THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

COMMERCIAL DIVISION

CIVIL SUIT NO. 751 OF 2014

BRITISH AMERICAN TOBACCO LIMITED :: PLAINTIFF

VERSUS

1. FRED MUWEMA
2. HERBERT KIGGUNDU MUGERWA
3. SIRAJ ALI
4. BRIAN KABAYIZA
5. TERRENCE KAVUMA

T/A MUWEMA AND MUGERWA ADVOCATES :::::::::::::: DEFENDANTS

BEFORE: HON. DR. JUSTICE HENRY PETER ADONYO

JUDGMENT

1. Brief facts:

The brief acts relating to this suit are that the Plaintiff was sued by a collection of 2838 Hoima District based tobacco farmers. These tobacco farmers were represented by the Defendants as counsel on record in ***High Court Civil Suit No. 268 of 2005 (Sedrach Mwijakubi and Others vs. British American Tobacco Uganda***

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Limited). The High Court delivered its judgment in favour of the farmers. The Plaintiff was dissatisfied with the judgment of the High Court and so it lodged an appeal in the Court of Appeal *vide* ***Court of Appeal Civil Appeal No. 50 of 2008; British American Tobacco Uganda Limited vs Sedrach Mwijakubi & Others.*** At The Court of Appeal Respondents were still represented by the same law firm of Muwema and Mugerwa Advocates.

While the decision regarding the appeal was pending, the Plaintiff ostensibly conducted negotiations with the Respondents farmers through their legal representatives Muwema and Mugerwa Advocates with a view to settle the then pending dispute between themselves and the farmers culminating into the execution of a Deed of Settlement (Exhibit A2) dated 27th July, 2010 was signed wherein the parties agreed that the then Appellant pays the sum of Uganda Shillings Four Billion Six Hundred Million only (Ug. Shs 4,600,000,000/=) inclusive of Uganda Shillings Three Hundred Million Only (Ug. Shs. 300,000,000/=) to then then Respondents which amount was to constitute the whole settlement of the dispute

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between the parties inclusive of the costs of the appeal and in the High Court, respectively.

Upon the signing of the Settlement Deed by the parties the said amount was paid by the Appellant/Current Plaintiff to the Respondents/Farmers as final settlement of claims against it by the farmers.

The said money was remitted to the firm of Muwema and Mugerwa Advocates for the benefit of the Respondents/ Farmers upon representation by M/s Muwema and Mugerwa Advocates to the Appellant/Current Plaintiff that the said law firm had full instructions to receive the monies on behalf of the Respondents /tobacco farmers). These sums were remitted to M/s Muwema and Mugerwa Advocates.

On12th August, 2010 the Court of Appeal delivered its judgment in in the case of ***Civil Appeal No. 50 of 2008; British American Tobacco Uganda Limited vs Sedrach Mwijakubi & Others*** (Exhibit P3) in the favour of the tobacco farmers. British American Tobacco Uganda Limited was dissatisfied with the Court of Appeal decision and thus lodged an appeal in the Supreme Court vide ***Civil***

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Appeal No. 1 of 2012; British American Tobacco Uganda Limited vs Sedrach Mwijakubi & Others. This appeal (Exhibit P4. was also dismissed by the Supreme Court on 20th June 2013 with the Supreme Court agreeing with the decision of the Court of Appeal.

The Plaintiff herein then filed a post judgment application in the Supreme Court vide **Civil Application No. 7 of 2013 British American Tobacco Uganda Limited vs Sedrach Mwijakubi & others** in which it was seeking among others a number of declarations.

The Supreme Court on 10th July, 2014 dismissed the said application as per Exhibit P5 and awarded to the Respondents/ Tobacco Farmers the sum of Ug. Shs.14, 364,358,042/- with interest of 15% per annum on daily balances compounded monthly in line with regulation 11(2) and (3) of the Tobacco (Control and Marketing) Regulations, S.I 35-1 in addition to advising the Appellant/Plaintiff herein to recover directly the sum of Ug. Shs. 4,300,000,000/= previously paid to the current Defendants and or any of the respondents therein the claimed sum of Shs. 921, 195, 924/= arising from the Settlement Deed.

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With all these efforts ending in vain, the Plaintiff quickly paid the decretal sum of Ug. Shs.14, 364, 358,042/- directly to the farmers and thereafter made several demands to the law firm of M/s Muwema and Mugerwa Advocates to have refunded to it the sums previously remitted to it amounting to Uganda Shillings Four Billion Six Hundred Million only (Ug. Shs 4,600,000,000/=) which had erroneously been paid as a settlement of the dispute between the parties then pending appeal at the Court of Appeal.

M/s Muwema and Mugerwa Advocates immediately, thereafter, by a correspondence dated 8th July 2013 communicated to the Plaintiff/ Appellant in Supreme Court of the remittal of Uganda Shillings One Billion Only (Ug. Shs. 1,000,000,000/= (Exhibit P11) in addition to mentioning that an amount of Ug. Shs 921,195, 924/= had been directly remitted to the farmers in addition to indicating that the balances of monies they had received had been reduced to their legal fees and disbursements since they had a rémuneration agreement with the farmers entitling them to a portion of the amount recovered which they intended to apply towards their outstanding fees.

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This state of affairs was rejected by M/s Kwesigabo, Bamwine & Walubiri Advocates who then were representing the farmers by their letter dated 8th July, 2013 (Exhibit P12) wherein they requested the Manager Standard Chartered Bank not to receive any such money from M/s Muwema and Mugerwa Advocates stating that the said money was remitted without their client's authority and against their interests.

The Plaintiff herein then through M/s Sebalu & Lule Advocates and Solicitors on 18th July, 2014 demanded from M/s Muwema and Mugerwa Advocates the sums of all monies paid to them directly by their client arguing that the said money was paid in error and thus should be refunded.

M/s Muwema and Mugerwa Advocates did not do so and so the Plaintiff being dissatisfied with the inaction of the Defendant brought this suit for claims as follows;

a. An order for the refund of Uganda Shillings Three Billion, Six Hundred and Seventy Million only (Ug. Shs. 3,670,000,000/=), being money had and received owing to a failure of consideration.

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b. Paid interest of Uganda Shillings Four Billion, Eighty-Two Million, Three Hundred and Fifty Six Thousand Three Hundred Eighty Five only (Ug. Shs. 4,082,356,385) on the failed deed of settlement owing to the Defendants lack of mandate to enter settlement.

c. Interest on (a) at court rate from the date of making the demand.

d. Costs of the Suit.

2. Representation:

During the hearing of this matter the Plaintiff was represented by Mr. Michael Mafabi and Mr. Allan Waniala of M/s Sebalu & Lule Advocates while Mr. Mulema Mukasa of M/s KSMO Advocates appeared for the 1st Defendant and Mr. Ebert Byenkya and Mr. Bazira Anthony of M/s Byenkya, Kihika & Co. Advocates appeared for the 2nd, 3rd, 4th and 5th Defendants.

3. Issues:

The parties framed the following for trial;

i. Whether the Plaintiff has an actionable claim in law and is entitled to a refund of monies paid to the firm of Muwema & Mugerwa Advocates

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ii. Whether the Defendants have a lien and set-off on the sums being held on the account

iii. Whether the payment of UGX 630,000,000/= was paid to solely discharge the 2nd Defendant

iv. Whether there was a discharge of the 2nd Defendant

v. Whether the Defendants are liable to refund the sum of UGX 921,195,924/= which was paid out to the farmers

vi. Whether the Plaintiff is entitled to the remedies claimed.

4. Witnesses:

a. Plaintiffs witnesses:

i. Ms. Agnes Nantongo

b. Defendants Witnesses:

i. Mr. Herbert Kiggundu (DW1)

ii. Mr. Siraji Ali (DW2)

iii. Mr. Terrence Kavuma (DW3)

iv. Mr. Brian Kabayiza (DW4)

v. Mr. Fred Muwema (DW5)

vi. Mr. Friday Kagoro Roberts (DW6)

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5. Submissions:

a. Plaintiff's submissions:

On Issue (1) of whether the Plaintiff is entitled to a refund of monies paid to the firm of Muwema and Mugerwa Advocates, Counsel for the Plaintiff submitted that the Defendants received the sum of Ug. Shs. 4,300,000,000/= for the benefit of their clients as agreed under a Deed of Settlement dated 27th July 2010 (P. Exh.2) and that since this money was received on behalf of their clients, the Defendants were obligated to keep it on a client's account.

The Plaintiff's further counsel submitted that the Court of Appeal in Civil Appeal No. 58 of 2008 and the Supreme Court in Civil Appeal No. 1 of 2012 decided in favour of the Defendants and awarded to them the decretal sum of Ug. Shs 14, 364, 358,042/- upon which the Plaintiff filed Miscellaneous Application No. 7 of 2013 in which the Supreme Court ordered that the Plaintiff was at liberty to recover the sum of Ug. Shs 4, 300,000,000/= directly from the Defendants which had already been paid to the Defendant's law firm as well as interest of 15% per annum on daily balances compounded monthly under the decree of the Supreme Court.

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It was argued for the Plaintiff that the ruling meant that under the decree of the Supreme Court, the Plaintiff was condemned to make double payments in respect of the claims of the farmers who were formerly clients of the Defendants.

Counsel submitted further that the Plaintiff made a demand for the sum upon which the Defendants partially refunded Ug. Shs 630,000,000/= leaving a balance of Ug. Shs. 3,670,000,000/= the principal amount in addition to interest and costs of the suit.

Counsel referred to incidents of legal liability of the Defendants jointly and severally.

On this it was argued that the Defendants are jointly and severally liable to refund monies owing to the Plaintiff as money had received by them referring to *Bryan Garner, Black's Law Dictionary, Ninth Edition at page 33,* that;

> ***'An action for money had and received lies to recover money which the Plaintiff had paid to the Defendant. The action lies to recover money on the ground that it had been paid under a mistake or compulsion, or for a consideration which had wholly failed....'***

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It was further submitted that the concept of money had and received is founded in equity and is meant to prevent unjust enrichment of the Defendants at the expense of the Plaintiff.

Several authorities were cited by counsel including ***Clothlink Uganda Limited vs African Trade Investments Fund Limited & Another HCCS No. 234 of 2010*** as well as Chitty on Contracts, 33rd Edition.

On the liability of the Defendants jointly and severally, counsel for the Plaintiff asserted that the section 9 (1) of the Partnership Act (D. Exh.18) provides that a partner in a firm is liable jointly with the other partners for all the debts and obligations incurred while he or she is a partner. And that at the time the sums were received, DW1 and DW5 were partners and remained so during the period when the monies claimed were utilized by the law firm.

That the 3rd, 4th and 5th Defendants were also partners when the liability arose. The Plaintiff's counsel contended that they became partners by virtue of the partnership deed dated 1st February 2011, and became liable because after they joined the Defendant's law firm, the said firm continued to carry out work relating to the case and

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that also became liable for the Ug. Shs. 4,300,000,000/= after the Supreme Court decision held that this sums were recoverable against the firm of Muwema and Mugerwa Advocates. Counsel pointed to several acts which according to the Plaintiff were proof that the 3rd, 4th and 5th Defendant were liable jointly with the 1st and 2nd Defendants and these included several correspondences issued or received by the firm of Muwema and Mugerwa Advocates (P.Exh.11, P.Exh.12, P.Exh.17) where they approved or participated as partners; filing of bill of costs where the 3rd, 4th and 5th Defendant pleaded that they entitled to a share a lien of the costs in this matter, and also that the bill of costs (D.Exh.6 and D.Exh.7)were signed off by the 3rd and 5th Defendants which was proof that

That in ***British American Tobacco Uganda Limited vs Muwema and Mugerwa Advocates Civil Suit No. 751 of 2014***, on the question of liability, the court found that since the 3rd, 4th and 5th Defendants were involved in the administration of finances on the Defendant's law firm, they were equally liable.

It was counsel's submissions that there should be a refund since it was the finding of the Supreme Court that the Deed of Settlement

signed between the parties was not a valid compromise settlement and consent order since it was not signed and sealed, with the result that there was failure of consideration which meant that the Defendants were liable to refund the sums that were remitted to them. Furthermore, that the money remitted to the Defendants possessed the character of client's money and was paid of the Defendant's clients and should be available for refund. It was submitted that there was documentary evidence that the money was moved from the Defendant's law firm and disbursed to the Defendants personal accounts and then used for their own benefit as per D. Exh. 22, D. Exh. 17, and P. Exh.17

Also, that by refunding UGX 630,000,000/= the Defendants admitted that they were liable to refund the full sums, as well as the interest on the sums claimed.

On number Issue (II) of whether the Defendants have a lien and set-off on the sums being held on account counsel for the Plaintiff submitted that the Defendant's premise for a lien and set-off based on the remuneration agreement signed between them and their former clients is illegal, and cannot be supported by public policy.

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Counsel cited ***Shell Uganda Limited 7 & 9 Others vs Muwema and Mugerwa Advocates & Solicitors Civil Appeal No. 2 of 2013***, the Supreme Court, which was dealing with a similar issue found that such arrangements are champertous;

See: https://www.dictionary.com/browse/champertous an adjective of the noun champerty ['tʃampəti] which in law is an illegal agreement in which a person with no previous interest in a lawsuit finances it with a view to sharing the disputed property if the suit succeeds and so since the claim as made in P. Exh. 6 is champertous it means that the Defendants cannot claim off it.

Additionally, that the Defendants were already entitled to costs of Ug. Shs. 300,000,000/= under P. Exh.2, the Deed of Settlement and also that the costs claimed by the Defendants actually belonged to their former clients.

On issue (III) and (IV) of whether the payment of Ug. Shs. 630,000,000/= was paid solely to discharge the 2nd Defendant and whether there was a discharge of the 2nd Defendant, respectively, counsel for the plaintiff submitted that the sum of Ug. Shs 630,000,000/= was paid to the Plaintiff as a partial refund and not

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to discharge the 2nd Defendant. That this was even clear in the paragraph 9 (b) of the 1st Defendant's defence, in paragraph 29 of the 1st Defendant's witness statement, as well as paragraph 7 of the witness statement of DW6.

On issue (V) of whether the Defendants are liable to refund the sum of Ug. Shs 921,195,924/= which was paid out to the farmers, Counsel submitted that the sum of Ug. Shs 921,195,924/= was also included in the sum sought by the Plaintiff, and the matter was res judicata since the Supreme Court already found that this sum was the responsibility of the Defendants and their clients. That the Defendants' clients argued successfully contended that no payments were ever made to them., and there was no evidence they had actually ever received it and therefore the Defendants are liable for this sum.

On issue (VI) of whether the plaintiff is entitled to the remedies claimed The Plaintiff sought a refund of the Ug. Shs 3,670,000,000/= being money had and received; as well as Ug. Shs 4,082,356,385/= being interest owing and outstanding from the payment of the decretal sum of Ug. Shs 4,300,000,000/=; interest on the

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outstanding amount from at court rate from the date of demand on 18th July 2014 until payment in full; and costs of the suit.

b. <u>Defendants submissions:</u>

a. <u>1st Defendant's submissions:</u>

On whether the Plaintiff has an actionable claim in law and is entitled to a refund of monies paid to the firm of Muwema & Mugerwa Advocates, the 1st Defendant's counsel submitted that the Plaintiff's submissions heavily relied on the ruling in ***Supreme Court in Civil Application No. 7 of 2013 BAT (U)LTD Vs Sedrach Mwijakubi & Others***, an application for review, yet it in no way found that the Plaintiff has an actionable claim but instead arrived at several conclusions including that the Applicant took a risk to make part-payments to the law firm, and was at liberty to recover whatever sums were due to it. That, it also found that the Supreme Court could not make an order against the law firm for repayment of the monies since it was not part of those proceedings; and that it was necessary to establish if the said sums were due to the Applicant from the law firm, through a suit, if it was actionable.

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According to the 1st Defendant's counsel, the payment of the sums in question arose out of Deed of Settlement (D. Exh. 1) and the Consent Order (D. Exh.2), which is barred by law and is illegal, because the Plaintiff and the farmers attempted to settle an appeal by consent and reverse the judgment of the lower court. Counsel relied on ***Bulasio Konde vs Bulandina Nankya & Another Civil Appeal No. 7 of 1980 f***or the holding that an appellate court will not allow an appeal by consent as to do so would be to find that the decision below was wrong and that only an appellant court has powers to reverse a decision of the court below after hearing the appeal.

Counsel for the 1st Defendant submitted that the Consent Order sought to reverse the Judgment and Decree in that it was agreed to reverse the judgment and decree of the High Court and yet it expected the court to go by the Consent Order without deciding the matters of law. It also decided the liability of both parties and discharged them, without the court deciding the matters of law and arriving at a decision, and the amounts to be paid by BAT were not included in the Consent Order but were secretly hidden and kept in the Deed of Settlement. That, the clause in the Consent Order that '**This Appeal**

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be and is hereby settled out of court with no admission of liability by both parties and the settlement reached discharges all and any claims between the parties in this appeal and in the court below' is barred by law and is illegal and the court cannot condone or enforce an illegality.

Counsel cited the decision of the court in ***Active Automobile Spares Ltd vs Crane Bank and Another Supreme Court Civil Appeal No. 21 of 2001*** where it was held that a party could not claim and recover money paid through an illegal transaction and in which it was not at fault, as per the principle *Ex turpi causa nori oritur action.*

Counsel submitted that in Active Automobile, the court declined to make to make an order for the return of the money which was based on an illegal transaction. Counsel submitted that it was the Plaintiff's scheme to arrive at a consent or settlement, in order to avoid a much bigger award by the Court of Appeal in its judgment.

On Issue 3 of whether the Defendants had a lien and set-off in the sums being held on account, according to the 1st Defendant's submissions, the Defendant's law firm has never been paid to date its professional fees and costs yet it was entitled to these fees as per

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section 46 of the Advocates Act Cap. 267. That, under this section, the Defendant law firm is entitled to treat the monies held as a set-off, lien, charge, counter-claim or any other manner of recourse or right.

Further still, that the Plaintiff was well aware of the Defendants' claim as set-out in the Advocates-Clients Remuneration Agreement (D. Exh. 9). Counsel submitted in addition that all the Defendants clearly testified that the Defendant law firm had not been remunerated with the sums that were due to them under the Advocate Client-Remuneration-Agreement, as well as the party-to-party bill of costs in the High Court and Court of Appeal where the Defendant's clients, the tobacco farmers were awarded costs.

It was submitted for the 1st Defendant that the tobacco farmers were awarded costs of the suit in both the High Court and Court of Appeal and it was the Defendant's law firm that was representing them until 22nd October 2010 when instructions were withdrawn from them which was after the judgment of the Court of Appeal. Further that the bill of costs was filed in both courts by the Defendant's law firm and the Plaintiff was served with the same but they are still pending

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taxation, before the Plaintiff can pay the Defendants' law firm as the retained advocates on record. Counsel submitted that the bill of costs for both claims is Ug. Shs 1,747,929,639/= for the High Court and Ug. Shs 2,409,323, 178/= for the Court of Appeal with the total being Ug. Shs 4,157,252,817/=.

Counsel distinguished the case of ***Shell Uganda Ltd & 9 Others vs Muwema and Mugerwa Advocates & Solicitors*** cited by the Plaintiffs' counsel and stated that in the present case, the clients admitted as per P. Exh.7 that the advocates were not paid their costs and in fact agreed that they had been admitted they had indeed instructed the Defendant's law firm.

Concluding the submissions on this issue, counsel submitted that the Defendant's law firm has a statutory lien on the sums paid to it, cannot be paid by its clients the legal fees as per section 46, notwithstanding the withdrawal of instructions or the fact that the Court of Appeal declined to endorse and seal the Consent Order or that the Supreme Court declined to validate it.

On Issues No. 4 and No. 5 Whether the payment of Ug. Shs 630,000,000/= was paid to solely discharge the second Defendant

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and whether there was a discharge of the second Defendant, submitting on these two issues, counsel argued that in a letter dated 1st August 2014, the Defendant's law firm demonstrated that the amount in question was a payment from the law firm to the Plaintiff, and that this was corroborated by the testimony of DW5 and DW6 Mr. Kagoro Roberts Friday.

On issue 6 of whether the Defendants are liable to refund the sum of Ug. Shs 921,195,924/= which was paid out to the farmers, it was counsel's submissions that in filing Civil Application No. 07 of 2013, an application for review, the Plaintiff sought inter alia, an order that 'the court make directions and orders that the sum of Ug. Shs 921,195,924/= already paid to some of the beneficiaries to the judgment in Supreme Court Civil Appeal No. 1 of 2012 as per account rendered in compliance with the Order of Court of Appeal in Civil Application No. 187 of 2010 arising out of Civil Appeal No. 50 of 2008 is factored in the computation of the decretal sum in Civil Appeal No.1 of 2017 as monies paid on account.

That the above orders sought by the Plaintiff was made well aware that Ug. Shs 921, 195, 9924/= was already paid to some of the

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farmers. Counsel submitted further that the accountability by the law firm, D. Exh.5, which was a letter submitted to the Court of Appeal showed that payments were made to the farmers showed that these sums were paid to the farmers and that the Plaintiff cannot approbate and reprobate at the same time for as per P. Exh.5, D. Exh.3, D. Exh.4 and D. Exh.5, it cannot say one thing during the Supreme Court proceedings and another at the High Court.

Further still, that in Civil Application No. 7 of 2013, the Supreme Court advised the Plaintiff to take steps to recover Ug. Shs 921,195,924/= from the farmers provided that the money is due to it.

On whether the plaintiff is entitled to the remedies claimed, Counsel submitted that the Plaintiff is not entitled to the remedies claimed because the transaction was illegal and the court cannot endorse an illegality since the Defendant's law firm was only an agent of the principal and the proper party to the suit should have been the farmers.

Thirdly, Counsel submitted that that the suit is barred by clause 7 of the Deed and the principle of promissory estoppel prohibits the court

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proceedings arguing that the Plaintiff had failed to prove professional misconduct and misrepresentation occasioned by the Defendants in paragraphs 9 of the plaint since the Defendant's law firm did not propose the payments or force the hand of the Plaintiff to pay to it the said monies said to be for the farmers.

On all the issues Counsel thus urged court to find that the 1st defendant was not liable.

b. <u>Submissions of the 2nd, 3rd, 4th and 5th Defendants:</u>

Counsel for the 2nd, 3rd, 4th and 5th Defendants submitted that the clause 7 and Clause 3 of the Deed is clear and unambiguous and precludes the parties from instituting any action or proceedings of any kind, against one another except an action based on indemnity which was contemplated by the Deed and yet the Plaintiff brought an action not based on contract but for money had and received.

Further, that section 114 of the Evidence Act establishes a statutory bar against the Plaintiff seeking to base an action for money had and received using the Deed of Settlement since the Plaintiff had undertaken not use the deed in action under contract.

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The second argument presented was that the Deed of Settlement constituted an illegal contract and any payments that were made pursuant to it were illegal and were not recoverable in an action for money had and received as by the impugned settlement the Plaintiff planned to affect the rights of the farmers by secretly working to obtain a substantial discount on the amounts it was to pay to the 2800 tobacco farmers under the judgment of the court which would reduce a claim of 7.6 billion down to 4 billion shillings thus causing significant injury which would be occasioned to each of the 2800 tobacco farmers because they would lose their due entitlement as awarded thus amounting to an injury to property rights making it fall within the meaning of section 19 (d) of the Contracts Act.

Counsel further argued that the Plaintiff insisted on making a payment on 13th August 2010, a day after the Court of Appeal had already pronounced in its judgment and that the Plaintiff attempted to settle by a Settlement Deed even when they had been advised by their lawyers not to do so and despite the fact that the Court of Appeal had rejected the attempted settlement clearly demonstrated that the money the Plaintiffs are trying to claim as money had and received

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was paid to the Defendants pursuant to objects that were unlawful and whose performance was also unlawful as seen from the evidence by DW5 who noted that by the Plaintiff insisting on making payments yet it was well aware that the consent had been rejected, it was doing so in defiance of a court judgment. To aid its argument, counsel cited the case of **Jamba *Soita vs David Salaam HCCS No. 4000 of 2005***, and ***Legal Brain Trust and Others vs Hassan Bassajabalaba and others Constitutional Petition No. 4/ 2012,*** where it was held that in a claim for recovery of money had and received, the courts cannot enforce a claim arising out of money paid out of an illegal act as per the principle of *ex turpi causa non oritur action* since the Plaintiff could not make out a case under an illegal transaction and so the court should find so.

6. <u>Decision of Court:</u>

In making my decision in this matter, I have taken into account the pleadings in this matter, the affidavits in support and in opposition tendered herein, the evidence of witnesses, the documents in form of Annextures on record, the submissions of counsels and the authorities cited by parties.

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In resolving this matter, I have adopted the issues framed by the parties. These issues are discussed and findings on each is made accordingly as below.

a. <u>Whether the Plaintiff is entitled to a refund of monies paid to the firm of Muwema and Mugerwa Advocates:</u>

There is no doubt that British American Tobacco Uganda Ltd, the Plaintiff entered into a Deed of Settlement *cum* Compromise (P.EXH.2) dated 27th July 2010 with Sedrach Mwijakubi and Others for the purposes of settling the dispute between the parties amicably arising out of a Court of Appeal Civil Appeal No. 50 of 2008 where it was agreed that the Plaintiff would make a total payment of Ug. Shs. settlement sum and Ug. Shs. 300,000,000/= being the costs of the Appeal and the Original Suit at the High Court. It is also correct and factual to state that these payments were made to the law firm of Muwema and Mugerwa Company Advocates for the benefit of the Respondents in the said civil appeal. This was before the Court of Appeal made its final decision.

However, when the Court of Appeal subsequently delivered its judgment on 12th August 2010 in favour of the farmers the Plaintiff

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herein was not satisfied with the decision of the Court of Appeal and thus appealed to the Supreme Court challenging the decision of the court on several grounds.

The appeal, however, was dismissed by the Supreme Court in favour of the farmers with the result that the Supreme Court ordered the Plaintiff herein to pay a total of Ug. Shs. 14,364,358,042/= to the farmers which it did directly.

The Plaintiff now seeks to recover the sum of Ug. Shs. 4,300,000,00/= which was paid to the Defendant law firm a result of the Deed of Settlement before the Court of Appeal's decision and the subsequent dismissal of its appeal by the Supreme Court which was not approved by the courts as money had and received.

Several facts in relations to this claim have been adduced and I am satisfied from the evidence before me that indeed a Deed of Settlement was made in 2010 as final settlement between the Plaintiff and the tobacco farmers while there was an appeal in the Court of Appeal of the decision of Frederick Egonda–Ntende, J (as he then was) well before the Court of Appeal. This settlement was not confirmed by the Court of Appeal.

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It is also true that the Supreme Court dismissed the Plaintiff's appeal against the decision of the Court of Appeal which upheld the decision of the High Court and ordered the Plaintiff to pay the beneficiaries a huge amount of money which was due to them and the Plaintiff complied.

The Plaintiff then by these proceedings is seeking to recover the amount paid to the farmers law firm arising out of the unrecognized Settlement deed on the basis that since it had paid the farmers their total money and that since counsel for the farmers had previously , on behalf of the farmers, received monies from it as final settlement of a payment dispute then existing between it and the farmers, which money was in excess of what had already been paid to the farmers then then the said money ought to be refunded since its non-refund would amount to illicit enrichment on the part of the counsels for the farmers.

The perspective of unjust enrichment as alluded to by the Plaintiff is picked from the explanation made by Kenneth Kakuru, JA, who, while explaining the concept of unjust enrichment and money had and received in the case of ***Nipun Norratum Bhatia vs Crane Bank***

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Limited Civil No. 75 of 2006 quoted the speech of Lord Wright in ***Fibrosa Spolka Akcyjna versus Fairbairn Lawson Combe Barbour Ltd [1943] AC 32 AT 61*** as;

> ***"The claim in the action was to recover a prepayment of Pounds 1,000 made on account of the price under a contract which had been frustrated. The claim was for money paid for a consideration which had failed. It is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep. Such remedies in English law are generally different from remedies in contract or in tort, and are now recognized to fall within a third category of the common law which has been called quasi-contract or restitution.***
>
> ***Restitution is an equitable remedy. Courts have long held that actions for money had and received lie "for money paid by mistake, or upon a consideration which happens***

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to fail, or for money got through imposition (express or implied) or extortion or oppression or undue advantage taken of the plaintiff's situation contrary to laws made for the protection of persons under those circumstances".

(Underlining for emphasis added)

The Learned Justice thus concluding from the above statement went on to determine that from the circumstances of the case before him natural justice and equity obliged the defendant in the case before the Court of Appeal ought to refund the money it had received.

In regard to the principle of money had and received the holding in the case of ***Kensheka vs Uganda Development Bank Civil Suit No. 469 of 2011*** is relevant for the said court while referring to the holding in ***Dr. James Kashugyera Tumwine, & Another vs Willie Magara & Another*** went on to explain the principle of money had and received as being;

"Money which is paid to one person which rightfully belongs to another, as where money paid by A to B on a consideration which has wholly failed, is said to be money had and received by B to the use of A. It is recoverable by

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action by A. The paying of A to B according to the Learned Author of A Concise Law Dictionary by P.G Osborn 5th Edn 9th P.212 becomes a quasi-contract an obligation not created by but similar to that created by contract and is independent of the consent of the person bound.....the other view is that in an action for money had and received liability is based on unjust enrichment i.e. the action is applicable whenever the defendant has received money which in justice and equity belongs to the Plaintiff under circumstances which render the receipt of it by the defendant a receipt to the use of the Plaintiff."

The import of the decisions above demonstrates the fact that a plaintiff is entitled to bring actions to recover sums of money where there was evidence that monies from one party to another was paid but that due to non-performance or defect in whole or part of the agreement or where there was a failure of consideration nothing of value could be performed resulting in the plaintiff being aggrieved and was entitled to restitution.

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Relating the above concepts to the instant matter, it is the case of the Plaintiff that it should be refunded monies which was received by the defendants' law firm which was paid as a result of an attempted settlement of a decision of the High Court then pending an appeal before the Court of Appeal which was later appealed to the Supreme Court with finding that the Deed of Settlement that was signed between the parties and had not been approved by the Court of Appeal was not a valid compromise settlement and consent with the Plaintiff herein being advised to seek to recover the same by the apex court from those who received the said money.

That is exactly what the Plaintiff did and in its argument the Plaintiff submitted that the said money remitted to the Defendants possessed of the character of client's money and that since it was paid for the benefit of the Defendant's clients who subsequently were paid all what was due to them then the money which was paid to the defendants should be refunded.

This claim was, however, rubbished off by the 1st Defendant on grounds that the Deed of Settlement which is the documentary evidence on record titled as D.EXH 1 and the Consent Order

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documentary evidence Exhibit D.EXH.2 were stripped of their legality as they were barred in law and were illegal on the basis that the Plaintiff and the farmers attempted to reverse illegally reverse the decision of the High Court which was then pending an appeal before the Court of Appeal.

This above argument was bolstered by the arguments of the 2nd, 3rd, 4th and 5th Defendants that indeed the illegality of the Deed of Settlement could be seen from the fact that the Plaintiff tried to use it to illegally and secretly obtain a discount on amounts which was payable to the tobacco farmers in total disregard of the law and the then existing High Court judgment and decree which then was on appeal in the Court of Appeal.

I have had the fortunate occasion to peruse the said Consent Deed made by the Plaintiff and the farmers. The single and most important clause in the said deed provides as follows;

> ***"This Appeal be and is hereby settled out if court with no admission of liability by both parties and the settlement reached discharges all and any claims between the parties in this appeal and in the court below"***

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This is the clause which is the basis of the argument raised by the 1st Defendant that the Plaintiff is barred from claiming for restitution since it was illegal given that it sought to set aside the judgment of the High Court as was held in the case of ***Bulasio Konde vs Bulandina Nankya & Another***.

The validity of the said deed was in detail considered by the Supreme Court's in the appeal before it of ***British American Tobacco (U) Ltd vs Sedrach Mwijakumbi and 4 Others Civil Appeal No. 01 of 2012***. It that regard the Supreme Court found as a matter of fact that the settlement deed and the consent order arising from it were never been signed or sealed by the Court of Appeal although there was a letter addressed to the Court of Appeal to have the same validated before the Court of Appeal rendered its decision on the 12th of August 2010 in Civil Appeal No. 50 of 2008 which was pending before it.

Additionally, the Supreme Court noted in its decision that the said settlement deed and the consent order were contested by even some of the beneficiaries of the settlement with some of those beneficiaries filing ***Miscellaneous Application No. 175 of 2012*** wherein they

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sought for orders rescinding the appointment of the 1st, 2nd, and 3rd Respondents thereto as their representatives.

At the same time the Supreme Court in ***Supreme Court Miscellaneous Application No. 07 of 2013 British American Tobacco (U) Ltd vs Sedrach Mwijakubi and 4 Others*** commented that indeed the Deed of Settlement lodged in the Court of Appeal was could not be a valid document since it was not endorsed by the Court of Appeal for the Court of Appeal had proceeded to go ahead to deliver its judgment without any regard of the same or of money paid under it.

Given the above, the Supreme Court concluded that there was no valid deed of settlement or consent order.

I am subordinate to the above findings above of the Supreme Court and would similarly conclude that the Deed of Settlement and the Consent Order were never valid documents for they never received any seal of approval by the courts. And thus were illegal with any actions arising from them to be of no consequence given that the said documents attempted to settle a then pending appeal against a decision of the High Court.

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That position being as so then the Defendants' assertions that they had a right of lien on funds received is rendered moot with the Plaintiff not being estopped from bringing an action even if it was a participant and signed documents which have been declared illegal *ab initio* rendering the 1st Defendant argument the Plaintiff cannot come to court to make claims under documents barred by law and illegal invalid.

On the other hand , from my consideration of the sum total of evidence before me show that these said illegal documents were orchestrated by the 1st Defendant through his law firm for reasons which I consider purely selfish since nowhere has it been shown that the Plaintiff , while it proposed a settlement, did so in an attempt to settle a dispute between it and the farmers yet the defendant law firm was representing the farmers and officers of the law who should have known better the legal consequences of one trying to circumvent illegally court process and should have given proper legal advice accordingly.

Therefore, my conclusion would be that since it was the law firm which should have taken professional responsibility to advise the

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Plaintiff of the consequences of the illegality in trying to circumvent a court decision then it is the defendant law firm which is in the wrong and I find no ill intention on the side of the Plaintiff when an attempt was made to reverse orders and decisions made in the Judgment / Decree of the High Court per F.M.S Egonda Ntende J (As he then was).

Therefore, the Plaintiff would have a right to bring this action for money had and received for indeed consideration had failed as was held in the case of ***Nipun Norratum Bhatia vs Crane Bank Limited*** and even commented upon by the Supreme Court when it found that monies which were paid outside the decision of the Court of Appeal or its decision were illegal and thereafter even proceeded to order the Plaintiff to pay Ug. Shs. 14,364,358,042/= to the farmers rendering the earlier payment of Ug. Shs. 4,300,000,000/= received by Defendants' law firm for purposes of settling the suit against the Plaintiff to become due and thus entitling the Plaintiff to its refund as a cause of action founded in equity for money had and received with the result that tit would be entitled to restitution.

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Therefore, since the acts of settlement was negated by the Supreme Court as illegal and my finding so here as a matter of fact then the monies paid under it would become due and refundable to the Plaintiff directly and immediately.

In regard the liability of partners of the defendant's law firm in terms of the amount had and received Section 9 of the Partnership Act 2010 becomes handy as it provides that a partner in a firm is only liable jointly with the other partners for all debts and obligations of the firm incurred while he or she is a partner.

The liability of partners in a firm is restricted, however, by Section 19 of same Act for it limits the liability of new partners to the creditors of the firm only to those liabilities incurred after becoming partners and not to liabilities incurred before one becomes a partner in a firm. Thus in this regards I would find that the 3rd, 4th and 5th Defendants who became partners on 1st February 2011 as seen from document on record marked D. Exh.1 assumed liabilities on the date onwards of becoming partners and not before for even when these learned gentlemen joined the defendant law firm as testified to by Mr. Kagoro Friday Roberts (DW6) the balances on the defendant law firm

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accounts as of 31st January 2011 which is a day before these defendants joined the defendant firm amounted to only Ug. Shs. 8,976,000/= meaning that the 3rd, 4th and 5th Defendants clearly played no part in spending whatever monies were received by the defendant law firm before that date including to Ug. Shs. Ug. Shs. 4,300,000,000/= paid by the Plaintiff and as such no claims against the 3rd, 4th and 5th Defendants could stand and thus fails accordingly.

Arising from the above, therefore, I would find that it is only the 1st and 2nd Defendants who are solely liable to refund to the Plaintiff jointly the total amount of Ug. Shs. 2,748,804,076/= being balances of money had and received as they were the partners who received and utilised the monies before the other partners joined the defendants' law firm. As such this issue is answered partly in the affirmative.

b. Issue 3: Whether the Defendants have a lien and set-off in the sums being held on account:

The 1st as well as the 2nd, 3rd, 4th and 5th Defendants submitted that the Defendant's law firm provided legal services to its clients, the

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tobacco farmers, both High Court and Court of Appeal where costs were awarded.

However, according to the 1st Defendant, the bill of costs in relations to that representation have been filed in both the High Court seeking for Ug. Shs. 1,747,929,639/= and in the Court of Appeal seeking for Ug. Shs. 2,409,323,178/= but are yet to be taxed meaning the Defendant law firm has to date not yet been paid even though there is a letter of withdrawing instructions from the Defendant's law firm dated 22nd October 2010 wherein the clients of the Defendants said that upon completion of the appeal in the Supreme Court, they would take action towards the settlement of the Defendant's bill which they also urged the Defendant's law firm to share with them, the 1st Defendant submitted that the law firm has not been paid to date.

Counsel for the 1st Defendant submitted that the Defendant's law firm has thus a statutory lien on the sums that were paid to it by the Plaintiff and thus could not pay the same out to its beneficiaries until the firm's legal fees and costs are paid pursuant to **Section 46 of the Advocates Act** with the fact being that the advocate-client fees / the Advocate-Client remuneration) being that the defendant law firm is

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seeking for the costs of the suit, 12% of the total proceeds as well as 3% of the total claim as the matter goes on appeal.

First and foremost, I should state that by the holding in ***Shell Uganda Limited & 9 Others vs Muwema & Mugerwa Advocates and Solicitors*** the sum of 12 % of the total proceeds of the clients' claim would be excessive and on the high side. I note that moreover, the Defendant's law firm has already received the sum of Ug. Shs. 300,000,000 which was paid under the Deed of Settlement as costs for the Advocates.

However, of most importance is the fact that the Defendant law firm has no *locus standi* to apportion for itself its due legal costs and fees without going through the process bill of taxation for doing so otherwise would amount to an illegality which is sanctionable by deregistration.

Furthermore, given that the Plaintiff was not even the client of the Defendant law firm, the said law firm cannot claim a lien on funds to paid to it erroneously since those funds were even found by the Supreme Court to have been illegally paid to it and without authorization of both the Court of Appeal and the Supreme Court

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meaning that whereas the Defendant's law firm could be entitled to claim costs and fees, it must do so directly by making demands upon final taxation of its bills from their former clients the tobacco farmers purposes of settling its due claim and not from sums which were paid erroneously to it by BAT(U) Ltd.(Plaintiff) for those funds paid to it are illegally held.

Therefore, my finding here is that the Defendant law firm holds no legal lien on the monies paid to it erroneously by the Plaintiff and thus must return it accordingly as that would amount to illicit enrichment.

c. Issues No. 4 and No. 5 Whether the payment of Ug.Shs. 630,000,000/= was paid to solely discharge the second Defendant and whether there was a discharge of the second Defendant:

In the joint scheduling memorandum, dated 9th September 2015, it parties stated that it was as an agreed fact that on 15th July 2014, the sum of Ug. Shs. 630,000,000/= paid to the Plaintiff by the Defendant was done so as a partial refund after various demands to refund the monies.

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Indeed, a letter dated 1st August 2014, indicates that the said sums were paid on behalf of the Defendants' law firm. This was also the evidence of Mr. Kagoro Roberts Friday (DW6). The 2nd,3rd, 4th and 5th Defendants disputed this evidence submitting that the 2nd Defendant received an undertaking from Mr. James Sebugenyi during some surreptitious meetings that if he paid that sum, then he would be absolved from further liability.

I note that under section 9 of the Partnership Act, partners are liable for all debts and obligations of the firm. As such, it is not possible that the 2nd Defendant, who was a partner in the firm at the time the sums were paid would be absolved from liability while other sums were still due to the Plaintiff.

Moreover, given that all payments under this transaction are made on behalf of the Defendant's law firm, I would find that it was not possible for the 2nd Defendant to make payments of that magnitude absolving himself from liability of the partnership. My take is that the sum of Ug. Shs 630,000,000/= was paid on behalf of the defendant law firm and not to solely discharge the 2nd Defendant and not as a discharge of any one partner.

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d. Issue 6: <u>Whether the Defendants are liable to refund the sum of Ug. Shs. 921,195,924/= which was paid out to the farmers:</u>

The Defendant's law firm as per the *Report of the BAT Verification and Payment in the Markets of Hoima, Kiryandongo, Bweyale, Katubikira, Kigumba, Mutunda and Masindi General,* D. EXh.5 of the 1st Defendant's trial bundle indicated that it had paid a total amount of Ug. Shs. 921,195,924/= to the farmers. In D. EXh16 of the 1st Defendant's trial bundle, the lawyers of the Plaintiff also wrote to the Registrar of the Court of Appeal on 15th September 2011 stating their belief that some of the beneficiaries of the decretal sum had already been paid and settled.

In ***Miscellaneous Application No. 07 of 2013 British American Tobacco Uganda Ltd vs Sedrach Mwijakubi and 4 Others*** which was filed by the Plaintiff before the Supreme Court, one of the prayers sought was that the *'Court* ***make direction and orders that the sum of Ug. Shs. 921,195,924 already paid to some of the farmers' beneficiaries to the judgment in Supreme Court Civil Appeal No. 1 of 2012, as per account rendered in compliance with the order of the Court of Appeal in Civil Application No.***

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187 of 2010 arising out of Civil Appeal No. 50 of 2008 is factored in the computation of the decretal sum in Civil Appeal No. 1 of 2012 as monies paid on account.'

In its finding on this issue, the Supreme Court made orders that '***The Applicant should...take steps to recover any money due to it from...any of the respondents claimed to amount to Shs 921,195, 924/=.'***

In my considered opinion, the respondents referred to were the farmer (beneficiaries) and no one else and as rightly pointed out by the Plaintiff the issue in regards to this amount is *res judicata* for even the Plaintiff also acknowledges that some payments were made directly to the farmers.

On the basis of this fact alone, I would find that there is sufficient evidence that this sum was paid out to the farmers as beneficiaries of which the Plaintiff is well aware and even approved and therefore cannot seek to recover these sums from the Defendant's law firm making the Defendant's law firm not to be liable to refund the sum of Ug. Shs. 921,195,924/=.

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e. Issue **6: Whether the Plaintiff is entitled to the remedies claimed:**

The Plaintiff seeks a refund of Ug. Shs. 3,670,000,000/= (Uganda shillings Three Billion Six Hundred and Seventy Million only) less the Ug. Shs. 630,000,000/= that was refunded on 15th July 2014.

The Plaintiff also sought interest of Ug. Shs. 4,082,356,385/= for professional misconduct and misrepresentation on grounds that the Defendant law firm misrepresented that it had the authority to compromise and settle the dispute.

My observation is that the Supreme Court in its finding, found no evidence of misrepresentation on the part of the Defendant's law firm. This position is not supported by any evidence before this court. In the alternative I find as a fact that it was the Plaintiff Company which directly approached the Defendants' law firm with the possibility for the parties in this dispute to conciliate and settle the then dispute between the parties during the time when the Defendants' law firm was representing the tobacco farmers with the instructions having been given to it on 18th March 2005 by Sedrach Mwijakubi, Joshua

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Byangire and Solomon Kiiza who were at the time the elected representatives of the farmers and beneficiaries.

Even though the said instructions were withdrawn on 22nd October 2010 by the same representatives after the judgment in the Court of Appeal was delivered, I find from the record that throughout the defendant's law firm continued to represent the farmers even up the time of the alleged settlement with some payments even made to the farmers / beneficiaries through the Defendant's law firm even though some disagreements subsequently arose among the beneficiaries which disagreements I have not found directly attributable to the Defendant's law firm and as such the Plaintiff's claim that the Defendants' law firm had no authority to act on behalf of the beneficiaries would, in my view, have no basis.

Furthermore, no evidence of professional misconduct on behalf of the Defendant law firm as against its client while still representing their clients is demonstrable. Indeed, my finding is that there was constant amicable contact between the parties which even led to the alleged settlement of the then matter which though subsequently was not approved by the Court of Appeal and found illegal by the Supreme

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Court, with the failure of the consideration resulting from the alleged settlement not solely attributable to the Defendant's law firm but all the parties involved including the Plaintiff and the farmers' representatives.

Given this position, I would deem it that up to the time when the defendant's law firm was still with full brief and thus cannot be held culpable for any subsequent failure of what their brief entailed and consequently, the prayer by the Plaintiff that it was entitled to interest of Ug. Shs. 4,082,356,385/= for professional misconduct and misrepresentation on grounds that the Defendant law firm misrepresented that it had the authority to compromise and settle the dispute is unproven and is not granted.

The Plaintiff further sought interest on the sum of Ug. Shs. 2,748,804,076/= on the above amount from the time that the date of demand on 18th July 2014 until payment in full. This based on the argument that the Plaintiff is a commercial entity and had been kept out of its money and should therefore be awarded interest on the outstanding amounts.

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Under **section 26 of the Civil Procedure Act**, a court is clothed with discretion to award interest on claimed fixed sums with this position having been upheld in the case of **Majid Akuze vs Centenary Rural Development Bank Civil Suit No. 87 of 2015.**

From the evidence before me, the Plaintiff paid to the Defendant's law firm an amount of Ug. Shs. 3,670,000,000/= (Uganda shillings Three Billion Six Hundred and Seventy Million only) less the Ug. Shs. 630,000,000/= that was refunded on 15th July 2014. This fact is not disputed and has been proven and so taking into account the circumstances of this case I would on the basis of my finding that the 1st and 2nd Defendants were culpable for retaining at the Defendant's law firms sums of money which was had and due to the Plaintiff then a court interest of 6% per annum on the balance due would in my view be reasonable from the time when it was illegally till payment in full.

Therefore, I would allow interest on Uganda Shillings Two Billion Seven Hundred Forty-Eight Million Eight Hundred Four Thousand Seventy-Six Only (Ug. Shs. 2,748,804,076/=).

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6. **Orders:**

Arising from my findings above, I would make the following orders;

i. That the Plaintiff is entitled to recover from the 1st and 2nd Defendant a balance of Uganda Shillings Two Billion Seven Hundred and Forty-Eight Million Eight Hundred and Four Thousand and Seventy-Six (Ug. Shs. 2,748,804,076/=) which was money had and due to the Plaintiff and unreasonable withheld from the use of the Plaintiff even after the decision of the Supreme Court on the matter otherwise.

ii. That the Plaintiff is awarded interest at the court rate of 6 % per annum on the balance of Uganda Shillings Two Billion Seven Hundred and Forty-Eight Million Eight Hundred and Four Thousand and Seventy-Six (Ug. Shs. 2,748,804,076/=) from the date it was received till payment in full.

iii. I have found that when the Plaintiff paid the sum of Uganda Shillings Four Billion Six Hundred Million only (Ug. Shs 4,600,000,000/=) to the Defendant law firm M/s Siraji Ali, Brian Kabayiza and Terrence Kavuma were not partners in the defendant law firm and so by virtue of Section 19 of the

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Partnership Act they are not culpable and liable for any actions before becoming partners they became partners only on 1st February 2011. They are thus discharged from any liabilities in this regard.

iv. The First and Second Defendants to meet the costs of this suit in equal amounts.

I so order.

Hon. Justice Dr. H. P. Adonyo

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Hon. Dr. Justice Henry Peter Adonyo

Judge

25th September 2020