

5 Uganda Shillings Seventy Million only (Ug. Shs. 70,000,000/=) to the Defendant to be repaid within a period of Eighteen (18) months. The two parties signed the necessary documents to that effect. The said money was credited onto the Defendant's account.

10 After sometime the Defendant defaulted on repayment in repayment of the loan. The Plaintiff company made several demands requiring the Defendant to repay the outstanding loan together with accumulated interests amounting to Uganda Shillings Ninety Three Million One Hundred Twenty One Thousand One Hundred Forty Eight Only (Ug. Shs 93,121,148/=). The Defendant was not upcoming
15 and still failed to honour his outstanding loan obligations resulting in the Plaintiff initiating this suit to recover the defaulted amount claiming it had suffered severe business loss as a result of the Defendant's action and was greatly inconvenienced.

The Defendant was notified of the institution of this suit against him.
20 He filed a written statement of defence denying being indebted to the Plaintiff totally putting the Plaintiff to task prove its allegations.

Representation:

Ms. Birungi Christine appeared for the Plaintiff and M/s Kajeke, Maguru and Co. Advocates represented the Defendant in as far as
25 filing his written statement of defence. That was it.

Proceedings:

The proceedings in regard to this matter was set on diverse dates including the 10th April, 2018, 9th July 2018, 11th July 2019 and 17th


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5 March 2020. On 10th April, 2018 the matter was set for hearing. It did not take off due to COVID-19 pandemic lockdown.

By 28th July 2020, the file had lost position, the court on its own motion summoned both parties including the Defendant to appear in court for 24th August 2020 for mention and direction. On that date
10 only Ms. Birungi Christine representing the Plaintiff appeared in court. The Defendant was still absent and was still unrepresented. The court satisfied itself that the Defendant was absent on his own accord and had given no reason for doing so. The Plaintiff was allowed to proceed *ex-parte* to formally prove its case. It did so by calling one
15 witness.

Witnesses:

The Plaintiff's single witness, Ms. Namirembe Dorothy (PW1), the Regional Manager of the Plaintiff physically testified in court, confirming her written sworn witness statement which was
20 previously filed on record.

Exhibits:

Attached to Ms. Namirembe Dorothy (PW1) written sworn witness statement were several documents attached including a loan application (P. Exh.1), an evaluation of collateral (P. Exh.2), sales
25 agreement (P. Exh.3), mortgage approval and consent (P. Exh.4), loan agreement (P. Exh.5), loan statement (P. Exh. 6), demand notice (P. Exh. 7) and the loan recall (P. Exh. 8). These documents were


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5 admitted on record as the Plaintiff's exhibits for assessment by court accordingly.

Written submissions:

Upon completion of the hearing of the testimony of the sole Plaintiff's witness counsel for the Plaintiff filed a written final submission in
10 which two issues were discussed as below.

The first issue was whether there was a breach of the loan agreement by the Defendant. In respect of this point, the Plaintiff's counsel submitted that the Defendant on his own choice approached the Plaintiff on 1st February 2015 and applied for which was
15 subsequently given to him in the sum of Ug. Shs. 70,000,000/= only for which he signed the necessary loan documents in addition to executing the required securities.

Counsel concluded that by the Defendant signing for and subsequently receiving the loan amount which he had applied then
20 a valid contract was proven and he was by virtue of section 33 of the Contracts Act obliged to perform the terms stipulated by the contract unless constrained by law or where performance of the contract had been waived as was held in the case of **Stanbic Bank Uganda Limited vs Hajji Yahaya Sekalega t/a Sekalega Enterprises No. 25 185 of 2009** which was not the case in the instant matter with the Defendant subsequently defaulting on repaying the loan for which he should be found liable.


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5 On the second issue of whether the Plaintiff was entitled to remedies
prayed for in the plaint as a result of the default of the Defendant,
counsel for the Plaintiff's submitted since the Defendant had
breached the contract between him and the Plaintiff then pursuant
to section 61 (1) of the Contracts Act, the Plaintiff was entitled to a
10 refund of the amounts it extended to the Defendant in addition to
being compensated for losses suffered, embarrassment caused to it
and the resultant inconvenience as a result of the Defendant's breach
for which the Defendant should pay the sum of Ug. Shs. 50,000,000
in general damages.

15 On interest on the amount due, counsel for the Plaintiff prayed that
since the Plaintiff was denied the use of its moneys for several years
which monies was for business and commercial transaction then the
court should award it interest on the unpaid sum at a commercial
rate of 25 % per annum from the date of filing this suit until payment
20 in full.

Decision:

I have adopted for resolution of this matter the two issues framed by
the counsel for the Plaintiff. For clarity these issues are;

- a. Whether there was a breach of the loan agreement.
- 25 b. The remedies available to the parties.

i. Whether there was a breach of the loan agreement:

On the first issue of whether there was a breach of the loan
agreement, the Plaintiff's case resolved mainly around the evidence

5 of its sole witness Namirembe Dorothy PW1 which is to the effect that
on the 1st February 2015 the Defendant made an application for a
loan facility for which this witness personally took the Defendant
through the requirements needed for acquiring the loan and that
upon the Defendant demonstrating a clear understanding of what he
10 needed to do went on to sign a loan agreement (P. Exh. 5) on 15th
March 2015 which enabled him to receive into his account the sum
of Ug. Shs. 70,000,000 with the loaned amount to be repaid within a
period of 18 (eighteen) months beginning from that date in equal
installments on a monthly basis until payment in full.

15 Namirembe Dorothy (PW1) testified that in order for the Defendant to
receive the loan he secured it by guaranteeing repayment when he
tendered registration cards for a Toyota Hiace Registration Number
UAW 112P, an Isuzu Elf Registration Number UAW 325E and a
Mitsubishi Pajero Registration Number UAW 929N as per P. Exh.2 in
20 addition to a title for his *kibanja* located at Mirumu Zone LC1, Wakiso
District as per P. Exh. 3 and P. Exh.4 which he mortgaged
accordingly.

Namirembe Dorothy (PW1) testified that the Defendant received the
money but soon thereafter defaulted on the entire loan amount as
25 shown by P. Exh. 6 which forced the Plaintiff company to
subsequently issue to him a loan demand letter dated 3rd November
2015 (Exhibit P. Exh.7) which still the Defendant ignored leading to
a recall of the loan on 6th April 2016.

5 The fact of a contractual relationship existing between the Plaintiff
and Defendant is established by a loan agreement (P. Exh.5)
Paragraph 1 of which shows that the Plaintiff company did tender a
loan amount of Uganda Shillings Seventy Million Only (Ug. Shs.
70,000,000/=) to the Defendant which was secured using three (3)
10 car log books and a land sale agreement.

Paragraph 4 of the said loan agreement provided for situation when
there would be default in repayment with the terms therein requiring
the entire loan to be repaid upon default in addition to an interest at
a rate of 3% per month.

15 Further Paragraph 8 of the agreement provided that the loan
repayment period was 18 months commencing from 10th February
2015 and the loan was to be repaid in equal monthly installments.
This condition is said to have been defaulted upon by the Defendant.
Furthermore, Paragraph 10 required the borrower to clear the loan
20 together with any interest due calculated accordingly.

All the above conditions were well to the knowledge of the Defendant
who after satisfying himself of them signed the loan agreement,
Exhibit P. Exh.5 and subsequently received the amount indicated on
the loan agreement into his account which I have seen.

25 The Defendant failed to meet the obligations as imposed by the loan
agreement forcing the Plaintiff to exercise its rights under the loan
agreement to recover the sums due firstly by issuing a demand notice
dated 3rd November 2015 to the Defendant which read;


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5 *"YOU ARE HEREBY NOTIFIED that pursuant to the loan agreement executed between yourself and Premier Credit Ltd on 10th/03/2015. We DEMAND that you pay all your outstanding arrears which amounts to the sum of Ug. Shs. 12.160.000/=. Please note that your loan is in arrears and this is not acceptable.*

10 *Please note that this is the second demand notice regarding payment on your loan account and affects your credit history with Premier Credit Ltd. We are therefore giving you 7 (seven) days to pay this amount, so you have up to 10th/11/2015 to pay a total arrears of Ug. Shs. 12,160,000/= to regularize your loan*
15 *account.*

If you do not pay by 10th/11/2015, we shall be compelled to take legal action to recover the whole loan balance (Ug. Shs 72,375,000/=) plus other charges as per the instruction from our lawyer.'

20 The Defendant ignored this notice.

By 6th April 2016 the Defendant had defaulted on loan repayments for over 30 days forcing the Plaintiff to issue a loan recall notice to him which stated;

25 *"... as a result of your failure to adhere to your contractual obligations, we hereby recall the said loan and demand that you immediately pay to us the full loan amount, plus interest amounting to UGX 93,063,481 (Ninety Three Million Sixty Three Thousand Four Hundred Eighty-One only) within 14 (fourteen)*


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5 *days from the receipt of this letter but in any case not later than
the close of business on 05.9.2016...*”

The above loan recall letter gave the Defendant up to 5th September
2016 to repay the whole amount in full with notifications that any
subsequent failure would result in the Plaintiff using all available
10 legal means to recover the sums due. The Defendant still did not heed
to this loan recall notice. The Plaintiff was then forced to institute the
instant suit for the recovery of the amount due together with interest.

Interestingly though, it was only when the Defendant was served with
court process that he bothered to respond to the Plaintiff by filing his
15 written statement of defence in which denied owing any of the
amounts demanded by the Plaintiff.

From the above, it is clear to me that indeed a contract existed
between the Plaintiff and the Defendant and the Defendant defaulted
on the terms of the contract yet he benefited from it for he received
20 onto his account the said loan amount which he kept on withdrawing
as evidenced from his bank statement.

The defendant for no apparent reason has given no explanation as to
why he failed to pay the monthly installments as agreed leading to
his default.

25 Arising from the facts of this matter I see before me is a case of breach
of contract which in several decided cases such as **Sempa vs
Kambagambire HCCS No. 408 of 2014** and **Barclays Bank of
Uganda vs Bakojja HCCS No. 53 of 2011** has been defined as one

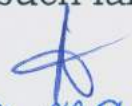

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5 where one or both parties fail to fulfill the obligations imposed by the terms of a contract or agreement between the parties.

This is because in the instant matter, the terms of the loan agreement were clearly spelt out and the Defendant signified his consent to those terms by signing the same but he ignored and or neglected to
10 meet the terms of the loan agreement as stipulated for he failed in his obligation to repay the amounts due to the Plaintiff which in my view since there was no reason given by the Defendant for doing so amounted to a breach of contract.

From the conduct of the defendant I am satisfied that the defendant
15 after receiving the loan sums ignored or neglected to repay it as was stipulated in the loan agreement. He also failed to indicate or provide reasons for doing so instead he in his written statement of defence manifestly denied having received the loan.

The corroboration that indeed a loan was tendered and received by
20 the Defendant can be confirmed by the various exhibits tendered in by the Plaintiff Especially Exhibit P.Ex.5, which is the loan agreement, Exhibit PEx. 6 which is a bank statement in the names of David Kalumba on an account number 800000179 who is the Defendant wherein it is credited on the 10th of March, 2015 with an
25 amount of Ug. 66,500,000 together with Ug. Shs. 3,500,000 being the disbursement and fees charged on the loan all totaling Ug. Shs. 70,000,000 which was utilized by the Defendant who has since failed to date to repay the loan amount even after being given the opportunity to do so with no reasons even advanced for such failure.


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5 That being the case I would resolve this issue in the positive that indeed the Defendant breached the loan agreement and thus he is accountable.

ii. Remedies:

The Plaintiff sued the Defendant and sought the following;

- 10 a) The Recovery of a sum of Uganda Shillings Ninety Three Million One Hundred Twenty-One Thousand One Hundred Forty-Eight Only (Ug. Shs. 93, 121, 148/=).
- b) Interest at commercial rate on the outstanding amount.
- c) General damages for breach of the loan agreement.
- 15 d) Interest on general damages at court rate.
- e) Costs of the suit arising out of breach of contract
- f) Any other relief as the court deems fit

The reading of paragraph 4 of the loan agreement shows that it was agreed that upon default on repayment the loan balance would
20 become due automatically with the borrower obliged to pay the outstanding loan amount in addition to an interest at the rate of 3 percent per month which would amount to 48% per annum. This amount, however, I find to be extremely high and is thus harsh and unconscionable as it is outside normal commercial rates given that
25 **Section 26 (1) of the Civil Procedure Act Cap. 71** grants the court powers not to enforce an interest rate that is deemed harsh as it provides that;


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5 ‘...where an agreement for the payment of interest is sought to be enforced, and the court is of opinion that the rate agreed to be paid is harsh and unconscionable and ought not to be enforced by legal process, the court may give judgment for the payment of interest at such rate as it may think just...’

10 In this case the interest rate of 48% is in my view harsh and excessive and so given the fact that in its pleadings the Plaintiff has instead prayed to the court to grant interest at a commercial rate.

 Therefore, given that under section 26 of the Civil Procedure Act and this court is given the discretion award an interest rate that is
15 reasonable in the circumstances I would, taking into account the circumstances of this matter and the current prevailing economic circumstances award an interest to the Plaintiff Company at the rate 19 % per annum from the date of filing this matter till payment full.

 As regard the request for general damages, it has been held that a
20 loss which arise as the direct probable consequences of the act complained of such as loss of profit, loss of use, physical inconvenience, mental distress and pain may be taken into account by a court as was held in the case of **Ahmed El Termewy vs Hassan Awdi and 3 Others HCCS No. 95 of 2012.**

25 In the instant matter, I award general damages amounting to Ug. Shs. 20,000,000 to the Plaintiff for loss of profit and inconvenience suffered as a result of the failure of the Defendant in honoring his loan obligations. Persons should not take loans which they never intend to repay especially from commercially oriented entities as

5 those loans are not a gift nor a reward but a business undertaking
by the lender who is interested to make money out of such business.
The award of interest on general damages is discretionary and its
basis is that the Defendant has kept the Plaintiff out of his money
and as such he ought to compensate him accordingly. The court will
10 take into account the prevailing economic value of money,
depreciation and inflation when determining the rate of interest to be
granted as was noted in the case of **Oketha Dafala Valente vs The
Attorney General of Uganda HCCS No. 69 Of 2004**. Given the
situation of the instant matter an interest rate of 6% on general
15 damages from the date of this judgment would suffice.

Pursuant to Section 27 of the Civil Procedure Act, costs follow the
event. It is in the court's discretion to award costs and in the case
before me, there is no reason which prevents the court from
exercising its discretion in the favour of the Plaintiff since it has spent
20 time and money in prosecuting this suit. Being the successful party,
the Plaintiff is entitled to costs.

A look at Paragraph 13 of the loan agreement shows that the lender
upon default by the borrower to repay the loan granted would be
entitled to claw its moneys from the assets and securities used to
25 secure the loan. In the instant matter the Plaintiff was entitled upon
failure by the Defendant to repay the loan to effect transfer, sell any
or all of the securities to recover their money without recourse to
court. Since the parties agreed so then the lender is entitled to sell
the securities pledged to recover the outstanding amounts due to it.


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5 Having found as above in issue (1), I would order that should the Plaintiff fail to recover the outstanding amounts due to it within a period of 3 (three) months from the Defendant then it will be entitled to enforce paragraph 13 of the loan agreement accordingly.

Orders:

10 Having found as above I would make the following awards to the Plaintiff as against the Defendant;

- 15 i. The Plaintiff is awarded Uganda Shillings Ninety-Three Million One Hundred and Twenty One Thousand One Hundred Forty Eight Only Ug. (Shs. 93, 121, 148/=) as outstanding amount.
- ii. Interest of 19% per annum on the outstanding amount from the date of filing this suit till payment in full.
- iii. General damages of Twenty Million Shillings Only (Ug. Shs. 20,000,000/=).
- 20 iv. Interest of general damages at 6% per annum from the date of this judgment.
- v. The Plaintiff is awarded the Costs of this suit.
- 25 vi. Upon the failure of the Plaintiff fail to recover the outstanding amounts in (i), (ii), (iii) and (iv) above which has been found due to it within a period of Three (3) months from the Defendant then the Plaintiff would be entitled to enforce paragraph 13 of the loan agreement accordingly. That is effect transfer, sell any or all of the securities to recover the outstanding amounts.


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I so order.



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HON. JUSTICE DR. HENRY PETER ADONYO

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JUDGE

7TH SEPTEMBER 2020