THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL SUIT No. 0082 OF 2021

MTN TWO ONE TWO STAFF COOPERATIVE }
AND CREDIT SOCIETY LIMITED } ……………… PLAINTIFF

VERSUS

SAMUEL MAJWEGA MUSOKE …………………………………………… DEFENDANT

Before: Hon Justice Stephen Mubiru.

JUDGMENT

a) The Plaintiff's claim;

By an agreement dated 3rd May, 2019 The Plaintiff purchased 25 acres of land from the defendant at a price of shs. 1,250,000,000/= Each acre was priced at shs. 50,000,000/= The plaintiff paid the price in full. The defendant had mortgaged the land to a bank and part of the price was applied to clear the loan. Later it was discovered that not all the 25 acres were available. Only 15 could be used; 7 had been sold to another person, a one Kibuuka Robert. The rest of the land was a gazetted wetland. After making that discovery, the plaintiff made a second agreement with the defendant on 22nd November, 2019 in which the defendant agreed to refund the purchase price of ten acres at an interest of 30% per annum for the six months from 3rd May, 2019 until 22nd November, 2019 amounting to shs. 75,000,000/= The defendant also agreed to pay all the expenses that had been incurred by the plaintiff in surveying and transferring the land, amounting to shs. 50,940,000/= hence a total of shs. 625,940,000/= On default, it was agreed the outstanding sum on a reducing balance would attract an interest of 5% per month. The defendant only refunded shs. 351,200,000/= leaving a balance of shs. 274,740,000/= hence the summary suit for recovery of the money had and received by the defendant.

b) The defence to the claim;

By his written statement of defence, the defendant admits having sold 25 acres of his land to the plaintiff at the price of shs. 1,250,000,000/= by an agreement dated 3rd May, 2019. At the time of the transaction the title deed was mortgaged to a bank as security of a loan and the bulk of the purchase price was intended to pay of the outstanding loan. Prior to that sale, the plaintiff had inspected the land and had seen that part of it was a wetland. It is only six months later, around November 2019 that the plaintiff decided it was no longer interested in purchasing ten acre of the land which lay in the wetland, thereby demanding that the defendant refunds the value of the ten acres. The plaintiff's advocate drafted a tripartite agreement that the defendant was required to sign. During negotiations leading to that contract, the defendant had no legal representation. As a result, the amount demanded by the plaintiff as a refund was way above what was paid for the ten acres. The defendant was given an unreasonably short period within which to refund the money at the risk of incurring a penal interest of 5% per month. The defendant thus counterclaims for a declaration that the tripartite agreement is invalid by reason of economic duress and for an order directing a refund of money paid back to the plaintiff under its terms.

c) <u>The issues to be decided;</u>

During the scheduling conference, it was determined that the defendant had no plausible defence regarding shs. 148,800,000/= being the outstanding balance of the amount agreed to be refunded and accordingly a partial judgment in that sum was entered in favour of the plaintiff. The issues raised thereafter for trial were as follows:

1. Whether the interest stipulated in the contract is recoverable.
2. Whether the expenses incurred by the plaintiff are recoverable.
1. What remedies are available to the parties?

d) <u>Submissions of counsel for the plaintiff;</u>

M/s Century Advocates on behalf of the plaintiff submitted that out of the 25 cares purchased, only 22 were usable as the rest were in a gazetted wetland. Out of the 22 usable acres, it turned out that the defendant had sold 7 of them to a one Kibuuka Robert. Removal of a caveat lodged by that third party necessitated the tripartite agreement by which the plaintiff agreed to retain 15 acres and secure a refund of the price paid for the 10 acres, interest thereon and the expenses incurred. The total amount to be refunded was shs. 625,940,000/= The defendant has since then paid only shs. 351,000,000/= leaving an outstanding balance of shs. 274,740,000/= out of which a partial judgment for shs. 148,800,000/= was entered. In the tripartite agreement signed on 22nd November, 2019 the defendant undertook to make a full refund by 15th December, 2019 failure of which the outstanding balance would attract interest at the rate of 5% per month until payment in full. The defendant, a highly educated businessman, is bound by the terms of the contract he freely signed. The interest at the rate of 5% per month was the consideration given for the plaintiff's ceding the 7 acres to Kibuuka Robert. The defendant was involved in the negotiations leading to fixing that rate and is thus estopped from claiming that the rate is unconscionable. In the alternative, if the court finds the rate unconscionable, then it should set a reasonable one that should apply to the entire agreed sum of shs. 625,940,000/= The defendant knew the plaintiff's business to be that of money lending, dependant on timely payment. In the course o surveying the entire 25 acres, the plaintiff incurred expenses of shs. 50,940,000/= The defendant voluntarily signed the tripartite agreement binding himself to refund that money as well. The plaintiff should be awarded general damages for the inconvenience suffered as well as the costs of the suit.

e) Submissions of counsel for the defendant;

M/s Nakachwa and Partners Advocates on behalf of the defendant submitted that the plaintiff's claim being one for money had and received, the interest at the rate of 5% per month claimed by the plaintiff is extremely unfair / unconscionable and excessive. The court had the power to reopen a transaction where it forms the opinion that the rate of interest to be paid is hash and unconscionable. Just like a money lending agreement, the tripartite agreement involved paying back to the plaintiff on terms intended to treat the amount to be refunded, as a loan. The rate of 5% per month to which the defendant was subjected is nearly four times higher than that at which the plaintiff lends to its members which is 1.5% per month. Whereas they plaintiff's knew the bulk of the purchase price had been used to service an outstanding bank loan, they gave the defendant only three weeks within which to refund it. The plaintiffs themselves paid the purchase price in four instalments over a period of two months. The plaintiff cannot rely on the doctrine of estoppel as a cover for unconscionability. The tripartite agreement was initiated by the plaintiff's advocates, prepared by them and the defendant was asked to sign. The interest rate should be reduced to 10% and at most 15% as that applicable to the plaintiff's members. The expenses incurred are not recoverable since they were never pleaded. The defendant is only obliged to refund the actual amount of money received from the plaintiff, representing the value of that part of the consideration that failed, and no more. The plaintiff cannot seek to recover expenses incurred upon breach of contract, yet the action was for money had and received. In the alternative, the amounts claimed are not assessed *pro rata* the ten acres but rather cover the entire 45 acres. The suit should be dismissed.

f) <u>The decision;</u>

In all civil litigation, the burden of proof requires the plaintiff to prove to court on a balance of probabilities, the plaintiff's entitlement to the relief being sought. The plaintiff must prove each element of its claim or cause of action, in order to recover.

1st issue; <u>whether the interest stipulated in the contract is recoverable;</u>

The plaintiff's suit is founded on the agreement dated 22nd November, 2019. By clause 8.0 thereof, the defendant agreed to refund shs. 625,940,000/= to the plaintiff by 15th December, 2019. Clause 9.0 thereof provided that upon default, the outstanding amount was to attract interest at the rate of 15% per month until payment in full. Of the sum specified in clause 8.0 of that agreement, shs. 75,000,000/= was interest charged on the shs. 500,000,000/= refund for the ten unusable acres, at the rate of 30% per annum for the period from 3rd May, 2019 to 22nd November, 2019, and shs. 50,940,000/= as expense incurred by the plaintiff in trying to take possession of the ten acres. The defendant contends that the 30% per annum rate of interest applied to the refundable sum as well the 5% per month rate of interest incurred on default are extortionate.

Interest is the return or compensation for the use of retention by one person of a sum of money belonging to another (see *Stanbic Bank (U) Ltd v. Atyaba Agencies Ltd, H. C. Misc. Application No. 235 of 2006*). *The Tier 4 Microfinance Institutions and Money Lenders Act, 2016* does not specify the interest rate that should be charged. Section 86 (2) only provides that where a borrower defaults to pay the sum payable to the money lender on the due date, the moneylender is entitled to charge simple interest on that sum from the date of default until the sum is paid. The section however prohibits compound interest. A money lending contract is illegal and unenforceable if it directly or indirectly provides for the payment of compound interest; or the rate or amount of interest being increased by reason of a default in the payment of sums due under the contract.

One of the fundamental principles of the law of contract is freedom of contract, which allows a person to decide when, with whom and on what terms to contract with another. This liberty though is not absolute. Several limitations are placed on the exercise of this right. For example equity grants relief against contractual terms that are oppressive (unequal or one-sided exchanges) or unconscionable. If a contract is shown to be inequitable and unconscionable, a court of equity will not enforce it. Section 89 (1) of *The Tier 4 Microfinance Institutions and Money Lenders Act, 18 of 2016* empowers courts to reopen money lending transactions where the interest charged in respect of the sum actually lent is excessive, the transaction is harsh and unconscionable, or the transaction is such that a court of equity would give relief. Although the agreement at hand is not one for money lending, it had more or less the same effect since its formation, especially as regards the imposition of interest on outstanding sums, was guided by similar considerations.

"Unconscionability" applies to a contract or contractual provision that is so unfair or oppressive to one party that no reasonable or informed person would agree to it. An unconscionable contract or provision leaves one party with no real, meaningful choice and is unreasonably advantageous to the other party, usually due to the other party's superior bargaining power. The purpose and justification of the doctrine is to protect the weaker party to a contract from the possibility that the stronger party abuses that power and writes the terms of the contract to its sole advantage. It in essence addresses victimisation, which can consist either of the active extortion of a benefit or the passive acceptance of a benefit in inequitable circumstances; in breach of reasonable standards of commercial practice.

This means that the lender's conduct must be extremely unfair or unreasonable. The doctrine does not seek to undo a contract upon the mere existence of an unequal bargaining position or a bad bargain by one of the parties. Consequently, an unconscionable contract or clause has been defined as one that "no man in his senses and not under delusion would make on the one hand and as no honest and fair man would accept on the other" (see *Pelfrey v. Pelfrey 487 SE 2d 281, 284 (Va Ct App 1997*). The unconscionable character of a contract or clause will only be accepted in those cases that are “so outrageous and unfair in its wording or its application that it shocks the conscience or offends the sensibilities of the court” (see *Adams v. John Deere Co 774 P 2d 355, 357 (Kan Ct App 1989*).

Courts look at a number of factors when determining whether a contract is unconscionable, including the disparate bargaining power of the parties, whether one party was more sophisticated than the other, and whether the agreement was a contract of adhesion (a contract where the relevant terms have not been subject to effective negotiation between the parties). Courts also scrutinise the contract provisions to determine whether they are oppressive, unfair, or overly harsh. A court may refuse to enforce an unconscionable contract, or it may void the unconscionable clause and enforce the remainder of the contract, or it may enforce the contract but limit an unconscionable clause’s application to avoid an unconscionable result. Five factors normally present in a case of unconscionability, as classically understood; (1) the weaker party is under a significant disability; (2) the stronger party knows or ought to know of the disability; (3) the stronger party has victimised the weaker in the sense of taking advantage of the weaker party’s disability, either by active extortion of the bargain or passive acceptance of it in circumstances where it is contrary to conscience that the bargain should be accepted; (4) there is a marked inadequacy of consideration and the stronger party either knows or ought to know that to be so; (5) there is some procedural impropriety either demonstrated or presumed from the circumstances.

Therefore a contract which is negotiated in good faith, with no knowledge (or reasonable knowledge) of incapacity on the part of the other party, is not voidable for unconscionability (see *Hart v. O’Connor [1985] 1 AC 1004)*. In determining whether a term in a loan agreement satisfies the requirement of good faith, regard must be had in particular to the following matters: (i) the strength of the bargaining positions of the parties; (ii) whether the borrower had an inducement to agree to the term; (iii) whether the loan was advanced at the request of the borrower; and (iv) the extent to which the lender has dealt fairly and equitably with the borrower. In cases where a creditor has knowledge of facts which render the presence of undue influence not only possible, but probable, the creditor must insist on independent advice.

Clauses in a contract that have been obtained unconscionably will be struck out as void. To have a transaction set aside as a harsh and unconscionable bargain, a party would have to show not only that the terms of the transaction were harsh or oppressive, but also moral unfairness. Browne-Wilkinson J in *Multiservice Bookbinding Ltd v. Marden [1978] 2 All ER 489; [1979] Ch 84*, said;

> In my judgment a bargain cannot be unfair and unconscionable unless one of the parties to it has imposed the objectionable terms in a morally reprehensible manner, that is to say, in a way which affects his conscience.

In assessing whether relief should be granted, all circumstances of the case should be considered, including the degree of mutuality. Where it is an arm's length commercial transaction upon which each party had received legal advice, the court will not intervene (see *Knightsbridge Estates Trust Ltd v. Byrne [1939] 1 Ch 441; [1939] Ch 441*). The conditions required to establish the defence of unconscionability in the enforcement of a document are as follows: (a) a grossly unfair and improvident transaction; (b) a victim's lack of independent legal advice or other suitable advice; (c) an overwhelming imbalance in bargaining power caused by the victim's ignorance of business, illiteracy, ignorance of the language of the bargain, blindness, deafness, illness, senility, or similar disability; and (d) the other party's knowingly taking advantage of this vulnerability (see *Phoenix Interactive Design Inc. v. Alterinvest II Fund L.P., 420 D.L.R. (4th) 335*). There must be both procedural and substantive unconscionability. "A bargain cannot be unfair and unconscionable unless one of the parties to it has imposed the objectionable terms in a morally reprehensible manner, that is to say in a way which affects his conscience" (see *Multiservice Bookbinding Ltd v. Marden [1978] 2 All ER 489, [1979] Ch 84*).

Procedural unconscionability refers to the process by which an agreement is reached and the form of an agreement. Here, the court analyses the existence of oppression and surprise over the innocent party. Oppression will exist if there is an inequality of bargaining power that results in no real negotiation and an absence of meaningful choice. Surprise involves the extent to which the supposedly agreed-upon terms are hidden in a prolix printed form drafted by the party seeking to enforce them. Concerning substantive unconscionability, the task of the court is to analyse the terms of the contract. More specifically, the court addresses the fairness of the term in dispute. While both must be present, the two elements will not necessarily possess the same intensity.

For example in *Cityland and Property (Holdings Ltd) v. Dabrah [1968] Ch 166*, the plaintiffs, Cityland, sold a house to a former tenant for £3,500. The tenant paid £600 in cash and took out a mortgage from the plaintiffs for the remaining £2,900 over six years. There was no provision for the payment of interest. Instead the mortgage contained a premium of £1,653 that represented 19% interest per year, or 57% of the whole loan. The mortgage contained a term that in the event of a default the entire £4,553 was payable. The defendant sought equitable relief against the premium charged on the grounds that it was an unreasonable collateral advantage. The court held that it would grant relief against a collateral advantage if was unconscionable, paying particular attention to the size of the advantage. This meant the advantage could not be unfair or unreasonable. Reasonableness and fairness would depend on the circumstances. The agreement imposed an extremely high premium rate rather than interest, amounting to 57% of the loan. The plaintiffs could not justify charging such a high amount in lieu of interest. Also, in case of default the entire amount became due. This was unconscionable. Consequently, the court used its inherent jurisdiction to rewrite the agreement, and the borrower was allowed to repay the loan together with 7% interest, which was reasonable.

The Court came to that conclusion because the premium (collateral advantage) was out of all proportion to investment rates prevailing at the time of the advance the premium was so large that it had the effect of destroying the whole equity by rendering the security offered deficient and leaving no surplus for the tenant on any exercise by the company of its powers to repossess and sell the house. The collateral advantage was unreasonable in the circumstances and was invalid. Only the loan plus interest was payable.

Similarly in *Indianapolis Morris Plan Corp. v. Sparks, 132 Ind. App. 145, 172 N.E.2d 899 (1961)*, an instrument of guaranty signed by husband and wife when a note secured by a chattel mortgage was executed, did not guarantee a loan for a much larger amount to the husband individually. The agreement made each spouse the agent of the other, waived any demand for payment of a subsequent loan, provided for costs and attorneys' fees, waived the necessity for the mortgagee to resort to legal remedies, and ratified all subsequent acts of the other spouse. The court found the guarantee ripe for abuse and limited its application to the note with which it was executed. The court stated that;

> where one party has taken advantage of another's necessities and distress to obtain an unfair advantage over him, and the latter, owing to his condition, has encumbered himself with heavy liability or an onerous obligation for the sake of a small or inadequate present gain, equity will relieve him.

Multiple criteria have been considered by the courts to determine if a contract is procedurally unconscionable. Some of the most important criteria are: a) the way the contract was agreed upon by the parties (could the party negotiate the content of the contract? Was the agreement an adhesion contract?); b) the bargaining power of the parties (was one of the parties economically or legally stronger than the other?), c) the availability of a meaningful choice for the party alleging unconscionability at the time when the contract was agreed upon; d) whether the clauses were offered on a "take it or leave it basis," e) whether the party claiming the unconscionable character of the contract or clauses, considering his or her education or lack thereof, had the ability and reasonable opportunity to understand the terms of the contracts; and f) whether the relevant terms were hidden in a maze of fine print. With substantive unconscionability, the focus of the court's analysis is to determine two important aspects: whether the term is one-sided and whether the term has an overly harsh effect on the disadvantaged party. In other words, the court analyses whether the clauses of the agreement are unreasonable and unfair, or if the provision unreasonably favours the party asserting it. The court must evaluate all the circumstances on an objective basis, considering the reasonable expectations of the average person entering into such an agreement.

Considering the procedural unconscionability perspective, the court analyses whether the contract possesses an inequality of bargaining power that results in no real negotiation and an absence of meaningful choice. Although a contract can be held valid and enforceable even if there is a substantial difference in the bargaining powers of both parties, exercise of a superior bargaining power can lead to the inclusion of abusive clauses in the contract. A contractual term which is not individually negotiated may be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the weaker party.

In the instant case, it was the defendant's testimony that at he was not represented by a lawyer throughout the transaction. He in effect relies on the absence of independent legal advice, as a defence. In general the law does not require independent legal advice in any type of contract (see *Estevan Credit Union v. Halvorsen and Siroka (1991) 91 Sask R. 316*). In addition there is generally no requirement that a lawyer must insist that a person obtain independent legal advice (see *Gerlock v. Safety Mart Foods Ltd., Webber, Jeffrey and Whist (1982) 42 B.C.L.R. 137*). The need for independent legal advice is factually based. The necessity of such advice will depend on the particular facts and circumstances of a given case. Factors like the age, background, business experience, financial position and relationship with the real borrower, will be considered. Persons who may not understand the agreement because of the following: a) minimal business experience, b) age, c) infirmity, d) lack of education, e) difficulty with language, may need independent legal advice. Non-arm's length transactions between family members too.

Independent legal advice is required where a conflict of interest exists as regards the advocate involved, either because he or she has a personal interest in the transaction, directly or indirectly, or because he or she is proposing to act for sides that are adverse in interest. It is a mandatory requirement though during a transaction where a party is placed at risk but doesn't get a direct benefit from, such as personal guarantees and third party mortgages which involve persons who ordinarily do not play a part in the negotiations for the loan and are unaware of its terms, to ensure that the person signing the agreement fully understands its contents including all possible consequences, as well as ensuring they are aware of any legal or financial responsibilities they are committing to. The advice is provided by an advocate who is independent to the transaction. The purpose of requiring independent legal advice is to ensure that the party has an appreciation of the nature and consequence of the transaction where the advocate involved is in a conflict of interest, in order to understand exactly what the lender can or cannot do. It helps in providing an objective review of a legal document, confirms a party understands the document properly, and verifies that the party has not been pressured into signing the document (i.e. duress or undue influence).

Since the purpose of independent legal advice is to ensure that the borrower obtains a full and frank understanding of the risks and obligations associated with taking on the loan, mortgage or other facility, save for those situations where independent legal advice is mandatory, evidence may be adduced to show that even without it, the borrower signed the contract fully understanding his or her rights and obligations; to show that the party understood the general basis of the documentation and the consequences which may arise in the result of a default. This will depend on the complexity of the transaction. The need for independent legal advice may be rebutted where the lender can prove that the contract was signed by a free and independent mind with commercial knowledge, experience, and general sophistication or independence (see *Bank of Montreal. v. Duguid (2000), 132 O.A.C. 106*).

Therefore the mere lack of independent legal advice will not invalidate a transaction in the absence of proof of *non est factum*, unconscionability, fraud, misrepresentation or undue influence (see *Avon Finance Co Ltd v. Bridger [1985] 2 All ER 281* and *Barclays Bank Plc v. O'Brien and another [1993] 3 WLR 786; [1994] 1 AC 180; [1993] 4 All ER 417*). This onerous obligation to permit the other party independent legal advice is imposed on lenders to ensure that persons who are granting security, or otherwise indebting themselves to the creditor in circumstances where they may not directly benefit from the funds being advanced, or where they may be subject to undue influence, receive independent legal advice.

In the instant case, considering the low level complexity of the transaction, the position of the defendant as a Masters Degree holder in Business Administration and being the Chief Executive Officer of a reputable private publishing corporation, I find that the defendant had the experience and capacity, if anything was unclear, to seek clarification from his advocate before signing. He was not vulnerable to an extent that undermined the agreement he entered into. He was knowledgeable about the financial transaction and knew about the risks involved. He was indebting himself to the plaintiff in circumstances where he had directly benefited from the funds sought to be recovered. The defendant had the full and unimpeded opportunity to consult with independent legal counsel, if he had chosen to. There is no evidence to show that any amount of pressure was applied to him as was capable of overcoming his free will. At all time, the defendant was acting freely and voluntarily and not under undue influence, duress, intimidation, or inducement of the plaintiff or any other person. The plaintiff did not take advantage of the defendant's ignorance of the totality of the circumstances, since none existed. From this perspective, there was equality of bargaining given the extent of shared knowledge of the background information that led the two parties into this contract.

However, at the time of the original transaction of sale of the land, none of the parties knew that part of the land lay in a gazetted wetland. This fact was discovered six months later. Execution of the agreement of 22nd November, 2019 appears to have been a knee-jerk reaction to an unforeseen event; a sudden discovery that a sizeable part of the land lay in a gazetted wetland and was unavailable for sale. It is the defendant's case that signing of the tripartite contract was a condition precedent for the third party's withdrawal of the caveat that prevented the sale to the plaintiff going forward. The agreement was prepared by the plaintiff's lawyers without involvement of any legal representation for the defendant. The plaintiff knew most of the purchase price had been applied toward settlement of a bank loan yet gave the defendant only three weeks within which to refund almost half of it. The defendant was required to solely meet legal fees charged by the plaintiff's lawyer of shs. 7,000,000/= which he paid on 20th December, 2019.

On its part, the plaintiff contends that it is the defendant who convened the meeting for discussing the way forward after discovery of the fact that ten acres formed part of a gazetted wetland. That in consideration of the plaintiff relinquishing 7 out of the 22 usable cares of land to the third party to whom the defendant had an earlier transaction, the defendant agreed to meet all costs the plaintiff had incurred in surveying the ten acres in the wetland. This was followed by multiple other meetings that resulted in execution of the tripartite agreement.

From the two versions it emerges that the defendant was negotiating from a position of distress based on the sudden discovery of the fact that the available land could not satisfy the two contracts of sale, both of which were binding on him. In order to satisfy the agreement with the third party who already had caveated progress with the plaintiff's contract, the defendant had to make concessions to the plaintiff. The plaintiff appears to have obtained an unfair advantage over the defendant, and the latter, owing to his condition encumbered himself with a disproportionately onerous obligations or heavy liability for the sake of that small or inadequate present gain. This is especially manifested by the fact that the defendant was required to meet all the legal fees charged by the plaintiff's lawyer for the remedial transaction, given an inordinately short time within which to refund almost half of the purchase price he had received six months before, the bulk of which had gone into settlement of his then existing loan obligations with a bank.

With regard to the substantive unconscionability perspective, one of the most important factors is whether a clause or provision unreasonably favours the other party to the contract. The court considers whether the term is one-sided and whether it will have an overly harsh effect on the disadvantaged party. The existence of grossly unfair and unbalanced duties and obligations between the parties justifies the application of the doctrines of unconscionability. Two obligations stand out in this transaction; the imposition of a 30% per annum rate of interest on the amount to be refunded and 5% per month upon default thereon, both of which are *prima facie* usurious.

The expression "usury rate" refers to a rate of interest that is considered to be excessive as compared to prevailing market interest rates. In effect it is lending money at an unreasonably high rate of interest. The line between a usurious interest rate and a merely high interest rate is the subject of some controversy. High interest rates may be justified by the fact that the loan in issue carries unusually high risk or involves a high-risk borrower, where in spite of the interest being excessive, it would not be an unfair transaction because of the special circumstances justifying the rate of interest actually charged. Interest rates are subject to prevalent market conditions; to supply-demand economics etc. A hard and fast rule cannot be laid down to say that interest above a particular rate is usurious. Whether the rate of interest charged is unfair or not depends upon the circumstances of the case, with reference to the prevailing market lending rate and on the economy of the country in general. Judicial notice cannot be taken of interest rates. Evidence has to be introduced to show the prevalent interest rates at the period of the contract for the Court to conclude that the rate claimed is usurious.

On the other hand, predatory lending involves the imposing of unfair, deceptive, or abusive loan terms on borrowers. Predatory lenders often use aggressive sales tactics and take advantage of borrowers' lack of understanding of financial transactions. Through deceptive or fraudulent actions and a lack of transparency, they entice, induce, and assist a borrower to take out a loan at a cost that is extremely above the market rate, which they will not reasonably be able to pay back. Predatory lenders take advantage of either the borrowers' circumstances or their lack of knowledge. Typical targets include people whose inadequate income leads to regular and urgent needs for cash to make ends meet and the less educated.

Interest rates have a bearing on the credit risk. Credit risk is the possibility of a loss resulting from a borrower's failure to repay a loan or meet contractual obligations; the risk that a lender may not receive the owed principal and interest, which results in an interruption of cash flows and increased costs for collection. Credit risks are calculated based on the borrower's overall ability to repay a loan according to its original terms. Credit risk can be measured by: credit history, capacity to repay, capital, the loan’s conditions, and associated collateral. If there is a higher level of perceived credit risk, lenders usually demand a higher rate of interest for their capital. Interest rates on secured loans tend to be higher than on unsecured loans. The majority of lenders with higher lending rates tend to have higher non-performing loans and a small market share. Other factors are the size of the lending institution, the size of the economy and costs lending institutions incur to stay running which in turn requires a high level of profitability to generate the return on capital that the shareholders require. This being a private lending transaction, it has to be shown the private lending market rate is less than 30% per annum.

P.W.1 Mr. Joachim Masagazi testified that the second agreement charged interest because the defendant had taken some time with the money to be refunded yet ordinarily as a Society they should have earned interest had they invested the money elsewhere. The plaintiff had paid the purchase price by clearing a subsisting bank loan owed by the defendant with interest which the plaintiff paid on the defendant’s behalf. The rates included in the contract were guided by the rate the plaintiff charges its members. Members pay interest at 15% per annum. Since this was an investment outside membership and arose when the defendant defaulted, it was not ordinary borrowing, considering that they had invested and the investment failed. P.W.2 Mr. Peter Ochen, the Treasurer of the plaintiff testified that when the plaintiff SACCO members borrow, they are charged interest at 15% per annum, but when imposing an interest rate on the defendant, he was being penalised for holding onto the money the plaintiff could have made available to members.

According to the Bank of Uganda “*Bank Lending Survey Report First Quarter - FY 2020/2*1” (at https://www.bou.or.ug/bou/bouwebsite/bouwebsitecontent/statistics/Bank_Lending_Survey_Reports/2021/Sep/Bank-Lending-Survey-Report-Q1-FY2020_21.pdf), in January 2020, the industry average lending rates were at 20.06% percent and it had dropped to 17.2 percent in June, 2020. The plaintiff’s rate of 30% per annum applied in the agreement dated 22nd November, 2019 therefore appears to be significantly higher than the average market rate of 20%. While a high interest rate may be justified by the fact that the loan in issue carries unusually high risk or involves a high-risk borrower, that is not the reason which was advanced by the plaintiff. The plaintiff was instead driven by the consideration that this was a failed investment resulting in a "forced lending" or credit to a non-member.

A rate of interest that is considered to be excessive as compared to prevailing market interest rates, if not justified by the fact that the nature of the loan in issue carries an unusually high risk, is *prima facie* usurious. A high risk loan is one involving a borrower who does not have a solid track record of repaying debts, which could make default on the loan more likely, yet the debt is unsecured. A high risk borrower is one who has a history of failing to meet financial obligations on time, who as a result is likely to fail to make timely payments in the future. To protect against that, a high-risk loan comes with an extremely high interest rate such that if only partial repayment is made, the big-figure interest will help the lender recoup some of the loss.

To assess the creditworthiness of a borrower, the lender usually considers; the payment history of the borrower, the borrower's current level of indebtedness, and the categories of current debt (such as mortgages, personal loans, unpaid bills, etc.). A high interest rate may be justified where the analysis reveals that the borrower is not financially responsible when it comes to money and credit management, for example where it is shown that the borrower has a history of multiple defaults on different credit products from several different lenders. In the instant case, although the credit was unsecured, there is no evidence to show that the defendant was a high risk borrower as to justify a rate of interest that was significantly above the prevailing market interest rates. There being no evidence to show that the credit arrangement involved an unusually high risk or a high-risk borrower, I therefore find the 30% per annum rate of interest imposed on the defendant for the period running from 3rd May, 2019 to 22nd November, 2019 yielding a total of shs. 75,000,000/= was usurious in the circumstances.

Secondly, according to section 86 (1) (c) of *The Tier 4 Microfinance Institutions and Money Lenders Act, 18 of 2016* a money lending contract is illegal and unenforceable if it directly or indirectly provides for the rate or amount of interest being increased by reason of a default in the payment of sums due under the contract. In the instant case, clause 9.0 of the agreement of 22nd November, 2019 provides as follows;

> 9.0 That in the event where the full sum in clause 8.0 above is not fully paid by 15th December, 2019, the outstanding sum shall be subjected to an interest of 5% per month on reducing balance until the entire sum is fully paid.

By charging interest on the amount to be refunded at the rate of 30% per annum rate for the period running from 3rd May, 2019 to 22nd November, 2019 that yielded a sum of shs. 75,000,000/= thereafter capitalising the same, and then charging further interest thereon at the rate of 5% per month, the defendant was subjected to interest increased by reason of a default in the payment of sums due under the contract. That aspect is entirely unenforceable.

Consequently, I have found both procedural and substantive unconscionability in this contract regarding the rates of interest imposed on the defendant that justify this court's intervention on equitable grounds. In *Francis Kiyaga v. Josephine Segujja and another, C. A. Civil Appeal No. 37 of 2010* when the Court found the rate of interest of 20% per month unconscionable, invoking its powers under section 26 of *The Civil Procedure Act*, it reduced it to 20% per annum. Similarly in *Attorney General v. Dr. Major (Rtd.) Anthony Jallon Okullo, C. A. Civil Appeal No. 207 of 2016* the trila court reduced the contractually agreed rate of compound interest of 24% per annum to 15% per annum. On appeal, when the Court found the rate of compounded interest of 15% per annum on a dollar award of general damages harsh and unconscionable, invoking its powers under section 26 of *The Civil Procedure Act*, it reduced it to 6% per annum. In *Alice Okiror and another v. Global Capital Save and another, H. C. Civil Suit No. 149 of 2010* when the Court found the rate of interest of 12% per month unconscionable, invoking its powers under section 26 of *The Civil Procedure Act*, it reduced it to 25% per annum. Lastly, in *Juma v. Habibu [1975] 1 EA 108*, the Court having found that an interest rate of 5% percent per month, equivalent to 60% p.a. charged in a mortgage deed was unreasonable, it reduced it to 12% p.a.

By virtue of section 26 of *The Civil procedure Act*, this court has a discretion to award interest at less than the contractual rate, when that rate is manifestly excessive or unconscionable. The time when the amount claimed was due is the date from which interest should be awarded. 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 *J.K Patel v. Spear Motors Ltd, S. C. Civil Appeal No. 4 of 1991*).

I consider for this purpose that the plaintiff is in the money lending business and that this was a situation of forced credit following a partially failed purchase, rather than an arm's length contract of borrowing. Whereas the rate of interest to its members is 15% per annum, the defendant is not a member. At the same time, the prevailing market rate of interest at the time of the contract averaged at around 20% per annum. I therefore substitute the unconscionable rate of interest in the contract with a rate of 20% per annum on the reducing balance of the refundable amount of shs. 500,000,000/= from the date it was due, i.e. 15th December, 2019 until payment in full.

2nd issue; <u>whether the expenses incurred by the plaintiff are recoverable</u>.

A transaction that consists of two or more contracts is to be treated as a single contract if it is in substance and effect a single transaction. In the instant case, the agreement of purchase / sale of land dated 3rd May, 2013 contained clause 4 on the costs of the transaction, which provided as follows;

> 4.1 The purchaser shall be liable to pay all fees, stamp duty, taxes, charges and any other costs necessary for, or relating to the sale, conveyance and effecting the transfer of the title for the property from the vendor to the purchaser's name.

The tripartite agreement signed six months later dated 22nd November, 2019 contains clause 13.0 on the costs of the transaction, which provides as follows;

> 13.0 That all the costs, not limited to legal costs, caveat withdrawal fees, release of mortgage fees, and registration fees and all other expenses incidental to the execution of [this] memorandum of understanding shall be incurred by the 1st party herein [the defendant].

It is uunder clause 8.0 of the latter agreement of 22nd November, 2019 that the defendant undertook to refund a total of shs. 625,940,000/= of which shs. 500,000,000/= was money actually received by the defendant as the purchase price for the unavailable 10 acres; shs. 75,000,000/= was the impugned accumulated interest thereon at the rate of 30% per month from 3rd May, 2019 to 22nd November, 2019; while shs. 50,940,000/= were expenses incurred by the plaintiff.

P.W.1 Mr. Joachim Masagazi, a former Chairperson of the plaintiff testified that he was directly involved in the transactions now in issue. After the signing of the purchase agreement on 3rd May, 2019 the plaintiff engaged M/s Adero Lydia and Irumba Derick Robert to survey the land. The surveyors were paid in four instalments of shs. 3,000,000/=; shs. 7,500,000/=; shs. 20,000,000/= and shs. 15,000,000/= which covered the costs of surveying and partitioning off the entire 25 acres. P.W.2 Mr. Peter Ochen, the Treasurer of the plaintiff testified that the expenses were incurred by paying different service providers at different times. The expenses were incurred as a result of the steps taken to take possession of the 25 acres. He presented receipts dated 16th July, 2019, 13th July, 2019, and 8th September, 2019. He testified that part of the shs. 117,160,000/= was spent on survey of the entire 25 acres.

The defendant testified as D.W.1 and stated that the plaintiff inspected the land before the purchase. By the time they signed the tripartite agreement the plaintiff had already identified and demarcated the land that was the subject of the agreement. The first subdivision of plot 98 undertaken on 17th September, 2019 yielded plots 701 and 702 with the residue remaining on plot 703. He sold 702 and 701 to the plaintiff. The surveyors were engaged by the plaintiff to partition off the 25 acres from the mother title. He was not involved in the survey process. He was not aware that NEMA claimed the ten acres. It turned out that the ten acres had been gazetted as NEMA. He only became aware of that fact after the first sub-division was rejected. On the second subdivision, the 7 acres he had previously sold to Kibuuka were partitioned off plot 701.

It is uunder clause 8.0 of the agreement of 22nd November, 2019 that the defendant undertook to refund shs. 50,940,000/= as expenses incurred by the plaintiff. Whereas in the initial agreement all costs attendant to the transaction were to be borne by the plaintiff, in the subsequent tripartite agreement the costs were cast upon the defendant. From the testimony of both P.W.1 and P.W.2 it is evident the said sum represents the entire cost of surveying the land that was eventually transferred to the plaintiff, inclusive of the ten acres that were subsequently excluded from the transaction. What seems to have triggered this diametric reversal of this contractual obligation was the discovery of the fact that ten cares of the 25 sold to the plaintiff lay in a gazetted wetland while another 7 acres had previously been sold off by the defendant, yet the plaintiff had incurred costs in surveying the entire 25 acres. The defendant contends that casting upon him the entire cots of the transaction was unconscionable in so far as it is contrary to commonly accepted standards of fair dealing.

A term of a contract is oppressive if it: (a) imposes a burdensome obligation or liability which is not reasonably necessary to protect the interests of the other party; and (b) is contrary to commonly accepted standards of fair dealing. Under the common law of contracts, the obligation of "good faith and fair dealing" with respect to the parties' performance and enforcement of the agreement, is an implied and inescapable term of every agreement. It is an implied obligation that assumes that the parties to a contract will act in good faith and deal fairly with one another without breaking their word, using shifty means to avoid obligations, or denying what the other party obviously understood. The covenant imposes an obligation on parties to act in good faith and deal fairly with other parties to the contract, even though this duty is not specifically stated in the agreement. The courts have employed the covenant to prohibit a party from acting arbitrarily or unreasonably in a manner that frustrates the other party's reasonable expectations and benefit of the bargain. A party must not act in bad faith, dishonestly, or with improper motive designed to destroy or injure the other party's right to receive the benefits or reasonable expectations of the contract.

At the time the agreement of purchase / sale of land dated 3rd May, 2013 was signed, none of the parties was aware that part of the subject matter (ten acres out of the twenty five) lay in a gazetted wetland and was thus unavailable for the transaction. A mistake in contract law is when one or both parties have a false belief about a contract. A common mistake is the situation where all parties to a contract are "mistaken" regarding a fundamental matter of fact. If both parties are under the same misapprehension (e.g. the existence of 25 usable acres of land in this case) it may render the contract void at law or, in some circumstances, voidable in equity. Common mistake arises where the mistake is shared by both parties, is fundamental and directly affects the basic definition of what the parties are contracting for. The mistake will render the contract void if it robs it of all substance. However in the instant case, it never robbed the contract of all substance; it affected only part of the subject matter, hence the decision to continue with the transaction, but only in respect of the portion that was available.

Although the plaintiff claims that 7 acres the defendant previously sold were carved out of the 22 acres that remained, I find this untenable since the total usable acreage that remained available to the plaintiff after deduction of the ten in the gazetted wetland, was 15 and not 22 acres. That the plaintiff's first survey had included the seven acres already sold by the defendant was not the defendant's fault as he was not involved in the survey process. By casting the cost of the entire survey upon the defendant in the tripartite agreement, the defendant was in effect penalised for the common mistake regarding the ten acres and the plaintiff's unilateral mistake regarding the seven acres it had erroneously included in its initial survey.

When the defence of unconscionability is raised, Courts scrutinise the contract provisions to determine whether they are oppressive, unfair, or overly harsh. A court may refuse to enforce an unconscionable contract, or it may void the unconscionable clause and enforce the remainder of the contract, or it may enforce the contract but limit an unconscionable clause's application to avoid an unconscionable result. Wen resolving the first issue, I found that there was both procedural and substantive unconscionability in the agreement of 22^{nd} November, 2019.

As regards the costs of the transaction, by reason of the fact that partly on account of a common mistake in the transaction and partly on account of its own unilateral mistake the plaintiff cast upon the defendant a cost that the plaintiff had initially undertaken to bear, this renders that obligation oppressive, harsh, unjustly burdensome, unconscionable, and in breach of reasonable standards of commercial practice. The plaintiff did not act in good faith and did not deal fairly with on the defendant. The plaintiff recanted its word given in the agreement of 3^{rd} May, 2013 to meet its own costs of the transaction, using shifty means to avoid its obligations, by denying what the defendant obviously understood to be the plaintiff's obligation.

When the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result. I find that to enforce this clause against the defendant would be oppressive in the circumstances. For that reason the issue is answered in the negative. The expenses incurred by the plaintiff in surveying and transferring the land into its name are not recoverable from the defendant.

3rd issue; <u>what remedies are available to the parties.</u>.

The defendant testified that by December, 2019 he had paid shs. 351,200,000/= out of the shs. 500,000,000/= He has since then not made any further payments by reason of the fact that he deals in scholastic material and for two years he has not had business because of Covid19 lockdown that closed schools. The implication is that he owes the plaintiff shs. 148,800,000/= which has been due since 15th December, 2019. The plaintiff is entitled to the recovery of that sum. That sum is to carry interest at the rate of 20% per annum from that date until payment in full, as already determined when resolving the first issue.

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 outstanding balance of shs. 148,800,000/=
b) Interest thereon at the rate of 20% per annum from 15th December, 2019 until payment in full.
c) The costs of the suit.

Delivered electronically this 22snd day of April, 2022

……Stephen Mubiru…………..
Stephen Mubiru
Judge,
22nd April, 2022.