THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL SUIT No. 0174 OF 2016

AFRICA POLYSACK INDUSTRIES LIMITED …… PLAINTIFF

VERSUS

SUGAR AND ALLIED INDUSTRIES LIMITED …… DEFENDANT

Before: Hon Justice Stephen Mubiru.

JUDGMENT

a) The Plaintiff's claim;

The Plaintiff Company is a manufacturer of polypropylene bags, among other items, while the defendant is a manufacturer of sugar. For purposes of packing its sugar, the defendant from time to time made purchases of polypropylene bags from the plaintiff. The Plaintiff's claim against the defendant was for recovery of shs. 366,416,695/= as the amount outstanding for polypropylene bags and other items supplied to it but not paid for during the period from 19th November, 2014 to 22nd April, 2015 and interest thereon at the rate of 3% per month, hence a sum of shs. 74,796,828.44. The plaintiff's claim in total therefore was shs. 441,213,523.44/= interest thereon at 3% per month from the date of filing the suit until payment in full, and the costs of the suit.

b) The defence to the claim;

In its written statement of defence, the defendant denied being liable to the plaintiff as claimed pr at all. It contended that it paid off all its debts to the plaintiff as an when they fell due. However, before the trial could begin, the defendant had by 24th September, 2019 paid off the principal sum. The trial therefore is limited to the sum of shs. 74,796,828.44 and interest thereon at 3% per month from the date of filing the suit until payment in full, that the plaintiff seeks to recover from the defendant.

c) The issues to be decided;

Two issues were raised for trial, namely:

1. Whether the interest claimed was part of the contract.
2. Whether that interest is recoverable.

d) The submissions of counsel for the plaintiff;

Counsel for the Plaintiff M/s Kiboijana, Kakuba and Co. Advocates submitted that the defendant paid the principal sum in instalments over a period of there and a half years. One of the conditions stipulated on the invoices issued to the defendant was that overdue payments would attract a monthly interest of 3% per month. The defendant kept the invoices without raising any queries. After receiving the first invoice, the defendant must have noticed that all subsequent invoices contained that condition. In the alternative, if the contractual interest is not recoverable, the court ought to exercise its discretion to award the plaintiff interest at the rate of between 20% up to 25% per annum, in light of the period for which the defendant deprived it of the use of its money by the belated payments.

e) The submissions of counsel for the defendant;

Counsel for the defendant M/s Muwema and Co. Advocates and Solicitors submitted that terms of the contract should be clearly stated during the negotiation. Evidence adduced by the defendant is to the effect that there was no agreement relating to payment of interest. There were no discussions over the terms of payment. Interest can be charged on unpaid invoices only if the parties had an agreement to that effect. Interest is not recoverable on basis of the contract since there was no agreement to that effect. Regarding interest since the filing of the suit, that is awarded at the discretion of the court. There is no evidence to show that the defendant profited from the delayed payments and therefor should not be subjected to payment of interest.

f) The decision;

For a contract to come into existence, there must be an offer made by one party which is, in turn, accepted by another party. An offer is a promise to provide something specific if the other party agrees to do something specific in return. The acceptance must be stated either by words spoken or written or by conduct. Either words or conduct constitute acceptance of an offer if it occurs in accordance with and in response to the specific terms of the offer. The rights and obligations of parties to a contract are determined by the terms of that contract. These terms may be express (those articulated by the parties - whether in written or oral form) or implied. In order for terms and conditions to be incorporated into a contract, they need to have been agreed at the point of formation (see *Parker v. South Eastern Railway Co (1877) 2 CPD 416*). Terms cannot be unilaterally introduced into the contract after its formation (see *Olley v. Marlborough Court Ltd [1949] 1 KB 532*). Terms introduced by one party after the point of formation, unless the other party agrees (and the contract is thereby amended), do not form part of the contract. The more onerous and unusual the terms are, the more clearly they have to be brought to the other party's attention to get incorporated (see *Thornton v. Shoe Lane Parking Ltd [1971]; Spurling (J) Ltd v. Bradshaw [1956] 2 All ER 121 CA, [1956] 1 WLR 461; Le MANs Grand Prix Circuits Pty Ltd v. Iliadis. [1998] 4 VR 661* and *Interfoto Picture Library v. Stilletto [1989] QB 433*).

The objective theory of contracts holds that an agreement between parties is legally binding if, in the opinion of a reasonable person who is not a party to the contract, an offer has been made and accepted. Lord Clarke in *RTS Flexible Systems Ltd v. Molkerei Alois Müller GmbH & Co KG [2010] 2 All E.R. (Comm) 97 at [45]* set out the general principles, thus;

> Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend

agreement of such terms to be a pre-condition to a concluded and legally binding agreement.

Therefore, a contract is not an agreement in the sense of a subjective meeting of the minds. The existence of a contract is determined by the legal significance of the external acts of a party to a purported agreement, rather than by the actual intent of the parties. The important thing is not a party's real intentions but how a reasonable person would view the situation. Since a contract is a series of external acts giving the objective semblance of agreement, the court will examine those acts in order to determine the issue raised.

1st issue; <u>whether the interest claimed was part of the contract;</u>

There are mainly two modes by which expressions or representations may become terms forming part of a contract; expressly, or by implication. Ideally, express terms will be written down in a contract between the parties but where the contract is agreed verbally, they will be the terms discussed and agreed between the parties. A term is implied into a commercial contract by the courts because the term hasn't been expressly included by the parties. This may be because the parties did not consider it, did not think that the issue would arise or simply omitted to include the term. The terms should form part of the offer before acceptance by the other party. Thereafter, they cannot be unilaterally imposed.

i. <u>Whether the interest was expressly agreed upon</u>.

An express term in a commercial contract is a term that is expressly agreed between the contracting parties. In order for a term to be incorporated into the contract, the party upon whom it confers obligations must be or ought to be aware of its existence. In light of this, there are two requirements; (i) the term must be included in a document in which contractual terms would normally be found; and (ii) there must have been reasonable notice of the existence of these terms before or at the time of contracting. Express terms are those terms that the parties have articulated prior to concluding their contract. To constitute a term of the contract the parties must have intended it to be promissory in nature and intended to be part of the contract. Terms can be

considered “express,” even if not discussed by the parties. For example, terms may be incorporated by the exchange of written terms, notice-board displays and tickets.

However, to be successfully incorporated into a contract these terms must be exchanged or displayed prior to conclusion of the contract and adequate notice of the terms must be given to the other party. The parties must have made a sufficiently complete and certain agreement on all essential terms for an agreement to be enforceable. As a minimum requirement the conditions for an offer should include at least the following four conditions: (i) a description of the item on offer including a fair description of the condition or type of service; (ii) delivery date; (iii) price, and (iv) the terms of payment that includes the date of payment and detail. Without one of the minimum requirements of condition an offer of sale is not seen as a legal offer but rather seen as an advertisement.

According to section 5 (1) of *The Sale of Goods and Supply of Services Act, 10 of 2018*, a contract of sale or supply of services may be made in writing, or by word of mouth, or partly in writing and partly by word of mouth, or in the form of a data message, or may be implied from the conduct of the parties. In the instant case, the transactions between the parties were contained in three sets of documents; a purchase order issued by the defendant, followed by a delivery note and invoice issued by the plaintiff. The purchase order is a legally binding document sent from a buyer to a seller that indicates a buyer’s intention to pay for the listed items at the specified price. It is an expression of an offer to buy. When the seller accepts the document, a legally binding contract is formed between the buyer and the seller. The seller signifies acceptance of the order either by sending a confirmation of order or by performing the ordered deliveries without reservation. The seller is required to deliver the goods to the buyer at the time and in the mode and quantity required by the contract. The delivery note is a document, issued by the seller, which accompanies a delivery of the goods, specifying the type and quantity of the goods delivered. A copy of the delivery note, signed by the buyer, is returned to the seller as a proof of delivery.

The contract is concluded when in response to the offer to buy, the seller delivers the goods without reservation, and they are either expressly accepted by the buyer, the buyer does any act in relation to the goods which is inconsistent with the ownership of the seller, or when, after the lapse of a

reasonable time, the buyer retains the goods without intimating to the seller that he or she has rejected them (see section 43 of the Act). It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for the goods, in accordance with the terms of the contract of sale (see section 34 (1) of the Act). Unless otherwise agreed, delivery of goods and payment of the price are concurrent conditions.

On the other hand a tax invoice is a commercial document issued by a seller to the buyer indicating the products, quantities and agreed prices for the product or services the seller has provided the buyer. It is a written account of goods sold or services rendered indicating the prices charged therefor, or a list which is used in the ordinary course of business evidencing sale and transfer or agreement to sell or transfer goods and services. From the point of view of a seller, an invoice is a sales invoice. It indicates that the buyer must pay the seller according to the payment terms. From the point of view of a buyer, an invoice is a purchase invoice.

The controversy between the parties relates to six consignments of goods supplied between November, 2014 and April, 2015. On each of those occasions, sales would be preceded by the defendant's purchase order presented in a standard format. The order specified the description of the product (woven polypropylene bags), the specifications (55 x 98), the quantities (number of pieces), the price per piece (in shillings), the total value of the goods ordered for (in shillings), the amount of VAT (in shillings), the period within which delivery was to be made (stated to be three (3) days), and the terms of payment (credit days stated to be thirty (30) days in some orders while in other orders the space was left blank).

The purchase orders would be followed by the plaintiff's delivery notes in a standard format containing; a description of the goods delivered, the quantities (number of pieces), the price per piece (in shillings), the total value of the goods ordered for (in shillings), the amount of VAT (in shillings), and the terms of payment (credit days stated to be forty five (45) days in some delivery notes while in others the space was left blank). The defendant was invariably required on each occasion to sign signifying that the goods had been "received in good condition."

The delivery notes would be accompanied with tax invoices in a standard format containing; a description of the goods delivered, the quantities (number of pieces), the price per piece (in shillings), the total value of the goods ordered for (in shillings), the amount of VAT (in shillings), and the terms of payment (credit days stated to be forty five (45) days in some of the tax invoices while other are blank). In the first three invoices the defendant was invariably required on each occasion to sign thereby endorsing the statement "we declare that this invoice shows the actual price of the goods described and that the particulars are true and correct." That wording is to be found in the tax invoices dated; 19.11.2014 (two of them); and that of 20.11.2014.

However, starting with the invoice dated 19.01.2015 a new format was adopted by which additional declarations were introduced as follows,

> Declaration
> Terms and conditions of sale.
> 1. Goods once sold are not returnable.
> 2. Interest @ 3% p.m. will be charged on all overdue accounts.
> 3. Any queries regarding this invoice must be raised within 7 days from the date of invoice, otherwise this invoice will be considered confirmed.

That wording is to be found in the tax invoices dated; 23.01.2015; 03.02.2015 (two of them); 17.02.2015; 20.02.2015; 13.03.2015 (two of them); 09.04.2015 (two of them); and 27.04.2015. The issue then is whether the terms relating to interest, first introduced in January, 2015 were incorporated into the parties' contract. This depends on whether or not; (i) the term was included in a document in which contractual terms would normally be found; and (ii) there was reasonable notice of the existence of this term before or at the time of contracting.

As a general rule, parties are bound by all terms contained in a contractual document that they sign, regardless of whether they have read them or understood them (see *L'Estrange v E. Graucob Ltd [1934] 2 KB 394*). A party cannot avoid the terms of a contract on the ground that he or she failed to read it before signing. An exception to this general rule exists when the writing does not appear to be a contract and the terms are not called to the attention of the recipient. In such a case, no contract is formed with respect to the undisclosed term. Where the document is not signed by

the parties, the usual way by which terms are incorporated is by one of the parties giving the other notice of the terms of the contract and such notice must be reasonable. The party relying on the terms must show that, in the circumstances, reasonable steps were taken to bring the terms to the attention of the other party.

For example in *Chapelton v. Barry Urban District Council [1940] 1 KB 532*, the plaintiff hired a deck chair from the defendant for use on the beach. There was a notice on the beach next to the deck chairs stating that the deck chairs could be hired at 2d for three hours and also "respectfully requested" the public to obtain tickets issued by the chair attendants. The plaintiff obtained a ticket and put it in his pocket without reading it. In fact there was an exclusion clause printed on the ticket excluding the council's liability for personal injury caused in using the deck chair. The plaintiff was injured when he sat on the chair. The fabric of the deck chair split away from the frame. He brought an action against the council and they sought to rely on the exclusion clause contained in the ticket.

It was held that the exclusion clause was not incorporated into the contract. A reasonable person would regard the ticket as nothing more than a receipt and would not expect it to contain contractual terms. Furthermore, the terms of the contract the parties' agreed were those contained on the notice near the pile of deck chairs. That notice contained no exclusion clause. The wording of the notice suggested that a person could obtain the deck chair and get a ticket later. The notice constituted an offer and collecting the chair would amount to acceptance. It would not be open to the Council to introduce new terms after the contract had been formed.

A tax invoice being an invoice issued by a registered dealer to the purchaser for a taxable supply of goods, a reasonable buyer would not expect it to contain contractual terms. A reasonable person would regard the tax invoice as nothing more than a formal demand for payment describing the quantity, the value of goods supplied as per the purchase order and delivery note, as well as the tax charged, and would not expect it to contain new contractual terms. A clause in a document which a reasonable person would not appreciate contained contractual terms is not automatically incorporated into a contract. It will only be incorporated into the contract if the other party gives reasonable notice of the clause before the contract is formed. Where a term is particularly onerous

the person seeking to rely on the term must take greater measures to bring it to the attention of the other party. Once drawn to the attention of the other party, incorporation will take place if the latter proceeds in such a way that he is deemed to have accepted the terms (i.e. he proceeds without raising any objections).

For example in *Interfoto Picture Library v. Stilletto [1989] QB 433*, the plaintiffs ran a photo library the defendant was in advertising. The plaintiffs advanced some transparencies to the defendant for his perusal and he was to get back to them as to which photos he would like to use. The package of the photos contained a document stating that if any transparencies were kept longer than 14 days a £5 +VAT holding fee would be charged per photo per day. The defendant had not read this document and then forgot about the transparencies and failed to return them for 6 weeks. The plaintiffs brought an action claiming a holding fee of £23,783 as specified in the contract. It was held that the term was not incorporated into the contract.

Similarly in the Australian case of *La Rosa v. Nudrill Pty Ltd [2013] WASCA 18*, Mr La Rosa ran a transport business and Nudrill was a longstanding client. The arrangement between the two, over a period of over 10 years, was that Nudrill would phone Mr La Rosa and book the transport services. Following the transport of the cargo, Mr La Rosa would send an invoice that contained terms and conditions on the back. In that case, following a telephone order of the services, Mr. La Rosa transported Nudrill's drill rig but damaged it when it fell off because of Mr. La Rosa's negligence in driving the vehicle at excessive speed. Mr. La Rosa argued that the exclusion clause on the back of the invoices that he provided to Nudrill stating that "all goods are handled, lifted or carried at the owner's risk" meant that he was not liable for the damage.

The issue was whether the parties, by their past conduct, had incorporated the exclusion clause into the contract. It was held that there was no evidence that Nudrill had actually read the terms, and it was reasonable for a person to regard the invoice as simply a request for payment rather than a document containing contractual terms governing the transaction that had already occurred. The receipt of invoices by Nudrill was, in these circumstances, not sufficient to justify an inference that it had accepted or was willing to be bound by the terms printed on the back of the invoices.

Lastly in *DJ Hill Co v. Walter H Wright [1971] VR 749,* the defendant agreed to carry valuable machinery for the plaintiff and in doing so it was damaged. The contract was agreed by telephone, and the documents were signed on delivery. The defendants said that the carriage was subject to terms which excluded liability for damage. Previous work of this type had been done on about 10 occasions, and similar forms had been signed. There was no evidence to say that the terms had actually been read. It was held that on the first occasion it was an oral contract, made before performance had been completed. So the documents could not be contractual. The same applied to all the subsequent transactions. In the later transactions, the plaintiff did know of the existence of the forms but did not know the content of the terms and conditions as the documents were seen as acknowledgment of delivery. The documents were plainly never accepted or treated as being contractual. Furthermore, on the facts of the case there was no evidence of any "course of dealing" being established. Even though the parties had contracted on a number of previous occasions they had not done so by incorporating terms as were now sought.

In any event, the timing of the tax invoices is instructive. The term was introduced after the conclusion of the contract, yet notice of a term must be given before or during the time of contracting. In *Olley v. Marlborough Court Hotel [1949],* the plaintiff booked a room in a hotel owned by the defendant. Inside the door of her room was a notice stating that the hotel was not liable for anything lost or stolen unless the item had been given to the management to look after. When the fur coat of the plaintiff was stolen from her room, she sued the defendant for damages. It was held that because the contract had been made at the reception desk before the parties got to the room, and because notice of the term was only given after the formation of the contract, it was not an incorporated term and the plaintiff could sue the defendant for damages.

In the instant case, P.W.1 Mr. Nirmal Gopal testified that the tax invoices would be issued at the time the goods were delivered and one of the conditions was that interest would be charged in case of delay. By that time, the price, quantity of goods, time and place of delivery ex-factory would have ben specified in the purchase order. There would be nothing left for negotiations and what would be left is performance by way of delivery and payment. However, it is on the invoice that the 3% was mentioned and that they had talked to all customers that late payments would attract interest.

On his part, D.W.1 Mr. Nassif Ismael, testified that the defendant began transacting with the plaintiff during the year 2013 and continues to do so to-date. During all that period of time, the defendant has never received any invoice on accrued interest. The defendant has never received a demand for accrued interest and was shocked when on 13th April, 2021 they received a demand letter for accrued interest. The usual practice was that the plaintiff would send the defendant proforma invoice stating the terms. On those occasions the defendant considered the price to be too high, they would negotiate and thereafter the defendant would send the plaintiff a Local Purchase Order containing all the terms agreed terms. The defendant would pay against an LPO not an invoice. The defendant has never paid any interest on any transaction and they have never agreed to any terms of interest.

Examining the two versions against the available documentary evidence, I find that the clause on interest was contained in a document which a reasonable buyer would not expect to contain contractual terms. The tax invoices plainly were never accepted or treated as being contractual. There is no evidence to show that the additional terms introduced therein had actually been read by the defendant. There is further no evidence to show that that the plaintiff gave reasonable notice of the clause to the defendant before the contract was formed. The term is contained in a document issued after the formation of the contract. For all those reasons I find that it was never expressly agreed upon and incorporated as a term in the contract.

ii. Whether it may be implied from the conduct of the parties.

Terms, although not expressly agreed or rejected, may be incorporated by conduct when the parties act in a manner which shows they have been agreed. Alternatively, if the parties have had dealings before and in which the terms and conditions have been specified (e.g. on the back of an invoice) then it may be argued that subsequent dealings were upon those terms and conditions. Where parties are of equal commercial bargaining power, the conditions usually contained within industry contracts could also be successfully incorporated based on the common understanding of the parties (see *British Crane Hire Corporation Ltd v. Ipswich Plant Hire Ltd [1975] QB 303*).

Section 10 (2) of *The Contracts Act, 7 of 2010* provides that a contract may be implied from the conduct of the parties. A party can be found by the court to be in agreement with the terms of a contract based on his or her actions, even if the contract has not been signed (see *Reveille Independent Llc v. Anotech International (UK) Ltd [2016] EWCA Civ 443* and *G. Percy Trentham Ltd v. Archital Luxfer Ltd [1993] Lloyds Rep 25*). Implied acceptance occurs when the parties act in a way that indicates their agreement with the contract terms. For terms to be incorporated by conduct, the evidence must be clear and, when considered as a whole and in context, unequivocal. There should be something specific done by the defendant, of which the plaintiff was aware, that could be seen as an unequivocal representation that the term had become binding.

For example existence of a binding commitment may be deduced from agreeing to pay invoices, in accordance with the prescribed manner, raised on the basis of the contract. The court examines the correspondence as a whole and at the conduct of the parties and determines therefrom whether the parties came to an agreement on everything that was material (see *Brogden v. Metropolitan Railway Co. (1877) 2 App Cas 666; New Zealand Shipping Co. Ltd v. A. M. Satterthwaite & Co. Ltd [1974] 1 Lloyd's Rep 534 at 539; [1975] AC 154 at 167* and *Gibson v. Manchester City Council [1979] 1 All ER 97*).

In the instant case, the testimony of D.W.1 Mr. Nassif Ismael, to the effect that since the year 2013 when they began dealing with the plaintiff, the defendant has never paid interest on any transaction nor received any invoice on accrued interest, was not controverted. I therefore find that it cannot be implied into the contract from the conduct of the parties.

iii. <u>Whether it may be implied from previous dealings between the parties</u>.

For terms to be incorporated by previous dealings, those dealings between the parties using the terms would have to be regular and frequent (see *Hollier v. Rambler Motors (AMC) Ltd [1972] 2 QB 71* where three or four occasions in five years was found to be insufficient to amount to a course of dealing and the exclusion clause had not, therefore, been imported into the oral contract), and the party trying to incorporate the terms has to prove that the other party actually knew about and agreed to them (see *McCutheon v. David MacBrayne Ltd [1964] 1 WLR 125*).

Previous dealings are only capable of importing a term into a later contract where actual or constructive knowledge of the terms is established, and the parties assent to them. The practice must be based on a common understanding of the parties and the other party feels bound by it because of this common understanding which has developed between the parties to the contract in the past. This common understanding can emerge with respect to the performance of previous contracts concluded between them, or, in case of long-term contracts, with respect to previous performances under the contract at hand. Several factors are relevant to the court in determining whether a term was incorporated into a contract, including: the number of prior dealings, how recent the prior dealings were, and the consistency between the prior conduct and the dealing in question.

In the instant case, from the testimony of D.W.1 Mr. Nassif Ismael it can be deduced that for about a year, from 2013 until December, 2014, none of the tax invoices issued by the plaintiff contained the term on interest. There are only four transactions over the space of three months; from 19th January, 2015 to 9th April, 2015 during which the controversial tax invoices were issued. The short duration and limited number of transactions does not satisfy the requirement of regular and frequent dealings between the parties for establishing course of dealing on basis of which the term may be inferred into the contracts. I therefore find that it cannot be implied into the contract from previous dealings between the parties.

iv. Whether it may be implied from customary and accepted practice in the parties' line of business.

For a term to be incorporated based on the customary and accepted practice in the parties' line of business, it must be one that is regularly observed by parties to contracts of the type involved in the particular trade concerned. There must be evidence that the custom relied on is so well known and acquiesced in that everyone making a contract in that situation can reasonably be presumed to have imported that term into the contract. The existence of the alleged usage is a question of fact, and, like all other customs, it must be strictly proved. It must be so notorious that everybody in the trade enters into a contract with that usage as an implied term. It must be uniform as well as reasonable, and it must have quite as much certainty as the written contract itself (see *Nelson v.*

Dahl (1879) 12 Ch. D., at p. 575). A person may be bound by a custom notwithstanding the fact that he had no knowledge of it but a term will not be implied into a contract on the basis of custom where it is contrary to the express terms of the agreement.

Unless agreed otherwise, parties are considered to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in their trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned. A trade usage may be defined as a general or at least widespread regular observance of a particular line of conduct amongst those engaged in a particular branch of trade or business over at least a short period of time The usage is qualified in three ways: i) it must be a usage which the parties knew or ought to have known; ii) it must be widely known and regularly observed in that trade by parties to contracts of the type involved and iii) the usage must emanate from the particular branch of trade in which the parties are operating. Like a usage, a practice is a particular line of conduct, but contrary to a usage, it must not be observed by businessmen of a particular branch of trade, but only by the parties to the contract at hand.

In the instant case, P.W.1 Mr. Nirmal Gopal testified that the plaintiff fixed it at 3% because it is a normal business practice but he did not know the origin of that practice and could not explain whether it was generally observed by manufacturers of similar products or how widely known and regularly observed in that trade it was. Consequently, I find that on the materials before court, it has not been established that it is a usage or practice which the parties knew or ought to have known as one which in their trade is widely known to, and regularly observed by, parties to contracts of the type involved in this particular instance. In conclusion therefore, the first issue is answered in the negative; the interest claimed by the plaintiff was never part of the contract.

2nd issue; <u>whether that interest is recoverable</u>.

The rate of interest of 3% per month translating into 36% per annum is further challengeable as a disguised penalty clause. Had the interest been contractual, the defendant would have had a strong case for saying that the interest clause was void and unenforceable as a penalty clause. The defendant would thereby be relieved of the liability imposed by that clause because the plaintiff

had not done what was necessary to draw this unreasonable and extortionate clause fairly to the defendant's attention.

However, under section 26 (1) of *The Civil Procedure Act* where interest was not agreed upon by the parties, Court should award interest that is just and reasonable. In determining a just and reasonable rate, courts take into account "the ever rising inflation and drastic depreciation of the currency. A Plaintiff is entitled to such 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 further 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 (see *Mohanlal Kakubhai Radia v. Warid Telecom Ltd, H. C. Civil Suit No. 234 of 2011* and *Kinyera v. The Management Committee of Laroo Boarding Primary School, H. C. Civil Suit No. 099 of 2013*).

Interest can be demanded only by virtue of a contract express or implied or by virtue of the principal sum of money having been wrongfully withheld, and not paid on the day when it ought to have been paid. Interest falls due when money is wrongfully withheld and not paid on the day on which it ought to have been paid (see *Carmichael v. Caledonian Railway Co. (1870) 8 M (HL) 119*). If a party does not pay a sum when it falls due the aggrieved party is entitled to interest from the time payment is due to the time of payment. The other justification for an award of interest traditionally is that the defendant has kept the plaintiff out of his money, and the defendant has had the use of it himself so he ought to compensate the plaintiff accordingly. An award of interest is compensation and may be regarded either as representing the profit the plaintiff might have made if he had had the use of the money, or, conversely, the loss he suffered because he had not that use. The general idea is that he is entitled to compensation for the deprivation (see *Riches v. Westminster Bank Ltd [1947] 1 All ER 469 at 472*).

Interest is a standard form of compensation for the loss of the use of money. The award should address two of the most basic concepts in finance: the time value of money and the risk of the cash flows at issue. As per the coerced loan theory, the plaintiff was effectively coerced into providing the defendant with a loan at the date of the original breach, and therefore deserves to earn interest on this forced loan at the unsecured borrowing rate. Compensation by way of interest is measured

by reference to a party's presumed borrowing rate in the relevant currency because that rate fairly represents the loss of use of that currency (see *Dodika Limited & Others v. United Luck Group Holdings Limited [2020] EWHC 2101 (Comm*). The borrower typically pays interest on a loan at a rate equal to the base rate plus an agreed applicable margin.

The parties adduced diametrically opposed evidence regarding the question whether or not the sales were on credit terms or cash on delivery basis. According to P.W.1 Mr. Nirmal Gopal, the plaintiff was not giving credit to its customers. The plaintiff never supplied goods on credit to the defendant. These were cash transactions not credit transactions. In case of any credit arrangement, there would be specific agreements signed. An account would therefore be overdue from the date of the invoice since there were no credit days set. However, from time to time they accommodated the defendant's late payments for a few days only but there was no formal arrangement. He could not remember the number of days. After the plaintiff filing this suit, the defendant asked the plaintiff to create a separate account for business. Henceforth the defendant would deposit money in advance and pick the goods after a day or two. Before that they would never pay on delivery. At that time they would take the goods and pay later. On his part, D.W.1 Mr. Nassif Ismael testified that in all dealings with the plaintiff. The defendant was not paying on the day of delivery.

The documents themselves tell a different story. All the defendant's purchase orders invariably had a provision for "credit days" specified as "30 days" (these are purchase orders dated; - 30.10.2014; 10.11.2014; 12.01.2015; 02.03.2015; and 23.03.2015).

On the other hand, some of the delivery notes and the corresponding tax invoices under "Mode / Terms of payment" indicated "45 days" (such as the delivery note dated 19.11.2014 and tax invoice dated 19.11.2014). The rest of the delivery notes and invoices left the space blank (such as the tax invoices dated; 20.11.2014; 23.01.2015; 03.02.2015 (two of them); 17.02.2015; 20.01.2015 (two of them); 13.03.2015; and delivery notes dated; 19.11.2014 (two of them) or simply had no provision for such information (such as delivery notes dated; - 20.11.2014; 10.11.2014; 19.01.2015 (two of them); 11.01.2015; 03.02.2015 (two of them); 17.02.2015; 20.02.2015; 13.03.2015; 03/03.2015; 05.04.2015; 09.04.2015; 22. 04.2015 and tax invoices dated 13.03.2015; 09.04.2015 (two of them); and 22.04.2015).

Since the contract is concluded when in response to the offer to buy, the seller delivers the goods without reservation, I find that the sales of each of the occasions now in dispute incorporated a 30 days' credit period as it was one of the terms specified in each of the defendant's purchase orders, in response to which the plaintiff delivered without reservation. The plaintiff could not introduce new terms into the contract by its delivery notes or tax invoices, rendering the invoices overdue on delivery.

That being the case, the payments became overdue 30 days after delivery of the goods. The last delivery having been made on 22nd April, 2015 all sums due and owing as from 23rd May, 2015 would attract interest. Information provided by the Ministry of Finance is to the effect that lending rates for shilling denominated loans edged downwards an average of 17.5 per cent in December, 2020 from 19.6 per cent in November 2020 (see the "*Daily Monitor*" Newspaper of Wednesday 24th March, 2021). Considering that this rate may be significantly lower than the rates prevailing in the year 2015 when payment fell due, the plaintiff should not be prejudiced by averaging it at 19% per annum from 23rd May, 2015 until the date the defendant achieved payment in full, i.e. 24th September, 2019 (a period of four years and four months). Since the sum outstanding as at the time of filing the suit was shs. 366,416,695/= the interest payable thereon at the rate of 19% would be shs. 5,801,598/= per month or shs. 69,619,172/= per annum, hence shs. 301,683,080/= in total.

i. <u>Costs</u>.

The general rule under section 27 (2) of *The Civil Procedure Act* is that costs follow the event unless the court, for good reason, otherwise directs. This means that the winning party is to obtain an order for costs to be paid by the other party, unless the court for good cause otherwise directs. I have not found any special reasons that justify a departure from the rule. Therefore in conclusion, judgment is entered for the plaintiff against the defendant, as follows;

a) The sum of shs. 301,683,080/= accruing on the belated payment.
b) Interest thereon at the rate of 6% p.a. from the date judgment until payment in full.
c) The costs of the suit.

Delivered electronically this 15th day of September, 2021 ……Stephen Mubiru……..

Stephen Mubiru
Judge,
15th September, 2021.

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