**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA**

**(COMMERCIAL DIVISION)**

**CIVIL SUIT No. 0492 OF 2015**

**1. AFRO KAI LIMITED }**
**2. APONYE UGANDA LIMITED} …… PLAINTIFFS**

**VERSUS**

**KIIR FOR SERVICES AND CONSTRUCTION CO. LTD …… DEFENDANT**

**Before: Hon Justice Stephen Mubiru.**

## JUDGMENT

a. The plaintiffs' claim;

The plaintiffs jointly and severally sued the defendants jointly and severally for an account of funds received by the defendants from the government of the Republic of South Sudan, recovery of sums due under an agreement for the supply of foodstuffs, general damages for breach of contract, interest and costs. The plaintiffs' claim is that sometime during the year 2014 the defendant secured a tender for the supply of an assortment of foodstuffs to the government of the Republic of South Sudan. The defendants thereupon executed a memoranda of understanding with the plaintiffs on 23rd July, 2014 and 22nd October, 2014 respectively by virtue of which the plaintiffs were to supply the foodstuffs on credit to the defendants. It was agreed that the defendants were to receive payments by deposit of funds onto their bank account in Uganda, there after provide the plaintiffs with accountability thereof and eventually pay the amounts due. The plaintiffs duly supplied the defendants with 3,350 metric tonnes of maize grain, 2,771 metric tonnes of beans, 5,607.4 metric tonnes of maize flour, 3,720 metric tonnes of rice and 983.29 metric tonnes of cooking oil. The plaintiffs further stored and appropriated to the contract; 3579 metric tonnes of beans, 875 metric tonnes of maize flour, 80 metric tonnes of rice, and 1,366.71 metric tonnes of cooking oil. In breach of the memorandum of understanding, the defendant have neither provided accountability for funds they received from the government of the Republic of South Sudan nor have they paid the amounts due for the foodstuffs supplied to them and appropriated to the contract, hence the suit.

b. The defence to the claim;

Although the defendants were duly served with summons to file a defence, none of them filed a defence to the suit. An interlocutory judgment was thus entered against each of the defendants on 21st June, 2018 and the suit was set down for formal proof.

c. The issues to be decided;

The following are the issues to be decided by court, namely;

1. Whether the defendants are under an obligation to account to the plaintiff.
2. Whether the plaintiffs are entitled to recover the price of the foodstuffs supplied to the defendants.
3. Whether the plaintiffs are entitled to the rest of the remedies sought.

d. The submissions of counsel for the plaintiffs;

M/s Nambale, Nerima and Co. Advocates, counsel for the plaintiffs, submitted that the plaintiff's evidence is uncontested. The plaintiffs have adduced evidence of the memoranda, proof of delivery of the goods and the fact that they remain unpaid despite the defendants having received payment from the government of the Republic of South Sudan. Therefore judgment should be delivered in their favour.

e. The decision;

In all civil litigation, the burden of proof requires the plaintiff, who is the creditor, to prove to court on a balance of probability, 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. In other words, the initial burden of proof is on the plaintiff to show the court why the defendant / debtor owes the money claimed. Generally, a plaintiff must show: (i) the existence of a contract and its essential terms; ii) a breach of a duty imposed by the contract; and (ii) resultant damages.

**1st issue**; whether the defendants are under an obligation to account to the plaintiff.

According to section 10 (5) of *The Contracts Act, 7 of 2010*, a contract the subject matter of which exceeds twenty five currency points (500,000/=) must be in writing. The plaintiffs rely on memoranda of understanding dated 23rd July, 2014 and 22nd October, 2014 respectively (exhibits P. Ex.1 to P. Ex.3). It was the testimony of P.W.1 Mr. Christopher Kaijuka that it was agreed that the defendants were to receive payments by deposit of funds onto their bank account in Uganda, and there after provide the plaintiffs with accountability thereof. This version is not reflected in any of the memoranda, yet the court is to interpret documents, but it cannot supply the intention of the writer or import words into documents which are incapable of meaning for want of adequate expression. It is trite that the court does not make a contract for the parties. The explicit terms of a contract are always the final word with regards to the intention of the parties. The court will not improve the contract which the parties have made for themselves, however desirable the improvement might be.

According to section 92 of *The Evidence Act*, when the terms of any such contract have been proved by the production of the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to or subtracting from its terms, unless there is evidence of fraud, duress, or a mutual mistake (see also *Evans v. Roe and others (1872) L. R. 7 C. P. 138; Halsbury's Laws of England* (4th edn.) vol. 9 (1) para 622; *Chitty on Contracts* 24th Edition Vol I page 338; *Jacob v. Batavia and General Plantations Trust, (1924)1 Ch. 287*; *Muthuuri v. National Industrial Credit Bank Ltd [2003] KLR 145*; and *Robin v. Gervon Berger Association Limited And Others [1986] WLR 526 at 530*).

In other words, any information leading up to or during a contract that is not included in writing is considered inadmissible evidence and is excluded (see *Bank of Australasia v. Palmer [1897] A. C. 540 at 545*). Terms in a writing intended by the parties as a final expression of their agreement may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented by course of dealing, usage of trade, or by course

of performance; and by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement. The parol evidence rule assumes that the formal writing reflects the parties' minds at a point of maximum resolution and, hence, that duties and restrictions that do not appear in the written document, even though apparently accepted an earlier stage, were not intended by the parties to survive (see Marvin A. Chirelstein, in *Concepts and Case Analysis in the Law of Contracts* (5th ed. 2006) at p 98).

The court's function is to interpret and apply the contract which the parties have made for themselves (see *Trollope and Colls Limited v. North West Metropolitan Regional Hospital Board, [1973] 1 WLR 601, [1973] 2 All ER 260*). Therefore, for an unexpressed term to be implied into a contract, the court must be satisfied first that the parties must have intended that term to form part of their contract; it is not enough for the court to find that such a term would have been adopted by the parties as reasonable even if it had been suggested to them; it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which, though tacit, formed part of the contract which the parties made for themselves. A term will be inferred only if it is necessary to give business efficacy to the contract to avoid such a failure of consideration that the parties cannot as reasonable businessmen have intended. If the contract makes business sense without the term, the courts will not imply it. If the answer to the question; is it necessary to give business efficacy to the transaction? If "it is reasonable, but it is not necessary," it will not be implied into the contract.

I find that the term on accountability, as pleaded and expressed by P.W.1 Mr. Christopher Kaijuka in his testimony, is not a term that goes without saying, it is not one that is necessary to give business efficacy to the contract and is not one required to avoid a failure of consideration, since the contract makes business sense without it. For that reason it cannot be implied into the contract. It appears that part of the testimony and pleading was intended to buttress the claim for an account. A claim for an account is not for a definite sum of money but seeks an order directing the defendant to account to the plaintiff for monies received by the defendant. Such orders are ordinarily made in suits where it is necessary, in order to ascertain the amount of money due to or from any party,

that an account should be taken. If the amount claimed is an ascertained or ascertainable sum on the evidence availed to court, no account has to be taken.

According to Order 20 rule 1 of *The Civil Procedure Rules*, where a plaint prays for an account, or where the relief sought in the plaint involves the taking of an account, then, if the defendant either fails to appear or does not after appearance, by affidavit or otherwise, satisfy the court that there is some preliminary question to be tried, an order for proper accounts, with all necessary inquiries and directions usual in similar cases, shall immediately be made. The court will in those circumstances, before passing its final decree, pass a preliminary decree directing such accounts to be taken as it thinks fit.

Simply because some accounts are to be taken in a suit does not necessarily render a suit one for account. A suit does not become one for account simply because accounts have to be taken before a balance due from the defendant to the plaintiff can be established. A suit for an account is one where a preliminary decree for an account will be necessary and thus necessitates the Court calling upon the defendant to render an account. It must appear from the allegations made in the plaint that the defendant is an accounting party and that the plaintiff's claims on the footing that an account has to be taken to ascertain the sum due to him or her. A suit for an account envisaged by Order 20 rule 1 of *The Civil Procedure Rules* is a special form of suit and would not include every case in which accounts have to be looked into in order to ascertain the correctness or otherwise of the amount claimed by the plaintiff. A suit for an account is that suit where the defendant is under an obligation to render an account to the plaintiff. There must be something more than the mere relationship of debtor and creditor and the defendant must stand in some other relation to the plaintiff, such that of an agent or bailee or receiver or trustee or partner or mortgagee where a preliminary decree of rendition of account is necessary before the final decree.

A suit for rendition of an account can be maintained only if a person suing has a right to receive an account from the defendant. Such a right can either be (a) created or recognised under a statute; or (b) based on the fiduciary relationship between the parties as in the case of a beneficiary and a trustee, or (c) claimed in equity when the relationship is such that rendition of accounts is the only relief which will enable the person seeking account to satisfactorily assert his legal right. In such

suits the claimant should file documents to demonstrate that there was a running account between the parties and on the basis of the said account, he or she is claiming recovery of a deficit amount. Such a right to seek an account cannot be claimed as a matter of convenience or on the ground of hardship or on the ground that the person suing does not know the exact amount due to him or her, as that will open the floodgates for converting several types of money claims into suits for accounts, to avoid payment of court fees at the time of institution.

A suit for money which will be found due on taking accounts is instituted against a defendant under a legal obligation to render the accounts which the plaintiff has not been in a position to ascertain. In none of the memoranda of understanding dated 23rd July, 2014 and 22nd October, 2014 respectively (exhibits P. Ex.1 to P. Ex.3) is such a relationship created. The present case, therefore, is not a case of that kind. It is a pure trade transaction of buyer and seller suit for the recovery of a certain fixed amount. For that reason this issue is answered in the negative. The defendants have no legal obligation to account to the plaintiff.

**2nd issue**; whether the plaintiffs are entitled to recover the price of the foodstuffs supplied to the defendants.

It is the plaintiffs' claim that not only did they supply the defendants with 3,350 metric tonnes of maize grain, 2,771 metric tonnes of beans, 5,607.4 metric tonnes of maize flour, 3,720 metric tonnes of rice and 983.29 metric tonnes of cooking oil, but that they also stored and appropriated to the contract; 3579 metric tonnes of beans, 875 metric tonnes of maize flour, 80 metric tonnes of rice, and 1,366.71 metric tonnes of cooking oil. P.W.1 Mr. Christopher Kaijuka testified that at a meeting between the plaintiffs' and defendants' representatives convened on 3rd August, 2015 it was mutually established that the plaintiffs had delivered goods worth US $ 12,988,362 out of which the defendant had paid only US $ 6,109,140 leaving an outstanding balance of US $ 6,879,222. As proof thereof he adduced the record of reconciliation as exhibit P. Ex.4. This was followed by a formal demand letter for that sum dated 14th October, 2015 (exhibit P. Ex.5). The defendants have since neither responded to that letter nor paid the sum due.

When the existence of a debt is fully established by the evidence, the burden of proving that it has been extinguished by payment devolves upon the debtor who offers such defence to the claim of the creditor. It is a settled rule that once the plaintiff makes out a *prima facie* case in his favour, the evidential burden shifts to the defendant to controvert the plaintiff's *prima facie* case; otherwise, judgment must be entered in favour of the plaintiff. Consequently, the evidential burden rests on the defendant to prove payment, rather than on the plaintiff to prove non-payment. The debtor has the evidential burden of showing with legal certainty that the obligation has been discharged by payment. The defendants having failed to meet their burden of proving payment, this issue must be resolved in the plaintiffs' favour. The defendants are jointly and severally indebted to the plaintiffs jointly and severally in the sum of US $ 6,879,222. This amount was established to be due as at 3rd August, 2015 and has not been paid since.

**3rd issue**; whether the plaintiffs are entitled to the rest of the remedies sought.

Apart from the recovery of sums due under an agreement for the supply of foodstuffs, the plaintiffs seek to recover general damages for breach of contract, interest and costs.

i. Interest on the outstanding amount.

A breach of contract is a violation of any of the agreed-upon terms and conditions of a binding contract, and this includes circumstances where an obligation that is stated in the contract is not completed on time. It is a failure, without legal excuse, to perform any promise that forms all or part of the contract. Under section 64 (1) of *The Contracts Act, 2010* where a party to a contract, is in breach, the other party may obtain an order of court requiring the party in breach to specifically perform his or her promise under the contract. For that reason the plaintiff is entitled to recover the amount outstanding.

Upon ascertainable amounts of money being payable at ascertainable times, the persons entitled to receive the money were entitled to interest upon it from the date due interest thereon (see *London, Chatham & Dover Ry. Co. v. South Eastern Ry. Co. (1892) I Ch. 120 at 142-143*). The result, therefore, seems to be that in all cases where, the payment of a just debt has been improperly

withheld, and it seems to be fair and equitable that the party in default should make compensation, it is incumbent upon the Court to allow interest for such time and at such rate as the Court may think right.

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.

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*). Consequently, this having been a commercial transaction, the amount recoverable under specific performance of the contract carries interest at the rate of 8% per annum from 3rd August, 2015 until payment in full.

ii. General damages for breach of contract.

Damages are said to be "at large," that is to say the Court, taking all the relevant circumstances into account, will reach an intuitive assessment of the loss which it considers the plaintiff has sustained. The award of general damages is in the discretion of court in respect of what the law presumes to be the natural and probable consequence of the defendant's act or omission (see James *Fredrick Nsubuga v. Attorney General, H.C. Civil Suit No. 13 of 1993* and *Erukana Kuwe v. Isaac Patrick Matovu and another, H.C. Civil Suit No. 177 of 2003*). A plaintiff who suffers damage due to the wrongful act of the defendant must be put in the position he or she would have been if she or he had not suffered the wrong (See *Hadley v. Baxendale (1894) 9 Exch 341*; *Charles Acire v. M. Engola, H. C. Civil Suit No. 143 of 1993* and *Kibimba Rice Ltd v. Umar Salim, S. C. Civil Appeal No. 17 of 1992*).

General damages are the direct natural or probable consequence of the wrongful act complained of and include damages for pain, suffering, inconvenience and anticipated future loss (see *Storms v. Hutchinson [1905] AC 515; Kabona Brothers Agencies v. Uganda Metal Products & Enamelling Co Ltd [1981-1982] HCB 74* and *Kiwanuka Godfrey T/a Tasumi Auto Spares and Class mart v. Arua District Local Government H. C. Civil Suit No. 186 of 2006*). As a general rule, a person who has suffered loss as a result of another's breach of contract is entitled to be restored to the position that the person would have occupied had the breach not occurred. In special circumstances where the loss did not arise from the ordinary course of things, general damages are awarded only for such losses of which the defendant had actual knowledge (see *Hungerfords v. Walker (1989) 171 CLR 125*).

It so happens that in the instant case the plaintiffs are not entitled to any additional general damages. The common law does not award general damages for delay in payment of a debt beyond the date when it is contractually due (see *President of India v. La Pintada Compagnia Navigacia SA ('La Pintada') [1985] AC 104*). In special circumstances where the loss did not arise from the ordinary course of things, general damages are awarded only for such losses of which the defendant had actual knowledge (see *Hungerfords v. Walker (1989) 171 CLR 125*). The plaintiffs not having proved such special circumstances beyond losses arising from the ordinary course of things when there is delay in payment of a debt beyond the date when it is contractually due, they are not entitled to the award of general damages.

iii. The costs of the suit.

Under Section 27 of *The Civil Procedure Act*, costs are awarded at the discretion of court. In sub-section (2) thereof, costs follow the event, unless for some reasons court directs otherwise (see *Jennifer Rwanyindo Aurelia and another v. School Outfitters (U) Ltd., C.A. Civil Appeal No.53 of 1999*; *National Pharmacy Ltd. v. Kampala City Council [1979] HCB 25*). It was also held in *Uganda Development Bank v. Muganga Constructions [1981] HCB 35*, that a successful party can only be denied costs if it proved that but for his or her conduct, the litigation could have been avoided, and that costs follow the event only where the party succeeds in the main suit. 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 US $ 6,879,222.
b) Interest thereon at the rate of 8% per annum from 3rd August, 2015 until payment in full.
c) The costs of the suit.

Delivered electronically this 4th day of July, 2022

……Stephen Mubiru……..
Stephen Mubiru
Judge,
4th July, 2022.