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THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
[COMMERCIAL DIVISION]
CIVIL SUIT 0808 OF 2022

10 **NAKUNDA LILLIAN**

]

PLAINTIFF

VERSUS

MUSINGUZI MATHEW

]

DEFENDANT

15 **Before: Hon. Justice Thomas Ocaya O.R**

JUDGMENT

20 **Introduction**

The Plaintiff brought the following suit against the Defendant alleging breach of contract, and for recovery of UGX 10,000,000 and USD 6,000 along with interest on the same sums at a rate of 7% per month from the date of receipt until repayment in full. The Plaintiff prayed for general and punitive damages as well.

25 The Plaintiff contended that she had, prior to this dispute, known the Defendant for a period of seven (7) years as a businessman. In the year 2020, the Defendant approached the Plaintiff with a business proposition to join hands and enter the t-shirt printing and car wash businesses. As a result, the Plaintiff gave the Defendant
30 USD 6,000 for procurement and printing of the T-Shirts for sale to the public and UGX 16,000,000 as an investment (capital) to commence the car wash business. However, instead of placing the funds to their intended use, the Defendant instead disappeared with the same.

35 The Plaintiff contends that, with the assistance of some people, she managed to track down the Defendant and on 21st December 2020, he signed an



5 acknowledgment indicating he acknowledged his indebtedness to the Plaintiff in respect of the sums advanced, undertook to repay the same with interest by 30th March 2020 and pledged his land at Namusera, Wakiso District as security.

10 The Plaintiff contends that the Defendant reneged on his undertaking in the above stated agreement, only paid UGX 6,000,000 of the sums owing, a status quo which compelled her to commence this suit.

15 On 1st December 2022, the Plaintiff, upon an application for default judgment, and upon demonstrating that the Defendant had been duly served and failed or refused or neglected to enter a defence, was granted a default judgment under Order 9 Rule 6 of the Civil Procedure Rules ["CPR"] by the Deputy Registrar of this court. The Deputy Registrar accordingly set this suit down for formal proof of the Plaintiff's unliquidated claim in accordance with Order 9 Rule 8 and 10 of the CPR.

20 This court's judgment is therefore confined only to the Plaintiff's unliquidated claim.

Representation

25 The Plaintiff was represented by M/s United Advocates. The Defendant did not enter appearance and was accordingly unrepresented.

Evidence

30 The Plaintiff presented one witness, namely herself. The Plaintiff exhibited one document, namely the acknowledgement document signed by the parties dated 21st December 2020.

Issues:

The Plaintiff proposed the following issues

- (a) Whether there was a valid contract between the parties.
- 35 (b) Whether the Defendant breached the contract.
- (c) What are the available remedies?



5 **Order 9 Rule 8** of the CPR provides thus:

“Where the plaint is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages, and the Defendant fails or all Defendants, if more than one, fail to file a defence on or before the day fixed in the summons, the Plaintiff may, subject to rule 5 of this Order,
10 enter an interlocutory judgment against the Defendant or Defendants and set down the suit for assessment by the court of the value of the goods and damages or the damages only, as the case may be, in respect of the amount found to be due in the course of the assessment.”

15 The framing of issues by the Plaintiff as above presupposes that the court will, after the grant of a default judgment on the liquidated claim, proceed to try the entire dispute. Nothing could be further from this. Where there is a liquidated and unliquidated claim in the plaint, the court will, in the absence of the adverse party’s participation, grant a default judgment on the liquidated claim and proceed only
20 to take evidence on and determine the unliquidated claim. **See Valery Alia v Alionzi John HCCS 157/2010, Lloyds Forex Bureau v Securex Agencies (U) Limited HCCS No. 358/2012, Dembe Trading Enterprises Ltd V Uganda Confidential Ltd & Anor. HCCS No.0612 of 2006**

25 I would therefore re-frame the issues above into one issue

(a) Whether the Plaintiff is entitled to damages.

I will now proceed to dispose of the same.

Issue One: Whether the Plaintiff is entitled to the claim of damages?

30 The Plaintiff claimed both general and punitive damages. The thrust of the Plaintiff’s claim is that she is a victim of a breach of contract by the Defendant and should be awarded damages as atonement for her injury, inconvenience as a result of the same.



5 Lord Greene MR, in **Hall Brothers SS Co. Ltd v Young [1939]1 KB 748** defined the term damages thus:

“‘Damages’ to an English lawyer imports this idea, that the sums payable by way of damages are sums which fall to be paid by reason of some breach of duty or obligation, whether that duty or obligation is imposed by contract, by the general
10 law, or legislation.”

In **Principles Governing the Award of Damages**, Justice Bart Katureebe (CJ Emeritus) reiterates this position;

“Damages are, in their fundamental character, compensatory, not punishment.
15 Whether the matter complained of is a breach of contract or tort, the primary function of damages is to place the Plaintiff in as good a position, so far as money can do it, as if the matter complained of had not occurred. As we shall see later, this primary notion is controlled and limited by various considerations, but the central idea remains compensation. Accordingly, damages are usually measured by the
20 material loss suffered by the plaintiffs. As a general rule, the Plaintiff must not receive more, nor should he receive less than the appropriate measure of damages commensurate with his or her ‘material loss’.”

General Damages

25 General damages are what the law presumes to be the direct, natural or probable consequence that will have resulted from the defendant’s breach of contract. They are normally damages at large and can be nominal or substantial depending on the circumstances of each case. Nominal damages will be awarded where the court decides in the light of all the facts that no actual damage has been sustained. See
30 **Waiglobe (U) Ltd v Sai Beverages Limited HCCS 16/2017.**

As a general rule, whenever a party establishes a breach of contract, they are entitled to a quantum of damages as redress. See **Bhadelia Habib Ltd. v. Commissioner General, URA [1997-2001] UCL 202; Ssendi Edward v. Crown**



5 **Beverages Ltd [2005] 2 ULSR 7; Karim Hirji v. Kakira Sugar Works Ltd. [2005] 2 ULSR 60**

The law on general damages is that the damages are awarded at the discretion of the Court and the purpose is to restore the aggrieved person to the position they
10 would have been in had the breach or wrong not occurred. See **Kibimba Rice Ltd v. Umar Salim SCCA No. 17 of 1992, Maruri Reddy & Ors v Bank of India (Uganda) Ltd HCCS 804/2014.**

In the assessment of general damages, the court should be guided by the value of
15 the subject matter, the economic inconvenience that the Plaintiff may have been put through and the nature and extent of the injury suffered. See **Uganda Commercial Bank v Kigozi (2002) 1 EA 305, Maruri Reddy & Ors v Bank of India (Uganda) Ltd HCCS 804/2014 (supra)**

20 The Plaintiff testified that she had advanced the above said monies to the Defendant for investment in two ventures which the Defendant never put to their intended use. The Plaintiff and Defendant later executed an agreement where this money would be refunded. The Defendant did not comply with this agreement and retains the same money to this day. This evidence as unchallenged and I found the
25 Plaintiff a credible and reliable witness. I find this evidence to be true.

A breach of contract is defined as the breaking of the obligation which a contract imposes which confers a right of action for damages on the injured party. See **Ronald Kasibante vs. Shell Uganda Ltd HCCS No.542 of 2006, Sarah Kyarimpa
30 v Harriet Kasozi HCCS 794/2016, Mogas (U) Limited v Benzina (U) Ltd HCCS 88/2013.**

It follows from the above that the Defendant breached a contract twice; first, the oral investment contract between the parties and secondly, the written
35 undertaking to refund the monies. The Plaintiff is therefore entitled to appropriate



5 compensate to compensate them for any loss suffered. See **Section 61(1) of the Contracts Act, 2010, Mwesigye Warren v Kiiza Ben HCCS 320/2015**

The damages available for breach of contract are measured in a similar way as loss due to personal injury. The court should look into the future so as to forecast what
10 would have been likely to happen if the contract had not been entered into or breached. See **Bank of Uganda v Fred William Masaba & 5 Others SCCA No. 3/98 Esso Petroleum Co. Ltd v Mardon [1976] QB 801, Maruri Reddy & Ors v Bank of India (Uganda) Ltd HCCS 804/2014**

15 The Plaintiff testified that she is a hardworking business woman who has suffered anguish from the actions of the Defendant and has loss business opportunity/profit on account of the same.

It must be noted that whereas the parties had agreed that the sums advanced
20 would be for investment, by the acknowledgement executed on 21 December 2020 Exhibit PEX1, it was agreed that the sums would be refunded. Accordingly, in computing the appropriate quantum of damages, this court is to be guided not by expected earnings from the businesses sought to be invested in, but by computing the loss arising from retention of the monies for well over two years.

25 As far such loss, a good way to calculate and compensate for the same is to use the return on investment (ROI) metric. The average return on investment in business is around 7-20% if the business is profitable. In the instant case, we do not know for certain whether, if the sums had been returned, the same would have been
30 invested successfully by the plaintiff. Accordingly, we can use a conservative computation of 10%. This would mean that the Plaintiff would yield UGX 1,000,000 and USD 600 per year, and therefore around 2,000,000 and USD 1,200 for two years.



5 Factoring in any inconvenience, anguish and discomfort from the actions of the defendant, I find that an award of UGX 3,000,000 and USD 2,200 as general damages is fair.

Punitive/Exemplary Damages

10 In **Butterworth V. Butterworth [1920] P 126** punitive/exemplary damages were defined thus:

“Simply put, the expression exemplary damages means damages for ‘example’s sake’. These kinds of damages are clearly punitive or exemplary in nature. They represent a sum of money of a penal nature in addition to the
15 **compensatory damages given for the pecuniary or physical and mental suffering.”**

See also **Sentongo Jimmy v J. Kabugo Limited & Ors HCCS 342/2014**

In **Ahmed El Termewy v Hassan Awdi & Ors HCCS 95/2012** this court examined
20 the essence of punitive/exemplary damages:

“Punitive or exemplary damages are an exception to the rule that damages generally are to compensate the injured person. These are awardable to punish, deter, express outrage of court at the defendant’s egregious, highhanded, malicious, vindictive, oppressive and/or malicious conduct. They are also
25 awardable for the improper interference by public officials with the rights of ordinary subjects.

Unlike general and aggravated damages, punitive damages focus on the defendant’s misconduct and not the injury or loss suffered by the plaintiff. They
30 are in the nature of a fine to appease the victim and discourage revenge and to warn society that similar conduct will always be an affront to society and also the court’s sense of decency. They may also be awarded to prevent unjust enrichment. They are awardable with restraint and in exceptional cases, because punishment, ought, as much as possible, to be confined to criminal law and not the civil law of
35 tort and contract.

5 In cases of breach of contract, breach of contract of employment inclusive, the position of the law has tended to be that punitive/exemplary damages are awardable in respect of a breach of contract, where the breach involves a tort in the course of or in relation to the breach. Thus in reality punitive/exemplary damages are awardable in respect of the tort and not the breach of contract per se.

10 See Uganda Revenue Authority Vs Wanume David Katamirike SCCA No.3 of 1993.” See also **Transtel Limited & Anor v Mahi Computers & Appliances Ltd & Anor HCMA 397/2015.**

Whereas the position of their lordships above is that exemplary damages cannot
15 be awarded in breach of contract cases unless there is some tortious act, I take a different view. In my opinion, the emphasis is not on the character of the claim by the Plaintiff (that is, whether contractual, tortious etc) but on the conduct of the Defendant (that is, conduct that is criminal, malevolent or spiteful or a high-handed, morally shocking, malicious, insulting or aggressive etc). This court is
20 empowered to grant aggravated damages if the circumstances are deserving and is not confined to the character of the claim but is guided by the ends of justice. See **Section 33, Judicature Act, Section 98 Civil Procedure Act.**

As regards the present case, I do not find that circumstances exist for the grant of
25 aggravated damages because the evidence does not reveal conduct that is highly and particularly criminal, malevolent or spiteful or a high-handed, morally shocking, malicious, insulting or aggressive etc.

I would therefore decline to grant the reliefs sought under this head.

Interest

The Plaintiff sought interest at a rate of 7% per month. I believe a distinction needs to be made on pre- and post-judgment interest.



5 **Pre-Judgment Interest**

In the instant case, the Interest at 7% per month was claimed as being derived from the agreement between the parties dated 21st December 2020 and was part of the liquidated claim on which default judgment was granted by the decision of the registrar. This is because, by its nature, a claim for interest is a liquidated claim.

10 See **Order 9 Rule 6 CPR, 3WM Uganda Limited v Loadwell Freight Logistics Ltd & Ors HCCS 299/2015**

The Defendant is therefore, without else, liable to suffer interest on the principal sums outstanding at a rate of 84% per annum! This in my view is unconscionable.

15 This court is empowered to review unconscionable contracts and impose fair terms. See **Bookbinding Ltd and Another v Marden [1978] 2ALL ER 489, Muljibhai Madhvani & Anor v Francis Mugarura & Ors HCCA 13/2006, Francis Kiyaga v Josephine Segujja & Anor HCA 76 and 37/2010, Bob Kabuye v Kim Bowerman HCCS 535/2007, Charles Athembu v Commercial**
20 **Microfinance Limited HCMA 1/2014**

What happens if the quantum of interest that is unconscionable is already being granted to a party by way of a default judgment? In my view, the court can exercise its powers under **Section 33** of the Judicature Act and **Section 98** of the **Civil**
25 **Procedure Act** by reviewing the default/interlocutory judgment to redress this anomaly. Accordingly, exercise the powers in the provisions named above, I would review the default judgment to revise the quantum of interest to 20% per annum and 10% per annum on the respective amounts in the place of 7% per month.

30 **Post Judgment Interest**

I find it appropriate here to quote from the passage of Oder, JSC in **Premchandra Shenoï & Anor v. Maximov Oleg Petrovich, SCCA 9/2003**, because it is a correct statement of the principle relating to the award of interest on damages:

“In considering what rate of interest the respondent should have been
35 awarded in the instant case, I agree that the principle applied by this Court



5 in **SIETCO v. NOBLE BULDERS (U) Ltd Supreme Court Civil Appeal No. 31 of 1995** to the effect that it is a matter of the Court's discretion is applicable. The basis of awards of interest is that the Defendant has taken and used the Plaintiff's money and benefited. Consequently, the Defendant ought to compensate the Plaintiff for the money. In the instant case the learned
10 Justices of Appeal, rightly in my opinion, said that the appellants had received the money for a commercial transaction. Hence the Court rate of 6% was not appropriate and I agree with them. The rate of interest of 20% awarded by the Court of Appeal was more appropriate."

15 See also **Section 26(2) of the Civil Procedure Act, Ahmed v. Car & General Ltd., Supreme Court Civil Appeal No. 12 of 2002, Kengrow Industries Ltd. v. C.C. Chandran Supreme Court Civil Appeal No. 7 of 2001; Premchandra Shenoai & Anor v. Maximov Oleg Petrovich Supreme Court Civil Appeal No. 9 of 2003.**

20 In the premises, I find that an award of interest of 20% and 10% respectively per annum on the awards on the unliquidated claim is fair and just.

Costs

As a rule of law enshrined under **Section 27(2)** of the Civil Procedure Act, that
25 costs follow the event except where good cause dictates otherwise. See also **Harry Ssempe v Kambagambire David HCCS 408/2014.**

This suit would not have been filed but for the actions of the Defendant. The Defendant should accordingly meet the Plaintiff's costs of this suit.

Conclusion

Accordingly, the Plaintiff's claim success. I accordingly make the following orders

- (a) The Defendant is hereby ordered to pay the sums of UGX 10,000,000 (Uganda Shillings Ten Million only) and USD 6,000 (Unites States Dollars Six
35 Thousand) to the Plaintiff.



5 (b) The Plaintiff is awarded interest on the sums in (a) above at a rate of 20% and 10% respectively per annum from the date of the cause of action up to the date of commencing this action.

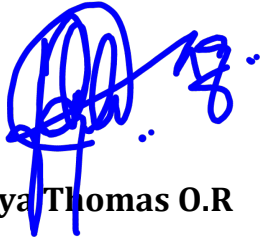
(c) The Plaintiff is awarded damages of UGX 3,000,000 (Uganda Shillings Three Million Only) and USD 2,200 (Unites States Dollars Two Thousand Two
10 Hundred only).

(d) The Plaintiff is awarded interest on the sums in (a) to (c) above at a rate of 20% and 10% respectively per annum from the date of judgment up to the date of repayment in full.

(e) The Plaintiff is awarded costs of this suit.

15 I so order.

Delivered electronically this 18th day of August 2023 and uploaded on ECCMIS.

20 
Ocaya Thomas O.R
Judge,

25 **18st August 2023**