THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL SUIT No. 0319 OF 2019

JACQUILINE PIMER ……………………………………………………… PLAINTIFF

VERSUS

1. **ISAAC BAKAYANA }**
2. **SYLVESTER HENRY WAMBUGA } …………… DEFENDANTS**
3. **ROBERT BAUTU }**
4. **PAUL KUTEESA all T/a ARCADIA ADVOCATES }**
5. **FRANCIS GIMARA } ………… THIRD PARTY**

Before: Hon Justice Stephen Mubiru.

JUDGMENT

a. The plaintiffs' claim;

The 1st to 4th defendant are advocates practicing law under the name and style of M/s Arcadia Advocates. Until 28th December, 2018 the 3rd party too was a partner in the same law firm. The plaintiff is a lawyer specialising in international trade and regional integration. The plaintiff's claim against the defendants jointly and severally is for recovery of US $ 12,000 being the 40% commission on the profit earned by the law firm when it executed a contract with the United Nation's International Organisation for Migration (IOM), special damages of US $ 2,400, general damages for breach of contract, interest and costs.

The plaintiff's claim is that sometime during the year 2015 she was engaged by the law firm in the preparation and presentation of bids for two projects offered by the United States Agency for International Development (USAID) known as the East Africa Trade and Investment Hub (EATIH). The law firm's bids were successful. By an agreement dated 20th July, 2016 between her and the law firm, the plaintiff was engaged as a legal consultant and project manager, of both the Uganda and Tanzania projects. While she was paid for the work she performed in respect of the Uganda project, she was never paid for the Tanzanian project. The plaintiff eventually entered into a consent judgment with the 3rd party by which she received part-payment for the work she accomplished on the two projects, thereby releasing him from liability.

It is the plaintiff's claim that her terms of reference were contained in a Key Performance Indicator form she executed with the firm on 26th January, 2017 where she was designated as a Project Manager – Legal Consultancy and Emerging Areas. By virtue of that document, she was entitled to 40% of the profits earned by the firm on any project she brought in and executed with the firm, inclusive of sourcing the project, preparation of its bid or proposal, using her network to secure it for the firm, and its implementation from the beginning to the end. Sometime during February, 2017 the plaintiff learnt that the IOM had issued a call for bids by individuals for a comparative study of existing gaps with a view to the harmonisation of immigration and employment laws and policies for the East African Partner States at a consultancy fee of US $ 42,000. Thorough the plaintiff's efforts, the IOM accepted bids by firms and eventually on 20th March, 2017 the firm won the award.

Work on that project began in April, 2017 and was eventually concluded in June, 2019. The plaintiff individually executed approximately 90% of the project's deliverables. Out of the US $ 42,000 paid to the firm, expenses totalled US $ 12,000 with the result that the form earned a profit of US $ 30,000. The plaintiff is entitled to US $ 12,000 being 40% of that profit on the project, as opposed to the profits of the firm. Although the consultancy agreement between the IOM and the firm ended in November, 2018 the plaintiff continued to execute some tasks that involved her in personal expenditure of US $ 400 per month from December, 2018 to May, 2019 hence her claim of US $ 2,400 as special damages. She was not privy to the firm's Partnership Deed and its contents were never brought to her attention. As Managing Partner at the material time, the 3rd party had the capacity to bind the firm. She was never an employee of the firm. Despite her demands for payment and efforts thereafter at a mediated settlement, the defendants have refused to pay the plaintiff her entitlement, hence the suit. She entered into a consent judgment with the 3rd party after the suit was filed, which was a partial settlement of her claim in respect of the USAID East Africa Trade and Investment Hub (EATIH) Tanzania project, whose contract was managed by the 3rd party. The plaintiff has not engaged in competitive practice with the firm.

b. <u>The defence to the claim</u>;

In their joint written statement of defence, the defendants contend that the affairs of the firm are governed by a Partnership Deed executed sometime during the year 2014. Under that agreement, the partners put in place a reward system for the sharing of the profits of their legal practice. Under that system, employees of the firm would share 10% of the profits declared by the firm. In her dealings with the third party for the period from June, 2015 to June, 2016 in her consultancy work, the plaintiff never sought the approval of the rest of the partners. Contrary to the Partnership Deed the consultancy agreement between the plaintiff and the third party was never placed before the rest of the partners for approval. The plaintiff was only introduced by the third party to the firm as the person to be in charge of al project assignment of the firm at a monthly salary of US $ 2,000. It is only after she filed this suit that the defendants became aware of the existence of the consultancy agreement between her and the third party. Even then, the agreement did not provide her with any entitlement to a commission and stipulated that she was a salaried employee of the firm. For the duration of her employment, her monthly salary was raised from the initial US $ 1,880 at the commencement of the project consultancy work in July, 2016 to US $ 4,400 by the end pf her employment in June, 2018. She executed her work as an employee of the firm and as part of a team. She never sourced the project, prepared the bid nor used her networks to enable the firm secure the project and she was paid all her emoluments in full. She was paid a total salary of US $ 66,000.

The Key Performance Indicators form that the plaintiff executed with the 3rd party was executed without authority and in contravention of the firm's Partnership Deed, since the firm only got to know about it in December, 2018 and never approved it. Any liability arising therefrom is that of the 3rd party alone, and not the firm. No one in the firm was ever paid a 40% commission. Upon termination of the contract with the IOM, the firm ceased to owe the plaintiff any contractual obligations. Whatever expenses she may have incurred thereafter are not recoverable from the firm. The firm has never declared a profit. In the alternative, based on the accounts available, the plaintiff's entitlement at the claimed 40% rate would be only US $ 6,345. In any event, the plaintiff's consent judgment with the 3rd party settled her entire claim. By the time of the 3rd party's resignation from the firm sometime in December, 2018, he and the plaintiff were engaged in a competitive practice with the firm, under the name and style of M/s ALP Advocates and M/s ALP Consultancy Services Limited.

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

At the scheduling conference, the parties agreed on following issues for determination by court, namely;

1. Whether the plaintiff has any cause of action against the defendants.
2. Whether in view of the consent judgment between the plaintiff and the 3rd party, the plaintiff's suit is still maintainable in law against the defendants.
3. Whether there is a valid and enforceable Key Performance Indicator Agreement to pay a commission to the plaintiff.
    a. If so, whether the contract is binding on the defendants.
    b. If so, whether the plaintiff performed the terms of the agreement to be entitled to a commission.
    c. If so, how much money is the plaintiff entitled to as commission?
4. Whether the defendants are entitled to any contribution or indemnity from the 3rd party in the event that the plaintiff's claim is successful?

d. <u>The final submissions of counsel for the plaintiff;</u>

If counsel for the plaintiff M/s Amber Solicitors and Advocates, filed their final submissions, then they were not brought to my attention. Consequently the judgment has been written without them.

e. <u>The final submissions of counsel for the defendants.</u>

M/s Arcadia Advocates, counsel for the 1st to 4th defendants, submitted that the plaintiff has no cause of action against any of the defendants. This is because the Objective Setting Form (Key Performance Indicators Form) upon which she relies was not signed in the ordinary course of business of the firm. There is no provision in the firm's Partnership Deed that empowered the 3rd party to sign such a document. It was a private agreement between the plaintiff and the 3rd party, the plaintiff fully knowing at all material time that the 3rd party had no authority to sign such an agreement on behalf of the firm. It is only by her email of 28th November, 2018 that the plaintiff sought to bring the existence of the profit-share agreement to the attention of the rest of the partners. The plaintiff's Legal Consultancy Agreement lapsed on 14th November, 2018. She was paid her salary in full and at a rate that was higher than that provided for by the contract. There was never any discussion over or approval of the 40% commission on profit claimed by the plaintiff. The period specified in the Objective Setting Form lapsed on 31st December, 2018 while the 3rd party was still a partner. When on 18th December, 2019 the plaintiff executed the consent judgment with the 3rd party, in light of the joint contractual liability of partners under the law, she effectually discharged the rest of the partners of her claim.

There is no agreement between the plaintiff and the defendants after November, 2018 on basis of which any contractual liability could have been incurred. The plaintiff did not adduce in evidence any travel document after November, 2018 to back up her claimed expenditure. There is no proof to back the claim that the plaintiff performed her obligations specified in the Objective Setting Form, especially the requirement to meet all targets by 30th June, 2017. Therefore she is not entitled to any commission. When the 3rd party bound the firm to pay the plaintiff 40% of its profits, he acted outside the ordinary course of the business of the firm. This gives an implied right to the firm to claim an indemnity from him. The Partnership Deed specified the mode of sharing profits. Never before has anyone taken a 40% share of the profit of the firm. The plaintiff having agreed to be an employee of the firm, her only entitlement, apart from salary, was a commission shared in accordance with The Partnership Deed. The suit should therefore be dismissed with costs.

f. The final submissions of the 3rd party.

M/s MMAKS Advocates, counsel for the 3rd party, submitted that the defendants have no express nor implied contractual basis upon which to claim an indemnity from him. Whatever the 3rd party did was in the firm's course of business as the then Head of Legal Consultancy and Emerging Areas Department, save that the defendants opted to destroy evidence in proof thereof, which fact should attract an adverse inference against them. Having received the benefits of the 3rd party's engagement of the plaintiff, the defendants cannot seek to renege from the attendant obligations;

they cannot approbate and reprobate the transaction. The IOM consultancy services agreement, following an extension, ended during the year, 2019. Both the bidding and execution of that contract was preceded by the plaintiff's execution of "The Objective Setting Form" (Key Performance Indicators Form) dated 26th January, 2017. The partnership deed has no provision for indemnity. It is the defendants who received and took benefits of all payments received on the IOM project, to the exclusion of the 3rd party. At the firm meeting of 28th August, 2018 the 3rd party reported a profit of US $ 20,000 on the EATIH project. Whereas the plaintiff's claim is for a commission owed under her contract fir consultancy services, the claim by the defendants against the third party is that of breach of the partnership deed. The Commission claimed by the plaintiff was a negotiated arrangement outside the rewards system contained in the Partnership Deed. The firm had the practice and policy of payment commissions on invoices as opposed to percentages of the firm's profits. The liability to pay a profit arose in 2019 at the close of the project, after the third party had ceased to be a partner in the firm. The claim against the 3rd party should be dismissed with costs.

g. <u>The decision;</u>

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 liable for the relief claimed. Generally, the plaintiff in the instant suit must show: (i) the existence of a contract and its essential terms; (ii) a breach of a duty imposed by the contract; and (iii) resultant damages.

1st issue; <u>whether the plaintiff has any cause of action against the defendants</u>.

A cause of action was defined as a bundle of facts which if taken together with the law applicable to them give the plaintiff a right to a relief against the defendant (see *Advocate General v. Major General Tinyefuza, Constitutional Petition No.1 of 1997*). It is alternatively defined as every fact which is material to be proved to enable the plaintiff succeed or every fact which if denied, the plaintiff must prove in order to obtain judgment (see *Cooke v. Gull, LR 8E.P 116* and *Read v.*

Brown 22 QBD 31). The pleadings must disclose that; the plaintiff enjoyed a right known to the law, the right has been violated, and the defendant is liable (see *Auto Garage and others v. Motokov (No.3) [1971] E.A 514*). Whether or not a plaint discloses a caution of action must be determined upon perusal of the plaint alone together with anything attached so as to form part of it (see *Kebirungi v. Road Trainers Ltd and two others [2008] HCB 72*). Order 7 rule 11 (a) of *The Civil Procedure Rules*, requires rejection of a plaint where it does not disclose a cause of action.

What is required is a statement of the essential facts constituting the right and its infringement which entitles a person to sue the wrongdoer or defaulter or any one liable for the infringement. A cause of action is said to consist of two parts, legal theory (the legal wrong the plaintiff claims to have suffered) and the remedy (the relief a court is asked to grant). The plaintiff's claim is for general and special damages arising from a breach of contract. A breach of contract is a violation of any of the agreed-upon terms and conditions of a binding contract. The plaint in the instant suit must show: (i) the existence of a contract and its essential terms; (ii) the plaintiff performed her part of the contract; (ii) a breach of obligations imposed on the defendants by the contract; and (iii) resultant damages caused by the defendant's breach.

An act of a firm means any act or omission by all the partners or by any partner or agent of the firm which gives rise to a right enforceable by or against the firm. It, therefore, means that any act or omission which creates a right enforceable is an act of the firm. It may be a contract or a wrongful act, for example, fraud, negligence, misapplication of money, improper employment of trust property or any tort. All the partners are liable as much for the wrongful act of any partner as they would be liable for a contract entered into by one of them on behalf of the firm. Thus a third party, if he or she so likes, can bring a suit against any one of them severally or against any two or more of them jointly.

According to section 9 (1) of *The Partnership Act, 2 of 2010* a partner in a firm is liable jointly with the other partners for all debts and obligations of the firm incurred while he or she is a partner. Joint liability means that more than one party is responsible legally for paying back a debt or otherwise covering a liability. The obligation of two or more debtors to perform the same obligation or to pay the same debt is a joint obligation. Joint liability applies whether or not the obligation is indivisible. Each of the debtors is bound *in solidum* (for the whole and not a proportional part). The plaintiff may choose to sue one party for the entire claim, sue more than one person jointly, or sue the parties consecutively if the full amount of the claim is not fully paid by the first defendant. It is however generally desirable for the plaintiff to bring proceedings (whether for recovery of a debt or for specific performance) against all co-obligors.

A debt may be wholly discharged by a one party releasing the other from its obligations in writing (release), or by the parties agreeing to compromise a contractual claim on agreed terms (accord and satisfaction). A debt is usually discharged by satisfaction, and when a debt of any kind is paid in full by any person, the creditor's rights against the debtor are at an end. Where liability is joint therefore, payment in full by one discharges the others (see *Bailey v. Haines [1850] 15 Q.B. 533*). Any part payment made by one defendant toward the debt owed to the plaintiff satisfies the obligation of the others toward the plaintiff, to the extent of such payment or set-off.

Since joint liability creates one obligation, release of one of the joint debtors by accord and satisfaction discharges all to the extent of such accord and satisfaction. Any joint debtor, including a partner, may compromise with a creditor, and a discharge to the joint debtor by the creditor is as effectual as if made to all debtors, but a partial discharge does not relieve the other joint debtors. The same applies if one joint debtor concludes a settlement with the creditor. A release of one debtor expressly or impliedly reserving rights against others is in fact no release, but rather in the nature of a covenant not to sue (see *Folly v. Forbes [1820] 4 Moore (C.P.) 448* and *Rice v. Reed [19001 1 Q.B. 54*). Therefore where in a suit for damages against several partners, the plaintiff compromises the suit with one of them, and undertakes to withdraw the suit as against him, the release does not discharge the other partners and the suit might proceed as against them. The issue therefore is answered in the affirmative; the plaintiff has and the plaint indeed discloses a cause of action against the defendants, despite the consent judgment entered into between the plaintiff and the 3rd party on 20th December, 2019.

2nd issue; <u>whether in view of the consent judgment between the plaintiff and the 3rd party, the plaintiff's suit is still maintainable in law against the defendants</u>.

Persons who have entered into partnership with one another are called individually "partners" and collectively "a firm," and the name under which their business is carried on is called the "firm name." Thus a firm has not a legal entity, and it is collective term for the partners who have entered into a partnership with one another. In other words, a firm does not have any existence away from its partners. A firm is not a legal entity in the sense of a company and when a suit is filed in or against the name of the firm it is in reality a suit by or against all the partners of the firm (see Order 30 of *The Civil Procedure Rules*). The suit must proceed as if the partners had been named as plaintiffs or defendants in the suit, even though the proceedings would nevertheless be continued in the name of the firm (see *Western National Bank of City of New York v. Perez, Trisanna and Co. (1891) 1 QB 304 at p. 314* and *In re, Frances Handford and Co. Ex parte, Frances Handford. (1899) 1 QB 566*). A suit by or in the name of a firm is thus really a suit by or in the name of all its partners. In a suit brought against a partnership, it is not necessary to name or serve all the partners to support a judgment against the partnership.

While the firm is incurring a liability it can be assumed that all the partners were incurring that liability and so the partners remain liable jointly and severally for all the acts of the firm. The liability of all the partners is not only joint and several but is also unlimited. It is the discretion of the third party to bring a suit against some or all the partners. A decree in favour of or against a firm in the name of the firm has the same effect as a decree in favour of or against the partners.

A consent Judgment is a judgment of the court in terms which have been contractually entered into by parties to the litigation, validated by Court under Order 50 rule 2 and Order 25 Rule 6 of *The Civil Procedure Rules* (see *Brooke Bond Liebeg (T) Ltd v. Mallya [1975] E.A 266*). A consent judgment once recorded or endorsed by the Court, becomes the judgment of the Court and binding upon the parties. It is however unique in that it is not a judgment of the Court delivered after hearing the parties. It is an agreement or contract between the parties. A judgment entered pursuant to a settlement agreement need not be limited to relief the court could grant on the merits. So long as the pleadings state a claim within the Court's subject matter jurisdiction and the settlement is within the general scope of the case made by the pleadings, the judgment can grant whatever relief is agreed to by the parties. Subject to the rules of agency, the court may render judgment against the partnership and / or against the partners who actually signed the consent judgment, but may not award a personal judgment or execution against any partner who never signed the consent judgment.

There can be no doubt that in the course of the business of the firm, the act of one partner is the act of all. There is virtual authority for that purpose, mutually given by entering into partnership, and in everything that relates to their usual dealings, each must be considered as the agent of the other. But this principle cannot be extended further to embrace objects out of the course of the business of the firm. An agent's authority is presumed to be coextensive with the business entrusted to his care. An agent is limited in his authority to such contracts and acts as are incident to the management of the particular business with which he is entrusted. If the act of a partner is not apparently for carrying on the partnership business, such act of a partner binds the partnership only if authorised or ratified by the other partners.

A consent Judgment is not a document signed in the regular course of the business of the firm. It is therefore only binding upon the partner that signs it. To be binding on the firm, a consent judgment must be made in the firm name, and purport to be the act of the firm signed either by previous authority given to the partner signing or by subsequent ratification. If the partner, though authorised to execute a consent judgment in the partnership name, does in fact make it in his or her own name only, it will bind himself or herself only, and will not operate so as to discharge the other partners.

For example in *Long v. Lopez 115 S.W.3d 221 (Texas App. 2003),* Wayne A. Long (the plaintiff at the trial court] sued the appellant Sergio Lopez to recover from him, jointly and severally, his portion of a partnership debt that Long had paid. After a bench trial, the trial court ruled that Long take nothing from the appellant. Long testified that in September 1996, Long, Lopez, and Don Bannister entered into an oral Partnership Deed in which they agreed to be partners in Wood Relo ("the partnership"), a trucking business located in Gainesville, Texas. Wood Relo located loads for and dispatched approximately twenty trucks it leased from owner-operators. The trial court found that Long, Lopez, and Bannister formed a partnership, Wood Relo, without a written Partnership Deed. Lopez did not contest these findings on appeal.

Long further testified that to properly conduct the partnership's business, he entered into an office equipment lease with IKON Capital Corporation ("IKON") on behalf of the partnership. The lease was a thirty-month contract under which the partnership leased a telephone system, fax machine, and photocopier at a rate of $ 577.91 per month. The lease agreement was between IKON and Wood Relo; the "authorised signer" was listed as Wayne Long, who also signed as personal guarantor. Long stated that all three partners were authorised to buy equipment for use by the partnership. He testified that the partners had agreed that it was necessary for the partnership to lease the equipment and that on the day the equipment was delivered to Wood Relo's office, Long was the only partner at the office; therefore, Long was the only one available to sign the lease and personal guaranty that IKON required. [The partnership disintegrated when Bannister left and he later filed for bankruptcy] Long testified that when Bannister left Wood Relo, the partnership still had "quite a few" debts to pay, including the IKON lease.

Eventually, IKON did repossess all the leased equipment. Long testified that he received a demand letter from IKON, requesting payment by Wood Relo of overdue lease payments and accelerating payment of the remaining balance of the lease. IKON sought recovery of past due payments in the amount of $ 2,889.55 and accelerated future lease payments in the amount of $ 11,558.20, for a total of $ 14,447.75, plus interest, costs, and advocate's fees, with the total exceeding $ 16,000. Long testified that he advised Lopez that he had received the demand letter from IKON. Ultimately, IKON filed a lawsuit against Long individually and d/b/a Wood Relo, but did not name Lopez or Bannister as parties to the suit. Through his counsel, Long negotiated a settlement with IKON for a total of $ 9,000. An agreed judgment was entered in conjunction with the settlement agreement providing that if Long did not pay the settlement, Wood Relo and Long would owe IKON $12,000.

After settling the IKON lawsuit, Long's counsel sent a letter to Lopez and Bannister regarding the settlement agreement, advising them that they were jointly and severally liable for the $9,000 that extinguished the partnership's debt to IKON, plus advocate's fees. The trial court determined that

Long was not entitled to reimbursement from Lopez because Long was not acting for the partnership when he settled IKON's claim against the partnership. The court based its conclusion on the fact that Long had no "apparent authority with respect to lawsuits" and had not notified Lopez of the IKON lawsuit.

On appeal it was held that the trial court erred in determining that Long did not have authority to act for Wood Relo in defending, settling, and paying the partnership debt owed by Wood Relo to IKON. *The Texas Revised Partnership Act* provided that a partner winding up a partnership's business was authorized, to the extent appropriate for winding up, to prosecute and defend civil, criminal, or administrative suits in the name of and for and on behalf of the partnership. Since the appellant accrued the IKON debt on behalf of the partnership when he secured the office equipment for partnership operations, and he testified that he entered into the settlement with IKON when the partnership was in its final stages and the partners were going their separate ways. Accordingly, the appellant was authorized by the Act to settle the IKON lawsuit on behalf of the partnership.

Lopez was therefore jointly and severally liable to IKON for $ 9,000, which represents the amount Long paid IKON to defend and extinguish the partnership debt. The court further held that Lopez was jointly and severally liable to Long for $ 1725, which represents the amount of advocate's fees Long paid to defend against the IKON claim, and that Long was entitled to recover from Lopez reasonable and necessary advocate's fees in pursuing the instant lawsuit. The decision of the trial court was reversed and judgment entered that Lopez owed Long $ 5362.50 (one-half of the partnership debt to IKON plus one-half of the corresponding advocate's fees). The case was remitted to the trial court for calculation of the amount of advocate's fees owed by Lopez to Long in the instant lawsuit, and calculation of pre and post-judgment interest.

Unlike the case cited above where the consent judgment was made in the firm name, and the partner purported to be acting on behalf of the firm as duly authorised by the Act when winding up a partnership's business, in the instant case, by signing the consent judgment, the third party was not carrying on in the usual way, the business of the partnership. He neither signed the consent judgment in the firm name, nor purported to be acting on behalf of the firm. He could not bind the partnership through a unilateral act which was not in the usual business of the partnership and not executed in its name. The third party simply compromised with the plaintiff on his individual obligation. In light of the expression contained in that consent judgment (exhibit P. Ex.24) that the suit as against the 3rd party (as 5th defendant then) was settled "amicably and in good faith without any admission by either party, to any claim in the suit…" the plaintiff's acceptance was good either as a release or as accord and satisfaction by the third party, and not as a settlement of any part of the claim made against the firm in the suit. The issue therefore is answered in the affirmative; despite the consent judgment entered into between the plaintiff and the 3rd party on 20th December, 2019 the plaintiff's suit is still maintainable in law against the defendants.

3rd issue; <u>whether there is a valid and enforceable Key Performance Indicator Agreement to pay a commission to the plaintiff</u>.

A legal contract is an agreement between two parties that creates mutual, legally enforceable obligations. A contract can be in writing, be made orally, be inferred by conduct or formed using a combination of all three. A valid contract requires that all the following exist between the parties: (i) communication of an offer; (ii) communication of mutual acceptance of the terms; (iii) capacity to contract; (iv) valid consideration; (v) legality of the subject matter; and (vi) mutual intent that the contract be legally binding. The most basic rule of contract law is that a legal contract exists when one party makes an offer and the other party accepts it. The core of a legal contract is the agreement between the parties. It is trite that multiple writings relating to each other can be combined to show that a single contract exists. Any memorandum or writing that contains the necessary elements will suffice.

In the instant case, the plaintiff's claim is founded on two contractual documents; "The Legal Consultancy Agreement" dated 20th July, 2016 (exhibit P. Ex.25) and "The Objective Setting Form" (Key Performance Indicators Form) dated 26th January, 2017 (exhibit P. Ex.26). Both were executed by the 3rd party in his capacity then Managing Partner and as Head of department, The Legal Consultancy and Emerging Areas Department, respectively. The parties entered into the contract of their own free will, with knowledge of the facts, and with the capacity to make a contract. On the face of it, the latter is a valid and enforceable Key Performance Indicator Agreement.

i. <u>If so, whether the contract is binding on the defendants</u>.

As against third parties, each partner is personally liable (jointly and severally with the others) for the debts of the business regardless of which partner incurred the liability. According to section 9 (1) of *The Partnership Act, 2 of 2010* a partner in a firm is liable jointly with the other partners for all debts and obligations of the firm incurred while he or she is a partner.

A partnership is a relationship between partners who agree to share the profits of the business. The business can be carried on by all of them or any of them acting for all. The law of agency applies to partnership law. Mutual agency between the partners is one of the essentials to create partnership. Every partner is an agent of the partnership for the purpose of its business. An agent can make contracts on behalf of a principal under three types of authority: express, implied, and apparent. Express authority is that explicitly delegated to the agent, implied authority is that necessary to the carrying out of the express authority, and apparent authority is that which a third party is led to believe has been conferred by the principal on the agent, even though in fact it was not or it was revoked. Consequently, every partner is an agent of the firm and his or her other partners for the purpose of the business of the partnership (see section 5 (1) of *The Partnership Act, 2 of 2010*). Hence, a partner embraces the character of both, the principal and the agent. Therefore, if a partner acts for himself or herself and in his or her own interest in the common concern of the partnership, then he or she is acting as a principal. On the other hand, if he or she acts for and in the interest of his or her partners, then he or she is acting as an agent. It was observed by Lord Wensleydale in *Cox v. Hickman (1860) 8 HLC 268*;

> A man who allows another to carryon trade, whether in his own name or not, to buy and sell, and to pay over all the profits to him, is undoubtedly the principal, and the person so employed is the agent, and the principal is liable for the agent's contracts in the course of his employment. So if two or more persons agree that they should carry on a trade and share the profits of it, each is a principal, and each is an agent for the other, and each is bound by the other contract in carrying on the trade, as much as a

single principal would be by the act of an agent, who was to give the whole of the profits to his employer.

Each partner is both an agent of his or her fellow partners and, as a member of the partnership, a principal. In a general partnership, each partner is an agent of the partnership for the purpose of its business; each partner's acts that apparently carry on partnership business in the usual way bind the partnership. Every partner having the capacity to act as firm's agent, the act done by any partner renders the whole firm liable towards a third party. The whole of the firm, which means all the partners of the firm become liable for an act of the firm done by any partner.

The liability of all the partners is joint and several even though the act of the firm may have been done by one of them. The act of a partner who does any act for the purpose of carrying on the ordinary course of business of the firm binds the firm and his or her partners, unless the partner so acting does not have authority to act for the firm in the particular matter, and the person with whom the partner is dealing; - (a) knows that the partner has no authority; or (b) does not know or believe him or her to be a partner (see sections 5 (2) and 8 of *The Partnership Act, 2 of 2010*). Therefore an act done by a Partner (within the ordinary course of partnership business) will bind the firm, even if the partner is acting outside the authority granted by the firm, unless the third party concerned actually know of this lack of authority. If it has been agreed between the partners that any restriction shall be placed on the power of any one or more of them to bind the firm, no act done in contravention of the agreement is binding on the firm with respect to persons having notice of the agreement. Thus, to restrict a partner's agency authority to do acts that apparently carry on partnership business in the usual way, the partnership has the burden of communicating the restriction to third parties.

The act of a partner which is done to carry on, in the usual way, business of the kind carried on by the firm, binds the firm (see *Dinesh Kotak v. Jagdish Kotak Royal Bank of Scotland Plc (Third Party) Bowbridge Ltd [2017] EWHC 1821 (Ch*). What is necessary to carry on the partnership business in the usual way is the test of a partner's implied authority to bind the firm. The question whether a given act can or cannot be said to be done in carrying on a business in the way in which it is usually carried on must evidently be determined by the nature of the business, and by the practice of persons engaged in it (see *Lal Chand Sharma trading as Regal Provision Stores v. Bush*

Mills [1957] 1 EA 404). The test for the ordinary course of business is whether the act or omission done was necessary to carry on the partnership business in the ordinary course or the usual way (see *Vijay Kumar Saidha & another v. Tribhuvan Gordhan Barkrania & 2 others [2015] eKLR*).

Therefore an act or instrument relating to the business of the firm done or executed in the firm-name, or in any other manner showing an intention to bind the firm, by any person thereto authorised as a partner, is binding on the firm and all the partners (see section 6 (1) of *The Partnership Act, 2 of 2010*). When a partner has implied authority to do something, the firm will be bound by such an act even though the partner may be acting in fraud of his co-partners. This is because the principal is liable for the act of the agent if the act is within the scope of the agent's authority even though the agent may be acting for his personal gain and the principal may not be knowing about the transaction (see *Lloyd v. Grace, Smith & Co [1912] AC 716* and *Hamlyn v. John Houston & Co [1903] 1 KB 8*). Third parties can always rely on the assumption that since a partner is an agent of the firm, he or she may be having an authority to do all what is necessary to carry on the business of the firm. The firm is not liable only when the act is for a purpose apparently not connected with the firm's ordinary course of business.

For example in *Mercantile Credit Company Limited v. Garrod [1962] 3 All ER 1103* a firm consisting of two partners Parkin and Garrod was carrying on garage business which was concerned with letting lock-up garage and repairing cars. Parkin was an active partner whereas Garrod was a sleeping partner. Sale of second-hand cars could be impliedly considered to be the business of the firm although no express authority had been given for the same. Parkin, without the authority of his co-partner Garrod, sold a car to the Mercantile Credit Company Ltd. Over which he had no title and received a sum of £ 700 for the same. On knowing that the seller had no title to the car, the company filed a suit against Garrod to claim £ 700 from him. It was held that the sale of the car to the company by one of the partners was an act for carrying on, in the usual way, the business of the kind carried on by the firm and, therefore, for such an act, which was within his implied authority, the other partner of the firm could be made liable.

To bind the rest of the partners of the firm, it has to be shown that the concerned act was done in a usual way to carry on the business of the kind carried on by the firm. The act or instrument done or executed by a partner on behalf of the firm must have been done or executed in the firm name, or in any other manner expressing or implying an intention to bind the firm. When the act or instrument is for a purpose apparently not connected with the firm's ordinary course of business, the firm is not bound. Similarly when a partner does an act or executes an instrument in his or her own name only and not on behalf of the firm, and there appears to be no express or implied intention to bind the firm, the firm will not be bound. Partners, like other agents, do not act on behalf of their fellow partners when they frolic on their own in non-partnership activity.

In the instant case it was the testimony of D.W.1 Robina Kyoshabire that on basis of the available email exchanges, both the 3rd party Mr. Francis Gimara and the 2nd defendant Mr. Sylvester Henry Wambuga were involved in the execution of the Legal Consultancy Agreement dated 20th July, 2016 between the plaintiff and the firm. The plaintiff testified that she drafted it and the then Partner in charge of Human Resource of the firm, Mr. Sylvester Henry Wambuga, corrected parts of it. It was eventually signed by the 3rd party on behalf of the firm and was witnessed by Ms. Ann Namara Musinguzi, a Legal associate of the firm. The plaintiff finally received it from Mr. Wambuga via email (exhibit P. Ex.3). It id defence counsel's argument that the Objective Setting Form (Key Performance Indicators Form) upon which the plaintiff relies was not signed in the ordinary course of business of the firm since there is no provision in the firm's Partnership Deed that empowered the 3rd party to sign such a document.

The expression "ordinary course of business" connotes activities considered normal for that specific business or industry practices, undertaken consistently within the scope of past commercial customs and practices of the industry, including the day-to-day operations of the firm. It does suppose that according to the ordinary and common flow of transactions in affairs of business there is a course, an ordinary course. It means that the transaction must fall into place as part of the undistinguished common flow of business done by the firm, calling for no remark and arising out of no special or particular situation (see *Downs Distributing Co. v. Associated Blue Star (1948) 76 C.L.R. 463*). It should be part of the regular and usual practice and method of business of the firm. There is no decisive test or straight jacket formula to determine whether an activity is in the ordinary course of business. Whether an activity is carried out in the ordinary course can be demonstrated from firm's historical practices, frequency of undertaking such activity, volume of such transactions and the amount of money and resources invested by the firm in undertaking such activity(ies).

To consider an activity as business there must be an identified course of dealing with a profit motive. While frequency, volume etc., are all guiding factors, one of the other tests is determining whether or not the carrying on of such operations is continuous and is done with a view to earn profit. Reliance can also be placed on the proximity of such transactions with the business and the distinguishing factor of any such transaction. To conclude that a transaction has been carried out in the ordinary course of business, it is also necessary to establish the nexus of such transaction with the primary business activities of the firm. However, a systematic activity carried on over a period of time, even with low volumes, would amount to carrying on of business in the ordinary course. Industry specific practices may also be relied upon, along with the past practices, to determine "ordinary course of business." In order to fit the description, such activity should be permitted under the Partnership Deed; the activity should not be a one-off transaction, and regular frequency of the activity should be demonstrable; there should be a sequence of similar transactions carried on by the firm in the past; the activity should be akin to general industry standards; and the activity should be a source of income for the business.

In the instant case, it was the testimony of the 3rd party that at the time of handing over the position of Managing Partner to the 2nd defendant, he conceptualised the creation of The Legal Consultancy and Emerging Areas Department of the firm and he was selected to be the partner in charge, as head of the department. Each Partner headed a department. The 4th defendant Mr. Paul Kutesa headed the Litigation Department. The 3rd defendant Mr. Robert Bautu headed the Natural Resources Department. The 1st defendant Mr. Isaac Bakayana headed the Banking and Finance Law Department, while the 2nd defendant Mr. Sylvester Henry Wambuga headed the Corporate and Commercial Department. It was the firm's Policy for each head of department to run the affairs of the department semi-autonomously, subject to reporting to the Partners' weekly meetings. It is at the firm's retreat that took place from 14th to 15th January, 2017 (exhibit PP. Ex.1) that it was resolved that each department was to formulate its key performance indicators by setting challenging targets. They further adopted it as a policy and it was to be implemented at departmental level.

This was corroborated by the testimony of P.W.2 Ms. Robina Kyoshabire, whose duty it was to receive and file the signed Key Performance Indicator (KPI) forms at the material time. She testified that the practice of KPIs was at department level. All departments developed KP1's. The Departmental Head would agree on the terms with the staff and then it would be filed. The partners' Board never discussed any of the other KPIs. They used to be discussed at Departmental level. None of the two witnesses was shaken or discredited in cross-examination regarding this practice and none of the defendants adduced evidence to the contrary. I therefore find that execution of Key Performance Indicator (KPI) forms was part of the ordinary course of business of the firm at its departmental level, undertaken consistently within the scope of its past commercial customs and practices.

By virtue of the Legal Consultancy Agreement (exhibit P. Ex.25), the plaintiff was engaged by the firm as a Project Manager to spearhead the attainment of the objectives of the project, while under the Objective Setting Form (Key Performance Indicators Form - exhibit P. Ex.26) she was designated Projects Manager – Legal Consultancy and Emerging Areas. While the Legal Consultancy Agreement spelt out her duties and highlighted her terms of reference in the management of the USAID project for Uganda under the direct supervision of the 3rd party, the Objective Setting Form outlined her deliverables in the performance of that role. The key items in the scope of work in respect of which the plaintiff was to provide leadership, included the drafting of "legal reform proposals where measures inconsistent [with] the implementation of the EAC Common Market Protocol connected to the movement of capital, services and goods have been assessed in Uganda," and undertaking a "monthly scan of legal, regulatory and administrative proposals in Uganda to assess potential measures that may be inconsistent [with] the provisions of the EAC Common Market Protocol."

The business of the firm is specified in Article II (1) and (5) of the firm's Partnership Deed dated 1st August, 2014 (exhibit D. Ex.1) as follows;

> 1. The Firm shall engage in the business of legal practice and such other business, additional trade, profession or business as the Partners shall from time to time determine and as permitted by law governing Advocates.

5. The Firm may associate with other law firms and consultants in the conduct of its business…..

The firm was clearly constituted primarily to engage in legal practice. The "practice of law" is not confined to practice in the courts, preparing pleadings and other papers incident to any action or special proceedings. It includes the application of legal principles and judgment with regard to the circumstances or objectives of a person that require the knowledge and skill of a person trained in the law, in order to resolve a problem or decide how to proceed under the law. "If the giving of [the] advice and performance of [the] services affect important rights of a person under the law, and if the reasonable protection of the rights and property of those advised and served requires that the persons giving such advice possess legal skill and a knowledge of the law greater than that possessed by the average citizen, then the giving of such advice and the performance of such services by one for another as a course of conduct constitute the practice of law" (see The *Florida Bar v. Sperry, 140 So. 2d 587, 591 (Fla. 1962); 373 U.S. 379 (1963*). It means the provision of legal advice or services where there is a client relationship of trust or reliance.

The single most important concern in defining and regulating the practice of law is the protection of the public from incompetent, unethical, or irresponsible representation. A person is therefore presumed to be practicing law when engaging in any of the following conduct on behalf of another; (i) giving advice or counsel to persons as to their legal rights or responsibilities or to those of others in any matter involving the application of legal principles to facts; (ii) selecting, drafting, or completing legal documents or agreements that affect the legal rights of a person; (iii) representing a person before an adjudicative body, including, but not limited to, preparing or filing documents or conducting discovery; or (iv) negotiating legal rights or responsibilities on behalf of a person.

The execution of employment contracts and agreements with consultants working with the firm has a very close nexus with the primary business activities of the firm. The key activities outlined in both the Legal Consultancy Agreement and the Objective Setting Form too are all related to drafting of "legal reform proposals" and undertaking "monthly scan of legal, regulatory and administrative proposals." Those activities technically constitute legal practice, which is the core business of the firm. Consequently, they are activities permitted under the Partnership Deed; they cannot be characterised as a one-off transaction, but rather their regular frequency is demonstrable;

there was a sequence of similar Objective Setting Forms executed by the firm in the past; the execution of employment contracts and agreements with consultants is akin to general industry standards; and their execution was intended to be a source of income for the firm. Therefore they were executed as part of the ordinary course of business of the firm.

The third party, while still the Managing Partner of the firm executed both the Legal Consultancy Agreement and the Objective Setting Form with the plaintiff. Both documents concerned acts done in a usual way to carry on the business of the kind carried on by the firm; the business of legal practice. Both documents were executed by a partner on behalf of the firm, in the firm name, or in a manner expressing or implying an intention to bind the firm. There is no evidence to show that the restriction on the partner's agency authority to do acts that apparently carry on partnership business in the usual way, contained in the partnership deed were communicated to the plaintiff before or at the time of execution of the two documents.

As principals, partners are bound by their fellow partners' acts as agents, and, as principals, partners have individual liability for the consequences of their agents' acts. It would be unfair for a firm to have the benefit of the work of its agents without making it responsible to some extent for their excesses and failures to act carefully. Partners are jointly and severally liable for partnership liabilities, which include loss or injury suffered by any non-partner caused by the wrongful act or omission of any partner acting either in the ordinary course of partnership business or with the authority of his fellow partners. If one appoints an agent to conduct a series of transactions over a period of time, it is fair that he should bear losses which are incurred when such an agent, although without authority to do so, does something which is usually done in connection with the transactions he is employed to conduct. Such agents can properly be regarded as part of the principal's organisation in much the same way as a servant is normally part of the master's business enterprise. In fact most general agents are also servants, such as managers and other persons continuously employed and subject to physical supervision by the employer.

In the case of the master, it is thought fair that one who benefits from the enterprise and has a right to control the physical activities of those who make the enterprise profitable, should pay for the physical harm resulting from the errors and derelictions of the servants while doing the kind of thing which makes the enterprise successful. The rules imposing liability upon the principal for some of the contracts and conveyances of a general agent, whether or not a servant, which he is neither authorised nor apparently authorised to make, are based upon a similar public policy. Commercial convenience requires that the principal should not escape liability where there have been deviations from the usually granted authority by persons who are such essential parts of his business enterprise. In the long run it is of advantage to business, and hence to employers as a class, that third persons should not be required to scrutinise too carefully the mandates of permanent or semi-permanent agents who do no more than what is usually done by agents in similar positions.

The 1st defendant testifying as D.W.1 stated that the rest of the partners first got to know of the existence of the plaintiff's KPI on 5th December, 2018. This was corroborated by P.W.2 Ms. Robinah Kyoshabire who testified that when it was brought to their attention, the 1st to 4th defendants objected to the 40% commission because they were not aware of that commission. In the law governing partnerships, each partner is deemed to have knowledge of all the partnership business as against third parties. If one partner engages in dishonest transactions, the other partners are presumed to know, regardless of whether they had actual knowledge of the transaction.

Partners therefore have joint and several liability for partnership liability arising from a partner's misapplication of money or property received by the partnership in the course of business or received by a partner acting within the scope of his apparent authority. Partners are also jointly liable for all other debts and obligations of the partnership. A general agent for a disclosed or partially disclosed principal subjects his principal to liability for acts done on his account which usually accompany or are incidental to transactions which the agent is authorised to conduct if, although they are forbidden by the principal, the other party reasonably believes that the agent is authorised to do them and has no notice that he is not so authorised (see *Halsbury's Laws of England*, 4th Edition, Vol. 35 at para 45).

A person has knowledge that the partner is acting without authority not only when he or she has actual knowledge thereof, but also when he or she has knowledge of such other facts as in the circumstances shows bad faith, or reason to know it exists from all of the facts known to the person at the time in question. For a person to acquire knowledge through notification under sections 5 (2) (a) and 8 of *The Partnership Act, 2 of 2010*, either the notification must have come to the person's attention or it must have been delivered to his or her place of business or other locale held out as a place to receive communications. This must be actual or express notice as opposed to implied notice (see *Black's Law Dictionary*, 10th ed. 2014). An individual is deemed to have acquired actual knowledge when he or she actually hears or reads the information. Implied notice is deduced or inferred from the circumstances rather than from direct or explicit words.

Direct or express knowledge or intimation of a fact to a person is said to be an actual notice of the fact to that person. Actual notice is express or formal communication of a definite fact relevant to the transaction to one party by another party interested in the transaction. Notification in this regard turns on communication targeted to a particular recipient, as opposed to filing information in a publicly accessible document. Absent actual knowledge, third parties have no duty to inspect the Partnership Deed or inquire otherwise to ascertain the extent of a partner's actual authority in the ordinary course of business, even if they have some reason to question it. Because they are not bound, third parties dealing with a partner do not need to monitor the partnership's filings in order to protect themselves against unknown restrictions. To require parties dealing with the partnership in everyday commercial or professional transactions to check the record continually would be inefficient. In those cases, the risk of a rogue partner exceeding his authority is better allocated to the partnership.

Personal knowledge within the context of the doctrine of notice necessitates either knowledge of a fact or proof that under the given circumstances, one must have had knowledge of that fact. The notice must be of such a nature that it is expected of a reasonable person to take it seriously. It must be the result of a formal communication and not a casual conversation between individuals. A person is not bound to attend to vague rumours or statements by mere strangers, and for a notice to be binding, it must proceed from some person interested in the transaction and must relate to the transaction in issue. Actual knowledge means that the person actually is aware of the relevant facts, not when he or she should be, such as that hypothetical knowledge a reasonably diligent person would know. Court must draw a distinction between what a person actually knows and what a person actually should know. Actual knowledge requires more than disclosing all relevant information to the person; the person must in fact have become aware of that information. Actual knowledge though may be shown, not only by direct evidence, but also by circumstantial evidence. It can be inferred from the circumstances only if, in the light of the evidence, such inference is not based on speculation or conjecture. Only where the circumstances are such that the person "must have known," and not "should have known," will an inference of actual knowledge be permitted.

For this purpose, the defendants had to prove, which they have failed to do, that the plaintiff actually knew, taking into consideration the direct or circumstantial evidence at her disposal, that the third party did not have the capacity to sign the consultancy agreement and the Key Performance Indicators form on behalf of the firm, by reasons of limitations contained in the Partnership Deed. The issue therefore is answered in the affirmative; the Key Performance Indicator Agreement dated 26th January, 2017 (exhibit P. Ex.26) signed between the 3rd party and the plaintiff is binding on the defendants.

ii. <u>If so, whether the plaintiff performed the terms of the agreement to be entitled to a commission</u>.

Although it was contended by the plaintiff that she was engaged as a consultant only and thus an independent service provider, not as an employee of the defendant firm, "The Legal Consultancy Agreement" that she executed on 20th July, 2016 (exhibit P. Ex.25) clearly states under clause 4.0 that "the Project Manager shall for all intent and purposes regarding the project be deemed to be an employee of the Firm…" I am guided in making this determination not only by that nomenclature but also by a number of other criteria including the extent of control over the task, the manner in which it was carried out, the means used to carry it out and where it is to be carried out; whether the plaintiff was in this business of her own account or whether she was an integral part of the business of the firm; whether the plaintiff was required to provide personal service or whether she could delegate the job and finally whether the plaintiff was free to work for other employers. In general a person will be regarded as providing his or her services under a contract of service and not as an independent contractor where he or she is performing those services for another person and not for himself or herself (see *Henry Denny Sons (Ireland) Ltd. v. Minister for Social Welfare [1998] 1 IR 34*).

I am guided further by the decision in *Ready Mixed Concrete (South East) Ltd v. Minister of Pensions and National Insurance [1968] 2 QB 497* where a contract between the plaintiff company and a lorry driver stated that the lorry driver was self-employed. He owned, insured and maintained his own lorry, but the plaintiffs had helped finance its purchase. He wore a uniform, and the lorry was painted with the company's colours. He could delegate the driving and was paid per mile driven. The issue arose as to whether he was an employee and whether the plaintiffs should have been making pension contributions for him to the defendants. McKenna J stated that three conditions had to be fulfilled to establish a contract of service: (1) there must be an obligation of the person to provide his own skill and work in return for a wage or other remuneration, (2) there must be a sufficient degree of control by the employer, (3) the other provisions of the contract must not be inconsistent with its being a contract of service. The court stated that the economic reality of the situation should also be considered when coming to a decision. Having regard to all of the factors, the court concluded that the lorry driver was an independent contractor.

In the instant case, although designated as a consultant, there is ample evidence that the firm exercised control over the plaintiff's activities and that she was a vital part of the operation of the work place; - such as the requirement to report to the Managing Partner whose directions she was bound to obey; serving as the Deputy head of the Legal Consultancy and Emerging Areas Department; she had to perform the tasks as instructed to by the Head of Department according to the Key Performance Indicator Agreement dated 26th January, 2017 which together with The Legal Consultancy Agreement was more or less a job description that terms of reference (the principal test being the right of the master to direct servants as to what is to be done and how it is to be done); although she earned what was characterised as a "gross monthly fee" from which deductions of withholding tax were made, in fact it panned out as a salary subject to increment from time to time. She was integrated with others in the work place even though the firm did not necessarily exercise a detailed control over what she did. The economic reality of the relationship between the parties was that of employer and employee rather than employer and independent contractor.

Unlike a wage or salary which is earned by an employee on the basis of performance of stipulated duties, commissions can accrue when an employee procures a client, or when an invoice is issued to the client, or when the firm receives payment from the client, or at other defined times. In order to be considered a commission, the compensation must be a percentage of the price of the service rendered. Commission computation is based upon the contract between the employer and the employee. The commission may be based on either gross income figures or net income figures. The plaintiff's right to a commission is dependent entirely upon the terms of the agreement between the parties and the nature of the services required to be rendered by her. The Key Performance Indicator Agreement dated 26th January, 2017 (exhibit P. Ex.26) provides that "for every project that is brought in by an individual and executed under the firm; 40% of the net profits made out of that project will be rewarded to the individual. The right to a commission was therefore hinged on three criteria; - (i) the project must have been brought in by the individual; (ii) it must have been executed under the firm; and (iii) the firm must have earned a net profit out of the project.

a) The project must have been brought in by the individual;

If the employee by using his or her time, efforts and business contacts is the procuring cause of the invoice, he or she is entitled to the commission. The phrase, "He who shakes the tree is the one entitled to gather the fruit" is used to describe the concept (see *Willson v. Turner Resilient Floors, (1949) 89 Cal.App.2d 589; 201 P.2d 406*). An employee whose compensation is conditional upon his or her accomplishment of a specified result is entitled to the agreed compensation if, and only if, he or she is the effective cause of accomplishing the result. The originating cause, which ultimately led to the conclusion of the transaction, is considered to be the procuring cause (see *Sessions v. Pacific Improvement Co., 57 Cal. App. 1* and *Chamberlain v. Abeles, 88 Cal. App. 2d 291*). Where the employee is the procuring cause of the transaction which she was authorised to negotiate she is entitled to her commission irrespective of the fact that the employer himself, or through others, may have intervened and actually completed the final act of the negotiation.

The plaintiff will be considered an effective or procuring cause if her efforts were sufficiently important in achieving a result for the accomplishment of which the firm has promised to pay her so that it is just that the firm should pay the promised compensation to her. The rule is that if the employee is the inducing or procuring cause of the contract, he or she is entitled to the commission, even though the employer takes it out of his or her own hand and completes it. The originating cause, which ultimately led to the conclusion of the transaction, is held to be the procuring cause. Therefore in order to qualify as the person who "brought in" the project, the plaintiff does not have to be the sole reason, but only needs to be the leading cause, for procuring the project. Absent any writing, it is commonly the case that an employee will be considered to have earned her commission or bonus after having performed a substantial portion of the work to bring in the project and that she will be entitled to payment of that commission even after her termination.

To originate a project is to give to it a genesis, to stand as the parent, the creative force from which the final transaction traces its birth. The word carries no implication requiring the originator to be also the finisher, or to be at once the alpha and the omega (see *Sessions v. Pacific Improvement Co., 57 Cal. App. 1*). In order to recover her commission it was incumbent upon plaintiff to produce evidence showing that she was the "effective" or "procuring" cause of the project. The plaintiff must initiate negotiations by doing some affirmative act to bring the client and the firm together; she must simply find a client and initiate negotiations between them. She must then stay involved in the continuous negotiations between the client and the firm, unless they sell intentionally exclude her from the negotiations. An employee is regarded as the "procuring cause" of a services contract, so as to be entitled to commission if his or her efforts are the foundation on which negotiations resulting in the contract begin. The plaintiff only needed to show that it was her activities that set in motion a series of events which, without break in their continuity, brought about the project in question to the firm.

It was the plaintiff's testimony that she specialises in both regional and international trade regulation, research and advisory on matters such as integration, development and investment. Her expertise was in mid-July, 2015 sought by the 3rd party to prepare the firm's bid for the East African Trade and Investment Hub (EATIH) due to the firm's lack of capacity in that area at the time. She worked together with other members of the firm to put the bid together. When in mid-2016 the firm secured the two projects for Uganda and Tanzania, she obtained a formal engagement with the firm as the Project Coordinator for Uganda. I find that she was not the "effective" or "procuring" cause of the EATIH project and thus she is not entitled to a commission thereon.

However as regard the IOM East Africa Immigration Policies Project, it was her testimony that during early February, 2017 she obtained information about an opportunity for an individual consultant to undertake that project. Indeed the IOM invitation for bids is directed at an individual consultant (exhibit P. Ex.28). It was her testimony that she called the coordinator of the project and made out a case for a bid by the firm. Once her suggestion was accepted, she sold the idea to the defendants and once they approved of it, she prepared a bid document which she submitted on 15th February, 2017. Indeed what was presented was the firm's bid for the consultancy work (exhibit P. Ex.12). The 1st defendant Mr. Isaac Bakayana while testifying as D.W.1 disputed this and averred instead that it is not the plaintiff who informed the firm about the opportunity, but rather that it was the 3rd party Mr. Gimara Francis who made a number of trips to Kenya with the intention of winning the contract. The plaintiff only provided the writing samples and also responded to the queries.

To the contrary, the plaintiff's version is corroborated by the 3rd party who in his testimony stated that the firm at the time had no in-house capacity to engage in bids for such jobs. That it was the plaintiff who brought this suggestion to him and he approved. The plaintiff led the process, wrote the proposal and bid with support of the firm. In the absence of evidence to the contrary, I find that by using her time, efforts and business contacts, the plaintiff was the "effective" or "procuring" cause of the firm's IOM East Africa Immigration Policies Project. She was the creative force from which the final transaction traces its birth; the originating cause, that ultimately led to the conclusion of the transaction. The project was the direct and proximate result of the plaintiff's efforts or services. For all intents and purposes therefore, the plaintiff is the person who brought the project to the firm.

b) <u>The project must have been executed under the firm</u>;

It is common ground between the parties as reflected in their joint scheduling memorandum that the IOM East Africa Immigration Policies Project was executed by the firm. The initial period of the project was from 3rd April, 2017 to 30th March, 2018 (exhibit P. Ex.14A). It was on 14th February, 2019 renewed or extended up to 31st May, 2019 (exhibit P. Ex.15).

c) <u>The firm must have earned a net profit out of the project</u>.

A net profit is the result after all expenses have been subtracted from revenues of the project. Both the call for bids (exhibit P. Ex.28), and the actual the service agreement between the IOM and the firm executed on 2nd October 2017 (exhibit P. Ex.14A) specified the fee as US $ 42,000 payable in five instalments. The plaintiff testified that based on a request she made to the Accountant at the firm, she obtained a detailed statement of expenditure incurred by the firm on the IOM project (exhibit P. Ex.17) showing that the project expenses were US $ 12,000 and thus the net profit was US $ 30,000. The defendants not having submitted any evidence to the contrary, I find that the plaintiff has proved that there was a net profit earned on the project. The only question is whether or not the fact that the plaintiff's contract had come to an end by the time the contract was concluded on 31st May, 2019 disqualified her from claiming the agreed commission thereon.

It has long been the rule that termination of the employment contract, (whether voluntary or involuntary) does not necessarily impede an employee's right to receive a commission where no other action is required on the part of the employee to complete the sale leading to the commission payment (See *Watson v. Wood Dimension (1989) 209 Cal.App.3d 1359* and *Zinn v. Ex-Cell-O Corp. (1944) 24 Cal.2d 290*). An earned commission is a form of wage. Therefore, the employer cannot refuse to pay the commission earned under the terms of the commission agreement. While an employee's entitlement to unpaid commissions and bonuses requires a case-by-case legal analysis, certain general rules may be applicable: (i) employees who voluntarily resign before performing substantial duties generally may not be entitled to recover commissions after departure; (ii) employees who have been involuntarily terminated may be entitled to recover either a *pro rata* share of the commission or, in some cases, the full commission, depending on the commission plan's terms; and (iii) vague and ambiguous commission plan terms may be construed against the employer in situations where the employer drafted the plan.

Denying commissions on invoices if the client's payments are received after termination of employment is considered unconscionable (see *Ellis v. McKinnon Broadcasting Co. (1993) 18 Cal.App.4th 1796*). Therefore in the circumstances, the plaintiff should not be denied the fruits of her labour, merely because by the time the profit was ascertained, she had left the firm. Since the plaintiff was the procuring cause of the project, she is entitled to her commission despite the fact that the objectives setting from on which it is premised expired on 31st December, 2017 and her legal consultancy agreement lapsed on 30th June, 2018.

iii. <u>If so, how much money is the plaintiff entitled to as a commission</u>.

Employers pay employees a commission to incentivise the employees to generate more business for the firm and to reward and recognise those who perform most productively. A commission agreement, also known as a commission plan, outlines how employers calculate and pay employees' commission payments. In some situations, an employee may procure an invoice all by himself or herself, but it's also common for employees to work together to close an invoice. The defendant firm's commission and bonuses plan seems to have defined when and how commissions may be allocated among multiple employees who contribute to procuring an invoice, as distinct from individuals who by using their time, efforts and business contacts bring in an invoice. While the former was pegged to the firm's profits, the latter was pegged to profits of a project or invoice.

a) <u>The commission on the firm's profits</u>;

The net profit is the firm's total earnings after subtracting all expenses. Expenses subtracted include the costs of normal business operation as well as depreciation and taxes. "Schedule A" to the Partnership deed (exhibit D. Ex.1) specifies the firm's rewards system. It clearly addresses the "net profits of the firm." Clause 3 thereof provides that; the partners are to share 50% of the net profits "in accordance with their *pro rata* entitlements to the capital and property of the firm," 40% is to go towards "rewarding the efforts of the partners who have contributed towards the income and business of the firm in that year," and 10% "to reward the Associates and other employees of the firm, who have contributed to the growth and profitability of the from as may be determined by the partners."

The 1st defendant Mr. Isaac Bakayana while testifying as D.W.1 stated that the practice was to aggregate the income before consideration of the contribution for reward. It was on that basis that there was a 5% bonus paid on 2nd January, 2018 in accordance with clause 3.3 of the Partnership deed (exhibit D. Ex.1). It was not paid as commission on a project. It was paid because the firm had declared a profit December, 2017. They never paid above 10% in bonuses.

P.W.2 Ms. Robina Kyoshabire, testified that the basic rate of commissions in this category was 5% but staff could negotiate higher rates of commissions. She once negotiated with the 2nd defendant Mr. Henry Sylvester Wambuga for a 20% commission on each invoice, who brought it up in the Partners' meeting that she attended where it was discussed and received approval. She had to relinquish part of her salary in order to earn the 20% commission. She acknowledged though that the firm's Human Resource Manual was signed by all the partners, including the third party, capped this type of commission at 20% for staff but it was silent on consultants. No one else ever got paid a commission of 20%. However, D.W.1 Mr. Isaac Bakayana testified that while P.W.2 Ms. Robinah Kyoshabire negotiated a 20% on each invoice with all partners upon agreeing to a salary reduction in lieu thereof, they never paid her any commissions because she never brought in the money.

On basis of all the above evidence, I find that the Partnership deed provides for commissions payable on the firm's profits, to Associates and other employees of the firm, who contribute to the growth and profitability of the firm as may be determined by the partners, at negotiable rates with a minimum of 5% but capped at 20%

b) <u>The commission on project profits (on invoices)</u>;

A commission is usually paid as a percentage of the sales value an employee generates. In this case, an employee has the option of receiving a very small salary while the bulk of their income would come from commissions generated from the amount of business they bring in for the firm. The Key Performance Indicator Agreement dated 26th January, 2017 (exhibit P. Ex.26) provides that "for every project that is brought in by an individual and executed under the firm; 40% of the net profits made out of that project will be rewarded to the individual."

Whereas the 1st defendant Mr. Isaac Bakayana while testifying as D.W.1 stated that the 5% bonus paid to the plaintiff on 2nd January, 2018 was in accordance with clause 3.3 of the Partnership deed (exhibit D. Ex.1) paid as a commission on profits of the firm rather than as commission on any project, the plaintiff testified that she received the 5% commission on 17th January, 2018 for having brought in an invoice. Despite this disagreement, on basis of the testimony of P.W.2 Ms. Robinah Kyoshabire, who stated that in lieu of salary she once negotiated with the 2nd defendant Mr. Henry Sylvester Wambuga and received approval by the rest of the partners of a 20% commission on each invoice she would bring in, I find that the firm permitted, as a matter of policy, the negotiation of rates of commissions payable on project profits or invoices, as opposed to the firms' profits. The only complaint in this case is that the rate negotiated between the 3rd party and the plaintiff of 40%, was unprecedented and never received the approval of the rest of the partners.

This argument fails by reason of the fact that The Key Performance Indicator Agreement in issue was executed for a purpose apparently connected with the firm's ordinary course of business. Third parties can always rely on the assumption that since a partner is an agent of the firm, he or she may be having an authority to do all what is necessary to carry on the business of the firm. When a partner has implied authority to do something, the firm will be bound by such an act even though the partner may be acting without the authority or knowledge of the rest of the partners. An act or instrument relating to the business of the firm done or executed in the firm-name, or in any other manner showing an intention to bind the firm, by any person thereto authorised as a partner, is binding on the firm and all the partners (see section 6 (1) of *The Partnership Act, 2 of 2010*). This is because the principal is liable for the act of the agent if the act is within the scope of the agent's express, implied or ostensible authority even though the principal may not have knowledge of the transaction (see *Lloyd v. Grace, Smith & Co [1912] AC 716* and *Hamlyn v. John Houston & Co [1903] 1 KB 8*). The firm is not liable only when the act is for a purpose apparently not connected with the firm's ordinary course of business.

That committing the firm to the unprecedented rate of commission payable on project profits was in violation of the Partnership Deed, or was without the authority or knowledge of the rest of the partners, is an issue appropriate for a suit between the partners relating to the enforcement of their rights *inter se*, which this suit is not. Partners are bound to carry on the business of the firm to greatest common advantage, to be just and faithful to each other, and to render true accounts and full information of all things affecting the firm to any partner, his heir or legal representative.

Fellow partners do have remedies against their errant fellows even when agency norms protect the third party. If an unauthorised act or transaction results in loss for the partnership (because it is liable to a third party), the errant partner, like any agent, is liable to the principal, that is, the partnership, for the loss caused it by the act or transaction. The cases involving a partner's breach of the fiduciary duty to their partners have been concerned solely with placing the wronged partners in the economic position that they would have enjoyed but for the breach. The 3rd party has not been sued for breach of the fiduciary duty he owed to the firm. I therefore find in conclusion that by executing the Key Performance Indicator Agreement dated 26th January, 2017 (exhibit P. Ex.26) the 3rd party bound the rest of the partners to pay the plaintiff a commission of 40% on for every project that she brought in and executed under the firm. Since the project's net profit was US $ 30,000, the plaintiff is entitled to the US $ 12,000 claimed.

Although the plaintiff sought to recover special damages of US $ 2,400 the law is that not only must they be specifically pleaded but they must also be strictly proved (see *Borham-Carter v. Hyde Park Hotel [1948] 64 TLR*; *Masaka Municipal Council v. Semogerere [1998-2000] HCB 23* and *Musoke David v. Departed Asians Property Custodian Board [1990-1994] E.A. 219*). Special damages compensate the plaintiff for quantifiable monetary losses such as; past expenses, lost earnings, out-of-pocket costs incurred directly as the result of the breach. Unlike general damages, calculating special damages is much more straightforward because it is based on actual expenses. It is trite law though that strict proof does not necessarily always require documentary evidence (see *Kyambadde v. Mpigi District Administration, [1983] HCB 44; Haji Asuman Mutekanga v. Equator Growers (U) Ltd, S.C. Civil Appeal No.7 of 1995* and *Gapco (U) Ltd v. A.S. Transporters (U) Ltd C. A. Civil Appeal No. 18 of 2004*). Despite the plaintiff having specifically pleaded this claim, she did not adduce evidence to support it and accordingly it is not awarded.

4th issue; whether the defendants are entitled to any contribution or indemnity from the 3rd party in the event that the plaintiff's claim is successful.

Indemnity is the shifting of responsibility from one party to another. It is a contract by which one engages to save another from a legal consequence of the conduct of one of the parties, or of some other person. If the plaintiff seeks reimbursement from the defendant for amounts the plaintiff paid in discharging a liability to a third party, the claim is for indemnity, irrespective of whether the plaintiff calls it something else. A right to indemnity generally arises from contract express of implied, but it also exists where the relation between the parties is such that either in law or in equity there is an obligation upon one party to indemnify another. It may arise from statute, it may arise upon the notion of a request made under circumstances from which the law implies that the common intention that the party requested shall be indemnified by the party requesting him, but it may also arise from a state of circumstances to which the law attaches a legal or equitable duty to indemnify (see *The Eastern Shipping Company Limited (Appeal No. 37 of 1923) v. Quah Beng Kee (Penang) [1924] AC 177* and *Birmingham and District Land Co v. London and North Western Railway (1886) 40 Ch D 268*). Therefore the three most common forms of indemnity are comparative equitable indemnity (based on principles of fairness), implied contractual indemnity (implied from the terms of a contract), and express (or contractual) indemnity (stated within the "four corners" of a contract).

Under comparative equitable indemnity principles, each party reimburses the claimant in relatively proportionate shares, based on percentages of liability attributed to each defendant or cross-defendant. A claim for comparative equitable indemnity need not be based on the express terms of, a valid, enforceable contract. A party asserting equitable indemnity is not asserting that a contractual right to indemnity exists; rather such a party is asserting that, given the special nature of the case's circumstances, equity demands that one party indemnify the other. It applies where it would be unfair for one of several parties causing damage to another to be "unjustly enriched" by not having to compensate the injured party for the damage that they did cause, and allowing for restitution to the party that actually did pay. In other words, if one were partly responsible for damage that somebody else paid for, it is only fair that he or she pays them back. The defendant must show: (1) the discharge of an obligation by the defendant; (2) the obligation discharged by the defendant is identical and co-extensive to an obligation owed by the third party; (3) the discharge of the obligation by the defendant is under such circumstances that the obligation should have been discharged by the third party; and (4) the third party will be unjustly enriched if he or she does not reimburse the defendant to the extent that the third party's liability has been discharged.

On the other hand, the implied contractual indemnity doctrine is grounded upon one contracting party's failure to properly perform contractual duties owed to the other contracting party. It stems from the existence of a binding contract between two parties that necessarily implied the right of indemnification. If one party did not do what it was supposed to under the contract, that party should pay something on the grounds of fairness. Under this indemnity theory, equitable considerations are brought into effect by contractual language not expressly dealing with indemnification. The party asserting such indemnity must show that the parties to the contract intended the indemnitor to be responsible for the loss.

Lastly, for express (or contractual) indemnity, all that is required is the expression of an agreement that one party will indemnify the other party. Under the law of contract, contracting parties are free to voluntarily define their duties toward one another, including clauses requiring one party to pay, or indemnify, the other against certain claims or losses. Absent fraud or some applicable overriding public policy set forth in a statute (such as voiding express indemnity agreements in certain contracts that seek to indemnify a party against their sole negligence), the court will generally not be concerned with issues of fairness. Unlike equitable theories under which a court will assign liability based upon what is fair or right, express contractual indemnity seeks to enforce the actual agreement of the parties. Moreover, the terms of an enforceable express indemnity provision will generally override any obligation due under a comparative equitable indemnity claim based on the same acts for which express indemnity is sought. If indemnity is to be allowed, the partner discharging the obligation is enabled to recover the whole amount from the other partner(s), on the theory that as between them the primary liability was on the partner against whom indemnity is given.

As regards the doctrine of contribution, it is not founded on contract, but is based on the principle of equality of burden as to a common right is equity, and that wherever there is a common right the burden is also common. Persons who are under co-ordinate liabilities to make good the one loss must share the burden *pro rata*. The test commonly applied to assess whether liabilities are coordinate, meaning that a right to contribution in equity arises, is whether they are of the same nature and to the same extent. This arises whenever the plaintiff could pursue either obligor for his or her loss, and either would be liable for it, and payment by either one would discharge the liability of the other. It should not matter who the plaintiff chooses to proceed against. Where there is a common burden; full liability can be recovered from each. Substantial justice in those circumstances requires that contribution be allowed. Consequently the common law has historically allowed a debtor to receive contribution from a co-debtor.

The doctrine of contribution may be defined as the rule by which one person, when compelled to discharge more than his share of any joint liability, can recover from those liable with him their aliquot proportion of the common burden. A right to claim contribution arises where the plaintiff could pursue either the person who is claiming contribution (the defendant) or the person against whom contribution is being claimed (the third party) for its loss and either would be liable in whole or in part for it. This in turn is based on the underlying rationale that payment by the defendant to the plaintiff discharges the liability of the third party (in whole or in part), and similarly payment by the third party to the plaintiff would discharge the liability of the defendant (in whole or in part). If that test is satisfied, a right to claim contribution arises and the court will then assess the amount of contribution that is appropriate. The doctrine of contribution in equity is to be applied when one is compelled to pay more than his share of a common obligation that several persons are obligated to discharge. If contribution is to be allowed, a partner who has been compelled to discharge the whole obligation to the injured person will recover a rateable portion of such total amount from the other partner(s), the idea being one of equalisation of what should be a common burden.

Generally speaking, there are three situations wherein a claim for contribution and indemnity may be made: (i) between contracting parties, (ii) between concurrent tortfeasors, and (iii) between tortfeasors and contracting parties. The terms contribution and indemnity are often used interchangeably, but contribution distributes the loss among the tortfeasors by requiring each to pay his proportionate share where indemnity shifts the entire loss from one tortfeasor who has been compelled to pay it to the shoulders of another who should bear it instead. The doctrine of contribution amongst joint debtors is not founded in contract, but is the result of general equity on the ground of equality of burthen and benefit (see *Dering v. Earl of Winchelsea [1787] EngR 39, (1787) 1 Cox 319, (1787) 29 ER 1184*).

As between partners, both the right to indemnity and to contribution arises from statute. According to section 9 (1) of *The Partnership Act, 2 of 2010* a partner in a firm is liable jointly with the other partners for all debts and obligations of the firm incurred while he or she is a partner. This creates an implied term in the partnership deed. The partners tacitly accept the rights and duties which the law has seen fit to assign them. The right to contribution as between partners is thus contractual in nature, the theory being that each partner on entering into the partnership agrees with every other partner to contribute his or her share to whatever burden falls upon the firm. On basis of the statutory right to contribution and contractual right to indemnity combined with comparative equitable indemnity principles, each partner reimburses the claimant in relatively proportionate shares, based on percentages of liability attributed to each under their deed. Whatever the rights and wrongs of the situation, an "innocent" partner has to pay his or her share of the continuing debts of the partnership. If an overpayment is made, then he is entitled to look for contribution. If an underpayment is made, conversely those over-paying are entitled to look to him for his contribution.

For example in *Hurst v. Bryk and others [2000] 2 All ER 193*, Hurst was a solicitor and member of a partnership. The defendants, Hurst's fellow partners, subsequently entered into a dissolution agreement to dissolve the partnership. Hurst refused to sign the agreement and informed his partners that he regarded their conduct as a repudiatory breach of the Partnership Deed, which he had no alternative but to accept. The trial judge found that Hurst's acceptance of the defendants' repudiatory breach brought about the dissolution of the partnership, but concluded that the repudiatory breach did not discharge Hurst from all further obligations under the partnership agree-ment. The House of Lords affirmed that the repudiatory breach did not discharge Hurst from all further obligations under the Partnership Deed. Hurst's liability to contribute to the accrued and accruing liabilities of the partnership arose from the fact that the liabilities were incurred by the partnership when Hurst was a partner.

The basis of the liability of the partners being mutual agency as between them, the liability of the partner, therefore, arises for such acts which are done while a person is a partner. Although a partner cannot be made liable to the creditors of the firm for an act of the firm which may have been done before he was introduced to the partnership, section 19 (2) of *The Partnership Act, 2 of*

2010 specifically provides that a partner who retires from a firm does not cease to be liable for partnership debts or obligations incurred before his or her retirement. Similarly, there can be no liability for the acts of the firm done after a person has ceased to be a partner.

All partners are liable jointly for all debts of the partnership unless otherwise agreed by the claimant or provided by law. As to the internal liability among themselves, the default rule or rule of thumb is that of equal sharing, unless the parties, expressly or by implication, have provided otherwise. If a partner reasonably incurs a liability in excess of the amount he agreed to contribute in properly conducting the business of the partnership or for preserving the partnership's business or property, he is entitled to be repaid by the partnership for that excess amount. A partner may sue another partner for reimbursement if the partner has made such an excessive payment. For example in *Long v. Lopez 115 S.W.3d 221 (Texas App. 2003)*, because Wood Relo was sued for a partnership debt made in the proper conduct of the partnership business, and Long settled this claim in the course of winding up the partnership, he could maintain a suit against Lopez for reimbursement of Long's disproportionate payment.

When the commission agreement specifies a percentage without further description, it is possible that the commission is earned upon the initial agreement with the client, upon the execution of a written contract for legal services with the client, upon the full payment by the client, upon initial payment by with the client, upon with the client not cancelling or rescinding the contract at some time, or upon some other term or event. In the instant case, it was to be earned upon the satisfaction of three cumulative criteria; - (i) the project being brought in by the individual; (ii) the project being executed under the firm; and (iii) the firm having earned a net profit out of the project.

Section 19 (2) of *The Partnership Act, 2 of 2010* renders a partner who retires from a firm liable for partnership debts or obligations "incurred before his or her retirement." To the extent that payment of a commission was conditioned on the firm having earned a net profit out of the project, payment of a commission to the plaintiff was a contingent liability. A contingent liability is one that may occur depending on the outcome of an uncertain future event. It is only at the end of the project that the firm would be in position to tell whether or not it had earned a net profit out of the project. Therefore, a commission could not be earned by the employee in order to become a debt, before the employer could reasonably calculate it. The firm as employer did not have to pay the commission before it had earned a net profit out of the project. The commission therefore became a debt due and recoverable at the end of the project, i.e. after 31st May, 2019 (exhibit P. Ex.15) when the firm could reasonably calculate it. The 3rd party having retired from the frim effective 31st December, 2018 the commission payable to the plaintiff was not a debt or obligation "incurred before his or her retirement" and therefore he is not liable to indemnify or contribute to its settlement by the rest of the partners, the defendants. The claim against the 3rd party is consequently dismissed with costs to the 3rd party.

i. Interest on the outstanding amount.

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 are entitled to interest upon it from the date due (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 for payment of a commission carries interest at the rate of 8% per annum from 1st June, 2019 until payment in full.

ii. <u>General damages</u>.

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 plaintiff is 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 plaintiff 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, she is not entitled to the award of general damages.

iii. <u>The costs of the suit</u>.

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 defendants jointly, as follows;

a) The commission of US $ 12,000.
b) Interest thereon at the rate of 8% per annum from 1st June, 2019 until payment in full.
c) The costs of the suit.
d) The defendants' claim against the 3rd party is dismissed with costs to the 3rd party.

Delivered electronically this 16th day of August, 2022

……Stephen Mubiru…………..
Stephen Mubiru
Judge,
16th August, 2022