

The Plaintiff opted for Allied Certified Public Accountant.

The chosen company of auditors went ahead and prepared for the Plaintiff a Financial Statement for the Year Ending 31-December 2011, Exh P3, Management Accounts for the Period Ending 30-June-2021 Exh P4 and Cash Flow Projections for a five year period Exh P5.

The Plaintiff paid to the Auditors UGX 3,200,000= (UGX Three Million Two Hundred Thousand Only) for their services Exh P6.

Because the Defendant also required securities, the Plaintiff provided two properties comprised in Freehold Register Volume 1257 Folio 22 Plot 2 Magumba Road, Iganga Municipal Council registered in his names and the other Leasehold Register Volume 2110 Folio 7 Plot 22 Oboja Road, Jinja Municipality also in the Plaintiff's names Exh P8.

Satisfied by the auditors reports and the securities the Defendant made a business Term Loan Offer of UGX 500,000,000= (UGX Five Hundred Million Only) in a Facility Letter dated 25-October-2012, Exh P7.

The Facility Letter indicated the purpose of the loan as purchasing items as hereunder:

- a) Beans, 100 tons at Shs 1500 per Kg
Amount UGX 150,000,000
- b) Maize 200 tons at Shs 500 per Kg
Amount UGX 100,000,000
- c) Coffee 20 tons at Shs 4500 per Kg
Amount UGX 90,000,000

The Defendant expected the Plaintiff to regulate himself and stick to the terms. To this regard Clause 2.2 provided

“Without affecting the obligations of the Borrower in anyway, the Bank shall not be under any obligation in verifying or monitoring the application of any of the Loan Facility”

The loan facility was to be utilized in full within 30 days from the date of the Facility Letter Clause 3.2.

As provided for in Clause 4 the loan facility was to be repaid in full within 48 equal monthly instalments of UGX 16,439,433 each (inclusive of interest at the current interest rate) payable on the last Business Day of each calendar month.

Repayment would begin a month after disbursements and thereafter monthly.

Interest would be charged at 1.5% per annum above the Defendants Prime Rate prevailing from time to time which at the time of execution of the Facility Letter was 23% per annum.

Under Clause 5.1 the Defendant received the right to amend interest. At such amendment, the Borrower would be notified in writing as to its effective date with a reasonable time prior to such change.

The sums which remained unpaid on the due date would attract a penalty interest at a rate of 10% per annum from the date it fell due to date of payment.

Clause 5.4.3 obligated the Borrower to pay all (fees and taxes), costs of registration of the securities and all other disbursements or fees that would arise from the Bank granting the loan.

In event of default, the full amount of the Loan Facility and any other facilities accrued to the Borrower by the Bank, then outstanding and all charges accrued thereon, together with additional interest as defined would immediately become due and payable.

Default in this case included any irregular conduct of the Plaintiffs account, non-compliance with the legal and regulatory requirements under Ugandan laws or violation of its corporate governance principals.

The securities having been provided by the Plaintiff, M/s Ligomarc Advocates prepared and registered the mortgage. They charged a professional fee of UGX 2,500,00= (UGX Two Million Five Hundred Thousand Only), with VAT of UGX 450,000=, Stamp Duty UGX 2,500,000, Registration Fees UGX 25,000=, Copies UGX15,000, plus UGX 30,000= for other instruments, Valuation reports costs UGX 200,000, Bank charges of UGX 10,000 and UGX 50,000= went towards miscellaneous.

In all the process cost a total of UGX 5,780,000= (UGX Five Million Seven Hundred Eighty Thousand Only).

The payments are supported by receipts from Ms. Ligomarc.

The Plaintiff also went through the rigour of obtaining spousal consent and independent advise at a cost.

That after he had provided all that was required in the Facility Letter, the Defendant refused to credit his account.

Wondering why the Defendant had not credited his account the Plaintiff wrote Exh P9 seeking an explanation. He wrote in part:

“Four months back, on 14-August-2012, I applied for a loan facility of UGX 500 million. This was done after consulting the Branch Manager and Business Banker if I qualify and fortunately, I was given a go ahead for the necessary requirements up to the last stage of mortgaging my two land titles to Stanbic Bank Ltd as of now.

Prior to that, all service experts who verified this business including Auditors, Valuers and Mortgage lawyers were given to me by the Bank which has cost me over Ten Million. The agreement between your bank and I in Ntinda Branch Kampala is a testimony to this cause.”

He also claimed that he had been promised that by 14-Dec-2012 his account would be credited.

On the 20-Dec-2012 however, the Defendant withdrew the Term Loan Facility, Exh P11. She wrote in part:

“The Bank regrets to inform you that it has decided to withdraw the facility because of your flagrant breach of the representation and warranties, Clause (VI) contained in the above referred general terms and conditions”.

The Defendant then proceeded to ask him to collect his documents:

“Please fill free to collect your documents deposited with the Bank in relation to the above Facility.”

On 19-February-2013, the Defendant by Exh P14 released the mortgage in respect of Volume 2440 Folio 7 Plot 22 Oboja Road Jinja and Freehold Register Volume 1257 Folio 22 Plot 2 Magumba Road, Iganga.

It partly reads:

“IN CONSIDERATION of all moneys due for principal and interest on the said mortgage and having been paid to us (the receipt of which is hereby acknowledged) hereby RELEASE and DISCHARGE the registered proprietor and the lands comprised in the said title from all claims under the said mortgage”.

Going by the record the mortgage was in respect of the UGX 500 million referred to in the Facility Letter.

The Plaintiff avers that the Defendant misrepresented to him that if he fulfilled the conditions set out which included auditors preparation of accounts, cash flow projections, financial statements, spousal consent, provisions of securities and registration of mortgage, he would access the UGX 500 million.

That having done all that was required which involved a list of expenses and expectation the Defendant turned round and denied him the facility.

That for those reasons he has suffered both special and general damages.

He claimed special damages under these heads:

• Registration of Mortgage	5,780,000
• Survey & Valuation	
○ Magumba Road	1,276,750
○ Oboja Road	849,000
• Audit Fess to Allied	3,200,000
• Legal fee for Independent advice	1,000,000
Sum total	9,980,000

The Plaintiff also claimed loss of earning of UGX 557,684,313= (UGX Five Hundred Fifty Seven Million Six Hundred Eighty Four Thousand Three Hundred Thirteen Only), as money he would otherwise have earned. He relied on the cash flow projection Exh P5.

Furthermore that since the unilateral withdrawal of the Term Loan was a breach of contract, general and aggravated damages be awarded.

In defence, the Defendant denied liability. She contended that the Plaintiff did not disclose any cause of action.

The Defendant averred that the Plaintiff indeed made an application for the facility. That in the application he was required to "provide information which would assist the Defendants in making their decisions regarding the said application".

The Defendant contended that the costs incurred in obtaining the required information would be borne by the Plaintiff.

That the Term Letter of offer clearly laid down the terms and conditions to be fulfilled. Those terms included the general terms and conditions which were attached to the term loan letter.

The Defendant averred that one of the terms allowed her to withdraw the Plaintiff's loan facility in the event that it was discovered that the Plaintiff had supplied materially incorrect information in order to obtain the loan facility.

She contended that a financial audit of the Plaintiff's business points of operation and his securities discovered that the Plaintiff had materially misrepresented his financial standing. The Defendant alleged that the Plaintiff indeed made misrepresentations. That it was found that;

the Plaintiff's maize mill and coffee processing operations were inoperative.

the Plaintiff had no records available to justify the level of operations reflected in his loan application.

the Plaintiff was involved in several types of business which complicated the monitoring of the utilisation of the facility.

the Plaintiff's business structure posed a high risk for the diversion of funds.

That because of these findings, the term loan facility was withdrawn.

The Defendant denied that the Plaintiff deserved special, general or aggravated damages. She also denied that the Plaintiff had sustained financial loss.

Contending that the Plaintiff was not entitled to any of her prayers, the Defendant prayed that the suit be dismissed with costs.

ISSUES

The issues for resolution were whether the Defendant was in breach when it withdrew the term loan and if so what were the remedies.

The Plaintiff alleges that after the Defendant had clearly outlined what was required of him and he having fulfilled all the conditions, Defendant refused to disburse the money.

He told court that the Defendants officials told him that to get the loan; he had first to avail audit reports, that the reports came from one of the prequalified firms listed in Exh P2. That in addition to that he would also provide two securities and pay the cost of registration of the mortgages. That in addition he would obtain a spousal consent in respect of the two securities. Furthermore, that he would ensure that the spouse received independent advice on the terms and conditions of the mortgage and provide a signed declaration in that regard.

The plaintiff told court that he indeed fulfilled all that and as a result the Defendant made an offer Exh P.7, which he accepted by signature on the 6th Nov 2011. This acceptance, he said amounted to creation of a contract.

The Defendant did not dispute any of the above.

She agrees that the Plaintiff supplied all that was required save that she subsequently discovered material facts which were in breach of the provisions of the Facility Letter.

That instead of the Plaintiff providing information that would assist the Defendant to make a correct decision regarding the Loan Facility, the Plaintiff supplied materially incorrect information which led the Defendant to offer a loan when it should not have done so.

The Defendant listed the particulars of misrepresentation stated earlier in this judgment. The written statement of defence is clear that the reason for withdrawing the Loan Facility was because the Plaintiff misrepresented the financial status of his business.

Going by the evidence of DW1, William Odelle, a Credit Officer of the Defendant, the loan was withdrawn because the Plaintiff was likely to divert the money from the purpose intended. In his view DW concluded there would be a diversion of funds because the Plaintiff was doing some other construction. With due respect, I do not think that borrowers of money should be prevented from doing any other development. In my view as long as they do not divert the borrowed money from the purpose of borrowing, they should not be castigated for being active in other developments.

DW2 Carolyn Emmah Rutaro testified that:

“That I know that Clause 11 of the agreement provided for conditions precedent to that bank disbursing the Term Loan. The clause required the Plaintiff to fulfil the condition precedent in both form and substance to the satisfaction of the bank and in her paragraph 11 she stated:

“That I have since learnt that the Plaintiff did not satisfy all the conditions precedent to the banks satisfaction thereby causing it to cancel the Term Loan offered to him”.

Before the Plaintiff made his application he was advised to produce audit reports, financial statement and a five year cash flow projections plan.

It is not in dispute that the Plaintiffs application was accompanied with the documents above mentioned. The reports were compiled by Allied Certified Public Accountants which was an audit firm prequalified by the Defendants.

In their report called REPORT OF INDEPENDENT AUDITORS, the auditors stated that they had obtained all the information and explanations required for the audit and that in their opinion the Plaintiff kept proper books of accounts.

These together with other terms were clearly laid out in the facility letter, Exh P7. The Defendant requested the Plaintiff to sign the Facility Letter

The signature of acceptance was one of the essential elements of their agreement. Having signed the acceptance what was required was consideration to create a binding agreement. The consideration was indeed supplied when the Plaintiff paid the arrangement fees and provided security for the loan. The endorsement of all the pages of the Offer Letter and the communication that followed shows that the Plaintiff intended to be bound by the agreement.

The Plaintiff signed the acceptance sheet on the 6th Nov 2012 thus creating a loan agreement.

It is some of the terms of this Exh P7 the Facility Letter that the Defendant through Mr. William Odelle DW1 and Ms. Carolyne Emmah Rutaro, DW2 allege that the Plaintiff did not fulfil thus leading to the withdrawal of the Loan Facility.

DW stated that the Plaintiffs involvement in other business activity would cause him to divert the money from produce buying.

DW2 also stated that the loan was withdrawn because there was a danger that the Plaintiff would divert the loan money.

DW1 said during cross examination:

“I saw a lot of construction and I concluded the chances of diverting the loan were high.”

DW1 and DW2 were not involved in the pre contract negotiations with the Plaintiff. They were also not involved in the appraisal of the information the Plaintiff provided before the offer was made and accepted. Consequently, they did not know what the Plaintiff was asked to do and produce before the contract. In fact, they could not tell what convinced either side to enter the agreement.

The Defendant’s human resource who dealt with the Plaintiff before the offer was made were not called. If they had been called, court would have leard the evidence as to whether milling of maize and processing of coffee was part and parcel of “buying and selling produce.”

The purpose of the facility is laid down in Clause 2 of the Facility Letter. It in part reads;

2.1 "The Loan Facility sanctioned for the money is required for the purchase of trade stock including:

1. Beans 100 tons equivalent to 100,000 Kgs at Shs 150,000,000
2. Maize 200 tons equivalent to 200,000 Kgs at Shs500 per Kg
all to cost

100,000,000

3. Coffee 20 tons equivalent to 20,000 Kgs at Shs 4,500 per Kg of
graded coffee all to cost Ugx 90,000,000=

The purpose is clear that the Plaintiff would buy and sale the items above mentioned. There is nothing to suggest that he would change their state through value addition. In fact, even for coffee he was to buy it already graded. In the letter of withdrawal of the Loan Facility Exh P11, the Defendant's Executive Director and Regional SME Manager seemed to justify the withdrawal on discoveries made by DW1 on 20-Dec-2012.

DW1 is said to have discovered that:

- (a) The maize milling and coffee processing operation are currently in operative which posed an income risk to servicing of the facility.

With lots of respect, I do not see how this finding would affect the contract let alone be an event of default. Maize milling and coffee processing was not part of the agreement. In the Facility Letter, Clause 2 clearly states that the Plaintiff would buy and sell beans, maize and coffee. The coffee would be bought by the Plaintiff already graded.

For those reasons, functional maize mills and coffee processors were not envisaged in the agreement. They could therefore not form part of the

contract in which case the Plaintiff cannot be said to have breached that requirement.

(b) There were no records available to justify the level of operations reflected in the application. This again cannot stand as a reason to withdraw the loan facility agreement because there is all the evidence to prove that the documents did not only exist but that the Defendant was possessed of information that they indeed existed.

On the advise of the Defendant the Plaintiff picked one of the Defendant's prequalified auditors. These auditors are listed in Exh P2, which has the Defendants stamp. The auditors selected by the Plaintiff were Allied Certified Public Accounts.

These studied the Plaintiff's documents related to his business finance and produced a report that the Defendant relied upon in their decision to offer the Plaintiff the Loan Facility.

In their independent report, which forms part of Exh P3, they wrote in part:

"We have obtained all the information and explanations that to the best of our knowledge and belief were necessary, for the purposes of our audit and it is our belief that the audit evidence we have obtained is sufficient to provide a basis for our opinion."

The auditors then proceeded to give their Audit Opinion in these words:

"In our opinion, proper books of accounts have been kept and the accompanying financial statement, which are in agreement with the books of account, give a true and fair view of the state of the proprietor's financial affairs as at 31st Dec-2011 and of its operating

results and cash flows for the year that ended in accordance with **International Financial Reporting Standards.**

This being the report of the auditor prequalified by the Defendant, there is no doubt that the Plaintiff kept proper records. There is also no doubt that they justified the level of operations that were reflected in the application. And I believe that was the reason why the Defendant offered the Loan Facility.

(c) That monitoring of the utilization of the facility was complicated because the Plaintiff was involved in several lines of businesses without adequate segregation of operational records or audit trail.

Again the foregoing fear is unfounded because Allied Certified Accountants who audited the Plaintiffs business reported that he kept *“proper books of account, which gave a true and fair view of the proprietor’s financial affairs.”*

(d) Lastly, that the risk of diversion of funds to other ongoing projects was rated high.

This fear was also stated in court by DW1, but he did not state whether borrowers of funds were not allowed to do anything else in their lives. The Defendant’s witnesses did not point at any conduct or intention by the Plaintiff that would suggest that on getting the money the Plaintiff would do other things with the money other than buy and sell beans, maize and coffee.

As I said earlier, the Defendants witnesses were not involved in the negotiations with the Plaintiff. They were also not involved in the appraisal of the information the Plaintiff provided before the offer was made to him.

While the Defendant alleged misrepresentation by the Plaintiff, there is no evidence to support the claim. Likewise there is no evidence to suggest or show that the Plaintiff was going to divert the money if disbursed.

The result is that the Loan Facility was withdrawn in total breach since the plaintiff did not do any act the Loan Agreement had prohibited.

The withdrawal of the facility can only be declared a breach of the Facility Loan Agreement and I so find.

REMEDIES

The Plaintiff in his prayer for damages stated that because of the loan applied for he incurred a lot of expenses.

He contended that because of the breach of contract, he was entitled to refund of all his money he had spent in processing the loan.

One of the consequences of breach of contract is compensatory damages also called actual damages.

Breach of contract is as a result of one of the parties failing to honour a binding agreement by non-performance or interference with the other parties' performance.

Damages are usually awarded to the injured party.

There are two common forms of damages in cases of breach of contract. These are special damages which are awarded for losses that can be quantified

such as money spent in respect of the contract and general damages awarded for unquantifiable losses such as inconvenience and loss of amenity.

The elements one has to prove are that there was a valid contract, the Plaintiff did his part and the Defendant failed to do his part.

In the instant case there was a valid contract, the Plaintiff did his part as required by the Facility Letter and the Defendant failed to honour her part by failing to disburse and ultimately withdrawing the facility. The end result is that the Defendant is liable to pay damages.

It is well established in law that special damages must be specifically pleaded and strictly proved; **Adonia Tumusime vs Bushenyi District Local Government & AG HCCS no 32 OF 2012.**

This type of damages can be proved by documentary or oral evidence by say a person who received or paid out the sums in question, **Kyambade Vs Mpigi District ADM [1983] HCB44.**

In the instant case the Plaintiff prayed for special damages which he particularised as hereunder;

- (a) Ug Shs5,780,000 registration of mortgages
- (b) Ug Shs1,276,750 surveying and valuation of Plot 2 Magumba Road, Iganga
- (c) Ug Shs 849,000 valuation and surveying Plot 22 Oboja Road, Jinja Municipality
- (d) Ug Shs 3,200,000 Audit fees
- (e) Ug Shs 1,000,000 Legal fees to Independent Advisers

The sum totalled **Ug Shs 9,980,000**

These sums were supported by receipts and documents. They were not dislodged by cross examination and I believe that the Plaintiff indeed incurred these expenses. He is awarded the same.

The Plaintiff also claimed loss of income occasioned by the unexpected withdrawal of the facility. He contended that in the first year as per the cash flows projection he would have made Ug Shs 93,482,000= And that as shown by the cash flow projection, Exh P5 he would make Ug Shs 557,684,313 in the projected five years.

The Defendant contended that the cash flow projections could not stand because an auditor in Allied Certified Public Accountant did not come to explain the tabulation in Exh P5. When PW2 Mawanda Lwanga who claimed to be an accountant with Allied Certified Public Accountants appeared, he said he was not a partner in the firm, but that he did the audit, he also said he was willing to show that he had participated in the audit. He however could not produce any evidence in that regard because even his signature was lacking on the document.

Under those circumstances it required the signatory of the report to come and explain the audit and projections which were products of an expert.

In the absence of someone to own the report it would be risky to treat the figures as representing special damages because they must be strictly proved.

Furthermore, the prospective losses are sums that had not been sustained at the date of filing. For those reasons, while they can be arithmetically calculated, it can only be rough estimates. In the instant case there are difficulties of proof which renders uncertainties in assessment. **Robert Coussens Vs Attorney General SCCA No 8 of 1999.**

Because of the difficulty in assessing the future loss in the instant case, I am constrained to make an “estimate taking into account all the proved facts and probabilities” of this case, **K & V Ltd Vs The Registered Trustees of Arya Fractinidili Sabha EA 299 of 2011**

The rationale for the award of General Damages was well illustrated in **Dharamshi Vs Karsam 1974 EA**, that such damages are awarded to fulfil the common law remedy of restitution in integrum which means that the Plaintiff has to be restored as nearly as possible to a position he or she would have been had the breach complained of not occurred.

This means that the general damages are intended to make good to the aggrieved party as far as money can do for the losses he or she has suffered as *the natural result of the wrong done to him or her*, **Okello James Vs Attorney General HCCS No574 / 2003**. When considering general damages the court may take into account factors such as malice or arrogance on the part of the Defendant and the injury suffered by the Plaintiff for example by causing him stress, **Obong Vs Kisumu Council [1971] EA 91**, reducing his business reputation and exposing him to loss of trust.

In the instant case, I have taken into account the business background of the Plaintiff as seen in the statements that were prepared, I have also taken into account the fact that the Defendant must have awarded him the facility because the picture the Plaintiff painted of the project was that of profit. I however also take into consideration that there is no proved evidence that the Plaintiff was going to make the Ug Shs 500 million plus as claimed. There is also nothing to show that the profits would always remain high. In a business there could be ups and downs to be considered. I have also taken into account the injury suffered by the Plaintiff. Being denied money at the last minute

when he had done all the Defendant required must have been very stressful to the Plaintiff.

It must also have affect his business reputation and certainly dented all his prospects of making a profit in the five years to come.

Having considered all the above, I find an award of General Damages of Ugx 200 million appropriate. It is so awarded.

The Plaintiff also prayed for interest.

Interest is at the discretion of court; **Uganda Revenue Authority Vs Steven Mobosi SCCA 16 OF 1995**. Like all other discretions it must be exercised judiciously taking into account all the circumstances of the case; **Superior Construction Ltd Vs Notay Engineering Ltd HCCS 24 of 1992**.

On the promise by the Dependant that a facility would be awarded the Plaintiff allowed the Defendant to debit his account for money that would be required to "arrange" the loan. The Plaintiffs account was also the source for payment of the mortgage registration costs and other.

The Plaintiff was deprived of his money because of a misrepresented that funds would be availed for his use. Some of the money went to the Defendant meaning that the Defendant removed it form the Plaintiff and put it to her own use.

The Plaintiff being a businessman was deprived of the use of this money which he would have ploughed back into his businesses. For those reasons he deserves interest.

Since he was a businessman and taking into account that the bank lends at a commercial interest, it is with a commercial lens that the interest in respect of

the special damages will be considered. The Plaintiff prayed for interest at 25% pa. I find the same appropriate and award it as prayed.

As for general damages, I award 8% pa from date of judgement till payment in full.

The sum total is that judgement is entered in favour of the Plaintiff against the Defendant in the following terms:

- (a) Special damages of Ug Shs 9,980,000=
- (b) General damages of Ug Shs 200,000 million
- (c) Interest on (a) at 25% per annum from 20-Dec-2012 till payment in full and on (b) at 8% from date of judgment till payment in full.
- (d) Costs of the suit.

Dated at Kampala this ^{30th}.....Day of ^{June}.....2021.


Hon. Justice David Wangutusi

JUDGE