THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL SUIT NO. 894 OF 2019

CLESSY BARYA KIIZA :: PLAINTIFF

VERSUS

1. JOMO ROBERT KASHAIJA

2. DR. IMELDA NIGHT KASHAIJA

3. WINNIE KOMUHANGI

4. BRIDGET HELGA KAVUMA KASHAIJA :::::::::::::::::::::::: DEFENDANTS

BEFORE: HON. JUSTICE BONIFACE WAMALA

JUDGEMENT

Introduction

[1] The Plaintiff brought this suit jointly and severally against the Defendants seeking recovery of UGX 267,000,000/= being special damages, interest at 6% per month on the said sum, general damages, costs and interest thereon arising out of breach of a friendly loan agreement.

[2] The brief facts according to the Plaintiff are that by three (3) different agreements, the 1st and 2nd Defendants obtained loans from the Plaintiff which were personally guaranteed by the 3rd and 4th Defendants. The loans were, namely, UGX 154,000,000/= obtained on 20th December 2018; UGX 77,000,000/= obtained on 21st December 2018; and UGX 36,000,000/= obtained on 22nd June 2019 respectively. An agreement was written and signed by the parties and the guarantors for each of the said facilities. The 2nd Defendant also deposited a certificate of title for land comprised in LRV Plot 74 Singo Block 427 land at Nabisisi Estate in Mubende District which was registered in her name. A date and a schedule of re-payment was set out in

respect of each facility. The Defendants did not make any payment towards any of the loan facilities within the agreed time or at all. The Plaintiff wrote and served notices to both the borrowers and their guarantors to no avail. The Plaintiff averred that as a result of the default by the Defendants, he has suffered capital lock down, financial stress and inconvenience for which he claims general damages. The Plaintiff thus brought this suit.

[3] The Defendants filed a joint written statement of defence (WSD) and a counterclaim by the 1st and 3rd Defendants on 15th November 2019 and an amended joint written statement of defence (WSD) by the Defendants with a counterclaim by the 1st and 3rd Defendants filed on 16th October 2020. In the amended WSD, the Defendants denied the Plaintiff's claims and particularly stated that according to the 1st Defendant, the Plaintiff was a celebrated unlicensed money lender that charges high, unconscionable, excessive and compounded interest rates and his alleged friendly loan agreements are illegal, contrary to public policy and the said transactions ought to be reviewed by the court in light of Sections 88 and 89 of the Tier 4 Microfinance Institutions and Money Lenders Act No. 18 of 2016. The 1st Defendant also averred that he requested the Plaintiff to lend him a sum of UGX 150,000,000/= around 1st December 2018 whereupon the Plaintiff gave him a list of conditions among which was a certificate of title and three guarantors. The 1st Defendant avers that the other three Defendants were guarantors and he was the sole borrower. The 1st Defendant provided a certificate of title for the land at Nabisisi in Mubende District which was in the name of Continental Finance International Services. The Plaintiff demanded that the title first get transferred in the name of the 2nd Defendant as a guarantor and the boundaries of the land had to be opened and valuation done before disbursement of the loan sum.

[4] It was further averred in the WSD that when the above stated conditions were satisfied, the Plaintiff called the 1st Defendant to sign the already prepared agreements together with the other three Defendants as guarantors. The

Plaintiff then deposited only UGX 85,000,000/= on the 1st Defendant's bank account and claimed that UGX 15,000,000/= (which made up the sum of UGX 100,000,000/=) had been deducted to cover the sum used in the transfer of the title, costs of survey and valuation of the land. It was further claimed that the said sum was disbursed at 9% interest per month for 6 months which totaled to UGX 54,000,000/=. The 1st Defendant avers that it was these sums; UGX 100,000,000/= allegedly disbursed and UGX 54,000,000/= being accumulated interest; that made up the sum of UGX 154,000,000/= that is indicated as the subject matter of the agreement dated 20th December 2018.

[5] The 1st Defendant further stated that on 21st December 2018, he was supposed to receive the second batch of the facility to the tune of UGX 50,000,000/=. The 1st Defendant avers that the same was deposited on his bank account at an interest rate of 9% per month payable within 6 months; which translated into UGX 27,000,000/= that the Plaintiff added to the deposited sum thus leading to the claimed sum of UGX 77,000,000/= indicated in the second agreement of 21st December 2018. It is further averred that when the 1st Defendant failed to pay back the loaned sum within the agreed time, the Plaintiff gave him a further period of 4 months and subjected the outstanding sum of UGX 150,000,000/= to interest at 6% per month which translated into 36,000,000/= that the Plaintiff claims under the third agreement of 22nd June 2019. The 1st Defendant denied receiving any payment in cash from the Plaintiff.

[6] In the Counterclaim, the 1st Defendant sought re-opening and setting aside of the loan transaction. The 3rd Defendant claimed that she had separately obtained loan advances from the Plaintiff at an excessive interest of 10% per month which made the transaction illegal and liable to be set aside. The 3rd Defendant also claimed that she had deposited her land title with the Plaintiff which the Plaintiff had refused to release even after she had paid off her loans. The 3rd Defendant therefore prayed that the Plaintiff be ordered to release her

certificate of title for land comprised in Block 72 Plot 35 Land at Seeta, Mutuba VI, Bulemezi, East Buganda. The 1st and 3rd Defendants/Counterclaimants also prayed for general damages and costs of the counterclaim.

[7] The Plaintiff made a reply to the WSD and the counterclaim whose contents I have also taken into consideration.

Representation and Hearing

[8] At the hearing, the Plaintiff was represented by Mr. Nester Byamugisha and Mr. Tumwesigye Louis appeared for the Defendants. Counsel made and filed a Joint Scheduling Memorandum. Evidence was agreed to be led by way of witness statements. The Plaintiff led evidence of four witnesses whose witness statements were filed and adopted by the Court. The witnesses were cross examined by Defence Counsel. The Defendant led evidence of two witnesses whose witness statements were filed and adopted by the Court and the witnesses accordingly cross examined by the Plaintiff's Counsel. Upon closure of the hearing, both Counsel made and filed written submissions which I have reviewed and considered during the determination of the issues before the Court.

Issues for Determination

[9] Four issues were agreed upon for determination by the Court, namely;

a) **Whether the transactions leading to the Plaintiff lending the various sums of money and the lending to the 1st and 2nd Defendants were lawful.**
b) **Whether any interest was charged in respect of the suit friendly loan transactions.**
c) **Whether the duplicate certificate of title for land comprised in Bulemezi East Buganda Block 72 Plot 35 at Seeta Mutuba VI was pledged as further security for repayment of the suit loans.**
d) **What remedies are available to the parties?**

Burden and Standard of Proof

[10] In civil proceedings, the burden of proof lies upon he who alleges. *Section 101 of the Evidence Act, Cap 6* provides that;

> *(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist.*
>
> *(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.*

[11] *Section 103 of the Evidence Act* provides that;

> *The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.*

[12] As such, the burden of proof in civil proceedings normally lies upon the Plaintiff or claimant. The standard of proof is on a balance of probabilities. The law however goes further to classify between a legal burden and an evidential burden. When a Plaintiff has led evidence establishing his/her claim, he/she is said to have executed the legal burden. The evidential burden thus shifts to the defendant to rebut the plaintiff's claims.

Resolution of the Issues by the Court

Issue 1: Whether the transactions leading to the Plaintiff lending the various sums of money and the lending to the 1st and 2nd Defendants were lawful.

Submissions by Counsel for the Plaintiff

[13] It was submitted by counsel for the Plaintiff that the Defendants were all sued jointly and or severally. Counsel submitted that the 1st and 2nd Defendants were sued for the primary liability on the friendly loans and the 3rd and 4th Defendants as guarantors. Counsel referred the Court to the written

statement of defence (WSD) and stated that only the 1st Defendant denied the contents of Paragraph 3 of the Plaint. Counsel noted that while the main contention by the Defendants was that the Plaintiff was an unlicensed money lender, according to the evidence of PW1, the Plaintiff did not advance the loans to the 1st and 2nd Defendants as a money lender because he was not engaged in the money lending business. Counsel submitted that according to the evidence, the Plaintiff gave out the loans on the strength of the 1st and 2nd Defendants being relatives of the 3rd Defendant.

[14] Counsel further stated that the evidence of PW3 corroborated the Plaintiff's evidence to the effect that the Plaintiff was not a money lender. Counsel also stated that upon perusal of the agreements in issue, it was evidenced that the said agreements were friendly loan agreements. Counsel also argued that from cross examination of DW1 and DW2, it was very clear that they were both principal borrowers and that their guarantors were highly educated and experienced persons in financial matters. Counsel further argued that the contents of the agreements were agreed upon and, as such, the said agreements were not illegal and bore no ambiguity. Counsel concluded that the parties were bound by the said agreement in line with the provisions under Sections 91 and 92 of the Evidence Act and the decision in ***Obwana vs Malaba Town Council & 2 Others, Mbale HC Civil Appeal No. 139 of 2013***. Counsel prayed that the Court finds that the Plaintiff is not and was not at the material time a money lender and answer the first issue in the affirmative.

Submissions by Counsel for the Defendants

[15] In reply, Counsel for the Defendants submitted that according to the defence evidence, the 1st Defendant previously knew the Plaintiff as a money lender. Counsel submitted that it was shown in evidence that it was agreed between the Plaintiff and the 1st Defendant that the first disbursement of the loan payment would be at 9% per month for 6 months. Counsel submitted that out of the amount claimed by the Plaintiff, the sum of UGX 132,000,000/= was

never disbursed to the 1st Defendant in cash and there was no proof to that effect, either by way of a voucher or any other acknowledgment. Counsel submitted that since the Plaintiff's witnesses PW3 (Nuwamanya Balam) and PW4 (Ford Kibegye) admitted that they did not attend the negotiations that took place before signing the agreements, it is only the evidence of the Plaintiff, the 1st and 2nd Defendants that should be considered by the Court on the aspect of the rate of interest and the amount that was actually disbursed to the 1st Defendant. Counsel prayed to Court to find the evidence of the 1st and 2nd Defendant to be more convincing. Counsel prayed to Court to find that the transaction in issue were those on money lending, at an exorbitant interest abd were therefore illegal and ought to be set aside.

[16] Counsel for the Plaintiff made and filed submissions in rejoinder which I have also taken into consideration.

Determination by the Court

[17] Let me begin with the contention raised by the 1st Defendant as to who were the principal borrowers under the loan agreements and who were guarantors. While the Plaintiff states that the 1st and 2nd Defendants were the principal borrowers and the 3rd and 4th Defendants were the guarantors, the 1st Defendant states that he was the only principal borrower and the three Defendants came in as guarantors. It is clear, however, that the contention by the 1st Defendant is not born out of the agreements herein in issue. The agreements dated 20th December 2018 (PE6), 21st December 2018 (PE8) and 22nd June 2019 (PE9) clearly indicate the borrowers as the 1st and 2nd Defendants and the Guarantors as the 3rd and 4th Defendants. In absence of any lawful and justifiable cause, the said content of the written agreements cannot be varied by oral evidence. As submitted by Counsel for the Plaintiff, such would be contrary to the provisions under Sections 91 and 92 of the Evidence Act Cap 6.

[18] Sections 91 and 92 of the Act fall under a head titled – *Exclusion of oral by documentary evidence*. Section 91 thereof provides –

> ***"Evidence of terms of contracts, grants and other dispositions of property reduced to form of document.***
>
> *When the terms of a contract or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence, except as mentioned in section 79, shall be given in proof of the terms of that contract, grant or other disposition of property, or of such matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained."*

[19] Under exception 3 to the above cited provision, oral evidence concerning a statement in any document is only acceptable if it is as to the same fact. It cannot be adduced to contradict a fact stated in the document. The exception provided for under Section 79 of the Evidence Act is not applicable herein since it relates to presumptions concerning a judicial record or proceeding. *Section 92(a) of the Act* provides as follows: -

> ***"Exclusion of evidence of oral agreement.***
>
> *When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 91, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to or subtracting from its terms; but —*
>
> *(a) any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto, such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration or mistake in fact or law".*

[20] The above provisions have been subject of interpretation in earlier decisions of the court in ***DSS Motors Ltd vs Afri Tours and Travel Ltd, HCCS No. 12 of 2013*** and ***Obwana Peter vs Malaba Town Council & Others, HC Civil Appeal No. 139 of 2013 (Mbale HC)***. From the above cited provisions of the law and the decided cases, it is a well settled position of the law that oral evidence cannot be admitted or that, even if admitted, it cannot be used to contradict, vary or add to a written instrument. This is what is commonly referred to as the parole evidence rule. In ***DSS Motors Ltd vs Afri Tours and Travel Ltd (supra)***, the court held that in relation to a contract, the rule means that where a contract has been reduced to writing, neither party can rely on evidence on terms alleged to have been agreed which is extrinsic to the contents of the agreement.

[21] As can be noted from the above cited provision of Section 92 of the Evidence Act, the rule has exceptions. One exception that is available to the present case is in paragraph (a) thereof where *any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto, such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration or mistake in fact or law*. In case any of the above mentioned circumstances are proved by a party, the rule may not apply.

[22] On the case before me, the Defendants have pleaded and relied on a plea of illegality as a factor that vitiated the contract and would permit adduction of oral evidence against the clear contents of written agreements. It is therefore important to examine whether the agreements herein in issue are affected by any illegality. It was averred by the Defendants that the agreements in issue were illegal because they constituted money lending agreements charging illegal and exorbitant interest by the Plaintiff who was acting as an unlicensed money lender contrary to the law. On his part, it was averred by the Plaintiff that he was not a money lender and only lent money to the Defendants as

persons known to him explaining why the agreements were termed as "Friendly Loan Agreements".

[23] To resolve this contention, the court needs to examine what amounts to illegal money lending. It ought to be noted that it is not correct to think that any money lending transaction where the lender possesses no money lenders' licence is illegal. In the case of ***Ndyareeba Ronald vs Joseph Arinaitwe, HC MA No. 173 of 2019 (Commercial Division)***, I had occasion to deal with the same contention. In that case, I did point out that according to the governing law, the *Tier 4 Microfinance Institutions and Money Lenders Act 2016,* for a transaction to be governed by the provisions of that Act, the lender has to be a registered company, and licensed to lend money as a business. See: *Sections 78 and 79 of the Tier 4 Microfinance Institutions and Money Lenders Act 2016*. Lending as a business is conducted in accordance with the rules of commerce. The most predominant of the rules is that the lender does it as a business and charges interest on the money lent. This in no way means that a person cannot lend money outside the framework of the said law. There is nothing illegal either within the said framework or under any other law for a person to lend money to another person under agreement. What is illegal is for a person to do so as a business without a license or without compliance with existing provisions of the law. The illegality, therefore, is trading as a money lender without a money lender's certificate/ license.

[24] I should also point out that the act of charging interest per se on money lent does not make a transaction illegal. Such an act, especially if done repetitively, can only disclose evidence of a business conduct which can in turn make a person a money lender. As such, where a person lends money repetitively with interest thereon, such can constitute evidence of trading as a money lender and if such a person has no licence, then he/she would be illegally trading as a money lender. On the other hand, where a person lends money and it is agreed that if it is not repaid within the agreed time, it will

attract interest at a given rate from the date of default; and where such is not done as a trade, the conduct will not be that of a money lender.

[25] In my considered view, the conduct described in the immediately foregoing paragraph would be synonymous to a person charging interest on unpaid balance over a sale transaction. As an example, if A sells land to B upon part payment, with an agreement that the balance be paid within a given time and that if the balance is not paid as agreed, it would attract interest at a given rate from the date of default; such a clause as to interest cannot be said to be illegal under the law. If the agreed rate is exorbitant or unconscionable, that is a different question and the court has power to set aside the agreed rate and award what is lawful and just. Similarly, in my view, a one off or occasional lending in absence of evidence of business conduct has similar attributes and cannot be said to be unlawful.

[26] In the present case, the evidence before the Court is that the Plaintiff and the 3rd Defendant had been acquaintances over a period of about 20 years. The Plaintiff was in the business of real estate. He, on about two occasions, lent money to the 3rd Defendant as a friend which the latter paid back fully. According to the Plaintiff's evidence, when the 1st and 2nd Defendants needed money to conduct an urgent business, the 3rd Defendant referred them to the Plaintiff who agreed to offer them a friendly loan. Each of the three agreements is indeed titled as "Friendly Loan Agreement". The agreements are clear as to their terms. None of the parties that signed each of the agreements, including all the Defendants, dispute the contents of the said agreements. The Defendants have not pleaded that they did not know what they were signing. Evidence shows that all the Defendants are highly educated persons. As such, there is no claim that any of the Defendants was unsure of what they signed. That being the case, the agreements have to be interpreted according to and within their terms.

[27] Looking at the three agreements (PE6, PE8 and PE9), none of them contain a clause charging interest on the money lent. The relevant clauses therein only refer to interest upon default of payment. In the agreement PE6, Clauses 8 and 9 read as follows;

"In the event of any default being made in the payment of any one instalment as stated above, the whole amount outstanding at that point shall become due and payable. In addition to number 8 above upon default the lender shall levy interest of 6% per month on the outstanding sum till payment in full."

[28] The same terms appear in clauses 8 and 9 of PE8 and clauses 7 and 8 of PE9. Contrary to the evidence by the Defendants, there is no evidence that interest of 9% per month was charged on the borrowed sums. There is also no evidence that the charge of 6% per month was placed on the borrowed sums whether paid in time or not. According to the agreements, the interest charged was only payable if the borrowers did not pay within time. The claim by the Defendants concerning charging of interest does not, therefore, disclose any illegality. Similarly, there is no evidence by the Defendants to prove that beyond lending to the 1st, 2nd and 3rd Defendants, the Plaintiff undertook money lending as a business. All the transactions that have been availed to the Court for review in evidence have similar characteristics including those between the Plaintiff and the 3rd Defendant separately. The money lent was devoid of interest and interest was chargeable upon default. In absence of any evidence to the contrary, I have found nothing that makes the loan agreements in issue illegal.

[29] That being the case, the agreements are valid and binding on the parties. Their terms have to be construed as expressing the intention of the parties to the agreements. In line with the position of the law already set out above, the terms of the agreements cannot, therefore, be contradicted, varied or added to by oral or any other extrinsic evidence. The rule set out under Sections 91 and

92 of the Evidence Act, therefore, strictly apply as no exception to the rule has been established by the Defendants.

[30] In view of the foregoing, therefore, the claim by the 1st Defendant that he was a sole borrower in the transaction is not correct. According to the clear terms of the subject agreements, the loaned sums were borrowed by the 1st and 2nd Defendants and guaranteed by the 3rd and 4th Defendants. This has been clearly established by the Plaintiff. Similarly, the Plaintiff has also established that the 1st and 2nd Defendants borrowed the sums of money indicated in the three agreements, namely, UGX 154,000,000/= in PE6; UGX 77,000,000/= in PE8 and UGX 36,000,000/= in PE9. The evidence adduced by the Plaintiff is sufficient to prove that claim.

[31] The foregoing conclusion is in spite of the Defendants' claim that the 1st and 2nd Defendants did not pick any cash and only the sums deposited on the 1st Defendant's bank account were received. I have not been able to believe this claim by the Defendants for the reason that the contracts expressly state that a named sum (in each agreement) had been received in cash and "the borrowers acknowledge receipt in cash and bank deposit by signing these presents" respectively. It is clear that the bank deposits came later after the signing and the alleged cash payment. There is no plausible explanation as to why the Defendants signed a contract that stated that they had received cash when no cash had been dispensed. If they had been duped and no cash was dispensed after signing, it would have been expected that they would either have reported to police or to court for repudiation of the agreement. Now that the Defendants did not do so, and they acknowledge receipt of the sums deposited on account, I do not find anything to make me believe their denial of having received the cash payment.

[32] In all, therefore, on the first issue, no illegality has been established concerning the transactions done between the Plaintiff and the current

Defendants on the one hand and those done separately between the Plaintiff and the 3rd Defendant on the other hand. The transactions were lawful and enforceable between the parties. The first issue is therefore answered in the affirmative.

Issue 2: Whether any interest was charged in respect of the suit friendly loan transactions.

[33] In view of the evidence on record and the foregoing evaluation by the Court, it has been established that no interest was charged on the loaned sums. Rather, interest was charged upon default of payment within the agreed time. This is lawful in principle. The only contention is whether the rate of interest charged is lawful and conscionable. The evidence is that the Plaintiff charged interest at the rate of 6% per month from the date of default until full payment. This translates to 72% per annum.

[34] For a rate of interest to be lawful and/or conscionable, it must either be provided for by the law or such as the court could reasonably award if it were claimed in an action that may be before the court. The law governing interest that may be allowed by the court is provided for under *Section 26 of the Civil Procedure Act*. Section 26(1) of the CPA provides that;

> *"Where an agreement for the payment of interest is sought to be enforced, and the court is of opinion that the rate agreed to be paid is harsh and unconscionable and ought not to be enforced by legal process, the court may give judgment for the payment of interest at such rate as it may think just."*

[35] Section 26(2) of the CPA provides that;

> *"Where and in so far as the decree is for payment of money, the court may, in the decree, order interest at such a 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."

[36] From the above legal provision, it is clear that award of interest is dependent on the terms of the contract and/or upon the discretion of the court. The rate of interest that may be awarded is purely based on the court's discretion; that is, what the court deems reasonable. Arriving at a reasonable rate of interest by the court involves consideration of the definition and nature of interest. According to the **Stroud's Judicial Dictionary of Words and Phrases, Sweet & Maxwell 2000 Edition**, the phrase "**interest on money**" is defined as "**... compensation paid by the borrower to the lender for deprivation of the use of his money"**. The text refers to the case of ***Riches v. Westminster Bank [1947] A.C. 390; [1947] 1 All ER 469*** wherein at Page 472, Lord Wright states as follows:

"*...the essence of interest is that it is a payment which becomes due because the creditor has not had his money at the due date. It may be regarded either as representing the profit he 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....*"

[37] The foregoing explains the reason behind the position that the basis of an award of interest 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. See: ***Jefford and another v Gee [1970] 1 All ER 1202***. It is also now an established position of the law that an award of interest as well falls under the doctrine of *restitutio in integrum*. See: ***Esero Kasule vs Attorney General, HC M.A No. 0688 of 2014*** which cited with approval the decision in ***Tate & Lyle Food and Distribution Ltd v Greater London Council and another [1981] 3 All ER 716*** wherein **Forbes J** at page 722

stated that when considering the rate of interest and how it should be computed, ***"... one looks ... at the cost to the Plaintiff of being deprived of the money which he should have had. I feel satisfied that in commercial cases, the interest is intended to reflect the rate at which the Plaintiff would have had to borrow money to supply the place of that which was withheld".***

[38] It follows from the above understanding, therefore, that where the sum claimed arise from a commercial transaction or is such as the plaintiff needed to make more money, the court would allow interest at a commercial rate. The commercial rate reflects the rate at which the plaintiff would obtain an alternative source of money by way of credit. This usually rotates around the Central Bank Lending Rate. In commercial practice in Uganda, the commercial interest rate falls somewhere between 15% to 32% per annum. If interest is not based on commercial use of the money, the applicable rate would be between the court rate (6%) and 15% per annum.

[39] On the case before me, it is clear that the rate of interest of 6% per month which translates to 72% per annum that was charged by the Plaintiff in the subject transactions was harsh and unconscionable and cannot be enforced by the court. In line with the provision under Section 26(1) of the CPA, the court has discretion to give interest at such a rate as it deems reasonable and just. As already indicated above, such does not make the agreement illegal. It only disentitles the claimant to such unreasonable interest and leaves room to the court to determine what is reasonable in the circumstances. In the present case, considering the evidence and circumstances of the case, I find that the Plaintiff should not have charged interest beyond the rate of 24% per annum; which would translate to 2% per month. This is what the court shall award on the principal sum claimed.

Issue 3: Whether the duplicate certificate of title for land comprised in Bulemezi East Buganda Block 72 Plot 35 at Seeta Mutuba VI was pledged as further security for repayment of the suit loans.

[40] It was an agreed fact that the Plaintiff is in possession of the certificate of title for land comprised in Bulemezi East Buganda Block 72 Plot 35 at Seeta Mutuba VI belonging to the 3rd Defendant. It is also agreed that the 3rd Defendant deposited the said certificate of title when she personally borrowed money from the Plaintiff; which monies she paid back fully. It is stated by the Plaintiff that the 3rd Defendant accepted to leave the title in the Plaintiff's possession for the reason that she could need another cash advance. The 3rd Defendant does not dispute this evidence. It is alleged by the Plaintiff that upon valuation of the land presented by the 1st and 2nd Defendants (the land at Nabisisi, Mubende District), its forced sale value was lower than the amount that the Defendants wished to borrow. The Plaintiff further alleges that the 3rd Defendant accepted him to take the 3rd Defendant's certificate of title (for the land at Seeta Bulemezi) as additional security. This would be in addition to the title presented by the 1st and 2nd Defendants and the personal guarantees by the 3rd and 4th Defendants.

[41] The Defendants dispute this claim by the Plaintiff. The 3rd Defendant denies that she accepted her certificate of title to be taken as additional security and stated that the Plaintiff was only holding to it because of the earlier loan transactions which the 3rd Defendants had fully satisfied. By the counterclaim, the 3rd Defendant prayed that the Plaintiff be ordered to release her certificate of title.

[42] I have looked at the subject agreements and each of them makes reference to only two forms of security, namely; the land comprised in Plot 74 Block 427 at Nabisi Mubende District and the personal guarantees by the 3rd and 4th Defendants. Despite the fact that at the time the agreements were made, the title for the Land at Seeta Bulemezi (the 3rd Defendant's title) was in possession

of the Plaintiff, there is no mention of its being taken as additional security for the loan amounts. As such, the claim by the Plaintiff is not borne out of evidence and is in contradiction, variation and/or addition to the express terms of the agreements. Like the Defendants' oral evidence that had the same effect was rejected, this evidence by the Plaintiff also runs contrary to the provisions under Sections 91 and 92 of the Evidence Act and suffers the same fate.

[43] In the circumstances, therefore, there is no justifiable reason as to the continued holding of the 3rd Defendant's title by the Plaintiff. The third issue is therefore answered in the negative and the counterclaim partly succeeds on this point.

Issue 4: What remedies are available to the parties?

[44] From the foregoing, the Plaintiff's suit has substantially succeeded and the counterclaim has partly succeeded in favour of the 3rd Defendant. The Plaintiff has proved on a balance of probabilities that he lent to the 1st and 2nd Defendants a sum of UGX 267,000,000/= which was secured by the personal guarantees of the 3rd and 4th Defendants. Evidence is agreed that no payment was done towards the said debt. The Defendants were sued jointly and severally. Under the law, once a principal debtor fails to pay, the guarantor is liable to pay the debt. Under *Section 71(1) of the Contracts Act 2010*, the *"liability of a guarantor shall be to the extent to which a principal debtor is liable, unless otherwise provided by a contract"*. Under *Section 71(2) of the same Act*, the liability of a guarantor takes effect upon default by the principal debtor.

[45] At law, a guarantee is a contract whereby the guarantor promises the lender to be responsible, in addition to the principal borrower, for the due performance by the principal of his existing or future obligations to the lender, if the principal fails to perform those obligations. Under the guarantee, the guarantor promises or undertakes that he/she will be personally liable for the debt, default or miscarriage of the principal. The guarantor's liability is

ancillary or secondary to that of the principle who remains primarily liable to the creditor. There is no liability on the guarantor unless and until the principal has failed to perform his obligations. **See: *Paul Kasagga and Another vs Barclays Bank (U) Ltd (HC MA No. 0113-2008) [2008] UGCOMMC 42 (21 August 2008)*** and ***Moschi Vs Lep Air Services and Ors [1973] AC 345***.

[46] On the case before me, it is not in dispute that the 3rd and 4th Defendants executed a contract of guarantee in respect of the monies borrowed by the 1st and 2nd Defendants. Since it has been proved that the borrowed sums were not paid back, after notice to all the Defendants and despite this suit, all the Defendants are jointly and severally liable for the non-payment. The Plaintiff is, therefore, entitled to payment of the principal sum of UGX 267,000,000/= by the Defendants jointly and severally.

[47] The Plaintiff claimed for interest of 6% per month on the principal sum from the date of default till full payment. Under Issue 2 above, the Court has already made a determination over this matter leading to the conclusion that the Plaintiff is entitled to and is awarded interest at the rate of 24% per annum. Since the dates of default were different, the interest shall run from the date of filing the suit (which is 29th October 2019) until payment in full.

[48] In the plaint, the Plaintiff had prayed for general damages. No evidence was however led to prove any additional loss that was suffered by the non-payment of the money, which deprivation has been catered for by way of interest. Indeed, in their submissions, Counsel for the Plaintiff conceded that award of interest would suffice to meet the ends of justice. I therefore make no consideration for award of general damages in the matter.

[49] Regarding the counterclaim, the same has only succeeded on the prayer by the 3rd Defendant for release of her certificate of title for land comprised in

Block 72 Plot 35 land at Seeta, Mutuba VI, Bulemezi, East Buganda. This prayer has been granted together with an order of removal of any encumbrances on the said land. For avoidance of doubt, this order refers to encumbrances over which the Plaintiff has charge.

[50] The 3rd Defendant/Counter Claimant had also prayed for general damages against the Plaintiff/Counter Defendant for illegally holding onto her certificate of title. Under Issue 3 above, it was found that the 3rd Defendant willingly surrendered her title to the Plaintiff. There is no evidence that she ever demanded for it formally and the Plaintiff refused to release it. The 3rd Defendant has, therefore, not proved that she has suffered any damage for the continued holding of the said title by the Plaintiff who obtained its possession lawfully. I am satisfied that the order of release and removal of any encumbrances will suffice to meet the ends of justice in the matter.

[51] On costs, the law is that costs follow the event unless the court, for good cause, finds otherwise. I find that the Plaintiff is entitled to the costs of the suit. Since the 1st Defendant's counterclaim has wholly failed, the Plaintiff will have the costs of the counterclaim against the 1st Defendant/Counter Claimant as well. Since the 3rd Defendant's counterclaim has partly succeeded, the 3rd Defendant/2nd Counter Claimant shall have half of the costs of the counterclaim which shall be assessed and offset from the general costs in the suit.

[52] In all, therefore, the Plaintiff's suit succeeds and the counter claim is partly allowed. Judgement and decree are entered in the suit against the Defendants jointly and severally in the following terms:
(a) Payment of UGX 267,000,000/= to the Plaintiff by the Defendants.
(b) Payment of interest on (a) above at the rate of 24% p.a. from the date of filing the suit (29/10/2019) until payment in full.

(c) Pursuant to the counter claim, the Plaintiff shall release the certificate of title for land comprised in Block 72 Plot 35 land at Seeta, Mutuba VI, Bulemezi, East Buganda to the 3rd Defendant/2nd Counter Claimant and ensure removal of any encumbrances on the said title over which the Plaintiff has charge within sixty (60) days from the date of this judgment.

(d) Payment of costs of the suit by the Defendants to the Plaintiff.

(e) Dismissal of the counterclaim by the 1st Defendant/Counter Claimant with costs to the Plaintiff.

(f) Payment of half of the costs of the counterclaim to the 3rd Defendant/2nd Counter Claimant; which shall be by way of offset from the general costs of the suit.

It is so ordered.

Dated, signed and delivered by email this 22nd day of September 2022.

Boniface Wamala

JUDGE