

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA**  
**(COMMERCIAL DIVISION)**  
**CIVIL SUIT No. 0889 OF 2020**

5   **1. GLORIA KUBAJO**                                }  
     **2. OLOYE VENANCE KOLLEY } .....**       **PLAINTIFFS**

**VERSUS**

10   **FRANCIS DRATE .....**                               **DEFENDANT**

**Before: Hon Justice Stephen Mubiru.**

**JUDGMENT**

a. The plaintiffs' claim;

15   The plaintiffs jointly and severally sued the defendant for the recovery of a sum of £ 19,980.5 and shs. 32,736,224/= being money had and received upon the failure of an agricultural enterprise, general damages, interest and costs. It is the plaintiff's claim that sometime during the year 2017 the plaintiffs and the defendants agreed to undertake a joint farming agricultural enterprise in Northern Uganda. On divers occasions between the year 2017 and 2019, the plaintiffs remitted  
20   sums of money to the defendant for that purpose. Although the defendant sent the plaintiffs documentary evidence of having supplied farm produce to companies in Kampala and Matugga respectively, he never accounted to the proceeds to the plaintiffs despite the numerous demands they made of him and his multiple promises to refund the plaintiff's money, hence the suit.

25   b. The defence to the claim;

Although the defendant was duly served with summons to file a defence, he never filed a defence to the suit. An interlocutory judgment was thus entered against each of the defendants on 3<sup>rd</sup> March, 2021 and the suit was set down for formal proof.

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c. The issues to be decided;

According to Order 15 rule 3 of *The Civil Procedure Rules*, the court may frame issues from all or any of the following materials; - (a) allegations made on oath by the parties, or by any persons present on their behalf, or made by the advocates of the parties; (b) allegations made in the pleadings or in answers to interrogatories delivered in the suit; and (c) the contents of documents produced by either party. The court may at any time before passing a decree amend the issues or frame additional issues on such terms as it thinks fit, and all such amendments or additional issues as may be necessary for determining the matters in controversy between the parties shall be so made or framed (see Order 15 rule 5 of *The Civil Procedure Rules*). The following are therefore the issues to be decided by court, namely;

1. Whether the plaintiffs are entitled to recovery of money advanced to the defendant.
2. Whether the plaintiffs are entitled to the rest of the remedies sought.

15 d. The submissions of counsel for the plaintiffs;

M/s Edroma and Co. Advocates, counsel for the plaintiffs, submitted that the defendant enriched himself from funds remitted by the plaintiffs. The plaintiffs adduced evidence of the said remittances. As further proof of receipt of the sums claimed, the defendant attempted to account to the plaintiffs by sending them documents showing he had made supplies of farm produce. The plaintiffs were to receive the proceeds of the business but to-date the defendant has never remitted the proceeds. As a result the plaintiffs have not obtained any benefit from the funds, as a result of which the defendant has been unjustly enriched. The plaintiffs are therefore entitled to a refund of the money, interest thereon, and the costs of the suit.

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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

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claimed. An suit for money had and received is a form of suit used by claimants who seek to recover from the defendant money which had been paid to the defendant: (i) by mistake; (ii) upon a consideration which has totally failed; (iii) as a result of imposition, extortion or oppression; or (iv) as the result of an undue advantage which had been taken of the claimant's situation, contrary to the laws made for the protection of persons under those circumstances, or where an undue advantage was taken of plaintiffs' situation whereby money was exacted to which the defendant had no legal right.

Generally, a claim for money had and received seeks to restore money where equity and good conscience require restitution; it is not premised on wrongdoing, but seeks to determine to which party the money rightfully belongs; and it seeks to prevent unconscionable loss to the payer and unjust enrichment to the payee. A cause of action for money had and received is not premised on wrongdoing, but looks only to the justice of the case and inquires whether the defendant has received money that rightfully belongs to another. In short, it is an equitable doctrine applied to prevent unjust enrichment. The elements for a successful "money had and received" claim are: (a) the defendant has, or had, possession of money; and (b) the money belongs to the plaintiff in equity and good conscience. Being a restitutionary cause of action, the plaintiff must prove; (i) that the defendant received money intended to be used for the benefit of the plaintiff; (ii) that the money was not used for the plaintiff's benefit; and (iii) that the defendant has not given the money to the plaintiff.

**1<sup>st</sup> issue;**     whether the plaintiffs are entitled to recovery of money advanced to the defendant.

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. A claim for money had and received is quasi-contractual in nature and is a cause of action for a debt not evidenced by a written contract between the parties. However, the plaintiffs rely on evidence of remittances sent to the defendant from the year 2017 to 2019 (exhibits P. Ex.2A - P. Ex.2J). This is buttressed by invoices sent to them by the defendant as a purported demonstration of how he had applied the funds by making supplies to a company in Kampala on 3<sup>rd</sup> May, 2019 and another in Matugga on 18<sup>th</sup> September, 2019 (exhibits P. Ex.3 and P. Ex.4 respectively).

A suit for money had and received is based upon an implied promise which the law creates to restore money which the defendant in equity and good conscience should not retain. The law implies the promise from the receipt of the money to prevent unjust enrichment. The measure of the liability is the amount received. Recovery is denied in such cases unless the defendant himself has actually received the money. P.W.1 Mr. Oloye Venance Kolley testified that in total a sum of £ 19,980.5 and shs. 32,736,224/= was remitted to the defendant (exhibits P. Ex.1 is a tabulation of the remittances). The defendant was under an obligation to send the proceeds of the sales of produce purchased with that money, to the plaintiffs. The plaintiffs have since made numerous demands for the proceeds to no avail. Where there is a total failure of consideration in relation to a particular sum, the right to sue for the recovery of that amount arises.

Recovery under a “money had and received” claim focuses on whether retaining the money claimed would unjustly enrich the defendant, not the parties’ agreement or intent. The issue is whether the defendant received money that rightfully belonged to the plaintiff. When it is established by the evidence that the defendant has, or had, possession of money which belongs to the plaintiff, the burden of proving that equity and good conscience does not demand a refund devolves upon the defendant 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 that equity and good conscience does not demand a refund, rather than on the plaintiff to prove otherwise. The defendant has the evidential burden of showing with legal certainty that equity and good conscience does not demand a refund. The defendant’s temporary right to retain the money was conditional on performance. It is the performance by the payee that is the essential element in the test to determine whether the payee has the right to retain the money. The defendant having failed to meet his burden of proof, this issue must be resolved in the plaintiffs’ favour. The defendant is indebted to the plaintiffs jointly and severally in the sum of £ 19,980.5 and shs. 32,736,224/=. The defendant is indebted to the plaintiffs in in that sum of money had and received by the defendant for the use of the plaintiffs.

**2<sup>nd</sup> 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. In a cause of action for money had and received, the plaintiff can recover actual damages, that is the amount of money the defendant holds that actually belongs to the plaintiff; exemplary damages when fraud and malice are shown; injunctive relief; interest; and litigation costs. These losses will be recoverable, subject to the principles governing all claims for damages for breach of contract, such as remoteness, failure to mitigate and so forth.

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) 1 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. In the nature of things the proof required to establish a claimed interest loss will depend upon the nature of the loss and the circumstances of the case. The loss may be the cost of borrowing money. That cost may include an element of compound interest. Or the loss may be loss of an opportunity to invest the promised money. Here again, where the circumstances require, the investment loss may need to include a compound element if it is to be a fair measure of what the

plaintiff lost by the late payment. Or the loss flowing from the late payment may take some other form. Whatever form the loss takes the court will, here as elsewhere, draw from the proved or admitted facts such inferences as are appropriate. That is a matter for the trial judge. There are no special rules for the proof of facts in this area of the law.

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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*).

The court has a common law jurisdiction to award interest, simple and compound, as damages on claims for non-payment of debts as well as on other claims for breach of contract and in tort. 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. A restitutionary award at common law should include restoration to the claimant of the time value of the money he transferred to the defendant and which the defendant enjoyed by having the money in his possession (see *Sempra*

*Metals Ltd v. Inland Revenue Commissioners and another* [2007] 3 WLR 354; [2008] 1 AC 561; [2007] 4 All ER 657).

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 on the sum of shs. 32,736,224/= at the rate of 23% per annum and on the sum of £ 19,980.5 at the rate of 8% per annum, both from 1<sup>st</sup> October, 2019 when the payment would have reasonably been due following the defendant’s purported supplies, 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*).

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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. An unparticularised and unproved claim simply for damages will not suffice. General damages are not recoverable. The common law does not assume that delay in payment of a debt will of itself cause damage. Loss must be proved. 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 and *London, Chatham and Dover Railway Co v. South Eastern Railway Co* [1893] AC 429, [1892] 1 Ch 120). 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 subsection (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;

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- a) The outstanding sum of shs. 32,736,224/=
- b) The outstanding sum of £ 19,980.5.
- c) Interest on (a) above at the rate of 23% per annum and on (b) above at the rate of 8% per annum, both from 1<sup>st</sup> October, 2019 until payment in full.
- 10 d) The costs of the suit.

Delivered electronically this 5<sup>th</sup> day of July, 2022

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.....Stephen Mubiru.....  
Stephen Mubiru  
Judge,  
5<sup>th</sup> July, 2022.