

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
[COMMERCIAL DIVISION]
CIVIL SUIT NO. 0992 OF 2022

VERSUS

15 JACO APEA T/A AGEN & CO. LIMITED] DEFENDANT

JUDGMENT

The Plaintiff filed this suit against the Defendant for Declaration of Breach of Memorandum of Understand, recovery of special damages of UGX 70,760,000/=-, Mesne Profits, and Interests on General Damages and Costs of the Suit.

The brief facts are that the Plaintiff and the Defendant on the 5th May, 2016 entered into a memorandum of understanding where the Defendant used the Plaintiff's Certificate of title over land in Block 383 Plot 9779 at Kitende, Wakiso District as security for a loan facility from Equity Bank Limited in exchange for compensation of 10% of the facility of the UGX 89,000,000/= which is UGX 8,900,000/=. The memorandum of understanding was intended to last for a period of 4 months.

12.

5 The Defendant defaulted on the loan facility and Equity Bank consequentially foreclosed and attached the mortgaged property. The Plaintiff instituted C.S No. 759 of 2021 against the Defendant and Equity Bank.

The Plaintiff and Equity Bank later entered into a consent to withdraw the suit where
10 the Plaintiff paid UGX 61,860,000/= to Equity Bank Uganda Limited in order to redeem and recover her property in Block 383 Plot 9779 at Kitende, Wakiso District. The Plaintiff pleads that the Defendant's conduct amount to breach of the memorandum of understanding for which for which she holds him liable for Breach/Fraud particularized as follows;

- 15 1. Refusing and neglecting to pay the Plaintiff 10% upon receipt of the loan facility.
2. Refusing to return the Plaintiff's Certificate of Title after 4 months.
3. Deliberately Neglecting/failing to communicate and disappearing away from the Plaintiff.
- 20 4. Dishonestly /Unconscionably changing his trade Name from Agen & Co. Ltd to Lisma Investments Ltd and concealing the same with an intention to defraud the Plaintiff.

The further averred that as a result of the Defendant's breach of the memorandum of
25 understanding, she suffered special damages particularized as follows;

1. The 10% of the loan facility equivalent to UGX 8,900,000/=
2. Consent settlement money paid in C.S 759 of 2021 UGX 61,860,000/=
- Totaling:..... UGX 70,760,000/=**

30 **Representation:**

The Plaintiff was represented by the law firm of Ssemengo & Co. while the Defendant was unrepresented.



5 **Issues:**

The following issues were arrived at for determination.

1. Whether there was a binding contract between the Parties?
2. Whether there was a breach of contract?
3. Whether the Plaintiff is entitled to the remedies or prayers?

10

Evidence:

The Plaintiff adduced two witnesses, Mrs. Nabulya Juliet Ndagala, the Plaintiff, who led her evidence in chief by way of witness statement which was admitted in court record PW1 and PW 2 Moses Adonyo Olet, a businessman, who led his evidence in chief by way of a witness statement and was equally admitted in court.

Plaintiff filed a trial bundle and exhibited 8 documents, namely the Certificate of Title comprised at Block 383, Plot 9779 at Kitende, Wakiso District (PEX1), A copy of the Memorandum of Understanding between the Plaintiff and the Defendant (PEX 2), A copy of the Loan facility Agreement between the Defendant Equity Bank (PEX 3), Bailiffs/Auctioneers Letter to the Plaintiff dated 25/10/2021(PEX 4), A copy of the Plaint in C.S No. 759 of 2021 (PEX 5), Consent to withdraw Suit and Counter-Claim (PEX 6), Letter to Equity Bank dated 07/05/2006 (PEX 7).

Defendant did not file a defense despite being served with a summons to file defense on 21/11/2022 received by a one, Apea Jacob and on the 12/12/2022, Counsel for the Plaintiff Wrote to court about the Defendant's failure to enter appearance and prayed for grant of Default Judgement under **Order 9 Rule 6** which verbatim labored to produce here providing that;

Where the plaint is drawn claiming a liquidated demand and the defendant fails to file a defense, the court may, subject to rule 5 of this Order, pass judgment for any sum not exceeding the sum claimed in the plaint together with interest at the rate specified, if



- 5 *any, or if no rate is specified, at the rate of 8 percent per year to the date of judgment and costs.*

Court fixed the matter for 14th February 2023, none of the parties appeared, and was further adjourned to 7th March 2023 and proceeded for formal proof on 15th March 2023.

Analysis:

I will determine issue 1 and 2 on whether there existed a contract between the Parties and if, so who breached the said contract jointly since resolution of Issue 1 ultimately leads to the determination of issue 2.

The Defendant's none appearance in this matter is well noted and has been taken into consideration by the grant of the default judgment on the 07th /03/2023 however nonetheless, in determining all issues, the court bears in mind the principle of law that *"the Plaintiff has to prove his case on the balance of probabilities even where the matter is not defended"*. See ***Sections 101, 102, and 103 of the Evidence Act.***

In civil proceedings, the burden of proof lies upon the party who alleges and must prove his or her case on a balance of probabilities if he or she is to obtain the remedies sought. see **Lord Denning in Miller versus Minister of Pensions (1947)2 ALL ER 372 at page 373.**

When a plaintiff has led evidence establishing his or 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.

PW 1 in her evidence in chief paragraph 7, 8 and 9 stated that sometime on the



5 Some time back on the 5th of May, 2016, the parties executed a memorandum of understanding where the Plaintiff allowed the defendant to use her certificate of title for the land comprised on Block 383, Plot 9779 at Kitende, Wakiso District registered in her names to process a business loan from Equity bank Uganda limited and adduced PEX 2.

10

On the 5th of May, 2016 the Defendant received and acknowledged the receipt of the Certificate of Tile from PW 2 Moses Adonyo Olet as seen in PEX 1. On that understanding, the Defendant was to pay the Plaintiff 10% of the loan facility of UGX 89,000,000/= which is UGX 8,900,000/= as goodwill for the use of the title for
15 a period of 4 months.

Section 10 of the Contracts Act 2010 defines agreements that amount to Contracts to mean-

(1) An agreement made with the free consent of parties with the capacity to contract, for a lawful consideration and with a lawful object, with the intention to be legally bound.

(2) A contract may be oral or written or partly oral and partly written or may be
20 implied from the conduct of the parties.

I have labored to reproduce verbatim the body clauses of the Memorandum of Understanding, PEX 2 as hereunder-

*Clause 1. THAT 1st Party has agreed to give the 2nd Party to use the above property as
25 collateral to obtain a loan from Equity Bank Ltd.*

Clause 2. THAT the 2nd party shall meet all the costs involved in the processing of the said loan AND Perfecting of the security (valuation report, processing fees, insurance, commission, etc.)



5 *Clause 3. THAT it is hereby agreed that the property shall be used for a period of four (4) months. In case the second party receives another LPO from OPM, both parties will sit and make a new agreement.*

Clause 4. THAT the 1st party shall be paid 10 % (ten percent) of the money obtained from the Bank as goodwill honorarium for use of the Title.

10 *Clause 5. THAT the 1st party shall sign powers of Attorney, Mortgage Deeds, and any other necessary documents for the securing of the said loan and shall sign from time to time all such necessary documents as deeds as may be found needed to further the fulfillment of the purpose of this memorandum of understanding.*

Clause 6. THAT the original certificate of Title shall be handed over to the 2nd party today 5th May 2016 upon signing of this agreement and a deposit of UGX 2,500,000 paid by the 2nd 1 party.

Clause 7. THAT the 1 party and the 2nd party shall keep in constant touch throughout the tenure of this Memorandum of Understanding and both parties shall monitor each other's transaction with regard to this loan account in order that the loan account and the 1 property is not put at jeopardy by either party.

Clause 8. THAT on completion of the loan; the 2nd party shall retire the title from the Bank and 1 return it to the 1st party; after which this Agreement shall automatically expire.

Clause 9. THAT this agreement can be terminated on mutual agreement with each party settling their own obligations with their Bank and/or with each other.

Clause 10. THAT Both parties to this Agreement have voluntarily entered the same without any coercion or duress from any third parties and in good faith; and any disagreement shall be settled or referred to the courts of law from settlement.

30 In the case of **William Kasozi versus DFCU Bank Ltd High Court Civil Suit No.1326 of 2000; Lady Justice C. K. Byamugisha**, while considering the prerequisites' that must exist in order for a contract to be valid and enforceable went stated that;



5 *“Once a contract is valid; it creates reciprocal rights and obligations between the parties to it. I think it is the law that when a document containing contractual terms is signed, then in the absence of fraud, or misrepresentation the party signing it is bound by its terms”*

10 In this instant case, the Plaintiff’s undisputed testimony and evidence show that there was a contractual agreement between the Plaintiff and the Defendant and in the absence of any evidence to the Contrary as the Defendant failed to enter appearance to dispute the same, I find it highly probable that there was a contract entered into between the Plaintiff and the Defendant for the Defendant to use the Plaintiff’s
15 property situated on Block 383 Plot 9779 at Kitende, Wakisao District to obtain a loan facility from Equity Bank Uganda Limited.

Black's Law Dictionary 11th Edition at page 232 defines breach of contract as violation of a contractual obligation by failing one’s own promise, by repudiating it or
20 interfering with another party’s performance.

In the case of ***Ronald Kasibante vs. Shell Uganda Ltd HCCS No.542 of 2006***, breach of contract was defined as;

25 *‘The breaking of the obligation which a contract imposes which confers a right of action for damages on the injured party.’*

PW 1 in her undisputed evidence in chief paragraphs 10, 11, and 12 stated that Defendant upon processing and obtaining the loan facility from Equity Bank Uganda Limited did not pay the 10% to her as agreed upon in the Memorandum of
30 Understanding and went on to default on the loan facility which led to her property being the subject of foreclosure and attachment for sale.



5 Defendant's failure to pay the agreed percentage as per the Memorandum of Understanding and further defaulting on the loan facility amount to breaching of the terms of the agreement which I labored to reproduce herein and I accordingly find the Defendant in breach of the Contract.

Issue 1 and 2 are therefore found in favor of the Plaintiff.

10

Issue 3: Whether the Plaintiff is entitled to the remedies or prayers?

The Plaintiff prayed for among others Payment of Special Damages of UGX 70,760,000/= as Special Damages.

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Special damages were defined in the case of Mugabi John v Attorney General C.S No. 133 of 2002 as those damages that relate to past loss calculable at the date of trial and encompass past expenses and loss of earnings which arise out of special circumstances of a particular case.

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The Plaintiff adduced undisputed evidence in PEX 4 of the eviction notice served on her by the Auctioneers as a result of the Defendant's default in clearing the loan facility with Equity Bank Limited.

25 Further in PEX 5, the Plaintiff adduced a copy of the Plaint in the Civil Suit No. 759 of 2021 where she sued the Defendant and Equity Bank in a bid to rescue her property from being attached for sale and the subsequent consent to withdraw the suit evidence by PEX 6 the consent agreement where she paid UGX 61,860,000/= in exchange for withdrawing the suit and rescue her property by clearing part of the
30 Defendant's loan.

The Plaintiff further stated that she is entitled to the UGX 8,900,000/= being the 10% she would have got and computation of al the stated figures brings the total amount in special damages to UGX 70,760,000/=.

5 The principle of law is that *“special damages must be specifically pleaded and proved, but that strictly proving does not mean that proof must always be documentary evidence. Special damages can also be proved by direct evidence; for example, by evidence of a person who received or paid or testimonies of experts conversant with the matters”*. See **Gapco (U) Ltd Vs A.S. Transporters (U)**
10 **Ltd CACA No. 18/2004.**

In my view the only damages arising from the Plaintiff directly specially proved by documentary evidence and that of the person who received or paid as evidenced by PEX 6 is that of the UGX 61,860,000/= which the Plaintiff used to pay off part of the
15 loan facility owed by the Defendant.

In the same vein, the claim of UGX 8,900,000/= being the 10% the Plaintiff is entitled to in the agreement does not fall under special damages but does form part of the liquidated amount in principle.
20

The Plaintiff is therefore entitled to UGX 61,860,000/= as claimed.

General Damages:

In **Principles Governing the Award of Damages in Civil Cases**, A paper by **Bart Katurabe [Justice Emeritus]** stated on General damages that, according to Lord
25 **McNaughten** in the oft-cited case of **Stroms V. Hutchinson [1905] AC 515**, are such as the law will presume to be the direct natural or probable consequence of the act complained of.

Section 61 of the Contracts Act empowers court to award compensation and provides
30 that-



5 (1) Where there is a breach of contract, the party who suffers the breach is entitled to receive from the party who breaches the contract, compensation for any loss or damage caused to him or her.

(2) The compensation referred to in subsection (1) is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

10 This Court is also aware that ***“in assessment of the quantum of damages, courts are mainly guided by the value of the subject matter, the economic inconvenience that a party may have been put through and the nature and extent of the breach or injury suffered”***. See **Uganda Commercial Bank Vs Kigozi [2002] 1 EA 305**. And that “a plaintiff who suffers damage due to the wrongful act of the Defendant must be
15 put in the position he or she would have been if she or he had not suffered the wrong”.
– See **Charles Acire Vs Myaana Engola, HCCS 143/1993, Kibimba Rice Ltd Vs Umar Salim, SCCA 17/1992 and Hardley Vs Baxendale (1894) 9 Exch 341**.

It has already been decided that the Defendant breached the terms of the memorandum of understanding and greatly inconvenienced the Plaintiff who
20 testified that her property was almost attached had she not rush to court and undertake the burden of clearing part of the Defendant’s loan obligation.

In the circumstances I therefore award the Plaintiff General Damages of UGX 20,000,000/= which should be sufficient to compensate the Plaintiff for the inconveniences suffered due to the actions of the Defendant.

25 Mesne Profits:

Section 2 (m) of the Civil Procedure Act defines Mesne Profits as **‘those profits which the person in wrongful possession of the property actually received or might with ordinary diligence have received from it, together with interest on those profits, but shall not include profits due to improvements made by the person**



5 **in wrongful possession.** I have carefully considered the Plaintiff's evidence. I find no evidence of the profits which the Defendant actually received that has not been catered for under General Damages.

Further Plaintiff did not give evidence of any earnings on the property in Block 383 Plot 9779 at Kitende, Wakiso District, and its subsequent disruption leading to profits
10 likely received by Defendant.

In the premises, I find that the evidence on record does not sufficiently justify a claim for mesne profits. I therefore disallow the said claim.

Interests:

The Plaintiff prayed for interests on the amount specified as Special Damages and the
15 General Damages court awards.

Section 26 (2) of the Civil Procedure Act, provides for the awarding of interests by court at its discretion.

Bart Katurabe [Chief Justice Emeritus] in Principles Guiding awarding of Damages(supra) quoted a passage of Oder, JSC in **Premchandra Shenoï & Anor v. Maximov Oleg Petrovich, Supreme Court Civil Appeal No. 9 of 2003**
20

*"In considering what rate of interest the respondent should have been awarded in the instant case, I agree that the principle applied by this Court 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
25 defendant has taken and used the Plaintiff's money and benefited from it.*

In the instant case, the Defendant in failing to pay the loan obligation benefitted from the detriment of the Plaintiff who had to pay part of it. The court is cognizant of the



5 inflation rates and therefore awards the Plaintiff interest at the current commercial bank rate of 18% per annum on the amount repaid by the Plaintiff.

Accordingly, I award an interest rate of 18% on the UGX 61,860,000/= from the time of filing this suit until payment in full.

10 In the same vein under section 26(2), I award an interest of 6% on the General Damages award of UGX 20,000,000/= from the date of this judgment until payment in full.

Costs:

As a rule of law, costs ordinarily follow the event and a successful litigant receives his or her costs in the absence of special circumstances justifying some other order.

15 Where the successful party has been guilty of some misconduct, an order of costs may not be granted. **Section 27(2) Civil Procedure Act, Harry Ssempe v Kambagambire David HCCS 408/2014, Iyamuleme David vs. AG SCCA NO.4 of 2013, Anglo-Cyprian Trade Agencies Ltd v. Paphos Wine Industries Ltd, [1951] 1 All ER 873.**

20 Had it not been for the Defendant's breach of the terms of the Memorandum of Understanding, Plaintiff would have had her property almost attached and subsequently filed this suit.

In the premises, I award the Costs of the Suit to the Plaintiff.

Conclusion:

25 I accordingly make the following orders,

- a) There existed a valid Contract between the Plaintiff and the Defendant.
- b) The Defendant breached the Contract between him and Plaintiff.



- 5 c) The Plaintiff is entitled to recover UGX 8,900,000/= being the 10% agreed to in the Memorandum of Understanding.
- d) The Plaintiff is entitled to Special Damages of UGX 61,860,000/=.
- e) The Plaintiff is awarded General Damages of UGX 20,000,000/=
- 10 f) The Plaintiff is awarded interest of 18% on (d) per annum from the date of filing this suit until payment in full.
- g) The Plaintiff is further awarded interest of 6% on (e) per annum from the date of this judgment until payment in full.
- h) The Plaintiff is awarded the costs of the suit.

15 I so order.

Delivered electronically this 1st day of December 2023 and uploaded on ECCMIS.

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Ocaya Thomas O.R
Judge,

1st December 2023