

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CIVIL SUIT No. 0022 OF 2013

OPIA MOSES **PLAINTIFF**

VERSUS

1. CHUKIA LUMAGO ROSELYN	}		
2. SADDAM LUMAGO	}		
3. ALIAS LUMAGO	}	DEFENDANTS
4. BILLY LUMAGO	}		
5. MOILILI HARUNA	}		
6. TABU ROBERT	}		

Before: Hon Justice Stephen Mubiru.

JUDGMENT

The plaintiff sued the defendants jointly for special and general damages for breach of contract, interest and costs. The plaintiff's case was that he is a trader ordinarily carrying on business in Juba, South Sudan. Sometime during the year 2012, while in Juba, the first defendant borrowed from him a sum of shs. 8,000,000/= in cash to recapitalise her business. The first defendant subsequently borrowed an additional sum of US \$ 30,000 from the plaintiff to invest in the then booming forex business promising that the plaintiff would share in the proceeds of the business. When the first defendant failed to honour her obligations and appeared to be avoiding the plaintiff, the plaintiff organised an impromptu meeting at the home of the first defendant on 10th May 2013. The meeting was attended by his advocate and the rest of the defendants, who are brothers to the first defendant.

At that meeting, all the defendants undertook in writing to pay the first defendants outstanding debt of shs. 8,000,000/= and US \$ 30,000 within a period of six weeks. When the defendants' defaulted on that undertaking, the plaintiff filed this suit. In their joint written statement of

defence, the defendants contended that the transaction occurred in Juba while the first defendant was an employee of the Kenya Commercial Bank branch in Juba and was therefore outside the jurisdiction of this court. The first defendant contended that the money was meant to be repaid in the South Sudanese Pounds and not in US dollars or Uganda shillings. The undertaking by the first defendant to pay the outstanding amount was conditional on her finding a buyer for her plot of land and motor vehicle and the delay in payment was occasioned by her failure to find a buyer. The rest of the defendants denied liability for the loan because they only signed the agreement of 10th May 2013 as witnesses and relatives of the first defendant to ensure that she pays the outstanding amount under the loan she contracted from the plaintiff. They claimed the agreement was written in English, which language they were illiterate in and yet the document was not read, translated and explained to them in Lugbara before they were required to sign it.

When the suit came up for hearing on 23rd of September 2014, Counsel for the plaintiff prayed court to enter judgment on admission in favour of the plaintiff against the defendants jointly and severally under the provisions of Order 13 rule 6 of *The Civil Procedure Rules* on grounds that in paragraph 5 of the written statement of defence, the defendants had admitted owing the plaintiff the sum claimed. Paragraph 5 of the written statement of defence reads as follows

5. In further reply to paragraph 5 of the plaint, the 1st defendant shall aver that she had accepted to refund the plaintiff some money but on condition that her plot of land and motor vehicle are bought which to date are not bought by any prospective buyer.

Counsel further submitted that since the filing of the suit, the defendants had deposited a total sum of US \$ 4,000 in two instalments of US \$ 2,500 on 25th September 2013 and US \$ 1,500 on 18th October 2013. On basis of that submission, my learned brother Resident Judge at the time, Hon. Justice Mr. Vincent Okwanga entered judgment on admission against all the defendants on 10th March 2015 and directed that the suit be set down for proof of and assessment of general damages.

Hearing of evidence in proof of general damages commenced on 1st April 2015 with the testimony of P.W.1 the plaintiff who testified that he got to know the first defendant during the year 2011, while she worked with KCB in Juba. He got to know the rest of the defendants on 10th

May 2013 at their residence in Arua, Oli Division when they invited him for purposes of resolving their sister's indebtedness to him. When he met them, they undertook to pay back the outstanding loan within six weeks. He presented an agreement signed to that effect, dated 10th May 2013 and it was tendered in evidence as exhibit P.E.1. When the defendants failed to honour that undertaking, he filed the current suit against them, whereupon they deposited in court a sum of US \$ 2,500 on 25th September 2013 and another of US \$ 1,500 on 18th October 2013. Due to their failure to pay within the agreed time schedule, his business had suffered and he was during January 2014 forced to borrow US \$ 18,000 at a rate of interest of US \$ 500 per month from a one Kwaze Alex in Juba. He was able to pay back the loan with interest for one year covering the period from 18th October 2013 to 25th September 2014. His business turnover before the transaction with the first defendant stood at two truckloads of beer per week at US \$ 12,500 per truck out of which he would earn US \$ 6,400 as profit. Upon borrowing the US \$ 18,000, he was able to have a truckload per week. As a result he had lost profit of US \$ 134,000 which he claims from the defendant as lost profit as well as the costs of the suit.

While under cross-examination by counsel for the defendants, Mr. Samuel Ondoma, P.W.1 testified that he had advanced the first defendant the loan of shs. 8,000,000/= while in Arua and the one of US \$ 30,000 from Juba. The rest of the defendants had agreed at a family meeting. The agreement to that effect was drafted by his lawyer Mr. Ben Ikilai who does not speak Lugbara and hence the agreement was written in English. When he borrowed the sum of US \$ 18,000 from Kwaze Alex in Juba, there was no written agreement signed between them. He had no documents to present relating to the weekly turnover he had testified to before. His business was not interrupted by the skirmishes that engulfed Juba on 13th December 2013. The plaintiff then closed his case.

The defence case opened on 11th July 2016 with the testimony of D.W.1 Mokili Haruna who stated that he first came to know the plaintiff on the day the first defendant gathered the rest of the defendants to meet him. At the meeting, the first defendant admitted she had received the money claimed, from the plaintiff. The plaintiff's lawyer, Mr. Ben Ikilai then prepared an attendance list which he asked all in attendance to sign. He was not told that he was signing an undertaking to pay the loan personally. He could not have undertaken to pay back money he had

not received personally. In order to pay off the outstanding loan, the first defendant later sold off her motor vehicle, raised US \$ 4,000 and deposited it in court. She subsequently was able to raise U shs. 2,000,000/= which she deposited in court as well. She was later able to sell off her plot as well but the witness did not know whether she deposited any more money in court. The defence then closed its case.

It is a settled principle that judgment on admission is not a matter of right but rather a matter of discretion of a Court. Where the defendant has raised objection which goes to the very root of the case, it would not be appropriate to exercise this discretion. The admission should be unambiguous, clear, unequivocal and positive. Where the alleged admission is not clear and specific, it may not be appropriate to take recourse to the provisions of Order 13 rule 6 of *The Civil Procedure Rules*. The admission in paragraph 5 of the written statement of defence is not categorical, unambiguous, clear, unconditional and unequivocal. The first defendant admitted having “accepted to refund the plaintiff some money.” It is not an admission of the plaintiff’s entire claim to justify a judgment for the whole sum claimed. The amount admitted is not specified and the acceptance is stated to have been conditional on the ability of the first defendant to sell “her plot of land and motor vehicle.” At the level of pleadings, the alleged admission was not clear and specific, and it may not have been appropriate to take recourse to these provisions had the plaintiff not subsequently presented exhibit P.E.1 during proof of general damages, although procedurally irregular having been brought to the attention of court after the judgment had already been entered, it in a way substantively cured the anomaly of the judgment on admission in respect of the first defendant. The procedural irregularity did not occasion any miscarriage of justice with regard to the first defendant since under Order 13 rule 6, such a judgment may be based on an admission made either in pleadings or otherwise.

I have however anxiously considered the propriety of the judgment on admission in respect of the rest of the defendants. The otherwise equivocal admission in paragraph 5 of the written statement of defence, cured by the subsequent tendering of exhibit P.E.1, has to be seen in the light of the averments in paragraph 6 of the written statement of defence which reads as follows;

6. The 2nd, 3rd, 4th, 5th, and 6th defendants shall aver that they are not in any way liable to refund the plaintiff his alleged US \$ 30,000 and U shs. 8,000,000/= because the entire transaction was between the plaintiff and 1st defendant in South Sudan and they are not parties to it. They only signed the agreement marked annexure “A” to the plaint as witnesses and relatives of the first defendant to ensure she refunds the alleged sums borrowed and used by her. They were not in any were (sic) not read and translated the agreement into Lugbara language which they understand but just made to sign.

The contents of this paragraph are clearly a denial of liability. Despite this, in his ruling of 18th October 2013, my learned brother Judge stated;

The plaintiff claims all the defendants admitted and acknowledged their liability to the plaintiff’s claim in the plaint. The defendants numbers 2, 3, 4, 5 and 6 are by such action estopped from denying that none of them save defendant No. 1 were party to the undertaking agreement marked annexure “A” to the plaint. Accordingly, each of them is equally liable by their respective admission. In the end I am satisfied and hereby grant judgment on admission against each of the six defendants No. 1, 2, 3, 4, 5 and 6 respectively for the total sums of US \$ 30,000 and U shs. 8,000,000/= respectively less the US \$ 4,000 already paid in court. Each of the defendants’ liability is several and jointly (sic) in equal measure in respect of the total value of the plaintiff’s claim the parties shall now proceed to submit on the issue of damages....

With all due respect, I am in disagreement with the manner my learned brother came to the decision that he did. The power conferred by Order 13 rule 6 is discretionary, which has to be exercised on well established principles; the admission must be clear and unequivocal; it must be taken as a whole and it is not permissible to rely on a part of the admission ignoring the other part; even a constructive admission firmly made can form the basis of exercise of that discretion. The submission seeking a judgment on admission was entirely based on the pleadings. The court had at that stage not received any evidence. A pleading has to be construed or read as a whole to see its effect and one or two lines or a single paragraph cannot be permitted to be taken out of context and used as an admission of a party entitling the other for passing of a judgment upon admission. In *Cassam v. Sachania* [1982] KLR 191, it was held that; “The judge’s discretion to grant judgment on admission of fact under the order is to be exercised only in plain cases where

the admissions of fact are so clear and unequivocal that they amount to an admission of liability entitling the Plaintiff to judgment.”

Before the court can act upon the admission, it has to be shown that the admission is unequivocal, clear and positive. The averments in paragraph 6 of the written statement of defence raised questions which could not be determined without evidence and, therefore, it cannot be said to be a case of "unequivocal" and clear positive admission, which is an essential requirement of law for a decree on admission. When entering judgment against the rest of the defendants, my learned brother judge proceeded to adjudicate upon some of the issues on merits by observing that all the defendants admitted and acknowledged their liability to the plaintiff's claim in the plaint and were thus estopped from denying, a conclusion he could not have reached without evidence and contrary to the contents of paragraph 6 of the written statement of defence. That paragraph raised triable issues going to the root of the case, in which case my learned brother Judge ought to have proceeded to try the suit as against the rest of the defendants and returned findings on merits. In the circumstances, the judgment on admission as against the rest of the defendants was entered erroneously.

The court, on examination of the facts and circumstances, has to exercise its judicial discretion, keeping in mind that a judgment on admission is a judgment without trial which permanently denies any remedy to the defendant, by way of an appeal on merits. I am persuaded by the decisions in *Industrial and Commercial Development Corporation v Daber Enterprises Ltd*, [2000] 1 EA 75 and *Continental Butchery Ltd v Ndhiwa*, [1989] KLR 573, where the Court of Appeal of Kenya stated that the purpose of a judgment on admission is to enable a plaintiff to obtain a quick judgement where there is plainly no defence to the claims. To justify such a judgment, the matter must be plain and obvious and where it is not plain and obvious, a party to a civil litigation is not to be deprived of his right to have his case tried by a proper trial where, if necessary, there has been discovery and oral evidence subject to cross-examination. Therefore unless the admission is clear, unambiguous and unconditional, the discretion of the Court should not be exercised to deny the valuable right of a defendant to contest the claim.

Although the judgment was entered before I was seized of this suit, this to me is an error apparent on the face of the record and I consider it the duty of this court, on its own motion, to correct its errors before finally disposing of the suit and thereby becoming *functus officio*, in which event the error would become a matter for the Court of Appeal or for a formal application for review. The power to correct its own errors while still seized of a matter is exercisable as part of the inherent jurisdiction of this court under section 98 of *The Civil Procedure Act*, where there is no alternative effective remedy and section 17 (2) of *The Judicature Act*, where there is need to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court, which authority is wide enough to include the correction of errors that can be corrected without the court appearing to sit on appeal on its own decision. The basic philosophy inherent in the concept of exercise of such a power is acceptance of human fallibility and acknowledgement of frailties of human nature and sometimes the possibility of perversion that may lead to miscarriage of justice. This course of action should be available where the Court itself has made such an egregious mistake that grave injustice to one or more of the parties concerned would result if the Court's erroneous decision is not corrected. It is a jurisdiction though that has to be exercised cautiously and only where it will serve to promote public interest and enhance public confidence in the rule of law and our system of justice. I am further persuaded in doing this by the decision in *Bremer Vulcan Schiffbau and Maschinenfabrik v. South India Shipping Corp* [1981] All ER 289 at pg 295, [1981] AC 909 at pg 979 where Lord Diplock stressed the need for a Court, whether appellate or not, to have power to control its own procedure so as to prevent it being used to achieve injustice.

Invoking Order 13, rule 6, is a matter of discretion of the Court which has to be judicially exercised. If a case involves questions which cannot be conveniently disposed of on a motion under this rule, the Court is free to refuse exercising discretion in favour of the party invoking it. In any event, I consider this to be a proper case to invoke the proviso to section 57 of *The Evidence Act* which confers upon court the discretion to require the facts admitted, to be proved otherwise than by such admissions. Court need not necessarily proceed to pass a judgment on the basis of such admission but call upon the party relying upon such admission to prove its case independently. Considering the nature of contentions raised by the rest of the defendants, it would not be permissible at all to grant the relief before trial of the issues raised.

It was specifically stated in the written statement and emphasized during the course of hearing by D.W.1 that the entire transaction was between the plaintiff and the first defendant, and the rest of the defendants were not parties to it. That they only signed the agreement exhibit P.E.1, as witnesses and relatives of the first defendant to ensure she refunds the alleged sums borrowed and used by her. Those averments in the written statement and in the subsequent oral testimony do not constitute an unambiguous or clear admission so as to entitle the respondent for a decree forthwith.

It is a general rule that a party of full age and understanding is normally bound by his signature to a document whether he reads or understands it or not (see *Saunders v. Anglia Building Society [1971] AC 1004*). Examination of exhibit P.E.1 indicates that each of the defendants signed as a party. In the preamble of the agreement, each of the defendants is named as a party. The only persons who signed as witnesses are; Matia Charles, Delu Sebi and Matua Romano. In paragraph 3 of the agreement, the defendants undertook as follows; “in the event of failure by us to pay the aforementioned sums within the period stipulated therein Mr. Opia Moses shall be at liberty to take legal action against us.”

In paragraph 6 of the written statement of defence, the defendants claim not to have understood the contents of the document at the time they signed it. In his testimony, D.W.1 stated that the meeting at which the agreement was signed was conducted in Lugbara yet the agreement was written in English, and he was not proficient in the language, having stopped formal education at the level of Primary Five, the fourth defendant at the level of Primary Four, the first defendant up to Senior Four. Mutua Romano was translating the proceedings to Mr. Ben Ikilai, the plaintiff’s lawyer. Based on this evidence regarding their level of education, none of the defendants can rely of the protection afforded by *The Illiterates Protection Act, Cap 78* which protects persons “unable to read and understand the script or language in which the document is written or printed.” Being persons of full age and understanding, the rule at common law is that they are bound by their signatures to the document whether they read or understood it or not.

However, one of the exceptions to a signed document being binding upon the signatory is the defence of "*non est factum*." This is a defence in the law of contract that allows a party who signed, to escape performance of an agreement "which is fundamentally different from what he or she intended to execute or sign." It means that the signature on the contract was appended by mistake, without knowledge of its meaning. A successful plea would make the contract *void ab initio*. The defence of *non est factum* is a special defence. If established, it allows a party relying on it, to completely avoid being bound by a contract. The burden, of establishing the defence is a heavy one on the person who seeks to avail himself of it. The authorities on this proposition of law are many and varied. For example in *Saunders v Anglia Building Society* [1970] 3 All ER 961 (HL), [1971] AC 1004 (HL), the House of Lords held;

The plea of *non est factum* can only rarely be established by a person of full capacity and although it is not confined to the blind and illiterate any extension of the scope of the plea would be kept within narrow limits. In particular, it is unlikely that the plea would be available to a person who signed a document without informing himself of its meaning. The burden of establishing a plea of *non est factum* falls on the party seeking to disown the document and that party must show that in signing the document he acted with reasonable care. Carelessness (or negligence devoid of any special, technical meaning) on the part of the person signing the document would preclude him from later pleading *non est factum* on the principle that no man may take advantage of his own wrong; it is not, however, an instance of negligence operating by way of estoppel.

Similarly in *Chitty on Contracts*, Thirteenth Edition Vol. 1 para. 5101 pp. 484485, the learned author states as follows:

The general rule is that a person is estopped by his or her deed, and although there is no such estoppel in the case of ordinary signed documents, a party of full age and understanding is normally bound by his signature to a document, whether he reads or understands it or not. If, however, a party has been misled into executing a deed or signing a document essentially different from that which he intended to execute or sign, he can plead *non est factum* in an action against him. The deed or writing is completely void in whosoever hands it may come. In most of the cases in which *non est factum* has been successfully pleaded, the mistake has been induced by fraud. But the presence of fraud is probably not a necessary factor. As Byles J. said in *Foster v Mackinnon*: 'it is invalid not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signor did not accompany the signature; in other

words, that he never intended to sign, and therefore in contemplation of law never did sign, the contract to which his name is appended.’

There is a similar passage in *Halsbury’s Laws of England*, 4 th Ed. Reissue Vol. 13 para. 69 page 48 where it states:

The plea of *non est factum* on the ground mistake as to contents appear originally to have been allowed in favour of those who were unable to read owing to blindness or illiteracy and who therefore had to trust someone to tell them what they were executing. It is also now allowed to those who are permanently or temporarily unable, through no fault of their own, to have any real understanding, without explanation, of the purport of the particular document, whether their inability arises from defective education, illness or innate incapacity.

From the above sources, one can see that the general principle is that a person of full age and understanding is bound by his or her signature to a document whether he reads or understands it or not, unless he or she is misled into executing a deed or signing a document which is essentially different from that which he or she intended to execute or sign. The strict requirements necessary for a successful plea can be generally that: the person pleading *non est factum* must belong to "class of persons, who through no fault of their own, are unable to have any understanding of the purpose of the particular document because of blindness, illiteracy or some other disability." The disability must be one requiring the reliance on others for advice as to what they are signing. The "signatory must have made a fundamental mistake as to the nature of the contents of the document being signed," including its practical effects. The document must have been radically different from one intended to be signed.

In *Saunders v Anglia Building Society*, Mrs. Gallie, a 78 year old widow who made a will leaving her house to her nephew, Parkin. One Lee, who was a good friend of Parkin and who was heavily in debt, discussed with Parkin how to raise money on the house. A document was prepared and in the presence of Parkin, Lee put the document before Mrs. Gallie, telling her that it was a deed of gift of the house to Parkin. The deed was in fact a deed of sale of the house to Lee. With the deed, Lee mortgaged the house of Anglia Building Society for a loan of £2,000.00. Lee defaulted in payments and the Building Society sued for possession of the house. Mrs. Gallie pleaded the defence of *non est factum*. She said that her intention was to give the house to her nephew, Parkin, and that she signed the deed to give effect to her intention. In rejecting the plea,

the House of Lord held the plea of *non est factum* can only rarely be established by a person of full capacity, and that although it is not confined to blind and illiterate, any extension of the scope of the plea of *non est factum* must be kept with narrow limits. The House of Lords made it plain that it is unlikely that the plea would be available to a person who signed a document without informing himself of its meaning. It is pertinent to note the remarks made by Lord Hodson as follows:

To take an example, the man who in the course of his business signs a pile of documents without checking them takes the responsibility for them by appending his signature. It would be surprising if he was allowed to repudiate one of those documents on the ground of *non est factum*.Want of care on the part of the person who signs a document which he afterwards seeks to disown is relevant. The burden of proving *non est factum* is on the party disowning his signature; this includes proof that he or she took care. There is no burden on the opposite party to prove want of care.

In the instant case, none of the defendants adduced evidence of having been misled into executing or signing the agreement. There was no evidence to suggest that any of them was tricked into signing the agreement nor was there any evidence to show that at the time of signing they raised any issue about the agreement before signing it. There was clearly no evidence of any form of incapacity affecting the defendants at the time. In fact, the defendants are intelligent and educated persons and not naive to the extent they claim to be. It appears to me rather that if they are to be believed, that they were only negligent in signing the agreement and negligence cannot be the basis of the defence of *non est factum*. Failure to read an agreement before signing it, or carelessness, will not allow for *non est factum*. In accordance with the common law principle that persons of full age and understanding are bound by their signature to a document whether they read or understood it or not, I find that all the defendants were bound by the agreement. To hold otherwise would yield to the danger mentioned in *Muskham Finance Ltd. v. Howard* [1963] 1QB 904 at 912 where Donovan LJ. Commented; “much confusion and uncertainty would result in the field of contract and elsewhere if a man were permitted to try to disown his signature simply by asserting that he did not understand that which he had signed.”

However, the mere fact of agreement alone does not make an enforceable contract. Both parties to the contract must provide consideration if they wish to sue on the contract before it can

become enforceable. This means that each side must promise to give or do something for the other. Lush J. in *Currie v Misa (1875) LR 10 Exch 153* defined consideration as consisting of a detriment to the promisee or a benefit to the promisor: "... some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other." The definition given by Sir Frederick Pollock, approved by Lord Dunedin in *Dunlop v Selfridge Ltd [1915] AC 847* is as follows: "an act or forbearance of one party, or the promise thereof, is the price for which the promise of the other is bought, and the promise thus given for value is enforceable." In other words, for promise (offer) to be legally binding, it must seek something (or some action) in return. The Promisee must show that he or she "bought" the promise either (i) by doing some act in return for it, or (ii) by promising to do or refrain from doing some act in return for it, the bargain principle (*quid pro quo*).

Consideration must be given in return for (must be, to some extent, caused by) the promise or act of other party, i.e. there must be a fairly direct co-relation between the consideration and the promise / act. Something only done for reason other than promise will not be valid consideration for promise. This requirement is often summed up by the expression "consideration must not be past" (See, *Roscorla v. Thomas (1842) 3 QB 234*; *Eastwood v. Kenyon (1840) 113 ER 482* and *R. v. Clark (1927) 40 CLR 227*). The elements of an enforceable contract were restated in *Greenboat Entertainment Ltd v. City Council of Kampala H. C. Civil Suit No. 580 of 2003* to include; capacity to contract; intention to contract; consensus and idem; valuable consideration; legality of purpose; and sufficient certainty of terms and that if in a given transaction any of them is missing, the agreement is unenforceable. I respectfully agree.

In the instant case, whereas the second up to the sixth defendants undertook to pay the plaintiff, this was not in return for any corresponding promise, act or forbearance on his part for that promise. The agreement created a right, interest, profit or benefit accruing to the plaintiff, without a corresponding forbearance, detriment, loss or responsibility given, suffered or undertaken by him. He did not claim to have refrained from taking action against the first defendant based on the rest of the defendants' promise. The only consideration he gave was to the first defendant before the signing of the agreement when she borrowed funds from him, which in respect of the rest of the defendants, was past consideration. The second up to the sixth

defendants' promise was driven by pure familial relations with the first defendant and for all intents and purposes was gratuitous as regards the plaintiff. In absence of any consideration given by the plaintiff for the rest of the defendant's promise, the agreement was only enforceable against the first defendant. For that reason the judgment on admission against the rest of the defendants other than the first defendant is hereby set aside. The suit against these defendants is dismissed with no order as to costs.

While submitting with regard to damages, counsel for the plaintiff argued that the plaintiff is entitled to damages since due to the first defendant's breach of contract, the plaintiff's business suffered due to being under-capitalised and he had to incur payments on money he borrowed to revitalise his business, even then, he was unable to recoup the profits he would have earned had the first defendant made a timely payment. Counsel for the first defendant disagreed. He argued that the plaintiff did not adduce any evidence of borrowing as claimed, had not produced any business records and therefore there was no proof of conduct of business.

The general principle underlying the award of damages in contract is that the plaintiff is entitled to full compensation for his losses; i.e. the principle of "*restitutio in integrum*." Where a party has sustained a loss by reason of a breach of contract, he or she is, so far as money can do it, to be placed in the same situation with respect to damages, as if the contract had been performed. Damages are not awarded to enrich a plaintiff far beyond his actual losses nor should the plaintiff get far less than his actual loss. Therefore, when a claim for damages is made, the plaintiff is required to provide evidence in support of the claim and to adduce facts upon which the damages could be assessed. Before assessment of damages can be made, the plaintiff must first furnish evidence to warrant the award of damages. The plaintiff must also provide facts that would form the basis of assessment of the damages he would be entitled to. Failure to do so would be fatal to a claim for damages.

In a claim for damages for breach of contract, the *locus classicus* on this principle of remoteness is the case of *Hadley v. Baxendale* [1854] 9 Ex. 341. This case supplies two tests for determining which damages are proximate and recoverable and which are too remote and therefore unrecoverable. These tests are:

- a. Do the damages arise naturally from the breach? Or
- b. Were the damages reasonably contemplated by both parties when they made the contract as being a probable result of the breach?

If the answer to any of these two questions is yes, then damages are proximate; i.e. not too remote and therefore recoverable. 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. The function of nominal damages is to mark the vindication, where no real damage has been suffered, of a right which is held to be so important that its infringement attracts a remedy (see *Neville v. London Express Newspaper Ltd [1919] A.C. 368 at p.392*). Substantial damages will be awarded when actual damage is proved to have been caused. The plaintiff in this case, apart from his assertion that he was engaged in business as a dealer in beer, did not adduce any cogent evidence on basis of which a finding of fact can be made that he was indeed in such business and that he enjoyed the turnover which he claimed. I have decided to disregard that aspect in the assessment of damages.

In a case such as this where damages are claimed for failure to repay money borrowed on the agreed date, the normal measure of damages is the interest which the money would attract during the period of breach, assuming that it is a loan, taking the rates of interest and inflation into account. I am persuaded in using this as the yardstick by the decision in *Sowah v. Bank for Housing & Construction [1982-83] 2 GLR, 1324*, where Taylor, JSC stated at page 1359 as follows:

I propose to be guided by my initial inclination, for I am persuaded by the apparent modern approach of the English courts to the view that since the money was due at a point in time and it is now being paid at a subsequent point in time, the interest which the money attracts during the period assuming that it is a loan is, inter alia, a fair yardstick by which to measure to some extent the damages so suffered by the appellant.

Neither in the plaint nor in his testimony did the plaintiff disclose the actual dates on which he advanced the first defendant the sum of shs. 8,000,000/= and later US \$ 30,000 nor the date when repayment was due. The first time a specific repayment date was agreed in writing was at

the meeting of 10th May 2013 which resulted in exhibit P.E.1. where it was agreed that the money owed would be paid within six weeks. I therefore take the date of breach as 22nd June 2013, being the date six weeks after the due date. At an exchange rate of approximately US 1:3,350 U shs, the equivalent of US \$ 30,000 is U shs 100,500,000/= which added to the initial loan of shs 8,000,000/= translates into a total sum of U shs 108,500,000/= as the first defendant's total indebtedness as at 10th May 2013. Upon this I propose to apply a rate of interest not as low as the court rate but not as high as the commercial rate, since the plaintiff was not in the money lending business, as the measure of profit which the money would have attracted during the period of breach, i.e. 22nd June 2013 and the date of judgment (three years and seven months), as general damages to be awarded to the plaintiff. Applying a rate of 11% per annum as the measure, I therefore award the plaintiff shs 11,935,000/= as general damages.

In the final result, the suit against the second to the sixth defendant is dismissed with no order as to costs and judgment is hereby entered for the plaintiff against the first defendant for;

1. Special damages of US \$ 30,000 or its equivalent in Uganda shillings and shs 8,000,000/=, less the amount paid during the course of the trial.
2. General damages of shs. 11,935,000/=
3. Interest on the decretal amount in (a) and (b) above at the rate of 8% per annum from the date of judgment until payment in full.
4. The costs of the suit.

Dated at Arua this 1st day of December 2016.

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Stephen Mubiru

Judge