rate of interest as would not neglect the prevailing economic value of money, but at the same time one which would insulate him or her against any economic vagaries and the inflation and depreciation of the currency in the event that the money awarded is not promptly paid when it falls due.”

In the present case **ExhP3** section 3.02(d) of the Loan Agreement provided;

“Without prejudice to other remedies available to EADB, if the Company fails to make any payment of interest or any other payment (except principal) on or before the due date as specified herein (or, if not so specified, as notified to the Company) the Company shall pay in the Currency of the Loan, by way of liquidated damages in respect of the amount due and unpaid, additional interest at the rate of one half percent(1/2%) per month over and above the normal interest rate provided for in section 3.02(c) hereinbefore, from the date any such amount became due until the date of actual payment (as well after as before judgment), it being acknowledged by the Company that interest at such rate or rates constitutes a pre-estimate of EADB’s loss, and such interest shall be payable on the next school termly repayment date unless demanded or paid beforehand.”

Therefore the interest in event of default would be the required 12.16% plus the required 1/2 % per month from the date any such payment became due until the actual date of payment.

The learned Judge in **R.L.Jain vs. Loy Komugisha H.C.C.S No.98 of 2013** confirmed that interest upon interest was meant to compensate better the one entitled to payment under a contract, and yet is not paid with regard to consequences of delayed payment, namely loss of opportunity cost, risk and inflation however if the Plaintiff had committed a breach by default on payment, the penalty awarded should be genuine and a reasonable pre-estimate of any damages arising from the breach. The question before this court would then be whether the impugned

provision is a secondary obligation which imposes a detriment on the defaulter out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation.

The Plaintiff claimed that the interest provided in section 3.02 (c) was harsh and should not be allowed. It was upon it to justify this assertion. In contracts of this nature where the interest rates were so low the lender ought to protect his interests against defaulters to keep them on their toes. It is the only way it can cushion itself against the economic vagaries and the inflation and depreciation of currency where the installments are not paid in time. While the court can interfere with harsh interest rates, the Plaintiff did not show why the 1/2 % agreed by them would be declared harsh and unconscionable.

I therefore find no reason to declare them unconscionable.

With regard to the remedies the Plaintiff seeks an order to audit his account, general damages, aggravated damages, declaration of breach of contract.

Beginning with the order seeking audit I am of the view that it is not necessary since PW2 in his testimony exhibited a statement showing the amount over paid. When the Plaintiff realised that the unpaid balance had remained ever big, it caused an audit to see if the interest charged was the correct one. PW2 Boaz Ahimbisibwe a chartered accountant with ACCA and CPA registered with ICPAU was appointed by the Plaintiff to audit its account with the Defendant. His finding was that the Plaintiff was being charged with interest far above that which had been agreed upon set out in clause 3.02 (c) of the loan agreement namely 12.6% per annum.

As I have said earlier in this judgment the interest rate could only be varied on notification to the Plaintiff. The interest that was applicable was the one agreed upon by the parties in the loan agreement. The audit by PW2 revealed that interest had been increased to 19.24% in 2012 which with 4% above the Bank of Uganda rate raised it to 23.24% and in some periods as high as 29% per annum. PW2 worked out two scenerios; the first was loan interest and repayment computation schedule with penalty on interest loan, the second was loan interest repayment computation without penalty on loan interest. Only one of the computations could be applicable.

It is my view that since the Plaintiff admitted that it defaulted in the beginning; Annex "1" where penalties were included would be the appropriate one. PW2 took into consideration the agreed

annual interest rate of 12.16% from 30th December 2004 to 22nd October 2007 on a reducing balance. He also considered the rates after rescheduling on 22nd October 2007 of 8.82 % Bank of Uganda rate plus a margin of 4% which came to 12.82%. He based the penalty on the loan running balances. He concluded that all payments that were made after 31st December 2013 were over and above the required funds to pay the loans. He worked out the figures as indicated in Annexure “1” attached to his witness statement and he came up with a sum of UGX 210,080,711.78/= as money over paid to the Defendant. Neither was the evidence nor computations of PW2 challenged and I have no reason to doubt them. It is therefore my finding that the Plaintiff was charged interest far above what was agreed and the Defendant is ordered to refund the sum of UGX 210,080,711.78/= to the Plaintiff.

The Plaintiff prayed for general damages. The settled position is that the award of general damages is in the discretion of court and is always as the law will presume to be the natural and probable consequence of the Defendant’s act or omission; **James Fredrick Nsubuga v Attorney General HCCS 13/93; Erukana Kuwe v Isaac Patrick Matovu HCCS 177/03.**

In assessment of the quantum of damages, courts are mainly guided by a number of factors among which is the economic inconvenience that a party may have been put through and the nature and extent of the breach suffered; **Uganda Commercial Bank v Kigozi [2002] 1 EA 305.**

PW1 in his evidence said that the Plaintiff deserved general damages because he sold his houses to pay off the loan. Am afraid this cannot stand because he was not the Plaintiff in this case and neither could the Plaintiff claim rights over those houses. The only thing upon which general damages can be awarded in this case is the inconvenience caused to the Plaintiff as a result of retention of its money that was over paid. Court has found that the Plaintiff received notices of demand when in actual sense it had exhausted the loan. Its money that could have done other things was detained by the Defendant. Taking all the circumstances into consideration, I would find a sum of UGX 50,000,000/= as an appropriate award of general damages and it is so awarded.

The Plaintiff seeks for the award of aggravated damages. Aggravated damages were considered in **Fredrick J Zaabwe Vs Orient Bank & Ors SCCA No. 4 of 2006** as extra compensation to a Plaintiff for injury to his feelings and dignity caused by the manner in which the Defendant acted. The Plaintiff has not in any way shown how its dignity was lowered by the manner in

which the Defendant acted. The only wrong the Defendant did was to vary the interest rate without notifying the Plaintiff. This could not be classified as high handed to cause the Defendant to pay aggravated damages. The prayer for aggravated damages is therefore denied.

The Plaintiff prayed that interest be awarded on the amount that was overpaid as well as damages at a commercial rate of 25%. It is trite that interest is awarded at the discretion of court, but like all discretions it must be exercised judiciously taking into account all circumstances of the case; *Uganda Revenue Authority vs. Stephen Mbosi, S.C.CA No 1of 1996.*

The basis of this award is that a party has been kept out of the use of his money while the other has had use of it so the injured party ought to be compensated accordingly; *Harbutt's Plasticine Ltd vs. Wyne Tank & Pump Co. Ltd [1970] 1 Ch 447.*

It is without doubt that the Defendant kept the Plaintiff out of its money and deprived it of its use. Taking into account the length of time and the inflation I find interest of 18% per annum on the money that was unlawfully retained awarded with effect from December 2013 till payment in full. I also award interest at court rate on general damages from date of judgment till payment in full.

Since the Plaintiff no longer owes the Defendant it is ordered that the land title belonging to the Plaintiff and/or its directors be released and returned to the Plaintiff. The Defendant shall pay costs of the suit.

In conclusion, judgment is entered in favour of the Plaintiff against the Defendant in the following terms:

- a) It is declared that the Defendant was in breach of the contract.
- b) It is ordered that the Defendant releases and returns the land title to the Plaintiff.
- c) Refund of UGX 210,080,711.78/=
- d) General damages of UGX 50,000,000/=
- e) Interest on (c) at 18% per annum from 30th December 2013 till payment in full.
- f) Interest on (d) at court rate from the date of judgment until payment in full.
- g) Costs.

.....

David K. Wangutusi

JUDGE

Date: 7th FEBRUARY, 2017