



THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL COURT DIVISION)

CS No. 115 of 2011

GREAT LAKES PORTS LTD :::PLAINTIFF

VERSUS

TOM MUGENGA:::DEFENDANT

BEFORE HON. JUSTICE RICHARD WEJULI WABWIRE

JUDGEMENT

A. Introduction

1. This suit was commenced by the Plaintiff against the defendant to recover the sums in excess of USD 505,000 disbursed by the defendant from the Plaintiff's account no. 0245030915700 at Crane Bank which they state was used for improper purposes and without the knowledge or approval of the Plaintiff's board of directors which was in breach of the defendant's fiduciary duty; it is also for interest, general damages and for costs of the suit.

B. Representation

2. At the hearing the Plaintiff was represented by M/s Kabayiza, Kavuma, Mugerwa & Ali Advocates while the defendant was jointly represented by M/s Geoffrey Nangumya & Co. Advocates and M/s K & K Advocates. The Plaintiff filed two witness statements deponed by Herbert Kiggundu - Mugerwa their lawyer (PW2) and Ashok Doshi a shareholder in the Plaintiff (PW1). On the other hand, the defendant filed five witness statements deponed by Samuel Baker Okallany (DW3), James Odwori, Maombo Leonard Imogir (DW2), Onyango Odoi Otal Asinde Domisiano (DW4) and the defendant (DW1) which were all admitted on

Court record. All the witnesses, except James Odwori, were cross examined on the respective witness statements. James Odwori's statement was accordingly disregarded. The parties also addressed the Court in written submissions.

C. Background

3. The undisputed facts of this case as presented in the parties' joint scheduling memorandum are that the defendant was a director in the Plaintiff from its incorporation until his resignation on the 27th March 2009. That sometime in July 2006, the Plaintiff opened an account number 0245030915700 at Crane Bank Limited, with the defendant as one of the 3 signatories with the mandate to individually operate the said account on behalf and for the benefit of the Plaintiff. That on various dates between the 17th of July 2006 and the 28th of February 2007, various sums of money were remitted to the above account. That on the 27th day of July 2006 and on 4th of September 2006 the sums of USD 340,000 and USD 155,000 were transferred from the Plaintiff's aforesaid account by the defendant. That the Plaintiff company acquired property comprised in LRV 3581 Folio 5 Plot 124 Block 4 Malaba, Tororo and is the current registered proprietor of the land.

D. Issues

4. Two issues as follows were raised for determination;
 1. **Whether the Defendant breached his fiduciary duty to the Plaintiff.**
 2. **What remedies are available to the parties.**
5. To determine the issues raised, I have carefully considered the parties' pleadings, the witness testimonies, the audit findings by Ernst & Young, the written submissions of the parties and the authorities attached thereto and resolve as follows;

Issue 1: Whether the Defendant breached his fiduciary duty to the Plaintiff.

6. The Plaintiff's Counsel submitted that the Defendant stood in a fiduciary duty with regard to the monies he expended from the Plaintiff's account number 0245030915700 at Crane Bank Ltd.

7. In reply, the defendant's Counsel did not dispute the fact that as a Director, he and the other Directors of the Plaintiff jointly owed a fiduciary duty to the Plaintiff with regard to the monies expended from the Plaintiff's Account Number 0245030915700 at Crane Bank Ltd for purchase of 342.5 acres of land at Malaba.
8. **Black's Law Dictionary Ninth Edition at page 581** defines a fiduciary duty as a duty of utmost good faith, trust, confidence, and candor owed by a fiduciary such as a lawyer or corporate officer to the beneficiary such as a lawyer's client or shareholder; a duty to act with the highest degree of honesty and loyalty toward another person and in the best interest of the other person.
9. In the case of **Price v Kelsall 1957 EA 752 at page 765** Sir Kenneth O'Connor P held that upon appointment as a director, a person stood in a fiduciary position regarding the Company. It is common ground that the defendant is a director in the Plaintiff that therefore as a director of the Plaintiff, the defendant owed a fiduciary duty to the Plaintiff.

The question that remains therefore, is as to whether the defendant breached that duty.
10. In answer to this question, the Plaintiff's Counsel submitted that according to paragraph 4(d) of the amended plaint and paragraph 5 of the amended WSD and paragraph 9 of the Defendant's witness statement dated 12th May 2015, there is no dispute that the money remitted to the Plaintiff's account was intended for the purchase of 342.5 acres of land at Malaba. That however, the defendant used the said money to pay USD 455,000 to Holbud Ltd, USD 24,000 to Maina Speedy, USD 64,854 to Prime Finance Company Ltd, USD 1,250 to Prince Mugenga and USD 243,000 to the defendant himself.
11. In reply the defendant's Counsel pointed out that this Court referred this matter before a referee/ auditors to establish how monies in the Plaintiff's Account 0245030915700 with Crane Bank were disbursed and by whom for the period July 2006 up to March 2009. That the parties complied with the said Court Orders and presented their claims and expenditure evidence and witnesses to the auditor who made a report and submitted it to this Court. That the Court duly

accepted the report with an order to the auditor to respond to receipt for a sum of USD 46,827.500 which explained the accountability for the unaccounted for funds found by the Referee and file a supplementary report. That Court ordered that the hearing proceeds with the report as it is and the same be filed jointly with the Joint Scheduling Memorandum. The defendant's Counsel submitted that this issue could only be established by auditing the Plaintiff's Bank Account in question which was the very reason this Court referred this matter to the referee for determination.

12. The defendant's Counsel further submitted that the Plaintiff's submissions on this issue relating to arguments and a critique of the report and findings of the Auditor/Referee are illegal and unlawful and offend the Provisions of Order 47 Rule (3) of the Civil Procedure Rules, and Section 34 of the Arbitration and conciliation Act.
13. The defendant's Counsel denied the Plaintiff's claim as stated in the plaint that the Defendant misapplied the Plaintiff's money. Counsel submitted that the funds were properly requisitioned, lawfully withdrawn and properly expended on acquisition of land comprised in an LRV3581 Folio 5 Plot 124 Tororo, Block 4 Malaba, Tororo and the Plaintiff is the current Registered Proprietor of the land. That the fact of ownership of land was not in dispute and was an agreed fact under the Joint Scheduling Memorandum.
14. In rejoinder the Plaintiff's Counsel submitted that Court may rely on Exh. P5 in determining the issues but is not precluded from relying on other exhibits presented before it to make its finding on whether the Defendant breached his fiduciary duty because the auditor's report (Exh. P5) specifically indicated its restrictions and limitations at page 11 where the auditors stated that we have not verified the authenticity or validity of the documentation made available to us. That in circumstances where the documentation presented to the auditors is unauthenticated, the Court is at liberty to look at all material exhibited at the trial to determine the issue. That Court disregard the Defendant's submission and look at all the evidence presented at the trial to determine whether the Defendant breached his fiduciary duty to the Plaintiff. That the authorities cited by the

defendant are distinguishable because the Court in those cases never considered the import of Section 26 (2) of the Judicature Act and the auditor's reports in those case were not qualified and that the same be disregarded by Court. That in case the Court is inclined to follow the precedents in **Wanzala Enterprises v Barclays Bank of Uganda HCCS No.77 of 2012 and Simba Telecom Ltd v Karuhanga HCCS No.242 of 2011**, judgment is entered for the Plaintiff against the Defendant in the sum of \$46,827.50 which the auditors found to be unaccounted for.

15. By consent before Court the parties agreed to engage the services of Ernst & Young Certified Public Accountants of Uganda under S.27(c) of the Judicature Act Cap.13 to determine how money on the Plaintiff's account with Crane bank Ltd account no. 0245030915700 was disbursed and by whom and for what period 1st July 2006 up to 30th March 2009.

16. **Section 27 (c) of the Judicature Act Cap. 13** provides that where in any cause or matter, other than a criminal proceeding the question in dispute consists wholly or partly of accounts, the High Court may at any time, order the whole cause or matter or any question of fact arising in it to be tried before a special referee or arbitrator agreed to by the parties or before an official referee or an officer of the High Court.

The report of the auditors was filed on Court record on 5th February 2015 and admitted as PEX5. A summary of the findings of the auditor's report are at pages 31-34 of the audit report exhibit P5 as follows;

- i. Our analysis of the Bank Statement issued by Crane Bank for Account number 0245030915700 for Great Lakes CFS (U) Ltd ("Great Lakes Ports Ltd") for the period 18 July 2006 to 27 March 2009 revealed that 51 cheque payments and or Telegraphic Transfers reflected in the account, were duly and solely authorised by Mr Tom Mugenga in his capacity as Director/signatory. The disbursements are summarised in table 12 below.*
- ii. Mr Tom Mugenga explained to us that in order to facilitate local business operations, as sole signatory to the Great Lakes Ports Ltd United States Dollar Bank Account in Crane Bank, he would withdraw cash, authorise*

cheque transfers to his personal bank account or third party entities, in exchange for the purchase of equivalent local Uganda Shillings at the prevailing exchange rates.

- iii. Throughout this investigation, we have not been provided with the supporting documentation to conduct an audit trail of the transactions relating to the United States Dollar cash withdrawals, cheque transfers from Great Lakes Ports Ltd Bank Account number 0245030915700 held with Crane Bank Ltd to Mr Tom Mugenga's personal local Uganda Shillings bank account or third party beneficiaries accounts involved in the purchase of United States Dollars for equivalent local Uganda Shillings.*
- iv. However, we have identified various cash payments made in the course of running the local business operations of Great Lakes Ports Ltd.*
- v. According to Mr Tom Mugenga and Mr James Odwori, the recipients of local Uganda Shillings would acknowledge receipt of cash by signing on Great Lakes Ports Ltd payment vouchers for the delivery of goods and or services.*
- vi. We have not been provided with the supporting documentation to confirm the assertion by Mr Tom Mugenga that all the above beneficiaries and disbursements relate to the exchange of United States Dollars for local Uganda Shillings equivalent at the prevailing rates for purposes of running the local business operations of Great Lakes Ports Ltd.*
- vii. For all the 51 disbursements amounting to USD 1,141,094.50, Mr Tom Mugenga was the sole signatory to the Great Lakes Ports Ltd bank cheques and or Account Transfers.*
- viii. The explanations and supporting documents provided by Mr Tom Mugenga in relation to the disbursements and expenses he allegedly incurred on behalf of Great Lakes Ports Ltd for the period 1 July 2006 up to 30 March 2009 amounts to USD 1,094,267.00 leaving a balance of USD 46,827.50 as unaccounted for.*

17. According to the foregoing summary of the audit report, the defendant was unable to account for the sum of USD 46,827.50.

18. In the submissions of the parties, the Plaintiff departs from the audit report while the defendant partially endorses it. The submissions of the Plaintiff require reopening the matter referred to auditors for fresh scrutiny. In the case of **Simba Telecom Limited vs Karuhanga Jason and another, CS No. 242/2011**, Justice Christopher Madrama held that;

“Section 27 of the Judicature Act and particularly subsection (c) under which the order of reference to auditors was made result into a binding decision under the law because it is a trial of referred matters. The auditors are officers of Court. The finding or award ought to be challenged on the grounds accepted by the rules in the Civil Procedure Rules or law under the Arbitration and Conciliation Act 2003 for the challenge of an award of an arbitrator. The parties appearing before the referee who also happen to be auditors presented their own accounts and any documents requested of them and were entitled to address their clients concerns to the referee/auditor in this case. Under the Arbitration and Conciliation Act section 34 thereof, recourse to the Court against an arbitral award may be made only by application for setting aside the award. The grounds for doing so are also stipulated...The same issue of reconciliation of accounts cannot be tried again in this Court. Section 27 of the Judicature Act is enforced by Order 47 of the Civil Procedure Rules which deals with references by consent of the parties to arbitrators. Order 47 rule 3 (2) of the Civil Procedure Rules provides that the Court: “shall not, except in the manner and to the extent provided in this Order, deal with the matter in the suit.” Order 47 rules 15 give the grounds for setting aside an award. The Court is moved by notice of motion. However the grounds are misconduct or corruption, fraudulent concealment of any matter by one of the parties and the award is made after proceeding with the suit by the Court...I have again considered the grounds for setting aside an arbitral award under section 34 (2) of the Arbitration and Conciliation Act. I have come to the conclusion that the matter cannot be reopened because the auditors were not satisfied by the evidence produced by the Defendant. The evidence is clearly marked appendix IX together with the receipt numbers. Why is it that the auditors did not accept the receipts as they are? Both the Plaintiff and the

Defendant cannot on the one hand rely on the audit report and in another breath disregard it as suit their interests. Both parties cannot have their cake and eat it at the same time. The end result is that the auditor's report is unimpeachable on the grounds advanced by either the Plaintiff or the Defendant...Both parties had ample opportunity to present all the materials necessary for the reconciliation of accounts and to give their expert presentation to the auditors agreed to. If they did not give all that evidence to the auditors, it cannot be allowed to be placed before this Court which had referred the matter to a referee."

19. This was further elaborated in the case of **Wanzala Enterprises Limited vs Barclays Bank of Uganda Limited, CS No. 77/2012**, Justice Christopher Madrama (as he then was) held that;

"...In that context therefore rule 16 deals with cases where the Court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration. It also deals with situations where no application has been made to set aside the award (i.e. under Order 47 rule 15) or where the Court has refused the application to set aside the award. It provides that the Court shall after the time for making the application has expired; proceed to pronounce judgement according to the award.

...Where a matter has been referred to arbitrators / referees as prescribed, the Court shall not except as directed by the Rules and to the extent provided for Order 47 deal with the matter in the suit. Order 47 Rule 3 (2) of the Civil Procedure Rules provides as follows; "where a matter is referred to arbitration, the Court shall not except in the manner to the extent provided in this order deal with the matter in suit. It follows that the Court is forbidden from dealing with the matter in the suit Order 47 Rule 16 therefore introduces some kind of misnomer because a judgment is an adjudication arising from a controversy clearly spelt out. What is envisaged is that the Court may pronounce judgment based on the Reference and it would depend on the issue referred to the reference."

O.47 R.16 (1) of the CPR SI 71-1 provides as follows;

“Where the Court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration in manner aforesaid, and no application has been made to set aside the award, or the Court has refused the application, the Court shall, after the time for making the application has expired, proceed to pronounce judgment according to the award.”

20. In this particular case, none of the parties has applied to set aside the award/audit report on any of the grounds stipulated under the law. According to the ruling of this Court in Wanzala (supra), the trial would abide the report of auditors, his lordship made it clear that the Court may pronounce judgment based on the Reference. By virtue of this ruling, the audit report became part of the findings of Court and it is on the same basis that Counsel for the parties addressed Court on its findings.
21. As was in the cases immediately referred to, the instant case was referred to an auditor, Ernest & Young, under Section 27 of the Judicature Act Cap. 13. However, at page 11 of the Auditors Report (PEX5), the auditors stated that they had not verified the authenticity or validity of the documentation made available to them. For this reason, Court proceeded to full hearing and examination of witness notwithstanding the fact that the auditors had filed the report (PEX5) in this Court. I am therefore inclined, pursuant to S.26 (2) of the Judicature Act, to partly rely on the other material exhibited at the trial to determine the issue since the evidence had already been admitted as such on record. As such, I am in agreement with the Plaintiff's submissions that the authorities cited by the defendant are distinguishable because in those cases the audit/referee findings were not qualified.
22. To determine the issue as to whether there was a breach of fiduciary duties consideration is taken of matters of fact and the disbursements as established by the auditors. This therefore also makes it imperative for Court to partly rely on the auditor's report alongside the proceedings in Court to determine the issue as framed.

I will consider the disbursements as laid out on page 16 of the report, in the context of the evidence adduced by witnesses' testimony in Court.

a) PAYMENTS TO HOLBUD LTD OF \$455,000

23. In respect of this disbursement, the Plaintiff's Counsel submitted that in the amended WSD, the Defendant did not specifically give reasons why he paid \$455,000 from the Plaintiff's account to Holbud Ltd. In reply the defendant's Counsel submitted that Paragraphs, 3.0, 11, 12, 13, 14, 15, 16, 17 and 18 of the Written Statement of Defence explain the circumstances under which the Plaintiff United States Dollars Account had to be dealt with by the Defendant to change into Uganda Shillings in order to carryout the Company Business and in the best interest of the Plaintiff to bargain for prevailing exchange rates.
24. In his witness statement, the Defendant did not give any explanation as to why he disbursed \$455,000 to Holbud Ltd from the Plaintiff's account. During his cross-examination the Defendant (DW1) confirmed that Holbud Ltd did not belong to the Plaintiff and that the money paid to Holbud Ltd came from the Plaintiff's account which did not have any business transactions with Holbud Ltd. This is corroborated by the testimony of PW1 Ashok Doshi who testified that the sum of \$455,000 paid to Holbud Ltd was paid wrongly. In his testimony PW1 stated that all the money sent to the Plaintiff's account was solely for the purpose of purchasing land in Malaba. Contrary to the said purpose, in his explanation to Ernst & Young, at page 104 of the report the Defendant alleged that the transfer of a sum of \$455,000 to Holbud Ltd was for the purchase of an equivalent of Uganda Shillings from Ntake Bakery & Co. Ltd at a rate favorable in exchange.
25. When further asked about this in his re-examination, DW1 stated that according to the Articles of Association of the Plaintiff he was entitled to do what he could for the better of the company. However, he was not able to show how this particular transaction bettered the company.
26. The Plaintiff pointed out that the Defendant, Ntake Bakery & Co. Ltd and Holbud Ltd did not have licenses to deal in foreign exchange in Uganda. Counsel submitted that the transaction alluded to by the Defendant to Ernst & Young involved \$455,000 on the Plaintiff's account in Crane Bank and certainly required

a licensed dealer for purposes of exchanging the same into Uganda Shillings yet a receipt evidencing the alleged foreign exchange transaction was not exhibited in Court. PEX28 dated 11th September 2014 in which the Bank of Uganda confirmed that the defendant and Ntake Bakery & Co. Ltd were not licensed by Bank of Uganda to conduct foreign exchange business during the period 2006 to 2007.

27. Counsel submitted that Court find that the sum of \$455,000 paid to Holbud Ltd by the Defendant from the Plaintiff's account was expended in breach of his fiduciary duty to the Plaintiff.
28. In reply the defendant's Counsel submitted that there is no law that prohibits private persons or companies to exchange Foreign Currency with local currency and neither does the law require one to have a foreign exchange licence to exchange foreign exchange into Uganda Shillings since liberalization of the foreign exchange economy was provided under Section 9 (2) and (3) of the Foreign Exchange Act No. 5 of 2004. The defendant's Counsel further submitted that transactions of monies paid to Holbud and Prime Finance were done through Crane Bank and as such no illegality can be imputed as provided under S.9 ((2) and (3) on the Foreign Exchange Act.

DETERMINATION BY COURT.

26. **Section 5(1) of the Foreign Exchange Act 2004** specifically precludes any person from engaging in the business of dealing in foreign exchange without a license issued under the Act. Indeed the defendant never adduced any evidence to show that he, Ntake Bakery & Co. Ltd or Holbud Ltd had such license to deal in foreign exchange in Uganda.

Furthermore, **Regulation 22 (1) & (2) of the Foreign Exchange (Bureaus and Money Remittance) Regulations 2006** requires issuance of a Bank of Uganda official receipt or approved receipt evidencing the transaction of selling or buying foreign exchange. In his cross examination DW1 confirmed that he did not have receipts of the foreign exchange transactions. The defendant sought to rely on Section 9(2) and (3) of the Foreign Exchange Act which provides that all

payments in foreign currency, to or from Uganda, residents and non-residents or between non-residents shall be made through a bank.

Section 9(2) and (3) of the Foreign Exchange Act envisioned making a payment of foreign currency through the bank but not where parties pay through the bank after making their exchanges as is the case herein. Consequently if the foreign currency exchange was made by an unlicensed person and then paid through the bank as happened in the instance, that does not make an illegal transaction legal.

The transaction between the defendant and Ntake bakery & Co. Ltd was an illegal one and therefore in breach of the Defendant's fiduciary duty to the Plaintiff.

b) PAYMENTS TO MAINA SPEEDY OF \$24,000

27. The Plaintiff's Counsel submitted that there is no evidence before Court that the transaction from the Plaintiff's account with Maina Speedy was one of foreign exchange. That Court find that the sum of \$24,000 paid to Maina Speedy by the Defendant from the Plaintiff's account was expended in breach of his fiduciary duty to the Plaintiff.

28. In reply the defendant's Counsel submitted that the Plaintiff's United States Dollars Account had to be dealt with by the Defendant to change into Uganda Shillings in order to carry out the Company Business and in the best interest of the Plaintiff to bargain for prevailing exchange rates. The defendant's Counsel further submitted that the Plaintiff rubbishes the findings of the Referee on the transactions involving payments to Maina Speedy and yet own up to the activities such funds paid for on behalf of the Plaintiff Company which is contradictory.

DETERMINATION BY COURT

In paragraph 24 (b) of his witness statement, PW1, Ashok Doshi, identified the aforementioned disbursement as one that was done for improper purposes not associated with the Plaintiff's business. In his witness statement, the Defendant

does not give any explanation why he paid the sum of \$24,000 to Maina Speedy out of the Plaintiff's account.

29. When further asked about this in his re-examination, DW1 conceded that the Plaintiff did not have any business with Maina Speedy which also did not have a licence to transact in foreign exchange. He however stated that according to the Articles of Association of the Plaintiff he was entitled to do what he could for the betterment of the company. He however was not able to show how this particular transaction bettered the company.

30. On page 17, clause 4.5 of PEX5, the auditor's report, the auditors stated as follows;

'...Mr. Tom Mugenga explained to us that this accounts transfer of USD 24,000.00 was in exchange for the purchase of an equivalent of local Uganda shillings from Maina Speedy to facilitate local business related operations.

We have not been provided with the supporting documentation to corroborate the assertion by Mr. Tom Mugenga that the United States Dollar transfer from Great Lakes Ports Ltd bank Account number 0245030915700 to Maina Speedy was in exchange of an equivalent of USD 24,000 in local Uganda shillings.

According to Mr. Tom Mugenga, the support documentation for this disbursement is part of the expenses incurred on behalf of Great Lakes Ports Ltd and presented in table 10 of this report.'

31. As stated earlier, the defendant did not have a license to deal in foreign exchange in Uganda. Similarly, the auditor's report also clearly states that the auditors were not provided with the supporting documentation to corroborate the said assertion. This was corroborated by the defendant's testimony when he stated as follows;

'I own Maina Speedy. Great Lakes did not have any business with Maina Speedy. I paid Maina Speedy. It was a transaction of foreign exchange. Maina Speedy did not have a license to conduct foreign exchange business.'

32. No receipt was adduced by the defendant in respect of the said transaction contrary to Regulation 22 (1) & (2) of the Foreign Exchange (Bureaus and Money Remittance) Regulations 2006 which makes the transaction illegal. This was confirmed by DW1 in his cross examination when he testified that he did not have receipts of the foreign exchange transactions. As such the defendant was not able to prove his claims of using the sum of \$24,000 to purchase an equivalent of local Uganda shillings from Maina Speedy to facilitate local business related operations. This therefore was an illegal transaction between the defendant and Maina Speedy.

It is my finding that the sum of \$24,000 paid to Maina Speedy by the Defendant from the Plaintiff's account was disbursed in breach of his fiduciary duty to the Plaintiff.

c) PAYMENTS TO PRIME FINANCE COMPANY LTD \$64,854

33. The Plaintiff's Counsel submitted that in paragraph 24 (c) of his witness statement, PW1, Ashok Doshi, identified the aforementioned disbursement as one that was done for improper purposes not associated with the Plaintiff's business. Counsel prayed that Court find that the sum of \$64,854 paid to Prime Finance Company Ltd by the Defendant from the Plaintiff's account was expended in breach of his fiduciary duty to the Plaintiff.

34. In reply, the defendant's Counsel submitted that the Plaintiff's United States Dollars Account had to be dealt with by the Defendant to change into Uganda Shillings in order to carryout the Company Business and in the best interest of the Plaintiff to bargain for prevailing exchange rates. The defendant's Counsel further submitted that the Plaintiff rubbishes the findings of the Referee on the transactions involving payments to Prime Finance Company Ltd and yet owns up to the activities such funds paid for and on behalf of the Plaintiff Company which is contradictory.

DETERMINATION BY COURT

35. In his witness statement, the Defendant does not give any explanation why he paid the sum of \$64,854 to Prime Finance Company Ltd out of the Plaintiff's account. In his explanation to Ernst & Young as indicated at page 18 of PEX5, the Defendant characterized the payment as a foreign exchange transaction. In that report Ernst and Young stated that they had not been provided with supporting documentation to corroborate that assertion. The Plaintiff's Counsel submitted that Prime Finance Company Ltd is not a licensed foreign exchange dealer which would make the alleged transaction illegal. This was confirmed by PEX28 in which the Bank of Uganda confirmed that Prime Finance Company Ltd was not licensed by Bank of Uganda to conduct foreign exchange business during the period 2006 to 2007. This means that Prime Finance Company Ltd also did not have a license to deal in foreign exchange in Uganda since none was adduced.
36. Furthermore, no receipt was adduced by the defendant in respect of the said transaction contrary to Regulation 22 (1) & (2) of the Foreign Exchange (Bureaus and Money Remittance) Regulations 2006, which makes the transaction illegal. The sum of \$64,854 paid to Prime Finance Company Ltd by the Defendant from the Plaintiff's account was therefore disbursed in breach of his fiduciary duty to the Plaintiff.

d. PAYMENTS TO PRINCE MUGENGA

37. The Plaintiff's Counsel submitted that this was also another disbursement that PW1, Ashok Doshi, identified in his witness statement as having been done for improper purposes not associated with the Plaintiff's business. He prayed that Court find that the sum of \$1,250 paid to Prince Mugenga by the Defendant from the Plaintiff's account was expended in breach of his fiduciary duty to the Plaintiff. In reply the defendant's Counsel submitted that the Plaintiff rubbishes the findings of the Referee on the transactions involving payments to Prince Mugenga and yet own up to the activities such funds paid for on behalf of the Plaintiff Company which is contradictory.

DETERMINATION BY COURT

38. In his explanation to Ernst & Young as indicated on page 18 of PEX5, the Defendant characterized the payment as a foreign exchange transaction. However, Ernst and Young stated that the defendant had not provided supporting documentation to corroborate his assertion. Counsel further submitted that Prince Mugenga is not a licensed foreign exchange dealer according to the communication from Bank of Uganda exhibited as PEX28. Per PEX28, Bank of Uganda clearly stated that Prince Mugenga was not licensed to conduct foreign exchange business during the period in question.

The foreign exchange transaction between the Plaintiff and Prince Mugenga was therefore an illegal transaction.

e. PAYMENTS TO TOM MUGENGA \$243,000

39. The Plaintiff's Counsel submitted that PEX5 identified 35 cheques and account transfers to the defendant from the Plaintiff's account in the total sum of USD 534,912. Counsel further submitted that in paragraph 4(i) of the Plaintiff the Plaintiff admits USD 305,645 as having proper accountability, leaving a balance of USD 229,267 unaccounted for by the defendant. That in paragraph 24 (e)-(h) of PW1's witness statement, he identified disbursements from the Plaintiff's account to the Defendant in the total sum of \$ 243,000 as payments done for improper purposes not associated with the Plaintiff's business. That in paragraph 31 and 32 of his witness statement, PW1 denied that the Plaintiff's board of directors ever sanctioned the following payments;

a. Ugshs. 340,000,000/ to Ofwono David & Associates as commission fees for identifying the land

b. Ugshs. 20,000,000/ for facilitating public relations for visiting local politicians

c. Ugshs. 18,000,000/ for payment to Richard Kabona and Omongole Michael as car hire for 6 months

d. Ugshs. 30,000,000/ for payment to Odwori James as Hotel accommodation and transport refund for visiting members of Parliament and the Minister of Trade and Industry

e. Ugshs. 100,000,000/ as payment to Juma Seiko for special operations

f. Ugshs. 46,107,829/ to Tom Mugenga as miscellaneous expenses

g. Ugshs. 805,000,000/ to Maombo Imogir Leonard & Iddi Mutai as partial compensation to squatters.

f) PAYMENT OF UGSHS. 805,000,000/ TO SQUATTERS.

40. The Plaintiff's Counsel submitted that the defendant's claim that he paid Ugshs. 805,000,000/ to squatters/ tenants on Block 4 Plot 124 Tororo which was purchased by the Plaintiff was a departure from his pleadings, which is prohibited. See **Interfreight Forwarders Ltd v East African Development Bank SCCA No. 33 of 1992**. In reply the defendant's Counsel submitted that under paragraph 14 and 16 of the Written Statement of Defense the Defendant clearly pleaded that the acquisition of the land in issue involved Tororo District Land Board. Malaba Town Council, Ministry of Local Government, Tororo District Executive Committee the former Lessee, Commission Agents and local residents all of which the Plaintiff was fully aware.

41. The Plaintiff's Counsel further submitted that when the Plaintiff sought accountability from the Defendant for funds expended on its account, the accountability given did not indicate that any of the Plaintiff's money was applied to payment of squatters. That the purported payment to squatters is a disingenuous attempt to patch up misappropriation of the Plaintiff's monies. That Court find that the Defendant did not pay any squatters as the land was vacant save for Osuna Otwani the proprietor at the time.

DETERMINATION BY COURT

42. PW1 Ashok Doshi testified that he does not agree with the amount of Ughs. 805,000,000/ paid to squatters as stated on page 25 of the Audit report because there were no squatters on the land since land was vacant as in PEX6. In PEX25 a letter dated 21st August 2009 from Bitangaro & Co Advocates, who were acting on behalf of the Defendant, Counsel gave accountability for transactions and expenditure of money from the Plaintiff's account. The accountability given did not make any reference to the land being occupied by squatters at the time of the Plaintiff's purchase in 2006. However, during his cross examination DW1 stated that there were squatters on the land and were compensated but when asked details of the same, he referred to the manager who refused to testify before this Court. In his re-examination he stated that there was no accountability for payment of squatters in PEX25 because that payment had not yet been negotiated and that the squatters are still there.

43. In his testimony, PW1 Ashok Doshi testified that he visited the land prior to purchase and it was vacant. This was corroborated by the letter from the Town Clerk of Malaba Town Council dated 28th of April 2006 to the Minister of Water, Lands and Environment making a case for compulsory acquisition of the 210 acre property from Osuna for development of the industrial park, the Town Clerk described the land as being currently vacant and not in use and as have been so from time immemorial. In addition to that PEX8 which is an extract of minutes of a meeting of the District Executive Committee Meeting for Tororo District shows that the Resident District Commissioner described the land in question as 'bushy and a security threat'. This is corroborated by the fact that during his cross examination, the defendant kept referring to his manager as being more conversant about the compensation of squatters but never called him to testify about the same in this Court.

44. Contrary to the defendant's testimony in PEX6 dated 28th April 2006 the town clerk Malaba wrote a letter to the Minister for water, lands and environment stating that the land in question was currently vacant and not in use and had been so from time immemorial. When asked about this letter in his cross examination, DW1 agreed that there were no squatters when the suit land was bought. When asked why he

compensated squatters yet land was vacant, he stated that the town clerk would explain that. In his testimony DW3, the town clerk referred to by DW1 testified that as stated in PEX6 the land was vacant from time immemorial. He went ahead and contradicted himself by stating that the land was in two pieces of 140 acres and 210 acres.

45. That it was the 140 acres that were vacant while the 210 acres had squatters. That when making PEX6 he thought the land was 210 acres but later it was surveyed and determined to be bigger. PEX6 clearly refers to only 210 acres as is the certificate of title exhibited as DEX1. DW1 could not prove the 140 acres referred to and stated that the 140 acres were given to Malaba town for a market and taxi park and URA border post. The concern of this Court is the 210 acres that are shown in DEX1 not the 140 acres that have just been introduced. Stating in PEX6 that the 210 acres were vacant and then stating in cross examination that the same had squatters is a major contradiction that cannot go unnoticed.

46. In his testimony DW2, the alleged chairman of squatters stated that when PEX6 was written, the squatters were using the land for farming and residence and that three quarters of the squatters still reside there. He stated that at the time when the suit land was bought there were houses and crops but did not have a picture to show it. He further testified in his cross examination that the defendant paid the squatters Ugshs. 805,000,000/ through the town Council supervision yet in his re-examination he stated that the squatters are 201 and were not all paid. He was referred to PEX8 which are minutes of the joint district Executive Committee and Security management held on 21st July 2006 where the RDC of Malaba stated that no agriculture has ever taken place on the suit land and DW2 could not explain this but kept insisting that there were people farming without presenting evidence of the same.

47. Under paragraph 5 of his witness statement and in his cross examination DW4 Onyango Odoi stated that Town Council had confirmed to him in different meetings that the suit land was available but with several squatters. He however, could not produce any minutes of the said meetings to prove his allegations. PEX7 is a

correspondence prepared by DW4 on 21st July 2006. In that correspondence DW4 did not mention third party interests therein. When asked about this in his cross examination, DW4 stated that it was dealt with in the lease agreement. He was shown the lease agreement exhibited as DEX1 but was not able to show this Court any provision for squatters and stated that the squatters had left prior to the lease agreement. He insisted that there were houses but couldn't remember how many. DW4 testified that when PW1 visited the land and found nothing on it, it was after DW4 had reached an agreement with the squatters and they left the land.

48. The evidence of DW1 – DW4 was all full of inconsistencies and contradictions. DW2 stated that the squatters are still on the suit land while DW4 stated that he reached an agreement with the squatters and they left the land. On the other hand, DW1 states that he did not deal with the issue of squatters but his manager, did yet again during his cross examination DW2 stated that the defendant (DW1) paid the squatters Ugshs. 805,000,000/ through the town Council supervision. During his cross examination, DW2 also stated that all the squatters were paid yet he also stated in his re-examination that not all were paid. These contradictions among others show that witnesses were struggling to create a story of squatters who were non-existent. They did not succeed in this.

49. I am convinced that there were no squatters on the suit land at the time of purchase and so the defendant did not pay any squatters the alleged sum of Ugshs. 805,000,000/. This in turn means that the disbursements by the defendant was in breach of his fiduciary duty to the Plaintiff.

g). Payment to Ofwono David & Associates the sum of Ugshs. 340,000,000/ as commission fees for identifying the land; purported payment of 100,000,000/ to Juma Seiko for Special operations, 20,000,000/= to facilitate Public relations for visiting local politicians; payment of Ugshs. 18,000,000/ to Richard Kabona and Omongole Michael as car hire for 6 months and payment of Ugshs. 30,000,000/ to Odwori James as Hotel accommodation and transport refund for visiting Members of Parliament and the Minister of Trade and Industry

50. None of the correspondences on Court record show or mention Ofwono David & Associates in any of the processes leading to the grant of a lease to the Plaintiff to justify any alleged payment to him. There is also no evidence on record that the Defendant ever remitted that sum of money to the said Ofwono David who was also never called to testify that he received the said money from the Defendant. Furthermore, the defendant never adduced any evidence of the purported payment of 100,000,000/ to Juma Seiko for Special operations, 20,000,000/= to facilitate Public relations for visiting local politicians, 18,000,000/ to Richard Kabona and Omongole Michael as car hire for 6 months, 30,000,000/ to Odwori James as Hotel accommodation and transport refund for visiting Members of Parliament and the Minister of Trade and Industry.

51. Juma Seiko was not called as a witness to confirm that he was paid a sum of Ugshs. 20,000,000/= for Special operations, no receipts were adduced to show the facilitation of Public relations for visiting local politicians, Richard Kabona and Omongole Michael were never called as witnesses to confirm that they were paid a sum of Ugshs. 18,000,000/ as car hire for 6 months and Odwori James whom DW1 also referred to often as having answers to many of the questions asked to him during cross examination refused to testify before Court because he had been told not to. There is therefore no way for this Court to confirm that the payment of Ugshs. 30,000,000/ was indeed paid towards Hotel accommodation and transport refund for visiting Members of Parliament and the Minister of Trade and Industry as no receipts of the same were also adduced.

52. There is no evidence that these disbursements were done for the benefit of the Plaintiff which points to a breach of the fiduciary duty to the Plaintiff by the defendant.

Issue 2: Remedies

53. The Plaintiff prayed that the Defendant refund the monies expended for improper purposes, interest, general damages and costs. The Plaintiff submitted that the

disbursements in the sum of \$788,104 of the Plaintiff's money were used for improper purposes.

In reply the defendant's Counsel submitted that Court dismiss the suit with costs to the defendant including refund of costs paid to the referee.

54. In the Plaintiff's Amended Plaint dated 23rd November 2012, the Plaintiff prayed for a declaration that the defendant breached his fiduciary duty as a director in the Plaintiff, refund of monies expended for improper purposes, account for profits made by the defendant from the use of the Plaintiff's monies, interest, general damages and costs.
55. Whereas it has been established that the Defendant was resoundingly in breach of his fiduciary duty to the plaintiff when he made various disbursements of the plaintiff's money, it is common ground that the plaintiff company acquired property comprised in LRV3581 Folio 5 Plot 124 Malaba, Tororo and is the current registered proprietor of the said land.

By consent before court the parties agreed to engage the services of Ernst & Young Certified Public Accountants of Uganda under S.27(c) of the Judicature Act Cap.13 to determine how moneys on the plaintiff's account with Crane bank Ltd account no. 0245030915700 were disbursed and by whom and for what for the period 1st July 2006 up to 30th March 2009.

Section 27 (c) of the Judicature Act Cap. 13 provides that where in any cause or matter, other than a criminal proceeding the question in dispute consists wholly or partly of accounts, the High Court may at any time, order the whole cause or matter or any question of fact arising in it to be tried before a special referee or arbitrator agreed to by the parties or before an official referee or an officer of the High Court. The report of the auditors was filed on court record on 5th February 2015 and admitted as PEX5.

The explanations and supporting documents provided by Mr Tom Mugenga in relation to the disbursements and expenses he allegedly incurred on behalf of

Great Lakes Ports Ltd for the period 1 July 2006 up to 30 March 2009 amounts to USD 1,094,267.00 leaving a balance of USD 46,827.50 as unaccounted for.

29. According to the summary of the audit report, the defendant was unable to account for the sum of USD 46,827.50.

Since the court adopted the auditor's report as a judgment of this court, its findings are binding on the parties.

The Court has however, established that there was breach by the Defendants of their fiduciary duty to the plaintiff when they infringed the legal requirements for transaction in foreign currency, when they failed failure to prove that the moneys were expended for the betterment of the plaintiff and in the form of the monies that the defendant was unable to account for in the sum of USD 47, 827.50 according to the report of Ernst and Young.

56. Additionally, the following fictitious payments all together amounting to shs 508,000,000/= were not proved; payment to Ofwono David & Associates the sum of Ugshs. 340,000,000/ as commission fees for identifying the land; purported payment of 100,000,000/ to Juma Seiko for Special operations, 20,000,000/= to facilitate Public relations for visiting local politicians; payment of Ugshs. 18,000,000/ to Richard Kabona and Omongole Michael as car hire for 6 months and payment of Ugshs. 30,000,000/ to Odwori James as Hotel accommodation and transport refund for visiting Members of Parliament and the Minister of Trade and Industry.

57. **Halsbury's Laws of England Third Edition at page 307** states as follows;

'a director who has misapplied, or retained, or become liable or accountable for any money or property of the company, or who has been guilty of any breach of trust in relation to the company, must make restitution or compensate the Company for the loss.'

58. The Plaintiffs have discharged their duty in proof of damages and inconvenience caused to them as a result of the defendant's breach of his fiduciary duty to them. Damages are awarded as a remedy in vindication of the claimant's rights.

In the circumstances of this case, I find a sum of Ugx 600,000,000 (six hundred million Only) to be reasonable and adequate to compensate the Plaintiff for the damage occasioned.

Interest

The Plaintiff prayed that the Court award interest at the rate of 12% per annum from the date of filing the suit until payment in full.

59. **Section 26 (2) of the Civil Procedure Act** empowers the Court to award interest on a money decree at such rate as the Court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such rate as the Court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the Court thinks fit.
60. In determining a just and reasonable rate, Courts take into account "the ever rising inflation and drastic depreciation of the currency. See; **CS No.0016/2017 (Arua) Waiglobe (U) Ltd V Sal Beverages Ltd**. On that basis therefore, Court finds it reasonable to grant interest on the monies to be refunded at a rate of 12 % from the date when the cause of action arose to the date of judgment.
61. **Section 27 (2) of the Civil Procedure Act** provides that costs shall follow the event. Costs are awarded to the successful party. In this case, the successful party is the Plaintiff and such costs are awarded to them.

F. Final Orders

- a. Judgment is entered for the Plaintiff against the Defendant in the sum of \$46,827.50 which the auditors found to be unaccounted for.

- b. Interest is awarded on (a) above at a rate of 12% from the date of filing until payment in full.
- c. General damages of Ugx 600,000,000(six hundred million Only) with interest at a rate of 12% per annum from the date of judgment till payment in full awarded to the Plaintiff.
- d. Costs are awarded to the Plaintiff.

Delivered at Kampala this 24th day of May 2022.

Richard Wejuli Wabwire

JUDGE